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Presidential Documents

Title 3—

The President

Executive Order 13965 of December 11, 2020

Providing for the Closing of Executive Departments and Agencies of the Federal Government on December 24, 2020

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

Section 1. All executive departments and agencies of the Federal Government shall be closed and their employees excused from duty on Thursday, December 24, 2020, the day before Christmas Day.

Sec. 2. The heads of executive departments and agencies may determine that certain offices and installations of their organizations, or parts thereof, must remain open and that certain employees must report for duty on December 24, 2020, for reasons of national security, defense, or other public need.

Sec. 3. December 24, 2020, shall be considered as falling within the scope of Executive Order 11582 of February 11, 1971, and of 5 U.S.C. 5546 and 6103(b) and other similar statutes insofar as they relate to the pay and leave of employees of the United States.

Sec. 4. The Director of the Office of Personnel Management shall take such actions as may be necessary to implement this order.

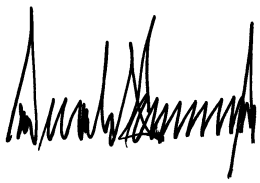
Sec. 5. *General Provisions.* (a) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(b) Nothing in this order shall be construed to impair or otherwise affect:

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

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

(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.



THE WHITE HOUSE,
December 11, 2020.

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

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

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Parts 317 and 381

[Docket No. FSIS–2020–0032]

RIN [0583–AD77]

Uniform Compliance Date for Food Labeling Regulations

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is establishing January 1, 2024, as the uniform compliance date for new meat and poultry product labeling regulations that will be issued between January 1, 2021, and December 31, 2022. FSIS periodically announces uniform compliance dates for new meat and poultry product labeling regulations to minimize the economic impact of label changes.

DATES:

Effective date: This rule is effective December 16, 2020.

Compliance date: The uniform compliance date for new meat and poultry product labeling regulations that will be issued between January 1, 2021, and December 31, 2022 is January 1, 2024.

Comments due date: Comments on this final rule must be received on or before January 15, 2021.

ADDRESSES: FSIS invites interested persons to submit comments on this rule. Comments may be submitted by one of the following methods:

- *Federal eRulemaking Portal:* This website provides the ability to type short comments directly into the comment field on this web page or attach a file for lengthier comments. Go to *http://www.regulations.gov.* Follow the on-line instructions at that site for submitting comments.
- *Mail, including CD–ROMs, etc.:* Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, 1400 Independence Avenue SW, Mailstop 3758, Washington, DC 20250–3700.
- *Hand- or Courier-Delivered submittals:* Deliver to 1400 Independence Avenue SW, Jamie L. Whitten Building, Room 350–E, Washington, DC 20250–3700.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2016–0026. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *http://www.regulations.gov.*

Docket: For access to background documents or comments received, call (202) 720–5627 to schedule a time to visit the FSIS Docket Room at 1400 Independence Avenue SW, Washington, DC 20250–3700.

FOR FURTHER INFORMATION CONTACT: Contact Rosalyn Murphy-Jenkins, Director, Labeling and Program Delivery Staff, Office of Policy and Program Development, Food Safety and Inspection Service, U.S. Department of Agriculture, Telephone: 301–504–0879.

SUPPLEMENTARY INFORMATION:

Background

On December 14, 2004, FSIS issued a final rule establishing January 1, 2008, as the uniform compliance date for new meat and poultry labeling regulations issued between January 1, 2005, and December 31, 2006 (69 FR 74405). The 2004 final rule also provided that the Agency would set uniform compliance dates for new labeling regulations in 2-year increments and periodically issue final rules announcing those dates. Consistent with the 2004 final rule, the Agency has since published six rules establishing the uniform compliance dates of January 1, 2010, January 1, 2012, January 1, 2014, January 1, 2016, January 1, 2018, January 1, 2020, and January 1, 2022 (72 FR 9651, 73 FR 75564, 75 FR 71344, 77 FR 76824, 79 FR 71007, 81 FR 91670, and 83 FR 63052).

The Final Rule

The new uniform compliance date will apply only to final FSIS regulations that require changes in the labeling of meat and poultry products and that are published after January 1, 2021, and before December 31, 2022. For each final rule that requires changes in labeling, FSIS will specifically identify January 1, 2024, as the compliance date. All meat and poultry food products that are subject to labeling regulations issued between January 1, 2021, and December 31, 2022, will be required to comply with these regulations on products introduced into commerce on or after January 1, 2024. If any food labeling regulation involves special circumstances that justify a compliance date other than January 1, 2024, the Agency will determine an appropriate compliance date and will publish that compliance date in the rulemaking.

Two-year increments increase industry's ability to make orderly adjustments to new labeling requirements without exposing consumers to outdated labels. This approach allows meat and poultry producers to plan for the use of label inventories and to develop new labeling materials that meet the new requirements. It also serves to reduce the economic impact of changing labels on both producers and consumers.

In the May 4, 2004, proposed rule on uniform compliance dates for labeling requirements, FSIS provided notice and solicited comment (69 FR 24539). In the March 5, 2007, final rule, FSIS received only four comments in response to the proposal, all in support. In the March 5, 2007, final rule, FSIS determined that further rulemaking for uniform compliance dates for labeling requirements is unnecessary (72 FR 9651). The Agency received no comments on the 2007 final rule, the comments FSIS received on the 2012 final rule were outside the scope (77 FR 76824), and FSIS received no comments on the 2014 final rule (79 FR 71007) or the 2016 final rule (81 FR 91670). The Agency received four comments on the 2018 final rule, all in support. One commenter requested that if a food labeling change warrants a different compliance date, federal agencies should coordinate and harmonize compliance and enforcement expectations. The Agency agrees and currently partners with the United States Food and Drug Administration (FDA) when developing any food labeling regulation that may impact FDA regulated products. Consistent with its statement in 2007, FSIS finds

that further rulemaking on this matter is unnecessary. However, FSIS is providing an opportunity for comment on the uniform compliance date established in this final rule.

Paperwork Reduction Act

FSIS has reviewed this rule under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and has determined that there is no new information collection related to this final rule. Under this final rule, the Agency is establishing January 1, 2024, as the uniform compliance date for new meat and poultry product labeling regulations that will be issued between January 1, 2021, and December 31, 2022. The relevant information collection or record keeping requirements are covered under OMB approval number 0583–0092, Marking, Labeling, and Packaging.

Executive Orders 12866 and 13563, and the Regulatory Flexibility Act

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 benefits, distributive impacts, and equity). Executive Order (E.O.) 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule has been designated as a ''non-significant'' regulatory action under section 3(f) of E.O. 12866. Accordingly, the final rule has not been reviewed by the Office of Management and Budget under E.O. 12866.

This rule does not have a significant economic impact on a substantial number of small entities; consequently, a regulatory flexibility analysis is not required (5 U.S.C. 601–612).

Congressional Review Act

Pursuant to the Congressional Review Act at 5 U.S.C. 801 *et seq.,* the Office of Information and Regulatory Affairs has determined that this final rule is not a ''major rule,'' as defined by 5 U.S.C. 804(2).

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 will also announce and provide a link to it 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 *Constituent 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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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).

Paul Kiecker,

Administrator.

[FR Doc. 2020–26733 Filed 12–15–20; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Parts 416, 417, 500, 590, and 591

[Docket No. FSIS–2005–0015]

RIN 0583–AC58

Egg Products Inspection Regulations

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Final rule; correction.

SUMMARY: Food Safety and Inspection Service (FSIS) is correcting a final rule that published on October 29, 2020. The final rule requires official plants that process egg products (herein also referred to as ''egg products plants'' or ''plants'') to develop and implement Hazard Analysis and Critical Control Point (HACCP) Systems and Sanitation Standard Operating Procedures (Sanitation SOPs) and to meet other sanitation requirements consistent with FSIS's meat and poultry regulations.

DATES: This correction is effective December 28, 2020. The **DATES**, certain amendatory instructions, and regulatory text in FR Doc 2020–20151 (85 FR 68640), published on October 29, 2020 are corrected.

FOR FURTHER INFORMATION CONTACT: Victoria Levine, Program Analyst, Office of Policy and Program Development by telephone at (202) 690–3184.

SUPPLEMENTARY INFORMATION: This document corrects several technical errors with certain amendments and effective dates in FR Doc 2020–20151 (85 FR 68640), published on October 29, 2020. The **DATES**, certain amendatory instructions, and regulatory text are corrected.

In FR Doc 2020–20151 (85 FR 68640), published on Thursday, October 29, 2020, the following corrections are made:

DATES:

1. On page 68640, first column, the **DATES** section is corrected to read as follows:

This rule is effective December 28, 2020, except for: Amendatory instructions 30 (§ 590.146), 32 (§ 590.149), 54 (§§ 590.500 and 590.502), 55a (§ 590.504(f) through, (n), (p), and (q)), 56–65 (§§ 590.506 through 590.560), and 66a (§ 590.570(a)), which are effective October 29, 2021; and amendatory instructions 4 (§ 417.7), 55b (§ 590.504(d) and (o)), 66b (§ 590.570), and 67 (§ 590.575), which are effective October 31, 2022.

Effective December 28, 2020, §§ 591.1(a) and 591.2(b) are stayed

through October 29, 2021 and §§ .590.149(b) and (c), 590.580(b)(1), 591.1(b), and 591.2(a) and (c) are stayed through October 31, 2022.

§ 590.504 [Corrected]

2. On page 68679, second column, amendatory instruction 55 and § 590.504 are corrected, and amendatory instructions 55a and 55b are added, to read as follows:

55. Amend § 590.504 by revising paragraphs (a) through (e) to read as follows:

§ 590.504 General operating procedures.

(a) Operations involving the processing, storing, and handling of eggs, ingredients, and egg products must be done in a sanitary manner.

(b)(1) Eggs and egg products are subject to inspection in each official plant processing egg products for commerce.

(2) Any eggs and egg products not processed in accordance with the regulations in this part or part 591 or that are not otherwise fit for human food must be removed and segregated.

(c)(1) All loss and inedible eggs or inedible egg products must be placed in a container clearly labeled ''inedible'' and containing a sufficient amount of denaturant or decharacterant, such as an FDA-approved color additive, suspended in the product. Eggs must be crushed and the substance dispersed through the product in amounts sufficient to give the product a distinctive appearance or odor. Inedible product may be held in containers clearly labeled ''inedible'' which do not contain a denaturant as long as such inedible product is properly packaged, labeled and segregated, and inventory controls are maintained. Such inedible product must be denatured or decharacterized before being shipped from a facility.

(2) Undenatured egg products or inedible egg products that are not decharacterized may be shipped from an official plant for industrial use or animal food, provided that it is properly packaged, labeled, and segregated, and inventory controls are maintained.

(d) [Reserved]

(e) Inspection program personnel may allow an official plant to move egg products that have been sampled and analyzed for Salmonella, or for any other reason, before receiving the test results, if they do not suspect noncompliance by the plant with any provisions of this part. The official plant must maintain control of the products represented by the sample pending the results.

* * * * *

§ 590.504 [Amended]

55a. Effective October 29, 2021, amend § 590.504 by removing and reserving paragraphs (f) through (n), and removing paragraphs (p) and (q).

§ 590.504 General operating procedures.

55b. Effective October 31, 2022, amend § 590.504 by adding paragraph (d) and removing paragraphs (f) through (o) to read as follows:

* * * * *

(d)(1) Egg products must be processed to meet the standard set out in § 590.570.

(2) Unpasteurized or microbial pathogen-positive egg products may be shipped from an official plant to another official plant only when they are to be pasteurized, heat treated, or treated using other methods of treatment sufficient to produce egg products that are edible without additional preparation to achieve food safety in the second official plant. Official plants must maintain control of shipments of unpasteurized or microbial pathogen-positive egg products shipped from one official plant to another official plant for pasteurization or treatment. Shipping plants must seal such shipments in cars or trucks and label them in accordance with § 590.410(c). Containers of unpasteurized or microbial pathogen-positive egg product must be marked with the identification mark shown in Figure 2 of § 590.415.

* * * * *

§ 590.570 [Corrected]

3. On page 68680, second column, amendatory instruction 66 is corrected as instruction 66b, and new amendatory instructions 66 and 66a are added, to read as follows:

§ 590.570 [Amended]

66. Amend § 590.570 by removing paragraph (c).

§ 590.570 [Amended]

66a. Effective October 29, 2021, amend § 590.570 by removing and reserving paragraph (a).

66b. Effective October 31, 2022, revise § 590.570 to read as follows:

Done at Washington, DC.

Paul Kiecker,

Administrator.

[FR Doc. 2020–26798 Filed 12–15–20; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF ENERGY

10 CFR Part 430

[EERE–2020–BT–TP–0002]

RIN 1904–AE85

Energy Conservation Program: Definition of Showerhead

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Final rule.

SUMMARY: In this final rule, the U.S. Department of Energy (''DOE'') adopts a revised definition for ''showerhead'' and definitions for ''body spray'' and ''safety shower showerhead''. The revised regulatory definition for ''showerhead'' is consistent with the most recent standard developed by the American Society of Mechanical Engineers (''ASME'') in 2018, such that each showerhead in a product containing multiple showerheads would be considered separately for purposes of determining standards compliance. DOE has determined that the definition is consistent with EPCA and, unlike the current definition, compliant with the National Technology Transfer and Advancement Act and Office of Management and Budget (''OMB'') Circular A–119. In addition, the definition is consistent with DOE's treatment of other products, such as body sprays. DOE is also defining the terms ''body spray'' and ''safety shower showerhead'' to clarify which products are not subject to the current energy conservation standard. With regard to the showerhead test procedure, DOE emphasizes in this final rule that the existing test procedure remains applicable for purposes of measuring the water use of a showerhead as defined in this final rule. DOE is not finalizing any test procedure amendments in this final rule.

DATES: The effective date of this rule is January 15, 2021. The incorporation by reference of certain publications listed in this rule is approved by the Director of the Federal Register on January 15, 2021.

ADDRESSES: The docket for this rulemaking, which includes **Federal Register** notices, comments, and other supporting documents/materials, is available for review at *https://www.regulations.gov.* All documents in the docket are listed in the *https://www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure. The docket web page can be

found at: *http://www.regulations.gov/docket?D=EERE-2020-BT-TP-0002.* The docket web page contains instructions on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT: Ms. Amelia Whiting, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585. Telephone: (202) 586–2588. Email: *Amelia.Whiting@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: DOE incorporates by reference the following industry standard into 10 CFR part 430:

ANSI/ISEA Standard Z358.1–2014, ''American National Standard for Emergency Eyewash and Shower Equipment'', approved January 8, 2015.

Copies of ANSI/ISEA Z358.1–2014, can be obtained from International Safety Equipment Association, 1901 North Moore Street, Suite 808, Arlington, Virginia 22209 or American National Standards Institute, 25 West 43 St., 4th Floor, New York, NY 10036, *http://ansi.org.*

For a further discussion of this standard, see section IV.M.

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I. Summary of Final Rule

In this final rule, DOE is revising its prior interpretation of the EPCA definition of ''showerhead'' to interpret the term as defined in ASME A112.18.1–2018. DOE defines ''showerhead'' as ''any showerhead including a handheld showerhead other than a safety shower showerhead.'' This definition restates the statutory definition of ''showerhead,'' at 42 U.S.C. 6291(31)(D). Through this final rule, DOE also includes in its regulatory definition of ''showerhead'', its interpretation of the term ''showerhead'' to mean ''an accessory to a supply fitting for spraying water onto a bather, typically from an overhead position.'' This interpretation incorporates the ASME definition.

DOE believes that interpreting the term ''showerhead'' consistent with the ASME definition is more appropriate than DOE's previous interpretation of ''showerhead.'' As described in section II.A of this document, DOE recognizes that the statutory definition of the term ''showerhead'' is ambiguous in key respects. Accordingly, to provide clarity to regulated entities and the public concerning what is meant by the term, DOE is revising its regulatory definition of showerhead using the definition of ''showerhead'' in ASME A112.18.1–2018. The most current ASME standard continues to define a showerhead as it did in 2011 when DOE first issued interpretive guidance for showerheads that defined the term to include all showerheads in a multi-head product —''an accessory to a supply fitting for spraying water onto a bather, typically from the overhead position.''

Under DOE's definition, each showerhead included in a product with multiple showerheads would separately be required to meet the 2.5 gallons per minute (''gpm'') standard established in EPCA. As explained in the discussion that follows, DOE concludes that its interpretation of the term ''showerhead'' is consistent with Congressional intent in establishing the EPCA definition of ''showerhead'' and the associated energy conservation standard. DOE's final rule is also consistent with the requirements of the National Technology Transfer and Advancement Act of 1995, Public Law 104–113, section 12(d), Mar. 7, 1996, 110 Stat. 783, as amended by Public Law 107–107, Div. A, Title XI, section 1115, Dec. 28, 2001, 115 Stat. 1241 (''NTTAA''), 15 U.S.C. 272 note, and the associated OMB Circular A–119, which directs Federal agencies to use voluntary consensus standards unless inconsistent with applicable law or otherwise impracticable.[1] In addition, DOE's rule treats products with multiple showerheads in a manner consistent with DOE's treatment of similar products, such as body sprays. Body sprays are not included in the current definition of showerhead. A regulatory definition of showerhead that allows each showerhead in a multiheaded product to be tested for purposes of compliance with the 2.5 gpm standard provides more consistent regulatory treatment for these products than a definition that considers all of the showerheads together, essentially prohibiting products with multiple showerheads that are no different from body sprays in their water use.

DOE also is defining the terms ''body spray'' and ''safety shower showerhead'' so that it is clear that these products are not considered showerheads subject to DOE's test procedures and energy conservation standards.

II. Authority and Background

A. Authority

Title III of EPCA (42 U.S.C. 6291, *et seq.*) sets forth a variety of provisions designed to improve energy efficiency and, for certain products, water efficiency.[2] Part B of Title III, which for editorial reasons was redesignated as Part A upon incorporation into the U.S. Code (42 U.S.C. 6291–6309, as codified), establishes the ''Energy Conservation Program for Consumer Products Other Than Automobiles,'' which includes

[1] Section 12(d) of the NTTAA provides that with one exception, all Federal agencies and departments shall use technical standards developed or adopted by voluntary consensus standards bodies (''voluntary consensus standards''), using such standards as a means to carry out policy objectives or activities determined by the agencies and departments. The statutory exception is that a Federal agency or department may elect to use other technical standards if using voluntary consensus standards is inconsistent with applicable law or otherwise impractical, and if the agency head submits to OMB an explanation of the reasons for using the alternative standards. See 15 U.S.C. 272 note. Section 6 of OMB Circular A–119, available at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A119/revised_circular_a-119_as_of_1_22.pdf,* reiterates the requirement for Federal agencies to use voluntary consensus standards unless inconsistent with applicable law or otherwise impracticable, and to issue guidance for agency reporting to OMB when standards other than voluntary consensus standards are used.

[2] All references to EPCA refer to the statute as amended through America's Water Infrastructure Act of 2018, Public Law 115–270 (Oct. 23, 2018).

showerheads, the subject of this rulemaking. (42 U.S.C. 6292(a)(15)) Under EPCA, the energy conservation program consists essentially of four parts: (1) Testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures.

B. Background

EPCA defines a showerhead simply as ''any showerhead (including a handheld showerhead), except a safety shower showerhead.'' In addition to defining ''showerhead,'' EPCA established a maximum water use threshold of 2.5 gallons per minute (''gpm'') applicable to ''any showerhead.'' Both the definition of showerhead and the 2.5 gpm standard were added to EPCA by the Energy Policy Act of 1992 (Pub. L. 102–486; Oct. 24, 2991, ''EPAct 1992''). From 1992 to 2013, DOE regulations did not contain a separate definition of ''showerhead.''

DOE issued a notice of availability of a proposed interpretive rule relating to the definition of showerhead in May 2010. 75 FR 27926 (May 19, 2010). In the proposed interpretive rule, available at *https://www.regulations.gov/document?D=EERE-2010-BT-NOA-0016-0002,* DOE noted that there were a myriad of showerhead designs marketed under names such as waterfalls, shower towers, rainheads and shower systems. DOE intended the proposed interpretive rule to address ''uncertainty'' in how the EPCA definition of showerhead and the 2.5 gpm water conservation standard apply to such products, which have multiple nozzles. The proposed interpretive rule sought comment on DOE's proposed interpretation of the term ''showerhead'' to mean ''any plumbing fitting designed to direct water onto a bather,'' including a fitting that comprises a set of showerheads, as conventionally understood (*i.e.,* a set of accessories that each spray water onto a bather). Under this interpretation, the Department would find a ''showerhead'' (*i.e.,* a fitting comprising multiple showerheads) to be noncompliant with EPCA's maximum water use standard if the showerhead's standard spraying ''components,'' operating in their maximum design flow configuration and when taken together, use a total in excess of 2.5 gpm, even if each spraying component individually does not use an amount that exceeds 2.5 gpm. *Id.*

DOE did not finalize the proposed interpretive rule. Instead, DOE withdrew the draft interpretive rule from review by OMB and in 2011 issued enforcement guidance that achieved essentially the same result. (See *https://www.energy.gov/sites/prod/files/gcprod/documents/Showerhead_Guidancel.pdf*).[3] The Department stated in the enforcement guidance that multiple spraying components, when sold together as a single unit designed to spray water onto a single bather, constitute a single showerhead for purposes of compliance with the 2.5 gpm standard. The guidance did not apply to tub spouts, locker room showers, or emergency showers, or to handheld showers where the sprayer cannot run at the same time as the main nozzle. To determine whether a showerhead complied with the standard, DOE would measure a showerhead's water use by turning on all of the unit's sprays and nozzles to their maximum flow settings. Id. In issuing the guidance, DOE stated its view that the term ''any showerhead'' was sufficiently clear that no interpretive rule was needed. The Department also stated its view that this interpretation was consistent with both the industry standard incorporated into EPCA and the plain language and intent of Congress in establishing a maximum water use requirement for showerheads. Because manufacturers had developed the ''myriad of products'' referenced in the draft interpretive rule based on their ''apparent misunderstanding'' of how to measure compliance with the 2.5 gpm standard, however, DOE provided an enforcement grace period of 2 years from issuance of the guidance for manufacturers to sell any remaining non-compliant multi-nozzle products and adjust product designs to ensure compliance with the standard. Id.

DOE subsequently proposed to change its regulatory definition of showerhead as part of a proposed rule to revise the test procedures for showerheads and other products. 77 FR 31742, 31747–31748, 31755 (May 30, 2012). In that proposed rule, DOE proposed to adopt definitions for the terms ''fitting'' and ''accessory'', as well as a definition of ''showerhead'' that used those terms. Under DOE's proposed definition, all components defined as an ''accessory,'' or a combined set of accessories, to a supply fitting represented a single covered product that would be required to meet the 2.5 gpm standard established in EPCA.

Specifically, DOE proposed to define an ''accessory'', with respect to plumbing fittings, as a component that can, at the discretion of the user, be readily added, removed or replaced. Removal of the accessory will not prevent the fitting from fulfilling its primary function. 77 FR 31742, 31755. DOE proposed to define a ''fitting'' as a device that controls and guides the flow of water. Id. These definitions were consistent with the ASME definition current at that time, ASME A112–18.1–2011. DOE also proposed to define a ''showerhead''; however, it defined that term in a manner different from the ASME definition. Specifically, the ASME standard defined ''showerhead'' as ''an accessory to a supply fitting for spraying water onto a bather, typically from an overhead position.'' DOE proposed to define a showerhead as ''an accessory, or set of accessories, to a supply fitting distributed in commerce for attachment to a single supply fitting, for spraying water onto a bather, typically from an overhead position.'' Id. DOE stated that the definition included body sprays and hand-held showerheads but did not include safety showerheads.[4]

In response to comments on the proposed rule, DOE issued a supplemental notice of proposed rulemaking (''SNOPR'') to revise the definitions of showerhead and hand-held showerhead and to remove body sprays from the definition of showerhead. 78 FR 20832, 20834–28835, 20841 (Apr. 8, 2013) (''April 2013 SNOPR''). Specifically, Kohler Company (''Kohler'') and Sloan Valve Company (''Sloan Valve'') responded to the proposal by recommending that DOE use the definition of showerhead in ASME A112.18.1–2011. The Natural Resources Defense Council (''NRDC'') commented that a showerhead should not be defined as an accessory, and both NRDC and the International Code Council supported including body sprays in the DOE definition. These comments were contrary to comments from the Plumbing Manufacturers International (''PMI''), Moen Incorporated (''Moen'') and Kohler, who stated that body sprays should not be included or considered an accessory because they cannot be readily added or removed by the user. Id. at 78 FR 20834–28835.

In the April 2013 SNOPR, DOE again declined to propose the ASME definition of showerhead. DOE reasoned that the ASME definition did not sufficiently address DOE's regulatory coverage, because it did not specifically include hand-held showerheads or exclude safety showerheads. DOE also

[3] The 2011 guidance was superseded by the October 2013 final rule described. This final rule would supersede the 2013 final rule by providing for a different interpretation of the term ''showerhead'' as defined in EPCA.

[4] DOE proposed to define ''body spray'' as a shower device for spraying water onto a bather from other than the overhead position. DOE proposed to define a ''hand-held showerhead'' as a showerhead that can be fixed in place or used as a movable accessory for directing water onto a bather.

revised its proposed definition of showerhead (and hand-held showerhead) so that the term ''accessory'' would not be included in the proposed definition. DOE instead proposed to use the undefined term ''component''. Specifically, DOE proposed to define showerhead as ''a component of a supply fitting, or set of components distributed in commerce for attachment to a single supply fitting, for spraying water onto a bather, typically from an overhead position, including hand-held showerheads but excluding safety shower showerheads.'' 78 FR 20832, 20841. DOE proposed that body sprays not be covered by the DOE definition of showerhead, stating that further study of the issue was needed before it could determine whether to include body sprays in the definition. 78 FR 20832, 20834–20835. DOE also considered defining the term ''safety shower showerhead'' to address the question of which products qualify for exclusion from coverage under EPCA and DOE regulations. DOE noted that the Occupational Safety and Health Administration (''OSHA'') did not define the term, but that certain state regulatory requirements referenced ANSI standard Z358.1, Emergency Eyewash and Shower Equipment, which contains specific design and performance criteria that must be met, such as flow rate and accessibility. DOE stated that these criteria could help develop a definition of safety shower showerhead. Id.

Industry commenters on the April 2013 SNOPR, including Kohler, PMI, NSF International (''NSF''), the International Association of Plumbing and Mechanical Officials, Chicago Faucets, and Moen, stated that DOE should adopt the definition of showerhead in ASME A112.18.1. The majority of these commenters also supported DOE's proposal not to include body sprays within the definition of showerhead. NRDC, the Appliance Standards Awareness Project, and the California Energy Commission did not support removal of body sprays from the definition. These comments are described in DOE's final rule, published in October 2013. 78 FR 62970, 62973 (Oct. 23, 2013) (''October 2013 final rule'').

After considering these comments, DOE issued a final rule in October 2013 adopting a slightly modified version of the definition set forth in the April 2013 SNOPR. Specifically, DOE defined showerhead in the October 2013 final rule as ''a component or set of components distributed in commerce for attachment to a single supply fitting, for spraying water onto a bather, typically from an overhead position, excluding safety shower showerheads.'' 78 FR 62970, 62973, 62986. DOE continued to include hand-held showerheads within the definition of showerhead. DOE excluded body sprays from the definition but did not finalize the definition of ''body spray'' set forth in the NOPR. DOE also declined to adopt a definition of ''safety shower showerhead'' to clarify those showerheads that EPCA had exempted from coverage.

DOE issued a NOPR on August 13, 2020 proposing to revise the current definition of ''showerhead'', to adopt definitions for ''body spray'' and ''safety shower showerhead'', and to clarify application of the current test procedure consistent with the proposed definitional changes. 85 FR 49284 (''August 2020 NOPR''). DOE held a public webinar on September 3, 2020 to hear oral comments and solicit information relevant to the August 2020 NOPR.

III. Discussion

Based on careful consideration of comments submitted during the comment period provided for this rulemaking, the Department is revising its prior interpretation of the EPCA definition of ''showerhead'' to interpret the term showerhead using the definition of the term in ASME A112.18.1–2018. DOE is also adopting definitions for the terms ''body spray'' and ''safety shower showerhead.'' DOE is not finalizing the proposal to clarify application of the test procedure discussed in the NOPR.

DOE received comments including from the International Association of Plumbing and Mechanical Officials (''IAPMO''); Sierra Club and Earthjustice (the Joint Commenters); Alliance for Water Efficiency, et al. (''AWE, et al.''); Appliance Standards Awareness Project (''ASAP''), along with Alliance for Water Efficiency (''AWE''), Consumer Federation of America (''CFA''), the National Consumer Law Center, NRDC, the Northwest Energy Efficiency Alliance, and the American Council for an Energy-Efficiency Economy (''ACEEE'') (collective referred to as ASAP); the Competitive Enterprise Institute (CEI); interested consumers; and others.

A. Justification for Showerhead Definition Revision

1. Ambiguity in Showerhead Definition

EPCA defines the term ''showerhead'' generically to ''mean[] any showerhead (including a handheld showerhead), except a safety shower showerhead.'' (42 U.S.C. 6291(31)(D)) In a May 2010 draft interpretive rule, DOE stated that uncertainty existed in application of the EPCA definition of showerhead and the 2.5 gpm standard to the ''myriad of products'' marketed under names such as waterfalls, shower towers, rainheads and shower systems. These products had been designed, manufactured, and marketed with knowledge of, and in the 19 years since, the 1992 law that established a definition of showerhead and the applicable 2.5 gpm standard. Less than a year later, in March 2011, DOE published enforcement guidance defining the term showerhead in a manner that deviated significantly from the ASME definition by determining that products with multiple showerheads constitute only one showerhead for purposes of EPCA. In the enforcement guidance, DOE further stated that the term ''any showerhead'' in EPCA was ''sufficiently clear such that no interpretive rule was needed''. DOE reached this conclusion despite DOE's statements in its 2010 draft interpretive rule about a lack of clarity and the development of the market since enactment of the 1992 definition of showerhead. Also despite the supposed clarity in the definition, DOE provided a two year grace period for manufacturers to sell products that the enforcement guidance in effect rendered noncompliant with the standard. DOE's October 2013 final rule then codified in its regulations the showerhead definition set forth in the 2011 enforcement guidance, rendering the guidance unnecessary. Following these developments, the number of multi-headed showerheads in the market decreased significantly from the ''myriad of products'' cited by DOE in 2010.

DOE received comments in support of addressing ambiguity regarding the definition of a ''showerhead.'' (Grimm, No. 0065; CEI, No. 0058 at p. 2) Grimm supported the proposal that clarifies regulatory intent on the definition of showerhead and coincides with the current edition of the ASME voluntary standards. (Grimm, No. 0065) The Competitive Enterprise Institute (''CEI'') explained that historically there was some ambiguity regarding models with multiple showerheads and whether the 2.5 gpm standard applied to each showerhead or the entire unit. (CEI, No. 0058 at p. 2)

DOE reiterates its view that ambiguity exists regarding what is considered a ''showerhead'' under EPCA. To address this confusion noted by Grimm and the CEI, DOE is finalizing this rule to clarify what constitutes a showerhead, consistent with statutory direction that

DOE's regulations for plumbing products, including showerheads, be based on the voluntary consensus definition in ASME A112.18.1–2018.

Other commenters stated that there does not seem to be any ambiguity perceived by the industry or stakeholders. (Bay Area Water Supply & Conservation Agency (''BAWSCA''), No. 0050 at p. 2; Walnut Valley Water District (''WVWD''), No. 0051 at p. 1) Miulli argued that DOE has admitted that the term ''showerhead'' is not ambiguous and that the 2-year grace period was not due to ambiguity, but rather to allow industry to adapt to new rules. (Miulli, No. 0052 at p. 2) Further, Miulli stated that manufacturers of showerheads have been complying with the testing requirements since 2016 without evidence of ambiguity. To the extent that the DOE is basing this rulemaking on confusion within the industry, the DOE should disclose such evidence to the public. (Miulli, No. 0052 at p. 2)

In response, DOE notes that a number of considerations support the conclusion that the term ''showerhead'' in EPCA is ambiguous: (1) DOE's own statements in the May 2010 draft interpretive rule; (2) the long-standing existence of waterfalls, shower towers and similar products on the market prior to DOE's 2011 enforcement guidance that effectively eliminated these products; and (3) the two-year grace period DOE provided in the enforcement guidance in recognition of these products. Specifically, in relation to the two-year grace period, DOE stated that manufacturers had developed a myriad of products based on a ''misunderstanding'' of how to measure compliance with the 2.5 gpm standard, and that the two year grace period provided manufacturers the time to adjust product designs to comply with the standard. (See *https://www.energy.gov/sites/prod/files/gcprod/documents/Showerhead_Guidancel.pdf.*) DOE has historically noted that the term ''showerhead'' is ambiguous, as evidenced by the May 2010 draft interpretative rule. If there was no ambiguity in what was meant by the definition of ''showerhead'', it is unclear why manufacturers would have developed so many noncompliant products during the time period from adoption of the definition in 1992 to the issuance of DOE's enforcement guidance in 2011, and why a 2-year grace period was provided to allow for the sale of such product. Further, this final rule does not amend current test procedure for showerheads. Instead, this rulemaking aligns the definition of showerhead with that of the industry standard, ASME A112.18.1–2018.

2. Reasoning for ''Showerhead'' Definition Revision

DOE received comments questioning DOE's reasoning for this rulemaking. (Shojinaga, No. 0015; Shepard, No. 0020; Sheegog, No. 0014 at p. 1; White, No. 0013; ASAP, No. 0086 at p. 3–4; ASAP, Public Meeting Transcript at p. 9) ASAP also stated that the information on the record and in the public domain demonstrates that the complaints are unfounded. In response, DOE reiterates that it is finalizing this rulemaking to address ambiguity regarding what constitutes a showerhead.

CEC asserted that DOE's proposed interpretation effectively creates regulatory loopholes that would exempt certain showerheads, specifically multi-headed showerheads and body sprays, from the maximum water flow standard set by Congress and as such, is not a ''permissible construction of the statute'' nor is it ''sufficiently reasonable'' to effectuate the statutory language. If Congress had intended to exclude more showerheads than safety showerheads, it would have done so explicitly. (CEC, No. 0083 at p. 3) PIRG also claimed that Congress did not intend the ''showerhead'' definition to be based on ASME because other definitions in the same paragraph include the phrase ''the meaning given such term in ASME A112.19.2M–1990.'' (PIRG, No. 0082 at p. 6 citing 42 U.S.C. 6291 (31)(F–H))

As DOE discussed in the August 2020 NOPR, EPCA relies on ASME standard for the test method, the standards, and the marking and labeling requirements. In the definition section, immediately preceding the definition of showerhead, Congress also included definitions of ASME and ANSI. (42 U.S.C. 6291(31)(B)–(C)) Because the other provisions in EPCA regarding showerheads relate to the ASME standard, Congress clearly intended that the definition would also align with the ASME standard. It would be inconsistent if the definition developed by DOE deviated significantly from the ASME definition such that it creates confusion in how to apply the standards and test methods. This final rule ensures that there is no confusion between the definition of showerhead and the testing and standard requirements for showerheads. In addition, DOE is not creating ''loopholes'' in revising the regulatory definition; each showerhead in a multi-headed product would be required to comply with the standard. DOE further emphasizes that body sprays are not currently within the definition of showerhead under the 2013 final test procedure rule, so they are not currently subject to DOE's testing requirements and the existing energy conservation standard.

PIRG also argued DOE says EPAct 1992 ''relied on the ASME standard for measuring the water use of showerheads.'' 85 FR 29290 (citing 42 U.S.C. 6293(b)(7)). But the cited section states only that ''[t]est procedures for showerheads . . . shall be the test procedures specified in ASME A112.18.1M–1989.'' (42 U.S.C. 6293(b)(7)) PIRG stated that test procedures simply measure water use—the rate of water flow through a fitting and through a nozzle (or multiple nozzles). (42 U.S.C. 6293(b)(3)) PIRG argued further that the cited statutory section says nothing about what constitutes a showerhead in the first place, or how much water should be allowed to flow through a nozzle. Making the test procedures depend on ASME's methods certainly does not suggest that ASME documents should determine those broader questions of showerhead definition and cumulative flow. (PIRG, No. 0082 at pp. 6–7) CEC further claimed that because DOE is bound by EPCA, and ASME/ANSI is not so bound, Congress explicitly instructed DOE to adopt the ASME/ANSI test procedure unless the Secretary determines that the test procedure, including the instructions and relevant definitions, conflicts with EPCA. (CEC, No. 0083 at p. 4)

As explained in the NOPR, the Energy Policy Act of 1992 illustrated Congress' intent that DOE adhere to ASME standards. When EPCA was amended in 1992 to define showerhead and to establish a test method and water conservation standard for showerheads, Congress specified that the test method applicable to showerheads is the procedure specified in ASME A112.18.1M–1989. (42 U.S.C. 6293(b)(7)(A)) If that ASME standard is revised and approved by ANSI, DOE is required to amend its test procedures to conform to those revisions unless doing so would be inconsistent with other provisions of EPCA. (42 U.S.C. 6293(b)(7)(B)) In the definition section, immediately preceding the definition of showerhead, Congress also included definitions of ASME and ANSI. 42 U.S.C. 6291(31)(B)–(C). The 2.5 gpm standard required compliance with ASME/ANSI A112.18.1M–1989 with regard to the amount of force needed to remove the flow restrictor from the showerhead. (42 U.S.C. 6295(j)(1)) Even the marking and labeling requirements are required to be consistent with those

of ASME A112.18.1M–1989, or a subsequently revised version as appropriate. 42 U.S.C. 6294(a)(2)(E). While commenters are correct that EPCA does not include an explicit direction regarding the definition of showerhead, as discussed previously, DOE has found that reliance on the ASME standard for this final rule is consistent with Congress's reliance on ASME. In particular, if the definition developed by DOE deviated significantly from the ASME definition, it would create confusion in how to apply the standards and test methods that Congress directed be consistent with ASME.

The CA Investor-Owned Utilities (IOUs) argued that this proposal will introduce confusion into an established market. (CA IOUs, Public Meeting Transcript at p. 13) Commenters also claimed that the proposal is inconsistent with previous DOE statements regarding the ASME definition. (CA IOUs, Public Meeting Transcript at p. 13; Miulli, No. 0052, pg. 3) PIRG also argued that none of DOE's justifications provide any reasonable basis for changing the definition of showerhead so as to allow more than 2.5 gpm cumulatively from a single fitting. (PIRG, No. 0082 at p. 6)

DOE disagrees that this final rule would introduce confusion into the market by aligning DOE's definition of ''showerhead'' with the ASME definition. DOE's 2011 enforcement guidance introduced confusion such that the Department felt it necessary to provide a 2-year grace period for manufacturers to sell product that the guidance effectively rendered noncompliant. In contrast, this rulemaking ensures that the definition in DOE's regulations aligns with that used in the ASME standard for showerheads, which is well known by manufacturers in the industry. As discussed throughout this document, DOE is only revising the definition of showerhead and has not amended the current energy conservation standard nor is it finalizing the test procedure clarifications.

PIRG asserted that DOE's supposed justification is that Congress preferred DOE to align with voluntary industry standards. 85 FR 49287 & n.5. Therefore, DOE says, it must adopt a definition of ''showerhead'' consistent with the one in ASME's current standard. PIRG notes that an ''accessory,'' under the ASME standards, can be ''readily added, removed, or replaced.'' As a result, PIRG asserts that DOE's interpretation of the ASME definition of ''showerhead'' in the NOPR cannot be correct because ASME defines an accessory as ''a component that can, at the discretion of the user, be readily added, removed, or replaced and that, when removed, will not prevent the fitting from fulfilling its primary function.'' PIRG stated that removal of one showerhead from a multi-headed product would result in an uncontrolled jet of water from the empty port. As a result, because removal prevents the fitting from fulfilling its primary function, a single showerhead in a multi-headed product cannot, on its own, be considered a showerhead. PIRG further asserts that DOE used the word ''component'' in the 2013 final rule because it wanted to be able to cover sprayers that cannot so easily be removed—namely, body sprays. DOE's original proposed definition used the word ''accessory,'' but then explicitly included body sprays. As a result of commenters' statements that body sprays are not accessories because they are not removable, PIRG states that DOE issued a supplemental proposal to switch from ''accessory'' to the word ''component'' to eliminate removability as a criterion. (PIRG, No. 0082 at pp. 4–5)

Commenters also noted that to fulfill the intent of greater alignment noted in the NOPR, DOE should also incorporate the definitions of accessory, body spray, showerhead, and safety showerhead in the current ASME standard. (AWE, et al., No. 0079 at p. 2) [5] Other commenters stated that DOE has ignored defining key provisions including ''accessory'' and ''supply fitting.'' (Joint Commenters, No. 0085 at p. 3; ASAP, No. 0086 at pp. 3–4)

DOE has adopted the ASME definitions for showerhead and body spray in this final rule. The term ''supply fitting'' is not defined in the ASME standard. The term ''safety shower showerhead'' is also not defined in the ASME standard, but DOE has adopted as the definition of ''safety shower showerhead'' a showerhead that is consistent with the requirements of another voluntary consensus standard, ANSI Z358.1–2014, American National Standard for Emergency Eyewash and Shower Equipment. With regard to adoption of the term ''accessory'' in the ASME standard, DOE acknowledges commenters' concerns regarding application of the ASME definition of ''accessory'' (which includes showerheads) to a single showerhead in a multi-headed product, and the attendant result of removal of that showerhead. DOE notes, however, that removal of a showerhead with a single nozzle (as opposed to one showerhead from a multi-headed product) would also result in an ''uncontrolled jet of water from the empty port''. Because removal of that single showerhead would therefore also prevent the fitting from fulfilling its primary function, under the commenters' approach, even a showerhead with a single nozzle would not be considered an accessory pursuant to the ASME definition. Therefore, the issue raised by commenters existed under DOE's 2013 regulatory definition of ''showerhead,'' though no concern had previously been expressed.

DOE continues to believe it is not necessary to include the definition of ''accessory'' in its regulations. ASME defines the term ''accessory'' to include a showerhead. DOE reads that definition of accessory in concert with the definition of showerhead to mean that a showerhead is a type of accessory and ASME makes clear that an accessory includes, as an example, showerheads. Accordingly, adding a definition of accessory (a commonly understood term) in DOE's regulations would add nothing that is essential to an understanding of what constitutes a showerhead.

In addition, and as stated previously, adoption of ASME's definition of showerhead conforms to Congressional intent, and is also consistent with comments received by DOE in the 2013 rulemaking that urged DOE to adopt the definition in the ASME standard. 78 FR 20832, 20834. During this proceeding, questions arose related to the use of the word ''accessory'' and its impact on body sprays. DOE chose to use the phrase ''component'' rather than ''accessory'' (which commenters indicated would not include body sprays), but did not address whether body sprays are included in showerheads. 78 FR 62970, 62972–62973 (Oct. 23, 2013). But as stated in the NOPR, an interest in retaining the ability to include body sprays within the regulatory definition of showerhead at some future time should not lead DOE to depart from the term ''accessory'' that had been, and continues to be, used consistently in the ASME definition. Similarly, DOE now recognizes that defining products with multiple showerheads to constitute a single ''showerhead'' inappropriately expands the definition of ''showerhead'' beyond the ASME definition.

With regard to whether 42 U.S.C. 6295(o)(4) precluded DOE from effectively banning multi-nozzle showerheads, the Joint Commenters claimed that DOE has not shown any consumer utility in allowing higher

[5] The AWE stakeholders submitted two versions of their stakeholder letter. The first version is comment No. 0072; the second letter, which includes additional signatures, is the version referenced throughout this document.

water use levels for multi-nozzle showerheads, much less the degree of utility that must be present to support invoking 42 U.S.C. 6295(o)(4). The Joint Commenters stated that DOE's claim that 42 U.S.C. 6295(o)(4) somehow raises the bar for Congress to legislate a product out of existence by codifying an energy conservation standard is incorrect. That Congress chose to restrict DOE's ability to adopt standards that would eliminate certain product features from the market says nothing about what a subsequent Congress intended when it enacted legislation that can reasonably be read to restrict the availability of certain products. (Joint Commenters, No. 0085 at p. 4) CEC argued that based on the plain language of the statute, section 6295(o)(4) applies only to standards. However, CEC stated that DOE's 2013 final rule did not directly or effectively amend any standards; instead, it clarified existing authority and had no regulatory effect. CEC commented that DOE seems to reference 42 U.S.C. 6295(o)(4) as evidence that DOE's previous rulemaking was unlawful because it impermissibly resulted in the unavailability of a certain performance characteristic. (CEC, No. 0083 at p. 6) Commenters argued that DOE's own analysis shows that the existing market includes multi-headed showerheads that meet the current standard. Therefore, no performance characteristic was eliminated from the market and DOE has not provided any evidence that consumers are not happy with the existing multi-headed showerheads. (CEC, No. 0083 at p. 6; PIRG, No. 0082 at pp. 3–4)

PIRG argued that DOE's new interpretation is contrary to those standards and goals of EPAct 1992, as it will permit higher water usage. DOE has said plainly that the new interpretation will mean a three-nozzle showerhead counts, for purposes of the water conservation standard, as three showerheads, each permitted to emit 2.5 gpm of water flow. Single-nozzle heads have been commonplace for decades, and single nozzles with 2.5 gpm flow have been the norm since DOE announced its current interpretation in 2011. PIRG also asserted that DOE does not suggest the three-nozzle showerhead has a distinctive functionality, or a value as a product category that DOE's 2011 interpretation would have eliminated. If the standard is interpreted to apply only at the level of nozzles, then the sole functional difference is that the three-nozzle head would allow for exceeding the statutory maximum of 2.5 gpm. Presumably, PIRG argues, DOE believes that consumers will value being able to get additional water flow from multiple nozzles. But that functionality—enabling increased water use beyond the maximum standard set by Congress—is not one that can justify a regulatory decision under EPCA. (PIRG, No. 0082 at p. 3)

Section 6295(o)(4) of EPCA states that DOE may not prescribe a new or amended standard if the Secretary finds that the standard ''is likely to result in the unavailability of performance characteristics and features that are substantially the same as those generally available in the United States at the time of the Secretary's finding''. DOE is uncertain as to the commenters' reference to ''value as a product category'', as that term does not appear in 42 U.S.C. 6295(o)(4). With regard to the ''distinct functionality'', or whether being multi-headed as opposed to single headed is a ''feature'', DOE has previously determined that refrigerator-freezer configurations, oven door windows, and top loading clothes washer configurations are all features. 84 FR 33869, 33872 (July 16, 2019). DOE's consideration of a two, three or eight showerheads (as opposed to one) in a given product as a ''feature'' is consistent with DOE's previous rulemakings and determinations of what constitutes a feature. DOE also acknowledges, as is the case with this definitional rule, that the 2013 rule was not a standards rulemaking and did not comply with the statutory requirements of a standards rulemaking. The effect, however, was the same in that multi-headed showerhead products, while not entirely eliminated from the market, were significantly reduced in availability as a result of the 2011 enforcement guidance. In addition, DOE acknowledges that Congress may pass legislation to eliminate a performance characteristic or feature from the market. The Joint Commenters imply that in establishing the 2.5 gpm standard, Congress intended to restrict the availability of certain showerheads in the market. (See Joint Commenter, No. 0085 at p. 4) In 42 U.S.C. 6295(j)(1), EPCA sets a maximum water use standard for showerheads, but it does not provide any other restrictions about how the showerhead is designed beyond that it must meet the requirements of ASME/ANSI A112.18.1M–1989, 7.4.3(a). Contrary to commenters' assertions, Congress did not act to remove products from the market.

Commenters stated that DOE violated the Administrative Procedure Act (APA) in proposing to revise the regulatory definition of showerhead. (PIRG, No. 0082 at p. 14; Center for Biological Diversity, No. 0071 at pp. 1–2; AWE, No. 0080 at p. 3) PIRG stated that the proposal falls far short of what the APA requires for such a substantial change. PIRG also asked DOE to provide information on: What products exist currently with multiple nozzles? How popular will high-flow showerheads be? How much additional water will showers consume? How much energy will that cost? How long will it take manufacturers to design, and retool to make these products and what is the cost? (PIRG, No. 0082 at p. 14) The Center for Biological Diversity also argues that DOE violated the APA by failing to provide analysis of its impact on the environment or threatened or endangered species. The commenter cites the Supreme Court decision in (*Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 371 (1962) to assert that for DOE's showerhead NOPR, as with the rule at issue in that case, there are no findings and no analysis to justify the choice made, and no indication of the basis on which the agency exercised its expert discretion. The Court stated that the Court was not prepared to, nor would the APA permit the Court to, accept agency promulgation of a rule under such circumstances.

AWE cited to *Encino Motorcars* v. *Navarro* (2016), stating that the U.S. Supreme Court has required agencies attempting to change definitional standards that have actual legal effects to explain the change in greater detail than if they were rulemaking for the first time. Changes in agency interpretations may be arbitrary and capricious under the APA unless fully explained and the implication of the change fully set forth. (AWE, No. 0080 at p. 3) The Joint Commenters argued that were DOE to follow its own professed rationale and align its regulations with ASME, each nozzle in a multi-nozzle showerhead would not meet the Department's proposed ''showerhead'' definition. DOE's refusal to act in accord with its own reasoning renders the proposal arbitrary and capricious. (Joint Commenter, No. 0085 at p. 3 (citing *Air Transport Ass'n* v. *DOT,* 119 F.3d 38, 43 (D.C. Cir. 1997) (''the most serious logical problem'' with the agency's regulation—which the Court ''simply cannot accept''—is that agency's explanation ''is internally inconsistent'').)

DOE has met the APA's requirements for issuing a final rule and has explained its reasoning for revising the definition of showerhead and defining body spray and safety shower showerhead. As discussed in Section II of the NOPR and section III of this final rule, DOE has explained in detail the

reasons for the definitional change. With respect to the information requested by PIRG, DOE provided information in the NOPR with regard to the very small percentage of multi-headed showerheads available on the market today. Other information requested by PIRG is speculative (*e.g.,* How popular will high-flow showerheads be? How much additional water will showers consume? How much energy will that cost? How long will it take manufacturers to design, and retool to make these products and what is the cost?) DOE emphasizes that the rule does not impose costs on manufacturers or consumers. The rule instead revises the regulatory definition of showerhead consistent with congressional intent. DOE does not dictate manufacturing or consumer purchasing choices as a result of this rule, and manufacturers can choose whether to produce multi-headed showerhead products depending on their particular circumstances.

3. NTTAA and OMB Circular A–119

In accordance with the NTTAA, OMB Circular A–119, and EPCA, DOE proposed to adopt definitions from voluntary consensus standards. 85 FR 49284, 49289–49291. DOE received comments regarding the appropriateness of relying on the consensus industry standards as it relates to showerhead. PIRG claimed that DOE cannot rely on the NTTAA to justify its matching of the definition of showerhead to the ASME standard. The 2.5 gpm showerhead maximum flow rate was not a policy objective determined by DOE; it was a water conservation standard determined by Congress. NTTAA does not instruct DOE to base its interpretation of Congress's policy by referring to industry standards. NTTAA itself states that an agency should not follow an industry standard where that is ''inconsistent with applicable law.'' Public Law 104–113, 12(d), 110 Stat. 775, 783. And as discussed, EPAct 1992 described in detail how the showerheads program should interact with ASME standards—NTTAA does not repeal or amend those directives. (PIRG, No. 0082 at p. 8)

PIRG argued that DOE's reliance on OMB Circular A–119 is misplaced for the same reasons. To state the obvious, Circular A–119 cannot trump the statute. Like the NTTAA, Circular A–119 does not instruct an agency to follow industry standards where doing so would be ''inconsistent with applicable law.'' 85 FR 49287 n.5. In particular, Congress specified the policy goals that DOE must consider when it makes rules under EPCA. Circular A–119 cannot supplant those policy goals with an extra-statutory mandate. (PIRG, No. 0082 at p. 8) Commenters also argued that the reference to OMB Circular A–119 and DOE's explanation clearly points out the inappropriateness of this proposed changed in the definition, because the ASME definition frustrates and is inconsistent with the statutory requirement to establish and maintain an upper bound no the flowrate of showerhead. (NRDC, No. 0033 at pp. 21–22; Joint Commenters, No. 0085 at pp. 3–4) Earthjustice questioned whether the proposed testing requirements that you only test the nozzle with the highest flow is consistent with the ASME standard; if not, this would seem inconsistent with DOE's rationale for this rulemaking. (Earthjustice, Public Meeting Transcript at pp. 18–19)

DOE considered the requirements of the NTTAA when developing its definitions. The NTTAA requires DOE to use voluntary consensus standards in lieu of government-unique standards in their regulatory activities, except where inconsistent with law or otherwise impractical. (See Pub. L. 104–113, section 12(d), Mar. 7, 1996, 110 Stat. 783, as amended by Pub. L. 107–107, Div. A, Title XI, section 1115, Dec. 28, 2001, 115 Stat. 1241 (''NTTAA''), 15 U.S.C. 272 note *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A119/revised_circular_a-119_as_of_1_22.pdf.*) As the commenters note, OMB Circular A–119 directs Federal agencies to use voluntary consensus standards unless inconsistent with applicable law or otherwise impracticable. EPCA certainly does not preclude DOE from using such industry standards. The statutory text of EPCA does not make compliance with OMB Circular A–119 inconsistent with applicable law or otherwise impracticable. DOE disagrees that the ASME definition frustrates and is inconsistent with the requirements of EPCA. Similar to the discussion above in regards to NTTAA, DOE has concluded that its definition, which is the same as the ASME definition, is compliant with EPCA. DOE has also determined that it is practicable to adopt the ASME definition. The ASME definition is well understood by showerhead manufacturers. In addition, contrary to DOE's reasoning in the 2013 rulemaking, it is not necessary that the ASME definition specifically exclude safety showerheads, because EPCA already does so.

B. Anti-Backsliding Consideration

When establishing a new product class, DOE must consider EPCA's general prohibition against prescribing ''any amended standard which increases the maximum allowable energy use, or, in the case of showerheads, faucets, water closets, or urinals, water use, or decreases the minimum required energy efficiency, of a covered product'' in any rulemaking to establish standards for a separate product class. (42 U.S.C. 6295(o)(1))

Commenters argued that the rule is an attempt to circumvent the federal standards in EPCA. (Save Water, No. 0031; Fisseler, No. 0032; Northwest Power and Conservation Council (''NPCC''), No. 0060 at p. 2) Further, commenters stated that the proposal is a violation of the anti-backsliding provision. (ASAP, No. 0086 at p. 5: PIRG, No. 0082 at p. 9; Davis, No. 0064 at p. 1) Los Angeles Department of Water and Power (''LADWP'') claimed that the proposed definitions violate the anti-backsliding provision because they will allow for both increased water and energy usage due to the augmented water consumption, higher operational energy demands, and diminished water conservation. (LADWP, No. 0066 at p. 3)

Commenters stated that EPCA's anti-backsliding provision prohibits DOE from prescribing any amended standard which increases the maximum allowable . . . water use. (CEC, No. 0083 at p. 6; the Joint Commenters, No. 0085 at p. 1; PIRG, No. 0082 at p. 9) CEC argued that the anti-backsliding clause must be read to restrict DOE's subsequent discretionary ability to weaken that standard at any point thereafter. (CEC, No. 0083 at p. 6) The Joint Commenters noted that as the Congress that enacted the provision explained, this rigidity serves an important purpose: ''to maintain a climate of relative stability with respect to future planning by all interested parties.'' (Joint Commenters, No. 0085 at p. 1 (citing H.R. Rep. No. 100–11 (Mar. 3, 1987) at 22))

Commenters argued that it is not plausible that Congress prohibited DOE from prescribing increases in the maximum allowable water use of a showerhead, while also permitting DOE to increase water use by redefining a term, citing *NRDC* v. *Abraham,* 355 F.3d 179, 197 (2d Cir. 2004). (Joint Commenters, No. 0085 at p. 2, PIRG, No. 0082 at p. 9) The commenters argued that EPCA's anti-backsliding provision must be interpreted in light of ''the appliance program's goal of steadily increasing the energy efficiency of covered products'' and Congress' intent to provide a ''sense of certainty on the part of manufacturers as to the required energy efficiency standards.'' *Abraham,* 355 F.3d at 197. In addition, reading

EPCA this way would ''effectively render'' the anti-backsliding provision ''inoperative'' or a ''nullity.'' (PIRG, No. 0082 at p. 9 citing *Abraham,* 355 F.3d at 197; Joint Commenters, No. 0085 at pp. 1–3 citing *Abraham,* 355 F.3d at 197 and referencing *Hearth, Patio & Barbecue Association* v. *DOE,* 706 F.3d 499, 508 (D.C. Cir. 2013) (observing that changes to covered product definitions can ''effectuate[ ] [a] workaround of statutory limits'' applicable to energy conservation standards under EPCA'').

EPCA's anti-backsliding provision prohibits DOE from prescribing ''any amended standard which increases the maximum allowable energy use, or, in the case of showerheads, faucets, water closets, or urinals, water use, or decreases the minimum required energy efficiency, of a covered product.'' (42 U.S.C. 6295(o)(1)) In this rulemaking, DOE is not amending the current energy conservation standard. If DOE were to do so, those standards would be established through DOE's standards-setting rulemaking process, which is governed by the Department's Process Rule and includes multiple distinct steps and includes opportunities for public comment. In the absence of such a rulemaking, neither DOE nor commenters can conclude that the revised definitions amend the standards currently applicable to showerheads. To argue otherwise, as commenters do, would mean that DOE undertook an unauthorized standards rulemaking in 2013.

DOE disagrees with commenters' reliance on *NRDC* v. *Abraham* to support their anti-backsliding argument. In that case, the Second Circuit held that the publication date in the **Federal Register** of a final rule establishing an energy conservation standard operates as the point at which EPCA's anti-backsliding provision applies to a new or amended standard. 355 F.3d at 196. This case is inapplicable to the present rulemaking because DOE has not yet published a final rule amending standards for showerheads. In this rulemaking, DOE is only finalizing definitions for showerheads.[6]

The Joint Commenters also claimed that other provisions of EPCA confirm the applicability of the statute's anti-backsliding provision to actions that alter regulatory definitions in ways that weaken the standards applicable to a covered product. EPCA broadly authorizes DOE to classify additional consumer products and commercial equipment as covered products and equipment subject to energy conservation standards. (42 U.S.C. 6292(a)(20), (b), 42 U.S.C. 6311(1)(L), 42 U.S.C. 6312(b)) In contrast, the statute confers no similarly broad authority to terminate the coverage of a product and allows products to be exempted from standards only under specified circumstances. The handful of EPCA provisions explicitly authorizing DOE actions that weaken energy conservation standards are the exceptions that prove the rule: the anti-backsliding provision blocks those changes to product definitions that would result in weaker standards. (Joint Commenters, No. 0085 at pp. 2–3)

DOE disagrees with the Joint Commenters' assertion that EPCA's anti-backsliding provision applies to changes to a definition. As discussed above, the language in 42 U.S.C. 6295(o)(1) prohibits DOE from prescribing an amended standard that results in a reduction in energy efficiency or increase in energy use. That provision does not limit DOE's discretion to amend definitions for covered products.

PIRG contended that in recent briefing on the standards for general service lamps, DOE asserted that it could undo or revise a prior standard, despite the anti-backsliding rule, if the previous standard was incorrect. The Second Circuit has already rejected that proposition with respect to EPCA itself, *NRDC* v. *Abraham,* 355 F.3d 179 (2d Cir. 2004). Besides, DOE has not even suggested that its existing interpretation of ''showerhead'' is incorrect. A shift in policy preference like that is certainly not an exception to the anti-backsliding rule. Nor can an error in the reasoning for a prior regulation, if there was one, exempt it from the anti-backsliding provision. According to the commenter, DOE purports to frame its revision as part of a test procedure rather than a standard. In fact, the regulatory definition at issue applies across the showerhead regulations—to the standard as well as to the test procedures. 10 CFR 430.2. Moreover, even if DOE were only amending a test procedure, it would still be engaged in impermissible backsliding. (PIRG, No. 0082 at pp. 9–10 (citing 42 U.S.C. 6293(e))

DOE is not amending the current energy conservation standards in this rulemaking, nor has DOE asserted that the current standard is incorrect. The adoption of new or revised definitions for a product, including showerheads, does not implicate the anti-backsliding provision because it is not a standard nor does it alter the current standards. Further as discussed previously, DOE developed this rulemaking as a result of ambiguity regarding what products fall under the definition of ''showerhead.'' Accordingly, the revised definition will provide clarity regarding what products qualify as a showerhead. DOE agrees that the definition of ''showerhead'' applies to test procedures, standards, and labeling.

The August 2020 NOPR included references to the test procedure for showerheads because DOE had proposed clarifications to the test procedure. DOE has decided not to finalize its test procedure clarification proposal.

C. Definition of Body Spray and Safety Shower Showerhead

In the proposed rule, DOE proposed to define the term ''body spray'' separately from the definition of showerhead, defining ''body spray'' as a ''shower device for spraying onto a bather other than from the overhead position.'' 85 FR 42984, 49291. DOE also proposed to adopt the ANSI standard as the definition of ''safety shower showerhead'': ''a device specifically designed and intended to deliver a flushing fluid in sufficient volume to cause that fluid to cascade over the entire body.'' 85 FR 49284, 49292. DOE received general comments opposing the proposed definitions that would remove ''body spray'' and ''safety shower showerhead'' from the definition of showerhead, such that energy conservation standards do not apply to body sprays and safety shower showerheads. (Hare, No. 0012; Cohen, No. 0036; City of Santa Rosa Water Department (''Santa Rosa Water''), No. 0037 at p. 2; BAWSCA, No. 0050 at p. 2; WVWD, No. 0051 at p. 1; City of Tucson, No. 0052 at p. 1; Western Municipal Water District, No. 0054; City of Sacramento Department of Utilities, No. 0055 at p. 2)

DOE notes that the current definition of ''showerhead'' in 42 U.S.C. 6291(31)(D) and 10 CFR 430.2 both exempt ''safety shower showerheads'' from the definition of showerheads. This rulemaking does not alter the current exception of ''safety shower showerheads'' from the definition of a

[6] DOE finds the *Hearth, Patio & Barbecue Association* decision inapplicable to this rulemaking. In that case, the court determined that DOE could not simply define direct heating equipment to include decorative fireplaces, because Congress did not intend for decorative fireplaces to be considered direct heating equipment. The court instead determined that DOE should have issued a coverage determination, with the attendant required findings, prior to establishing standards for decorative fireplaces. In this rule, there is no suggestion that a coverage determination is necessary or appropriate. That is, the statute clearly applies to showerheads. Instead, DOE is revising its regulatory definition consistent with statutory intent such that each showerhead in a multi-headed product must comply with the 2.5 gpm standard established in EPCA.

''showerhead''. Instead, DOE defines what products are considered safety shower showerheads. In regards to ''body sprays'', as discussed below, this rulemaking clarifies ambiguity resulting about whether ''body sprays'' fall under the definition of showerhead. It is important to note that DOE has not changed the current water conservation standard in this rulemaking.

1. Body Spray

In the proposed rule, DOE proposed to define the term ''body spray'' separately from the definition of showerhead, defining ''body spray'' as a ''shower device for spraying onto a bather other than from the overhead position.'' 85 FR 42984, 49291. Thus, DOE's regulations would make clear that body sprays are not covered by DOE's test procedure or the energy conservation standard applicable to showerheads, consistent with DOE's proposed interpretation of the term ''showerhead.'' Id.

Consumer Research supported the proposal, stating that the term ''body spray'' is left undefined in the current rule, leaving it unclear whether body sprays are subject to the 2.5 gpm limit. The rule remedies this situation, again adopting language consistent with the current ASME standard, ASME A112.18.1–2018, and makes it clear that body sprays are not showerheads. (Consumer Research, No. 0039 at pp. 3–4)

DOE has concluded that the definition of showerhead in the October 2013 Final Rule did not specifically include or exclude body sprays. DOE agrees that this omission may have introduced uncertainty for regulated parties and that it is appropriate to clarify that body sprays are not showerheads.

Commenters also raised concerns that the proposed rulemaking will result in wasteful and unnecessary ''deluge'' showers, which will also consume much more hot water increasing energy consumption. (BAWSCA, No. 0050 at p. 3; WVWD, No. 0051 at p. 2; AWE, et. al, No. 0079 at p. 2) AWE argued that U.S. plumbing codes require body sprays to comply with the current ASME A112.18.1/CSA B125.1 standard, which requires body sprays to flow no more than 2.5 gpm. If DOE exempts body sprays instead of aligning the definition with that in the industry standard, consumers will be able to purchase higher flow body sprays, but they will not be able to legally install them. (AWE, et al., No. 0079 at pp. 2–3) Commenters stated that under the proposal, body sprays would not be covered under DOE's test procedure or the energy conservation standard applicable to showerheads, which would allow body sprays to be developed with no limits on flow rate. (NPCC, No. 0060 at p. 2; Santa Clara Valley Water District (''Valley Water''), No. 0076 at p. 1)

CEC also raised concerns that DOE's proposed definition for body sprays relies solely on manufacturer intent and consumer installation decision, rather than discernable technical differences between the products. CEC argued that the proposed definition is overly broad and this ambiguity is compounded by the phrase defining showerhead as being ''typically from an overhead position.'' The word ''typically'' is not specific and inserts ambiguity and discretion into DOE's regulation. Because the definitions together are fundamentally subjective, excluding body sprays and adopting the ASME definition for them creates a loophole that could be used to circumvent Congress's maximum water flow of 2.5 gpm for any showerhead. (CEC, No. 0083 at p. 3)

The CA IOUs argued that in their analysis the marketplace does not clearly distinguish stand-alone body sprays from conventional showerheads. (CA IOUs, No. 0084 at p. 3) The CA IOUs also conducted a review of retailer websites that indicated that shower units with body spray capability are generally marketed or sold as combination shower systems or shower panels with an overhead showerhead component. Without a reliable way to distinguish stand-alone body sprays from other showerheads, retailers, consumers, and test labs will have no way to determine if a product is a body spray and exempt from current water conservation standards. The CA IOUs argue that industry considers body sprays a form of showerhead, and thus that action that exempts body sprays will result in backsliding. (CA IOUS, No. 0084 at pp. 4–5) The CA IOUs also highlight the WELS, WaterSense, EPA–2018, NCC, and EU standards to discuss how 3 of the 5 standards do not have an orientation requirement for showerheads and that 4 of the 5 standards treat multi-spray products and body spray components similarly. (CA IOUs, No. 0084 at p. 12)

DOE has determined that leaving the scope of products not subject to EPCA's energy conservation standard undefined, and potentially subjecting manufacturers of body sprays to DOE standards, causes more confusion than establishing a regulatory definition. In this rulemaking, DOE determined it was appropriate to clarify the existing ambiguity following the October 2013 Final Rule that did not include body sprays within the definition of ''showerhead,'' and also did not define what constituted a ''body spray''. This rulemaking clarifies the definitions of showerhead and body spray. DOE believes that defining what constitutes a ''body spray'' will help to distinguish ''body sprays'' from showerheads. Further, CEC and the CA IOUs raised concern about how consumers may install body sprays. (CEC, No. 0083 at p.3; CA IOUs, No. 0084 at p.12) Under EPCA, DOE does not have the authority to regulate where a consumer locates a showerhead after purchase. DOE notes its final rule does not affect any existing building code requirements, but emphasizes that neither its current regulation nor this final rule include body sprays as showerheads, and DOE recognizes the importance of clarity with regard to what products manufacturers must certify to DOE to demonstrate standards compliance.

2. Safety Shower Showerhead

DOE also proposed to adopt the ANSI standard as the definition of ''safety shower showerhead'': ''a device specifically designed and intended to deliver a flushing fluid in sufficient volume to cause that fluid to cascade over the entire body.'' 85 FR 49284, 49292. In DOE's October 2013 final rule establishing the current definition of ''showerhead'', DOE declined to define the term ''safety shower showerhead,'' which meant that the class of showerheads that EPCA excluded from standards was undefined and subject to DOE's discretion as to what was considered a safety shower showerhead. DOE noted in the October 2013 final rule that ANSI standard Z358.1, ''Emergency Eyewash and Shower Equipment'', defines an emergency shower as ''a device specifically designed and intended to deliver a flushing fluid in sufficient volume to cause that fluid to cascade over the entire body.'' 78 FR 62970, 62974; Oct. 23, 2013. Commenters, including NSF and PMI, supported inclusion of the definition of safety shower showerhead consistent with the requirements of ANSI standard Z358.1. At the time, DOE declined to adopt this definition, stating that DOE could not identify a definition that would clearly distinguish these products from showerheads covered under EPCA and that adopting an unclear definition would cause additional confusion. Id. Upon further reflection, DOE is of the view that leaving the scope of products not subject to EPCA's energy conservation standards undefined, and potentially subjecting manufacturers of safety shower showerheads to DOE standards

when EPCA specifically excluded them from coverage, causes confusion and is inappropriate. What is meant by a ''safety shower showerhead'' or emergency shower is understood in the regulated industry, and DOE believes that it is unlikely that manufacturers of showerheads intended for use by residential consumers would design a showerhead to meet the specifications of the ANSI standard to avoid compliance with DOE standards. In this final rule, DOE is incorporating by reference the definition of safety shower showerhead from American National Standards Institute/International Safety Equipment Association (''ANSI/ISEA'') Z358.1–2014: ''a showerhead that is designed to meet the requirements of ANSI Standard Z358.1.''

Commenters proposed that DOE define safety shower showerheads according to ANSI Z358.1. (CA IOUs, Public Meeting Transcript at pp. 33–34; ASAP, No. 0086 at p.6; ASAP, Public Meeting Transcript at p. 24; CA IOUs, No. 0084 at pp. 12–13) ASAP asserted that the proposed definition of ''safety shower showerhead'' is too broad and that many showerheads sold for bathing could be viewed as meeting this definition. (ASAP, No. 0086 at p. 6) Specifically, the commenters proposed that DOE adopt the full definition of safety shower showerheads from ANSI Z–358.1–2014 including definitions for terms used in the emergency shower definition and criteria related to flow rate, pattern, fluid temperature, and installation. (CA IOUs, Public Meeting Transcript at pp. 33–34; CA IOUs, No. 0084 at pp. 12–13; ASAP, No. 0086 at p. 6)

DOE agrees with the commenters that the proposed definition is overly broad and does not provide clarity as to what the specific terms in the ''safety shower showerhead'' definition mean. In the October 2013 Final Rule, DOE declined to adopt ANSI definition of ''emergency shower'' as the definition for ''safety shower showerhead'' because DOE could not identify a definition that would clearly distinguish these products from showerheads covered under EPCA and that adopting an unclear definition would cause additional confusion. 78 FR 62970, 62974. The adoption of the ANSI definition of ''emergency shower'' by itself, as proposed in August 2020 NOPR, does not clearly explain what differentiates a ''safety shower showerhead'' from a ''showerhead.'' Accordingly, DOE is defining ''safety shower showerhead'' to mean a showerhead designed to meet the requirements of ANSI/ISEA Z358.1 (incorporated by reference, see § 430.3). This standard sets forth specific performance criteria for emergency shower and would require that ''safety shower showerheads'': (1) Be capable of delivering flushing fluid at a minimum of 75.7 liters per minute (or 20 gpm) for a minimum of 15 minutes; (2) have a spray pattern with a minimum diameter of 50.8 centimeters (cm) (or 20 in.) at a height of 153.4 cm (or 60 in.) above the surface on which the user standards, and the center of the spray pattern shall be located at least 40.6 cm (or 16 in.) from any obstruction and that the flushing fluid shall be substantially dispersed throughout the pattern; (3) deliver tepid flushing fluid, where ''tepid'' is defined as a ''flushing fluid temperature conducive to promoting a minimum 15-minute irrigation period.'' (a suitable range is 16 °C to 38 °C (60 °F to 100 °F)); (4) be located in an area identified with a highly visible sign positioned so the sign shall be visible within the area served by the emergency shower; and (5) be operable with a valve that can be opened in under one second and remained open without user intervention for the duration of a flush.[7] The inclusion of the related definitions and performance criteria in the definition of ''safety shower showerhead'' addresses the concerns noted by commenters and clearly distinguishes a ''showerhead'' from a ''safety shower showerhead.''

D. Testing Requirements

In the August 2020 NOPR, DOE proposed to amend the testing provision in appendix S to subpart B of 10 CFR part 430 to address the testing of a single showerhead in a product with multiple showerheads. DOE proposed that a measurement would be required for only one showerhead when all showerheads in the product are identical. If the showerheads in such a product are not identical, only the showerhead with the maximum water flow would need to be tested to determine compliance with the 2.5 gpm standard. Additionally, DOE proposed to specify that where it is not possible to turn on only the showerhead being testing, testing would be performed with all showerheads flowing at the maximum rate. Measurement would be taken of only the showerhead under test. 85 FR 49284, 49292. In this final rule, DOE is not finalizing the proposed testing clarifications. Instead, as noted previously, DOE emphasizes in this final rule that the existing test procedure remains applicable for purposes of measuring the water use of a showerhead as defined in this final rule. It would be speculative for DOE to determine what products manufacturers may choose to produce subsequent to DOE's revision of its regulatory definition of showerhead. If issues arise where the existing test procedure does not produce a representative measurement of the water use of a particular showerhead product, the manufacturer can seek a waiver from DOE pursuant to DOE regulations at 10 CFR 430.27. DOE also notes the general requirement in EPCA for DOE to consider on a periodic basis whether test procedures for a covered product should be amended. *See* 42 U.S.C. 6293. As always, DOE welcomes input from interested parties regarding testing methodology during this required review.

DOE also received comments arguing that the proposal failed to define what constitutes a representative average use cycle for showerheads. (CEC, No. 0083 at pp. 4–5; CA IOUs, No. 0084 at p. 8, ASAP, No. 0086 at p. 5) CEC argued that without determining the representative average use cycle, the average use cycle or period of use of a multi-nozzle showerhead would reasonably include use of all the available nozzles. (CEC, No. 0083 at p. 5) The CA IOUs asserted that the proposed approach would on have one spray component turned on for testing, but that the expected average use of multi-spray component showerhead accessories is to maximize the number of spray components operating. (CA IOUs, No. 0084 at p. 8) Commenters also requested DOE provide data to demonstrate the representative average use of the multi-spray showerhead accessories. (CA IOUs, No. 0084 at p. 8; CEC, No. 0083 at p. 5) Serratos stated that multiple showerheads or body shower heads should not be exempt from the existing testing requirements. A test that would only test one of the showerheads in a multiple head shower would not be an accurate representation of total water use. (Serratos, No. 0041) Klein stated that the understanding of testing organizations is that you test everything that comes out of a showerhead at one time, regardless of the number of heads. (Klein, Public Meeting Transcript at p. 39) DOE is not finalizing the proposed clarifications to the test procedure. Instead, DOE clarifies in this final rule that the existing test procedure remains applicable for measuring the water use of a showerhead as defined in this final rule.

Commenters noted the impact of water pressure on the performance of showerheads. (Gassaway, No. 0009;

[7] ANSI/ISEA Standard Z358.1–2014, American National Standard for Emergency Eyewash and Shower Equipment.

Klein, No. 0063 at p. 5; Consumer Research, No. 0039 at p. 3; Klein, Public Meeting Transcript at p. 26) Commenters suggested that the testing conditions clarify the water pressure used for testing as water pressure, which can fluctuate daily as is impacted by factors including the proximity to the water supply and the water quality, and impacts the flow rate from the showerhead. (Gassaway, No. 0009; Consumer Research, No. 0039 at p. 3) A commenter also highlighted that the use of a pressure compensating flow regulator in a majority of showerhead products sold in the United States such that the flow rate remains almost the same over a wide range of operating pressures. (Klein, No. 0063 at p. 5; Klein, Public Meeting Transcript at p. 27)

Commenters noted that test labs interpret the ASME 2018 standard to require that a showering product, regardless of the number of spray heads, be tested for performance in each mode of operation. (ASAP, No. 0086 at p. 4; Joint Commenters, No. 0085 at p. 3; CA IOUs, No. 0084 at pp. 2–3) Commenters also highlighted that stakeholders appeared to agree in comments made at the public webinar hearing. (ASAP, No. 0086 at p. 4; Joint Commenters, No. 0085 at p. 3) DOE is not finalizing the proposed test procedure clarification. Instead, as noted previously, DOE clarifies in this final rule that the existing test procedure remains applicable for measuring the water use of a showerhead as defined in this final rule. If issues arise where the existing test procedure does not produce a representative measurement of the water use of a particular showerhead product, the manufacturer can seek a waiver from DOE pursuant to DOE regulations at 10 CFR 430.27.

E. Water Conservation

Numerous commenters, including a comment with 10,184 signatures, raised the importance of water conservation and protecting the environment. (Environment America, No. 0069 at p.1; Peltzman, No. 0006; White, No. 0013; Manduca, No. 0019; Kelley, No. 0023; Huggins, No. 0077; Baker, No. 0078; Rivet, No. 0003; Save Water, No. 0031; Shojinaga, No. 0015) Some commenters specifically highlighted the impact the water efficiency requirements in EPAct 1992 have had in reducing household water use. (Ruff, No. 0010; Sheegog, No. 0014 at p. 1; Hamilton, No. 0028; Cohen, No. 0036; BAWSCA, No. 0050 at p. 2; City of Sacramento Department of Utilities, No. 0055 at p. 3)

DOE also received numerous comments discussing how the proposal will waste water and energy and raise greenhouse gases. (Woodroffe, No. 0025; Anonymous, No. 0026; Cyra-Korsgaard, No. 0046; Goodwin, No. 0042; Gooch, No. 0043) One commenters stated that the proposal harms human health by wasting our most precious natural resource. (Anonymous, No. 0022) Commenters also focused on how conservation of treated drinking water and reducing the amount of domestic wastewater routed to sewage treatment plants is important. (Fisseler, No. 0032; Anonymous, No. 0049) Klein stated that assuming 200 million people shower daily, there is approximately 160 million kilowatt hours per year of water and wastewater treatment, which could increase if homes are using showerheads with more than one showerhead. (Klein, Public Meeting Transcript at p. 40) LADWP stated that to go backward on water conservation efforts would compromise the achievements that have been attained thus far and negatively affect economic growth and quality of life. (LADWP, No. 0066 at p. 2)

Commenters also provided estimates of water and energy savings. (AWE, et al., No. 0079 at p. 4; BAWSCA, No. 0050 at p. 4; WVWD, No. 0051 at p. 3) Commenters estimated that in 10 years, the savings for 2.5 gpm showerheads at the federal standard alone accumulate to the equivalent of supplying 1 million homes with water and 670,000 homes with energy. (AWE, et al., No. 0079 at p. 4; BAWSCA, No. 0050 at p. 4; WVWD, No. 0051 at p. 3; Davis, No. 0064) The Texas Water Development Board and the City of Sacramento also outlined the impact that water conservation standards, including those for showerheads, have had on reducing municipal water demands and treatment chemical usage. (Texas Water Development Board, No. 0074 at p. 1; City of Sacramento Department of Utilities, No. 0055 at pp.2–3) Commenters noted that federal water efficiency standards assist states and counties in implementing their water conservation programs and meeting water use efficiency and water conservation goals. The proposed changes threaten to undo local and state investments in these programs, which has ensured the efficient use of water and potentially forcing water utilities to meet future water demands through alternative water supply projects. (Wisconsin Department of Natural Resources, No. 0038; Broward County, No. 0081)

Numerous commenters also highlighted the ongoing water crises and droughts faced by states around the country and the resulting need for water conservation. (Anonymous, No. 0070; eb1mom, No. 0002; Fetting, No. 0004; Anonymous, No. 0022; Interested Citizen, No. 0005; Shepard, No. 0020; Shaw, No. 0059; Wargo, No. 0007; Hall, No. 0048; Moir, No. 0021; Lish, No. 0057; Santa Rosa Water, No. 0037 at p. 1, California State Water Resources Control Board (''State Water Board''), No. 0045 at p. 2; Ruff, No. 0010; Cohen, No. 0036; Godwin, No. 0042; Gooch, No. 0043; CA IOUs, Public Meeting Transcript at p. 12) Commenters noted that 40 to 50 states are confronting water shortages, according to a United States Government Accountability Office Report. (BAWSCA, No. 0050 at p. 3; WVWD, No. 0051 at p. 2; AWE, et al., No. 0079 at p. 3; Valley Water, No. 0076 at p. 1)

Numerous commenters also stated that the proposal will increase water and energy consumption and lead to higher utility bills for consumers. (CFA, No. 0029; CFA, Public Meeting Transcript at p. 14; Hall, No. 0048; Green Builder Coalition, Public Meeting Transcript at p. 35; Public Service Commission of Wisconsin (''PSC of Wisconsin''), No. 0061 at p. 2; Santa Rosa Water, No. 0037 at p. 2; LADWP, No. 0066 at 3) The NPCC stated that the impacts of this proposal could include increased energy consumption and water use by the consumer, decreased utility by the consumer, increased burden and cost on the water utility, increased burden and cost on water treatment facilities, and possible changes to plumbing, and needs for larger water heater storage tanks. (NPCC, No. 0060 at p. 2) The IAPMO noted that high flow showerhead devices can also deplete hot water from tank type water heaters in a very short period of time, potentially causing accidents when hot water runs out. (IAPMO, No. 0087 at p. 3) Klein stated that residential water heaters typically hold 40–50 gallons and that approximately 70% of the volume can be used during a long event or a series of events before the shower becomes cold. (Klein, No. 0063 at p. 6)

Commenters stated that the proposal will lead to increased water use. (Fisseler, No. 0032) Klein estimated that allowing the output of two headed showerheads to be 5.0 gpm would increase hot water use per shower by 5–20%, depending on the rate of adoption. For 3-headed showers, the increase would be 10–40% per shower depending on the rate of adoption. (Klein, No. 0063 at p. 13) CA IOUs relied on the analysis by Gary Klein and Associates, Inc. suggesting that even limited adoption of multi-spray component products will significantly increase national water use and hot

water use. For example, installing a three-spray component product increases total hot water use, normalized per shower, from 34 gallons (gal) to 61.2 gal, an increase of 80%. If 10% of showerheads were converted to three-spray component products, national residential hot water use could increase by as much as 8%. (CA IOUs, No. 0084 at pp. 5–6) ASAP, relying on Klein's analysis, stated that assuming a 5% adoption rate for showers using 7.5 gpm, the increase in hot water nationally would be 120 billion gallons per year with cold water usage increasing as well. (ASAP, No. 0086 at pp. 4–5; Klein, No. 0063 at p. 13) Other commenters suggest that the national water increase could be as high as 161 billion gallons in a single year. (Valley Water, No. 0076; AWE, et al., No. 0079 at p. 2; BAWSCA, No. 0050 at p. 3, WVWD, No. 0051 at p. 2)

The PSC of Wisconsin stated that showers account for 20% of indoor water use in the average American home, and homes with showerheads meeting the current standard use about 20.7 gallons per day (gpd), whereas homes using showerheads not meeting the current standard use approximately 34.8 gpd, a nearly 70% increase. A residential customer with average water use that installs a showerhead meeting the revised definition could potentially experience a water bill increase of $36 per year, which does not include any additional utility capital and operating costs that may result from increased demand on the water system if a significant portion of the customer base installs new showerheads with the higher flow rate. (PSC of Wisconsin, No. 0061 at p. 1)

Commenters also stated that the efficient plumbing standards and conservation programs lower costs for customers, allowing communities to delay or avoid developing new supplies and treatment capacity. (State Water Board, No. 0045 at p. 2; Anonymous, No. 0049; AWE, et al., No. 0079 at p. 3; PSC of Wisconsin, No. 0061 at p. 2; ASAP, No. 0086 at pp. 4–5; Green Builder Coalition, Public Meeting Transcript at p. 35; City of Tucson, No. 0053 at p. 2; Texas Water Development Board, No. 0074 at p. 2) Commenters noted that increasing the consumption of treated drinking water through this proposal will increase water utility costs for providing new supplies—and therefore increase customer bills, as those costs for procuring needed new supplies are then passed on to the customers. (BAWSCA, No. 0050 at pp. 3–4, WVWD, No. 0051 at p. 2) Commenters suggested that each additional 1 gpm of shower flow on a national basis could cost $1.14 billion. (Davis, No. 0064; Valley Water, No. 0076 at p. 1; BAWSCA, No. 0050 at p. 4; WVWD, No. 0051 at p. 3; AWE, et al., No. 0079 at p. 3)

One commenter stated that the inability of updated showerheads to allow more water during use is frustrating. (Goehring, No. 0062) A commenter sated that the free market has improved the water use/waste issue to the point where efficiency has succeeded. (Chick, No. 0047) DOE also received a comment suggesting that there is no need for water restrictions for homes on well water and septic systems as all water used returns to the grounds. (Bandy, No. 0030) Gurley claimed that DOE's determination that this proposal is not a significant energy action is incorrect as it ignores the fuels required to condition the additional gallons of water. (Gurley, No. 0035)

DOE recognizes the importance of water conservation and water savings around the country, especially in those communities facing droughts and water scarcity. As evidenced by the water conservation information provided by commenters, consumers have chosen to install efficient showerheads in their residences, resulting in significant reduction in water and energy consumption. As DOE has consistently stated in this rulemaking, this rulemaking does nothing to alter the current energy conservation standard for showerheads and is therefore not a significant energy action (see also Section IV.L). Instead, it revises and add definitions related to showerheads to provide clarity in the marketplace and preserve consumer utility. Further, while water conservation is obviously a purpose of EPCA, the definitional changes follow congressional reliance on the ASME standard.

F. Additional Issues

1. State Regulation of Showerheads

Commenters also discussed the regulation of showerheads by states. Some commenters argued that the redefinition would create confusion and uncertainty because some states already have more restrictive standards than the federal standard of 2.5 gpm for showerhead, and that the intention of EPAct 1992 was to establish a uniform regulation for all states. (BAWSCA, No. 0050 at p. 3; Valley Water, No. 0076 at p.1: WVWD, No. 0051 at p.2; AWE, et al. No. 0079 at p.3) ASAP argued that it is likely that state regulation of showerheads and body sprays will proliferate in response to this proposal. (ASAP, Public Meeting Transcript at p. 11)

LADWP noted concern that DOE's proposal would supersede measures adopted by the State of California, to regulate showerheads at a maximum flow rate of 1.8 gpm and that the proposal would allow high-flow showerheads on online marketplaces. (LADWP, No. 0066 at p. 2) The State Water Board noted that some states already regulate showerheads and that California would not be affected because of existing CEC regulations on showerheads. (State Water Board, No. 0045 at pp. 1–2) Commenters noted that DOE waived preemption in 2010 and that the proposal would have no preemptive effect on states. (CEC, No. 0083 at p. 8; ASAP, Public Meeting Transcript at p. 11)

As noted in the proposed rule, this rulemaking would not have substantial direct effect on the States. 85 FR 49284, 49295. On December 22, 2010, DOE issued a final rule waiving Federal preemption for energy conservation standards under 42 U.S.C. 6297(c) with respect to any State regulation concerning the water use or water efficiency of showerheads if such State regulation is: more stringent than Federal regulation concerning the water use or water efficiency for the same type or class of product; and applicable to any sale or installation of all products in that particular type or class. 75 FR 80289, 80289. Accordingly, states may currently develop more stringent regulations that the federal standard and this proposal does not change that ability. As noted by some commenters, this rulemaking would not supersede state regulation of water use or water efficiency of showerheads that are more stringent than the Federal standard.

2. Procedural Comments

Following publication of the NOPR, DOE received a request from PMI to extend the comment period by 30 days. (PMI, No. 0011) On August 31, 2020, DOE announced the extension of the comment period by 30 days. 85 FR 53707, 53707. On September 15, 2020, DOE received another request to extend the comment period to 90 to 120 days. (ASAP, AWE, ACEEE, CFA, NRDC, NEEA, No. 0040) DOE further extended the comment period by an additional 14 days for a total of 62 days. 85 FR 61653, 61653 (Sept. 30, 2020).

DOE received comments stating that this proposal violated DOE's Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment [8]

[8] 85 FR 8626.

(''the Process Rule''). (ASAP, No. 0086 at p. 5; CA IOUS, No. 0084 at pp. 9–10; PIRG, No. 0082 at p. 14; CEC, No. 0083 at p. 2) The CA IOUs argued that DOE must follow the Process Rule guidelines for changing scope of coverage of water conservation standards. These commenters further stated that the Process Rule includes specific guidance regarding changing scope of coverage of existing standards including describing the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible and, if the proposed standards would not achieve these levels, the reasons for proposing different standards. Furthermore, these commenters assert that the Process Rule requires a public comment period for a change in scope of coverage of not less than 75 days. (CA IOUs, No. 0084 at p. 9)

In this rulemaking, DOE proposed to revise its definition of ''showerhead'' and define the terms ''body spray'' and ''safety shower showerhead.'' EPCA provides DOE with the discretionary authority to classify additional types of consumer products as ''covered'' within the meaning of EPCA. (*See* 42 U.S.C. 6296(b) and 42 U.S.C. 6295(l)) This authority allows DOE to consider regulating additional products/equipment that would further the goals of EPCA. Under the Process Rule, DOE is required to provide a minimum of a 60-day comment period following publication of a notice of proposed determination. To conduct a coverage determination, DOE must determine that the classifying the product as a covered product is necessary or appropriate to carry out the purpose of this chapter and the average annual per-household energy use of products of such type is likely to exceed 100 kilowatt-hours per year. (42 U.S.C. 6292(b)(1)) This rulemaking does not attempt to make either of these determinations; rather it defines showerhead and related terms to avoid confusion in the market. Accordingly, this proposal is not a coverage determination. 10 CFR part 430, subpart C, appendix A.

Commenters also argued that DOE did not follow the Process Rule as it relates to requirements for amending a test procedure. (CA IOUs, No. 0084 at p. 10; ASAP, Public Meeting Transcript at p. 38; PIRG, No. 0082 at p. 14; CEC, No. 0083 at p. 2) Commenters stated that Process Rule requires an early assessment process, and DOE has not provided it in this rulemaking. (ASAP, Public Meeting Transcript at p. 38; CA IOUs, No. 0084 at p. 10; CEC, No. 0083 at p. 2) PIRG argued that DOE promised that the comment period on a proposed rule would be at least 75 days. (PIRG, No. 0082 at p. 14)

DOE has committed to following the Process Rule when amending a test procedure. DOE's proposal did not propose to amend the current test procedure for showerheads in any substantive fashion. Rather, the proposed rule was an attempt to provide clarification that DOE expected would be sought by regulated entities as to how the existing test procedure would apply to showerheads with multiple outlets. While DOE appreciates commenters' support for the recently revised Process Rule and seeking DOE's strict adherence thereto, to avoid any ambiguity regarding application of the Process Rule DOE is not finalizing the proposed test procedure clarifications, including the provisions specifying how to apply the test procedure if the showerheads in a multi-headed showerhead use different amounts of water. Instead, in this final rule, DOE emphasizes that the existing test procedure remains applicable for purposes of measuring the water use of a showerhead as defined in this final rule. It would be speculative for DOE to determine what products manufacturers may choose to produce subsequent to DOE's revision of its regulatory definition of showerhead. If, in the future, a manufacturer believes that the existing test procedure does not produce a representative measurement of the water use of a particular showerhead product, the manufacturer can consider seeking a waiver from DOE pursuant to DOE regulations at 10 CFR 430.27.

DOE also received also comments arguing that the public comment period should have been longer. AWE argued that despite separate extensions requested by stakeholders, the end result was still only a 62-day public comment period. (AWE, No. 0080 at p. 1) Commenters stated that DOE published a NOPR without immediately announcing a required public hearing, and initially only provided 32 days for public comment, even though EPCA requires a comment period of ''not less than 60 days.'' (CEC, No. 0083 at p. 2; CA IOUs, No. 0084 at p. 10) Valley Water stated that the proposed definition did not follow past DOE practices of allowing at least 60 days for public review. (Valley Water, No. 0076 at p. 1) ASAP further argued that DOE is statutorily required to provide a 60 day comment period and, under the Process Rule, DOE is required to provide 75 days. (ASAP, Public Meeting Transcript at p. 7)

Further, at the webinar, CFA requested an extension of 90 days to allow DOE to provide a cost impact analysis and allow the public the opportunity to review this data. (CFA, Public Meeting Transcript at p.15) Commenters argued that given the magnitude of the potential impact, the proposed rulemaking should allow at least 90 days or more for public comment and review. (BAWSCA, No. 0050 at p. 3; WVWD, No. 0051 at p. 2; AWE et. al, No. 0079 at p. 3) Commenters argued that DOE is not following its normal rulemaking process noting that DOE provided little notice for the public meeting. (ASAP, Public Meeting Transcript at p. 7; CA IOUs, No. 0084 at p. 10) Commenters stated the DOE did not follow typical procedure for pre-releasing rules. (ASAP, Public Meeting Transcript at p. 7; CA IOUS, No. 0084 at p.10)

Similar to previous discussion, this proposal was not an amendment to the current showerhead test procedure; instead, it was a clarification. Even if this proposal were considered to be an amendment of the test procedure, under EPCA, DOE is required to provide a comment period of not less than 60 days for a new or amended test procedure. (42 U.S.C. 6293(a)(2)) Commenters had a total of 62 days to comment on the proposal exceeding the 60 minimum provided by EPCA. Finally, as mentioned before, DOE is not finalizing the proposed clarification to the showerhead test procedure. As stated previously, in this final rule, DOE emphasizes that the existing test procedure remains applicable for purposes of measuring the water use of a showerhead as defined in this final rule. If issues arise where the existing test procedure does not produce a representative measurement of the water use of a particular showerhead product, the manufacturer can seek a waiver from DOE pursuant to DOE regulations at 10 CFR 430.27.

3. Consumer Choice

A commenter urged DOE to use latitude available under EPCA to minimize impacts on consumers and maximize choice as the energy posture of the country has changed since the enactment of EPCA. (Strauch, No. 0067) Consumer Research stated that the current rule artificially limits both the number and types of available multiple showerhead products. This restriction on consumer choice is undesirable and contrary to Congressional intent. (Consumer Research, No. 0039 at p. 2) Commenters noted that EPCA prohibits DOE from establishing a new or amended standard under the authority of 42 U.S.C. 6295 if DOE finds that such a standard is likely to result in the

unavailability of performance characteristics, features, sizes, capacities, and volumes substantially similar to those available in the U.S. at the time of the finding. (Consumer Research, No. 0039 at p. 3; CEI, No. 0058 at p. 3–4) CEI also described another provision of EPCA outlining the process for setting a separate standard for a product subgroup, which instructs the Secretary that in making a determination under this paragraph concerning whether a performance-related feature justifies the establishment of a higher or lower standard, the Secretary shall consider such factors as the utility to the consumer of such a feature, and such other factors as the Secretary deems appropriate. (CEI, No. 0058 at p. 4) While multiple showerheads were not prohibited, the effects of the 2013 regulatory interpretation of the term ''showerhead'' was to substantially reduce the availability of such products on the market, contrary to the provisions of EPCA or the intent of EPCA, which was to protect the consumer from losing such choices. (Consumer Research, No. 0039 at pp. 2–3; CEI, No. 0058 at p. 4) Commenters also argued that people should be free to use the showerhead and amount of water of their choosing. (Bell, No. 0016; Caspar, No. 0024)

In response, DOE emphasizes that this rule complies with the congressional directive to preserve performance characteristics and features that were available on the market at the time DOE originally acted to essentially eliminate them. Further, this rulemaking allows manufacturers to continue innovating and provide consumers choice in the marketplace.

4. Cost Impact and Technical Analysis

DOE received comments requesting that DOE complete a cost impact analysis of the proposal. (CFA, No. 0029; CFA, Public Meeting Transcript at pp. 14–15; BAWSCA, No. 0050 at p. 1; WVWD, No. 0051 at p.1; AWE, et al. No. 0079 at p. 2; Davis, No. 0064; Valley Water, No. 0076 at p.2; Miulli, No. 0052 at p. 3; Shojinaga, No. 0015; NPCC, No. 0060 at p. 2;) Cyra-Korsgaard argued that this rulemaking is not supported by facts. (Cyra-Korsgaard, No. 0046) A commenter asked if there should be a discussion of the amount of water used by these devices. (Wargo, No. 0007) CEC argues that DOE has not provided any data or analysis to show that the proposed amendments would be less burdensome for manufacturers and that the additional instructions in this proposal will be more burdensome than the existing test. (CEC, No. 0083 at p. 5) Further, commenters stated that DOE has failed to provide any analysis of the impact of the proposed rule including the impacts on consumers, on water and wastewater utilities, on water supplies, on energy use, on the environment, on manufacturers of showerheads, and on the market. (ASAP, Public Meeting Transcript at pp. 9–10 ; ASAP, No. 0086 at p. 4; NRDC, Public Meeting Transcript at p. 21; CA IOUs, No. 0084 at p. 7; CA IOUs, Public Meeting Transcript at pp. 24– 25; PIRG, No. 0082 at p. 10–12)

Commenters argued that in order to meet the requirements of 42 U.S.C. 6295(o)(1) that the Secretary may not prescribe any amended standard which increases the maximum allowable energy use, or, in the case of showerheads . . . , water use, or decreases the minimum required energy efficiency, of a covered product rulemakings that amend a test procedure typically include analysis of the impacts of the changes to the test procedure on the conservation standard, a process commonly referred to as a ''crosswalk.'' (CA IOUs, No. 0084 at p. 9; PIRG, No. 0082 at p. 13) However, the CA IOUs argue that the proposed rule contains no assessment of the impact of the proposed test procedure amendment on standards for either body sprays or multi-spray component products. (CA IOUs, No. 0084 at p. 9) PIRG also argues that DOE's Process Rule [9] also requires DOE to assess whether a proposed standard will result in ''significant savings'' of energy of water. More specifically, PIRG stated that even if the proposal were solely a revision to test procedures, DOE has not undertaken key assessments. It is required to evaluate whether the change in test procedures will change the measured water usage of products.[10] (PIRG, No. 0082 at p. 13)

This rule does not amend the current energy conservation standards or test procedures for showerheads; rather, it defines terms related to showerheads to address existing ambiguity. Accordingly, the requirement of completing analyses for energy conservation standards under 42 U.S.C. 6295(o)(1) are not required. Similarly, DOE is not required to conduct analyses regarding whether a test procedure is reasonably designed to produce results measuring water use or estimated annual operating costs during a representative average use cycle because DOE is not amending the current test procedure for showerheads. (*See* 42 U.S.C. 6293 (a)(3), (a)(7)(B))

5. Adoption of Consensus Standards

Consumer Research stated that the proposed rule returns the definition of showerhead to the intended definition in EPCA, which states that the test procedures for testing and measuring the water use of showerheads shall be ASME/ANSI standard A112.18.1M –1989. (Consumer Research, No. 0039 at p. 1) Other commenters supported aligning the definitions with the ASME A112.18.1–2018 standard. (IAMPO, No. 0087 at pp. 1–2; Kohler, No. 0075) IAPMO stated that all definitions pertaining to products regulated by Title III of EPCA should align with the definitions contained in products standards that are designated as American National Standards. (IAMPO, No. 0087 at pp. 1–2) DOE agrees that this rulemaking aligns the definition of showerhead with the definition in ASME as intended by Congress in EPCA.

Commenters also recommends that DOE incorporate the definitions for ''accessory'', ''body spray'', and ''safety shower showerhead'', contained in the current ASME A112.188.1. (IAPMO, No. 0087 at pp. 1–2; PMI, No. 0073 at pp. 2–4) CA IOUs stated that while they are supportive of reducing burdens on industry and confusion for consumers, they are concerned that the proposal misinterprets the 2018 ASME standard definition of ''showerhead'' by failing to consider the definition of the term ''accessory'' in the showerhead definition. (CA IOUs, No. 0084 at p. 2; CA IOUs, Public Meeting Transcript at p. 34) Kohler noted that consistency between the industry and DOE reduces burden and increases efficiency in bringing products to market. Kohler expressed opposition to amending the test procedure for measuring the energy efficiency of shower heads, but supported test methods aligning with the most recent industry consensus standard for showerheads, ASME A112.18.1/CSA Bl 25.1—2018. Deviating from the current requirements, industry standards as well as consumer trends, can create disruption not only in design and manufacturing, but also with supply chain and the end user. Additionally, prior to increasing or decreasing plumbing product now rates, research should be conducted to understand the impact of new capacity on our infrastructure, including wastewater systems. (Kohler, No. 0075).

The American Supply Association (''ASA'') stated that the current test procedure is correct and consistent with

[9] 10 CFR part 430, subpart C, appendix A.

[10] 42 U.S.C. 6293(3), (7)(B); 10 CFR part 430, subpart C, app. A.

the ASME standard. Adopting the proposed rulemaking would create inconsistencies regarding testing of multi-head showerheads and body sprays and cause confusion in the market place. ASA recommended that DOE codify the 2011 Enforcement Guidance such that body sprays fall under the 2.5 gpm flow rate and ASME references should refer to the current edition of the ASME standard. ASA stated that there is no ambiguity in industry when following the consensus-based industry standards including definitions and test procedures. The plumbing industry has spent a significant amount of time and investment to develop products to comply with the ASME standard test procedure and the DOE's 2011 Enforcement Guidance and to change the test procedure now will lead to confusion and a competitive disadvantage for US manufacturers who comply with the current requirements. (ASA, No. 0068 at pp. 1–2) PMI supports the current test procedure except that the reference should be updated to the latest edition. (PMI, No. 0073 at p. 4) As discussed previously, DOE is not finalizing a proposed test procedure clarification at this time.

6. Other Comments

Commenters argued that the proposal does not qualify for a categorical exclusion under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321, *et seq.,* as DOE failed to provide analysis of the environmental impacts. (BAWSCA, No. 0050 at p. 3; WVWD, No. 0051 at p. 2; AWE, et al., No. 0079 at p. 3; Davis, No. 0064; the Joint Commenters, No. 0085 at p. 4; AWE, No. 0080 at p. 2; ASAP, No. 0086 at p. 5; CEC, No. 0083 at p. 7) CEC also argued that the rule changes how DOE tests products currently subject to the standard and lead to increases in water and energy use. As such, categorical exclusion A5 is not applicable for this rulemaking. (CEC, No. 0083 at p. 7).

DOE maintains that this rulemaking, once finalized, will only revise the definition of ''showerhead'' and define the terms ''body spray'' and ''safety shower showerhead.'' Further, DOE is not finalizing the proposed changes to the test procedure. Finalization of the rule will not result in adverse environmental impacts and is covered by Categorical Exclusion A5 under 10 CFR part 1021, subpart D. This categorical exclusion applies to rulemakings that interpret or amend an existing rule without changing the environmental effect of that rule. This rulemaking will not result in a change to the environmental effect of the existing showerhead standards.

The Center for Biological Diversity argues that the proposed rule violates the Endangered Species Act. (Center for Biological Diversity, No. 0071 at pp. 2–4). This rulemaking only revises the definition of showerhead and defines ''body spray'' and ''safety shower showerhead''. It does not set a standard that has impacts on endangered or threatened species.

Some commenters argued that the proposal will impact plumbing codes. (Gassaway, No. 0009; Malatesta, Public Meeting Transcript at p. 27; Klein, Public Meeting Transcript at p. 30; IAMPO, No. 0087 at p. 2) Specifically, Klein stated that piping will need to get bigger as plumbing codes have limitations on the maximum velocity that's allowed in a certain sized pipe. (Klein, Public Meeting Transcript at pg. 30) The CA IOUs noted that new construction is built to meet minimum code requirements and these higher flow rate showerhead accessories come with a myriad of additional requirements. (CA IOUs, No. 0084 at p. 7) The IAPMO states that the plumbing codes assume a maximum flow rate of 2.5 gpm for showerheads to determine the right size for water piping. The installation of showerhead devices that flow far in excess of those values will cause problems in right sized plumbing systems resulting from excessive flow velocities. (IAPMO, No. 0087 at p. 2) Gassaway further stated that the regulation and proper labeling of the products is necessary because the purchaser or warranty holder may not be interested or invested in ensuring the showerhead meets engineering standards and the local plumbing code at the time of installation. (Gassaway, No. 0009) DOE notes that this rulemaking is solely a definitional change and does not alter the current standards or any applicable labeling requirements for showerheads.

Commenters also discussed innovation regarding showerheads. A commenter stated that the higher standards promote innovation. (Rivet, No. 0003) Another commenter stated that showerhead engineering has developed to a point that 2.5 gpm gives a very good shower stream and that many showerheads use less than 2.5 gpm. (Fetting, No. 0004) PMI stated that, since the issuance of the 2011 Guidance Document, manufacturers have spent millions of dollars to meet current DOE Guidelines and regulations. PMI also noted a shift in the showerhead marketplace where consumers have embraced water efficiency highlighting the 9,000 WaterSense showerhead models compared to 3,500 models in 2015 and a PMI commissioned study finding that 45.4% of installed residential showerheads have a flow rate of 2.0 gpm or less. (PMI, No. 0073 at pp. 4–5) Another commenter stated that limiting the flow of water to 2.5 gpm total, restricted innovation in the showerhead industry. (Bell, No. 0016). DOE encourages innovation in showerhead engineering.

Commenters also discussed their perspective on the current standard. Some commenters stated that there is no problem with the current standard, which has worked for decades. (Moir, No. 0021; Rivet, No. 0003; Fisseler, No. 0032; Fetting, No. 0004; Gooch, No. 0043) Another commenter stated that the current home appliance regulations prioritize efficiency and time consuming designs. (Battig, No. 0044) DOE notes that this rulemaking does not alter the current showerhead energy conservation standards, rather it revises the definition for ''showerhead'' and defines the terms ''body spray'' and ''safety shower showerhead.''

Commenters question why DOE was pursuing this proposal, suggesting it was a waste of time and resources. (Anonymous, No. 0008; Interested Citizen, No. 0005; Center for Biological Diversity, No. 0071 at p. 1) This rulemaking will provide clarity to regulated entities and the public concerning terms such as ''showerhead'', ''body spray'', and ''safety shower showerhead.''

DOE also received a comment related to other current rulemakings. (Hare, No. 0012) DOE also received a comment suggesting that DOE's Office of Congressional and Intergovernmental Affairs urge Congress to revisit EPCA. (Strauch, No. 0067) DOE appreciates all comments on its rulemakings, but these comments are outside of the scope of this rulemaking.

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

This regulatory action is a ''significant regulatory action'' under the criteria set out in section 3(f) of Executive Order 12866, ''Regulatory Planning and Review.'' 58 FR 51735 (Oct. 4, 1993). Accordingly, this regulatory action was subject to review under the Executive order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). The definitional change in this rule is not expected to have a material impact on costs. Similarly, the final rule is expected to result in minimal increase

in benefits, primarily through clarifying the showerhead definition.

B. Review Under Executive Orders 13771 and 13777

On January 30, 2017, the President issued Executive Order (E.O.) 13771, ''Reducing Regulation and Controlling Regulatory Costs.'' 82 FR 9339 (Jan. 30, 2017). More specifically, the order provides that it is essential to manage the costs associated with the governmental imposition of requirements necessitating private expenditures of funds required to comply with Federal regulations. In addition, on February 24, 2017, the President issued Executive Order 13777, ''Enforcing the Regulatory Reform Agenda.'' 82 FR 12285 (March 1, 2017). The order requires the head of each agency to designate an agency official as its Regulatory Reform Officer (RRO). Each RRO is tasked with overseeing the implementation of regulatory reform initiatives and policies to ensure that individual agencies effectively carry out regulatory reforms, consistent with applicable law. Further, E.O. 13777 requires the establishment of a regulatory task force at each agency. The regulatory task force is required to make recommendations to the agency head regarding the repeal, replacement, or modification of existing regulations, consistent with applicable law.

DOE has determined that this final rule is consistent with these Executive orders. The final rule amends the definition of showerhead such that each showerhead in a product with multiple showerheads would constitute a single showerhead for purpose of compliance with the 2.5 gpm standard and define and exclude body sprays and safety shower showerheads from the regulatory definition of showerhead. In this final rule, DOE is reinterpreting the definition of ''showerhead'' and adopting definitions for ''body spray'' and ''safety shower showerhead.'' DOE has designated this rulemaking as ''deregulatory'' under E.O. 13771 because it is an enabling regulation pursuant to OMB memo M–17–21.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996) requires preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment and a final regulatory flexibility analysis (FRFA) for any such rule that an agency adopts as a final rule, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. A regulatory flexibility analysis examines the impact of the rule on small entities and considers alternative ways of reducing negative effects. Also, as required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website at: *http://energy.gov/GC/office-general-counsel.*

DOE reviewed this rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. The head of this agency certifies that this rule will not have a significant economic impact on a substantial number of small entities. The factual basis for this determination is as follows:

The Small Business Administration (SBA) considers a business entity to be a small business, if, together with its affiliates, it employs less than a threshold number of workers or earns less than the average annual receipts specified in 13 CFR part 121. The threshold values set forth in these regulation us size standards codes established by the North American Industry Classification System (NAICS) that are available at: *https://www.sba.gov/document/support-table-size-standards.* Plumbing equipment manufacturers are classified under NAICS 332913 ''Plumbing Fixture Fitting and Trim Manufacturing,'' and NAICS 327111 ''Pottery, Ceramics, and Plumbing Fixture Manufacturing.'' The SBA sets a threshold of 1,000 employees or less for an entity to be considered a small business within these categories.

DOE notes that this final rule would amend the definition of showerhead such that each showerhead in a product with multiple showerheads would constitute a single showerhead for purposes of compliance with the 2.5 gpm standard. The final rule would also specifically define and exclude body sprays and safety shower showerheads from the regulatory definition of showerhead. This rule does not require or prohibit any specific action. Rather, manufacturers may choose to develop products as a result of this definitional change that comply with the EPCA 2.5 gpm standard, but no manufacturer would incur compliance costs as a result of this rule. Accordingly, this rule would not have a significant economic impact on any businesses that met the SBA definition of a small business. For these reasons, DOE certifies that this final rule would not have a significant economic impact on a substantial number of small entities, and the preparation of a FRFA is not warranted.

D. Review Under the Paperwork Reduction Act of 1995

Manufacturers of showerheads must certify to DOE that their products comply with any applicable energy conservation standards. To certify compliance, manufacturers must first obtain test data for their products according to the DOE test procedures, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including showerheads. (See generally 10 CFR part 429.) The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (''PRA''). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 30 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

This rule reinterprets the definition of ''showerhead'' but does not set energy conservation standards or establish testing requirements for showerheads, and thereby imposes no new information or record keeping requirements. Accordingly, Office of Management and Budget clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.)*

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any 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.

E. Review Under the National Environmental Policy Act of 1969

Pursuant to the National Environmental Policy Act (NEPA) of 1996, DOE has analyzed this action in accordance with NEPA and DOE's NEPA implementing regulations (10 CFR part 1021). DOE has determined that this rule qualifies for categorical

exclusion under 10 CFR part 1021, subpart D, appendix A5 because it is an interpretive rulemaking that does not change the environmental effect of the rule and meets the requirements for application of a categorical exclusion. See 10 CFR 1021.410. Therefore, DOE has determined that promulgation of this rule is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA, and does not require an environmental assessment or environmental impact statement.

F. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (Aug. 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. EPCA governs and prescribes Federal preemption of State regulations that are the subject of DOE's regulations adopted pursuant to the statute. In such cases, States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) Therefore, Executive Order 13132 requires no further action.

G. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Regarding the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that each Executive agency make every reasonable effort to ensure that when it issues a regulation, the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and has determined that, to the extent permitted by law, the rule meets the relevant standards of Executive Order 12988.

H. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. (Pub. L. 104–4, sec. 201 (codified at 2 U.S.C. 1531)) For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. (This policy is also available at *http://www.energy.gov/GC/office-general-counsel* under ''Guidance & Opinions'' (Rulemaking)) DOE examined the rule according to UMRA and its statement of policy and has determined that the rule contains neither an intergovernmental mandate, nor a mandate 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 in any year. Accordingly, no further assessment or analysis is required under UMRA.

I. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

J. Review Under Executive Order 12630

Pursuant to Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 18, 1988), DOE has determined that this rule will not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

K. Review Under the Treasury and General Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this rule under the OMB and DOE guidelines and has concluded that it is consistent with the applicable policies in those guidelines.

L. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and is likely to have a significant adverse effect on the supply,

distribution, or use of energy; or (2) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected effects on energy supply, distribution, and use.

DOE has concluded that the regulatory action in this document, reinterpreting the definition of ''showerhead'', is not a significant energy action because it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects for this rule.

M. Description of Materials Incorporated by Reference

In this final rule, DOE incorporates by reference the industry standard published by ISEA, titled ''American National Standard for Emergency Eyewash and Shower Equipment,'' ANSI/ISEA Z358.1–2014. ANSI/ISEA Z358.1 is an industry-accepted standard that established use and performance requirements for eyewash and emergency shower equipment. DOE incorporates by reference this industry consensus standard at 10 CFR 430.2, which defines term associated with energy conservation standards and test procedures for consumer products.

Copies of ANSI/ISEA Z358.1–2014, can be obtained from the International Safety Equipment Association, 1901 North Moore Street, Suite 808, Arlington, Virginia 22209, *www.safetyequipment.org* or American National Standards Institute, 25 West 43 St., 4th Floor, New York, NY 10036. *http://ansi.org.*

N. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule before its effective date. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

V. Approval of the Office of the Secretary

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

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Signing Authority

This document of the Department of Energy was signed on December 8, 2020, by Daniel R Simmons, Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on December 8, 2020.

Treena V. Garrett,

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

For the reasons stated in the preamble, DOE amends part 430 of title 10 of the Code of Federal Regulations as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. Section 430.2 is amended by:
■ a. Adding, in alphabetical order, definitions for ''Body spray'' and ''Safety shower showerhead''; and
■ b. Revising the definition of ''Showerhead''.

The addition and revision read as follows:

§ 430.2 Definitions.

* * * * *

Body spray means a shower device for spraying water onto a bather from other than the overhead position. A body spray is not a showerhead.

* * * * *

Safety shower showerhead means a showerhead designed to meet the requirements of ISEA Z358.1 (incorporated by reference, see § 430.3).

* * * * *

Showerhead means any showerhead (including a handheld showerhead) other than a safety showerhead. DOE interprets the term ''showerhead'' to mean an accessory to a supply fitting for spraying water onto a bather, typically from an overhead position.

* * * * *

■ 3. Section 430.3 is amended by:
■ a. Redesignating paragraphs (c)(3)(iii) through (v) as paragraphs (c)(3)(iv) through (vi);
■ b. Redesignating the second paragraph (c)(3)(ii) as new paragraph (c)(3)(iii);
■ c. Redesignating paragraphs (q) through (u) and paragraphs (r) through (v); and
■ d. Adding new paragraph (q).

The addition reads as follows:

§ 430.3 Materials incorporated by reference.

* * * * *

(q) International Safety Equipment Association, 1901 North Moore Street, Suite 808, Arlington, Virginia 22209, (703) 525–1695, *www.safetyequipment.org.*

(1) ANSI/ISEA Z358.1–2014 (''ISEA Z358.1''), American National Standard for Emergency Eyewash and Shower Equipment, ANSI-approved January 8, 2015, IBR approved for § 430.2.

(2) [Reserved]

* * * * *

[FR Doc. 2020–27280 Filed 12–15–20; 8:45 am]

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DEPARTMENT OF ENERGY

10 CFR Part 430

[EERE–2020–BT–STD–0001]

RIN 1904–AE86

Energy Conservation Program: Establishment of New Product Classes for Residential Clothes Washers and Consumer Clothes Dryers

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Final rule.

SUMMARY: The Energy Policy and Conservation Act, as amended (''EPCA''), prescribes energy conservation standards for various consumer products and certain commercial and industrial equipment, including residential clothes washers and consumer clothes dryers. In this final rule, the U.S. Department of Energy (''DOE'' or ''the Department'') establishes separate product classes for top-loading consumer clothes washers and consumer clothes dryers that offer cycle times for a normal cycle of less than 30 minutes, and for front-loading

residential clothes washers that offer cycle times for a normal cycle of less than 45 minutes. DOE's decision to establish these new product classes is based on the comments received in response to the proposed rule as well as testing and evaluation conducted by the Department. This rulemaking sets out the basis for the new product classes. DOE intends to determine the specific energy and water consumption limits for the new product classes in separate rulemakings in accordance with the requirements of the Department's Process Rule.

DATES: The effective date of this rule is January 15, 2021.

ADDRESSES: *Docket:* The docket for this activity, which includes **Federal Register** notices, comments, and other supporting documents/materials, is available for review at *http://www.regulations.gov.* All documents in the docket are listed in the *http://www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

The docket web page can be found at *https://beta.regulations.gov/docket/EERE-2020-BT-STD-0001.* The docket web page contains instructions on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT: Mr. Bryan Berringer, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW, Washington, DC, 20585–0121. Email: *ApplianceStandardsQuestions@ee.doe.gov.*

Ms. Jennifer Tiedeman, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC, 20585–0121. Telephone: (202) 287–6111. Email: *Jennifer.Tiedeman@hq.doe.gov.*

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I. Summary of the Final Rule

In this final rule, DOE establishes separate product classes for top-loading consumer (residential) clothes washers and consumer clothes dryers that offer cycle times for a normal cycle of less than 30 minutes, and for front-loading residential clothes washers that offer cycle times for a normal cycle of less than 45 minutes, as identified under 42 U.S.C. 6292(a)(7) and (8). Relying on its own analysis and the comments received in response to the notice of proposed rulemaking (''NOPR''), 85 FR 49297 (Aug. 13, 2020), DOE has determined that the establishment of these new product classes would protect a consumer utility (*i.e.,* cycle time), and could spur manufacturer innovation to generate additional product offerings to fill the market gap that exists for these products.

In establishing short cycle product classes offering 30 and 45 minute cycle times for clothes washers and clothes dryers, DOE is introducing additional consumer choice to the clothes washer and clothes dryer market. DOE's actions are intended to incentivize manufacturers to provide consumers with new options when purchasing top-loading residential clothes washers and consumer clothes dryers with a normal cycle of less than 30 minutes, and front-loading residential clothes washers that offer cycle times for a normal cycle of less than 45 minutes. This activity does not prevent consumers from choosing to purchase clothes washers and dryers from the currently-existing product classes that offer longer normal cycles as well as quick or alternative cycle options. The distinction created through the establishment of these new product classes rests on the length of the normal cycle, which is the cycle that would be subject to product testing for compliance with a future energy or water conservation standard.

As stated in the NOPR, the data gathered by the Department on cycle times, which was based on a range of products and demonstrated the wide range of cycle times available among clothes washer and clothes dryer models. For residential clothes washers, DOE evaluated the cycle times of a representative sample of units within the top-loading standard-size and front-loading standard-size product classes. For top-loading standard-size units, this testing included 23 units covering 10 brands across 7 manufacturers. For the front-loading standard-size product class, DOE tested 20 units representing 14 brands across 12 manufacturers. Generally, this testing was performed using the ''normal'' cycle (*i.e.,* wash program), which is defined as the wash program recommended for normal, regular, or typical use for washing up to a full load of normally-soiled cotton clothing. For consumer clothes dryers, DOE evaluated the cycle times of a representative sample of units within the vented electric standard-size and vented gas product classes. For vented electric standard-size product classes, DOE tested 6 units representing 4 brands across 4 manufacturers. DOE also considered cycle time data from the ENERGY STAR product database for an additional 245 vented electric standard-size units representing 14 brands across 7 manufacturers. For the vented gas product class, DOE tested 8 units representing 4 brands across 4 manufacturers. DOE evaluated cycle time data from the ENERGY STAR product database for an additional 110 vented gas units representing 9 brands across 5 manufacturers.[1] Under 10 CFR part 430, subpart B, appendix D2 (''appendix D2''), clothes dryers with automatic cycle termination are operated using the ''normal'' program (or the cycle recommended by the manufacturer for drying cotton or linen clothes in the absence of a normal program) until the completion of the cycle, as indicated to the consumer.[2]

[1] When seeking ENERGY STAR qualification for a consumer clothes dryer basic model, manufacturers must report cycle time as tested under Appendix D2. ENERGY STAR product database for clothes dryers is available at *https://www.energystar.gov/productfinder/product/certified-clothes-dryers/results.* Last accessed November 24, 2020.

[2] For clothes dryers, 10 CFR part 430, subpart B, appendix D1, does not provide data that can be used to determine a ''cycle time'' because the drying cycle is artificially terminated. The artificially terminated cycle has a field use factor applied to calculate representative energy consumption. DOE used appendix D2 because it provides representative energy use and a corresponding cycle time as the cycle is run from start to completion without being artificially terminated. 85 FR 49297, 49303 (Aug. 13, 2020).

DOE's analysis, in total, considered the cycle times of units representing over 50 percent of residential clothes dryer basic models.[3] (*See* Section II.B for more information). 85 FR 49297, 49300–49306 (Aug. 13, 2020).

DOE's data revealed that the shortest available cycle time for standard-size top-loading clothes washers on the market was appropriately 30 minutes and that for standard-size front-loading clothes washers the shortest cycle time was approximately 45 minutes. DOE's data indicated that the shortest available cycle time for vented electric standard-size and vented gas clothes dryers with cycle time was also approximately 30 minutes. DOE believes the creation of these new product classes will incentivize manufacturers, if they so choose, to develop innovative products with short cycle times for those consumers that receive a value from the time saved washing and drying their clothing. DOE intends to determine the specific energy and water conservation standards for the new short cycle product classes in a separate rulemaking following the procedures set out in the Process Rule.[4]

II. Introduction

A. Background

On August 13, 2020, DOE published a notice of proposed rulemaking, (''NOPR''), setting out the Department's intent to establish new product classes for residential clothes washers and consumer clothes dryers, and requesting comments and data on the proposed short cycle product classes. 85 FR 49297. The recently finalized rulemaking establishing a normal short cycle product class for standard residential dishwashers (85 FR 68724 (Oct. 30, 2020)) re-affirmed the Department's recognition of cycle time as a valuable consumer utility and performance-related feature. In light of that rulemaking, the Department determined that similarities existed between the consumer use of dishwashers and residential clothes washers and consumer clothes dryers (*i.e.,* products that provide consumer utility over discrete cycles with programmed cycle times, and consumers run these cycles multiple times per week on average). DOE conducted its own analysis on clothes washer and dryer cycle times and presented its analysis in Section II of the NOPR in support of the proposed product classes. There, DOE explained that based on the length of available cycle times that it was reasonable to propose establishing separate product classes for these products to preserve a performance-related feature of both residential clothes washers and consumer clothes dryers (*i.e.,* the consumer utility of a short cycle time). 85 FR 49297, 49298 (Aug. 13, 2020).

B. DOE Testing and Analysis of Results

The testing and analysis conducted as part of the NOPR included a review of the normal cycles currently available for a range of clothes washers and clothes dryers.[5] These cycle times were measured under the DOE test procedure (*i.e.,* the ''normal'' cycles only).

DOE's proposed rule presumed that certain manufacturers were implementing the shortest possible cycle times that enabled a clothes washer to achieve satisfactory cleaning performance (and other aspects of clothes washer performance) while meeting the applicable energy and water conservation standards. DOE believed the current energy conservation standards may have been precluding manufacturers from introducing models to the market with substantially shorter cycle times. To facilitate the opportunity for manufacturers to innovate and develop products that would provide consumers the utility of such shorter cycle times, DOE proposed to establish separate product classes for top-loading standard-size residential clothes washers with average cycle times less than 30 minutes and front-loading standard-size residential clothes washers with average cycle times less than 45 minutes. 85 FR 49297, 49305 (Aug. 13, 2020).

Similarly, DOE's data indicated that vented electric standard-size and vented gas clothes dryers that comply with the current energy conservation standards exhibit cycle times of approximately 30 minutes or longer. Thus, assuming certain manufacturers were already implementing the shortest possible cycle times that enabled a clothes dryer to achieve satisfactory drying performance (and other aspects of clothes dryer performance) while meeting the applicable energy conservation standards, DOE's standards may have discouraged manufacturers from developing such products for consumers that provide the utility of 30 minute or less cycle times. For these reasons, DOE proposed to establish separate product classes for vented electric standard-size and vented gas clothes dryers with cycle times less than 30 minutes. 85 FR 49297, 49306 (Aug. 13, 2020).

III. Discussion

Based on the evaluation of comments submitted in response to the NOPR and the data the Department compiled (*see* Section II.B of this document), DOE establishes separate product classes for top-loading residential clothes washers and consumer clothes dryers that offer cycle times for a normal cycle of less than 30 minutes, and for front-loading residential clothes washers that offer cycle times for a normal cycle of less than 45 minutes. DOE intends to conduct separate rulemakings to determine energy conservation standards for these new product classes that provide the maximum energy efficiency that is technologically feasible and economically justified, and will result in a significant conservation of energy, 42 U.S.C. 6295(o)(2)(A), as well as to establish the applicable test procedure. DOE will complete these associated rulemakings following the procedures outlined in the Process Rule.

A. Establishment of Short-Cycle Product Classes Pursuant to 42 U.S.C. 6295(q)

EPCA directs that when prescribing an energy conservation standard for a type (or class) of a covered product, DOE must specify a level of energy use or efficiency higher or lower than that which applies (or would apply) for such type (or class) for any group of covered products which have the same function or intended use, if DOE determines that covered products within such a group:

- Consume a different kind of energy from that consumed by other covered products within such type (or class); or
- Have a capacity or other such performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard from that which applies (or will apply) to other products within such type.

In making a determination concerning whether a performance-related feature justifies the establishment of a higher or lower standard, DOE must consider such factors as the utility to the consumer of such a feature, and such other factors as DOE deems appropriate. (42 U.S.C. 6295(q)(1))

EPCA authorizes DOE to establish separate product classes for residential

[3] The Technical Appendix provides additional details of the technical attributes of each of the units DOE evaluated in support of this rulemaking.

[4] Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment (''Process Rule''), 85 FR 8626 (Feb. 14, 2020); Appendix A to Subpart C of Part 430—Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Certain Commercial/Industrial Equipment.

[5] The technical appendix provides additional details of the technical attributes of each of the units evaluated.

clothes washers and consumer clothes dryers characterized by offering short normal cycles of less than 30 or 45 minutes pursuant to 42 U.S.C. 6295(q). Products with a short normal cycle offer consumers a specific utility that justifies the establishment of such product classes subject to a higher or lower standard than that currently applicable to products currently on the market. 85 FR 49297, 49298 (Aug. 13, 2020). With this final rule, DOE intends to incentivize manufacturers to provide products that best meet the specific needs of consumers with competing interests. Consumers who place a higher value on time saved while running single or multiple loads of laundry can select a washer or dryer characterized by a shorter normal cycle, while consumers who prioritize energy and water efficiency will continue to be able to purchase models characterized by a longer normal cycle. Consistent with the position taken in prior rulemakings, DOE maintains that products offering quick and alternative cycles are not the same as the products that will be available under this new product class. This is because quick and alternative cycles are designed not as the normal use cycle, but provide consumers with other wash or dry cycles for specific washing or drying needs. The creation of short normal cycle washers and dryers in this final rule opens the door for manufacturers to develop short cycle products intended specifically for normal activity. See, 85 FR 68723, 68727 (Oct. 30, 2020).

In response to the NOPR, DOE received multiple comments challenging the Department's position that cycle time was a performance-related feature that justified the establishment of new short normal cycle product classes for residential clothes washers and consumer clothes dryers.[6] These commenters focused on the Department's identification of cycle time as a performance-related feature. These commenters argued that product classes characterized by short normal cycles did not offer a consumer utility and were unnecessary based on a lack of data or evidence demonstrating the utility consumers would receive from the new product classes.

Specifically, some commenters argued that DOE failed to meet the requirements of 42 U.S.C. 6295(q) because the NOPR did not establish cycle time as a consumer utility justifying the creation of the new product classes. (CEC, No. 0038, pp. 6–7). AHAM argued that DOE failed to demonstrate that shorter cycle times were a performance related feature that provided a utility to consumers and submitted data to argue that the creation of normal cycle times shorter than those available today were unlikely to provide a significant consumer utility. AHAM continued that unless DOE could demonstrate that cycle time is a performance related feature, then it cannot rely solely on cycle time to establish the new product class. DOE would need cycle time plus something else like consumer preference or data supporting the new product class to justify the creation of the proposed product classes. AHAM distinguished the parallel DOE referenced in the NOPR between new product classes for certain clothes washers and clothes dryers and the separation of product classes for top- and front-loading commercial clothes washers by noting that the previous rulemaking rested not solely on cycle time as a performance related feature, but also on the consumer preference for the axis of loading which justified the new product class. AHAM argued that its data show that there is not a strong correlation between cycle time and consumer satisfaction, meaning consumers are not looking for products with shorter cycles and that consumers already have the option to use shorter cycles when needed as most washers and dryers offer quick cycles. (No. 0030, pp. 7–8).

Similarly, comments submitted by the Attorneys General and the Corporation Counsel of the City of New York argued that the proposal failed to meet the requirements of section 6295(q) because a reduced or shorter cycle time is not a performance related feature as the consumer utility of clothes washers and dryers is to clean and dry clothes, regardless of cycle time. While short cycles may lead to consumers receiving clean and dry clothes faster, short cycles do not provide an additional distinct utility beyond the purposes of washing and drying. (No. 0035, pp. 8–9). Commenters explained that while 42 U.S.C. 6295(q)(1)(B) does not define performance-related feature, the legislative history offers guidance on DOE's authority under the section and instructs DOE to ''use [its] discretion carefully, and establish separate standards only if the feature justifies a separate standard, based upon the utility to the consumer and other appropriate criteria'' because ''if [DOE] established a separate standard for every appliance having a detectable difference in features, no matter how slight, . . . then hundreds of standards might result.'' (No. 0035, p. 9 referencing H.R. Rep. 95–1751, at 115; Joint Environmental Commenters, No. 0041, p. 4). These commenters continued that different classes should be based on the product's capacity to provide consumers with a utility beyond what is provided by the corresponding basic product class. Here, commenters contend the short cycle washer and dryer classes provide the same utility as normal washer and dryer classes—clean and dry clothing. Without a detectable difference, DOE lacks sufficient justification to establish separate energy efficiency classes and standards for these products. (No. 0035, p. 9).

The Attorneys General and the Corporation Counsel of the City of New York also argued that this rulemaking presented an inappropriate interpretation of section 6295(q) when compared with prior rulemakings. This is because DOE's prior rulemakings resulted in a new product class only when a product type offered a substantial and distinct consumer utility, which cycle time does not. These commenters looked to DOE's water heater and self-cleaning oven rulemakings to demonstrate this distinction. In its water heater rulemaking, commenters argued that DOE determined the differences between heat pump and electric resistance storage water heaters did not justify separate product classes because both provided the same customer utility: Hot water. Whereas in the self-cleaning oven rulemaking, DOE determined the self-cleaning feature

[6] Commenters challenging DOE's position that cycle time is a performance related feature included: Anonymous Anonymous, No. 0002; Cohen, No. 0009; Rubang, No. 0011; Anonymous, No. 0014; Cyra-Korsgaard, No. 0015; Walnut Valley Water District (''WVWD''), No. 0017; City of Sacramento Department of Utilities, No. 0020; Northwest Power and Conservation Council, No. 0021; Davis, No. 0022; Metropolitan North Georgia Water Planning District (''MNGWPD''), No. 0025; Spire Inc., the American Public Gas Association, the American Gas Association, and the National Propane Gas Association (''Gas Industry''), No. 0028; Alliance for Water Efficiency, et al. (''AWE, et al.''), No. 0029; Association of Home Appliance Manufacturers (''AHAM''), No. 0030; Appliance Standards Awareness Project (''ASAP''), Alliance for Water Efficiency, Consumer Federation of America, National Consumer Law Center, on behalf of its low-income clients, and Natural Resources Defense Council (''ASAP et al.'') No. 0033; California State Water Resources Control Board (''CA SWRCB''), No. 0034; Attorneys General Of Oregon, Colorado, Connecticut, Illinois, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Vermont, Washington, And The District Of Columbia, And The Corporation Counsel Of The City Of New York (''Attorneys General and the Corporation Counsel of the City of New York''), No. 0035; California Energy Commission (''CEC''), No. 0038; Sierra Club and Earthjustice (''Joint Environmental Commenters''), No. 0041; Valley Water, No. 0042; Northwest Energy Efficiency Alliance (''NEEA''), No. 0044; and GE Appliances (''GEA''), No. 0045.

justified a separate product class because the self-cleaning function was a distinct feature that standard ovens did not provide. Commenters assert that the NOPR most closely resembles the water heater rulemaking because clothes washers and dryers, regardless of cycle length, provide the same consumer utility of clean and dry clothes, like heat pump and electric resistance water heaters provide the same utility of hot water. The proposal thus is inconsistent with prior rulemakings. (No. 0035, pp. 9–10). Commenters also note that DOE incorrectly relies on the previous residential clothes washer rulemaking because that rulemaking considered cycle time only to the extent that differential cycle times existed between front-loading and top-loading clothes washers. DOE determined that the method of loading was a feature, not the cycle time itself. (No. 0035, p. 10).

These commenters continued that DOE misstates the conclusions reached in other prior rulemakings to support the NOPR by equating a performance-related feature with mere consumer preference. The electric cooking products rulemaking did not result in a determination that oven windows were a feature justifying a product class, but concluded that windowless oven doors should not be considered as a potential design option because the windows provide consumer utility and in fact increase efficiency by reducing oven door openings. (Attorneys General and the Corporation Counsel of the City of New York, No. 0035, p. 10, referencing 63 FR 48038, 48040 (Sept. 8, 1998)). The establishment of refrigerator-freezer product classes based on freezer placement were justified by the unique utility provided by different configurations and efficiency capabilities. (No. 0035, p. 10 referencing 53 FR 48798, 48807 (Dec. 2, 1988)). These commenters continued that the NOPR is distinguishable from these prior rulemakings as they demonstrate the type of substantial consumer utility differences that necessitate a separate energy efficiency standard to maintain the utility that then justifies a separate product class. Therefore, these rulemakings demonstrate that a performance-related feature must be more substantial and qualitatively different than cycle time. (No. 0035, p. 10).

The Competitive Enterprise Institute (''CEI'') agreed with DOE's proposal that the time savings consumers would receive from the shorter cycles is a performance related feature and that this utility justifies a different efficiency level than other similar products. (No. 0031, p. 4). To support its position, CEI noted consumers are already sacrificing their time when washing and drying their clothing. CEI received feedback from consumers that (in CEI's view) demonstrates that a need does exist for new washers and dryers that operate faster. CEI commented that consumers are moving towards faster washing machines over those that offer higher efficiency ratings. This preference is demonstrated by 38 percent of consumers moving away from slower front-loading machines (70–120 minute cycles) to faster top-loading machines. (No. 0031, p. 3). CEI continued that consumers would benefit from being able to access an increased range of products to meet their specific needs and free up time for other things in their lives. (No. 0031, p. 2). The time saved resulting from short cycles is the utility and appliances that can clean or dry clothing more quickly offer a specific utility not available from those appliances that require longer cycles to accomplish the same task.

Similarly, the 60 Plus Association applauded the Department's recognition of cycle time as a performance-related feature. This commenter, arguing on behalf of its senior citizen members, believed the rulemaking will offer a significant benefit to individuals looking to make the most of their time. This commenter noted that the time saved through the use of future, short normal cycles will make a noticeable difference in the lives of its underrepresented members. (No. 0043, p. 1).

Comments from Spire Inc., the American Public Gas Association, the American Gas Association, and the National Propane Gas Association (''Gas Industry Commenters'') also agreed that appliances that can clean or dry clothing more quickly are appliances that offer a specific utility not available from appliances that require more time to accomplish the same task. These commenters continued that while this utility may not be significant for all consumers, many consumers have a strong preference for getting things done materially faster, even potentially at the expense of some increase in operating costs. (No. 0028, p. 3).

Additional support for the new clothes washer and clothes dryer product classes included some commenters recognizing the importance of consumer access to products that would offer features that address individual family needs, even if this could come with additional energy use. (Tanner, No. 0024). Another commenter suggested that the rulemaking would create greater competition between manufactures for the development of efficient appliances within the new product class and ultimately provide consumers with product options that best meet their different needs. (Anonymous, No. 0040).

As an initial matter, DOE maintains that short normal cycle product classes for clothes washers and clothes dryers will provide a distinct utility to consumers that other clothes washers and clothes dryers do not provide; *i.e.,* time saved. Some commenters may not recognize the benefit from saving small increments of time here and there over the course of a week or month and think that this rulemaking lacks value. But there are other consumers that do value this benefit and look for any time saved that can then be repurposed for other tasks. Households with greater frequency of use (*i.e.,* households that cycle multiple loads of laundry) are likelier to see the cumulative benefits of time saved from not having to wait as long for a normal cycle to complete. Time is an irreplaceable resource. This rulemaking would benefit those consumers who have chosen to place an additional value on their time. This category may include households of senior citizens, families with small children, and other categories of consumers for whom frequency of use or other factors may affect their valuation of time savings relative to other features.

DOE has taken the view in its prior rulemakings that consumer utility is an aspect of the product that is accessible to the layperson and based on user operation, rather than performing a theoretical function.[7] This interpretation has been implemented in DOE's determinations of utility through the value the particular feature brings to the consumer, rather than through analyzing more complicated design features or costs that anyone, including the consumer, manufacturer, installer, or utility may bear. DOE has determined that this approach is consistent with EPCA's requirement for considering the economic justification for adopting of any new or amended energy conservation standard. 85 FR 49297, 49298 (Aug. 13, 2020). DOE maintains,

[7] Comments from the Gas Industry Commenters also called it unreasonable for DOE to suggest features desired by consumers warrant protection only if they are ''accessible to the laypersons'' or to dismiss the need for building modifications as a matter of the associated economic cost of modification. (No. 0028, p. 4). These comments were submitted in relation to a separate rulemaking, Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Commercial Water Heaters, 84 FR 33011 (July 11, 2019), and are outside the scope of the rulemaking action addressed here.

under this approach, that cycle time is a consumer utility.

In prior rulemakings, DOE has determined that refrigerator-freezer configurations,[8] oven door windows,[9] and top loading clothes washer configurations [10] offered performance-related features that justified the creation of new product classes. DOE has also determined cycle time, in addition to axis of access, is a performance-related feature with respect to commercial clothes washers (77 FR 32308, 32319 (May 31, 2012)) and residential dishwashers (85 FR 68723 (Oct. 30, 2020). The creation of a product class characterized by offering a short normal cycle is no different than the conclusions reached previously. Like these prior rulemakings, DOE has recognized that consumers received a utility from the feature to support the establishment of the new product class under 42 U.S.C. 6295(q)(1)(B).

DOE has previously rejected the notion that the Department can determine a product attribute is a performance-related feature *only if* the feature adds a performance characteristic or utility distinct from the primary purpose of the product. To act otherwise would mean that a refrigerator-freezer's primary utility is only to store and preserve fresh food, and that consumers are not benefited from being able to access the contents through different door configurations. Because an oven's primary utility is to cook food, and food cooks in both a windowless oven and in an oven with a door window, DOE would be prohibited from recognizing the utility consumers receive from being able to see the contents cooking. Even though an oven with a door window uses more energy than an oven without a window, DOE has recognized that the window offers consumers a distinct consumer utility that goes beyond the oven's primary function of cooking food. 85 FR 68723, 68727 (Oct. 30, 2020). DOE's prior rulemakings support the determination that shorter normal cycle times are features that provide a consumer utility and justify the creation of a new product class for clothes washers and dryers.

DOE maintains that consumer preference for a particular feature indicates that the feature provides a utility to the consumer, even if that feature is related to the primary function or purpose of the product. In DOE's prior commercial clothes washer standards rulemaking, for example, DOE determined not only that the ''axis of loading'' constituted a feature that justified separate product classes for top-loading and front-loading clothes washers, but also the cycle time difference between the two models warranted separate product classes. 79 FR 74492, 74498 (Sept. 15, 2014). The split in preference between the models, DOE stated, indicated that a certain percentage of the market expressed a preference for (*i.e.,* derived a utility from) the faster top-loading configuration. DOE has also noted that the various refrigerator-freezer configurations provide no additional performance related utility other than consumer preference as all configurations still result in the storage of fresh food. This means that it is the location of access itself that provides a distinct consumer utility, which is unrelated to the primary purpose or function of the refrigerator. 79 FR 74492, 74499 (Sept. 15, 2014).

Additionally, comments arguing that this rulemaking more closely resembles DOE's prior hot water rulemaking are misplaced. In that rulemaking, DOE maintained the single product class for water heaters regardless of the technology utilized to heat the water. There, DOE acknowledged that it did not believe heat-pump and electric storage water heaters offered a different utility, but offered the same utility to the consumer (*i.e.,* hot water).[11] This is distinguishable from the utility consumers will receive when using clothes washers and clothes dryers with short normal cycles because these consumers will receive time savings as a result of the shorter cycles. DOE maintains that the products that can clean or dry clothing in less time offer consumers a utility not available from products that require more time to complete a comparable normal wash or dry cycle.

DOE recognizes that the comments submitted by CEI, 60 Plus Association, and individual members of the public evidence a consumer preference for shorter normal cycles. Looking again to DOE's rulemaking history, the Department maintains that establishing a short normal cycle for clothes washers and clothes dryers is no different from establishing product classes based on the axis of loading or the configuration of other covered products. DOE has also recognized the consumer value in being able to see inside an oven when cooking, as opposed to opening the oven door, and retained the window as a performance related feature. In each of these rulemakings, DOE identified a feature that provides a utility to the consumer. Comments challenging DOE's action on the basis that a feature must be accompanied by something else or offer a utility beyond the primary purpose of the product, are inconsistent with conclusions DOE reached in prior rulemakings.

To act otherwise, as these commenters suggest, would limit the Department's ability to establish product classes for features that may augment, but are not somehow separate from, the primary purpose for a product even if consumers received a recognizable utility from the feature as set out in 42 U.S.C. 6295(q). DOE's authority to establish a product class based on capacity and fuel type casts doubt on commenters' belief that features must go beyond the primary purpose of a product under 42 U.S.C. 6295(q)(1)(A).[12] As provided in EPCA, DOE may consider other criteria when exercising its discretion to identify the utility a feature provides consumers such as fuel type and capacity, which do not specifically add to the primary purpose of a product. As a result, DOE realizes it would be unreasonable to limit the authority granted in EPCA under 42 U.S.C. 6295(q) to only recognize new product classes on the basis of a feature's direct relationship to the primary purpose of the product. 85 FR 68723, 68728 (Oct. 30, 2020). Here, DOE maintains that the time consumers will save from using short normal cycles for clothes washers and clothes dryers justifies the creation of the new product classes.

DOE also received a variety of comments arguing that the establishment of the new product classes were not necessary given the availability of quick or alternative cycles available on current clothes washer and dryer models. AHAM argued that DOE failed to demonstrate that a new product class based on cycle time is necessary and that such action will have unintended consequences on laundry products, consumers, and manufacturers. (No. 0030, p. 2). Other

[8] 75 FR 59469 (Sept. 27, 2010) (creating a separate product class for refrigerators with bottom-mounted freezers).

[9] 63 FR 48038, 48041 (Sept. 8, 1998) (determined that the window in an oven door was a ''feature'' which eliminated from consideration the design option that would have removed the window feature).

[10] 77 FR 32308, 32319 (May 31, 2012) (creating a separate product class for compact front-loading residential clothes washers).

[11] 74 FR 65852, 65871 (Dec. 11, 2009) (No separate product class was needed as DOE did not believe heat pump water heaters provided a different utility from traditional electric resistance water heaters. Heat pump water heaters provide hot water to a residence just as a traditional electric storage water heater).

[12] 42 U.S.C. 6295(q)(1)(A) provides that DOE may establish a new product class for a type of covered product that consumes a different kind of energy (fuel or capacity) than other covered products within that same class.

commenters noted that the proposal is unnecessary because products meeting the short cycle times are already available, thereby making such actions not justified. (Joint Environmental Commenters, No. 0043, pp. 4–5; Cohen, No. 0009; Davis, No. 0022; ASAP et al., No. 0033, p. 2). GE Appliances commented that while cycle time is an important consideration, the current product classes, standards, and test procedures already allow for a short cycle, making this action unnecessary. (GEA, No. 0045, p. 2).

Many commenters also called the proposal unnecessary because DOE failed to provide any documentation or evidence of a need for shorter normal cycles and that consumers want such products. Commenters' continued that the data DOE provided actually show the availability of products that can meet the cycle times proposed, and DOE needs additional data to demonstrate necessity of the rule. (AWE, et al., No. 0029, p. 1; WVWD, No, 0017, p. 1; CA SWRCB, No. 0034, pp. 1–2; Valley Water, No. 0042, p. 1; AHAM, No. 0030, p. 3; CEC, No. 0038, p. 7; ASAP et al., No. 0033, p. 3; Rubang, No. 0011; Northwest Power and Conservation Council, No. 0021, pp. 2–3; MNGWDP, No. 0025, p. 2). Other commenters note that there is no evidence as to whether the new classes will be affordable to consumers or whether consumers will be harmed as a result of increased energy and water use. (''Anonymous''_ WC, No. 0012; Cyra-Korsgaard. No. 0015; Armstrong, No. 0004).

AHAM offered its weighted data to show the prevalence of each washer model on the market. AHAM's data indicate that there are laundry products already on the market that provide consumers with reasonable cycle times and comply with the current energy conservation standards. According to AHAM's data, top-loading and front-loading clothes washers have shipment weighted average normal cycle times of 43 and 57 minutes, and for clothes dryers, the shipment weighted average cycle time is 34 minutes. AHAM's relies on this data set to show that almost 20 percent of top-loading clothes washer shipments, about 45 percent of front-loading washer shipments, and about 75 percent of clothes dryer shipments are at or very near (within 10 minutes of) DOE's proposed product class division line. AHAM concluded that DOE's limited data sample proves that the market already has products that can meet the cycle times proposed. (AHAM, No. 0030, pp. 4–5).

These comments challenged the data and analysis provided in the NOPR as demonstrating that the new product classes are not necessary because similar products are already available. In response, DOE notes that commenters are correct that DOE's data shows the cycle time of products currently available to consumers and identifies a small number of models that have cycles close to the cycle times proposed in the NOPR. However, this information validates the view that clothes washers and dryers on the market that have a normal cycle that is less than 30 minutes or 45 minutes for top- or front-loading clothes washers are not widely available. According to AHAM's data, top-loading and front-loading clothes washers have shipment weighted average normal cycle times longer than the product class thresholds established in this final rule (43 and 57 minutes). AHAM's data for clothes dryers also show that the shipment weighted average cycle time is longer than the product class threshold established in this final rule (34 minutes). These data, which indicate that more than half of the shipments for both consumer clothes washers and consumer clothes dryers have cycle times longer than the established cycle times for the new product class thresholds, therefore support the appropriateness of these product class thresholds established by DOE. AHAM's and other similar comments noting that there are current models close to the 30 or 45 minute short cycle thresholds do not negate the need for short normal cycle products, but reveal that there is demand—and therefore, consumer preference—for products with shorter cycles, and offer a starting point for manufacturer innovation.

CEC also argued that DOE has not met its burden to establish the new product classes based on a cycle time as a performance-related feature because most clothes washers and dryers offer a short cycle already. CEC takes this to mean that DOE's proposal therefore identifies the actual customer utility as the benefit of not having to press a button to access the short cycle from the models settings. (No. 0038, pp. 6–7).

DOE notes that many appliances, not just clothes washers and dryers, are operated through selecting a specific setting or cycle. As with dishwashers, manufacturers describe in product literature the different intended uses for various products, and DOE presumes that manufacturers must intend something other than the ''normal'' cycle when describing a ''quick'' or lightly soiled-type cycle. In addition, while some commenters such as CEC associate pressing the start button as the same utility as utilizing a desired cycle feature, DOE realizes that not every consumer will use the variety of cycles on a device, or want to spend the time completing multiple cycles to adequately clean or dry their clothing. Some consumers may just want the availability of one short cycle, provided as the normal cycle, which can be used every time they wash or dry their clothing. That is what this rulemaking seeks to provide. Offering short normal wash and dry cycles as standard features on their appliances will reasonably provide a utility to those consumers seeking to cut down on the time they spend waiting for their clothing to be clean and dry.

In response to DOE's request for information in the NOPR, NEEA submitted comments arguing that market data, consumer-use data, and technology research for both clothes washers and clothes dryers suggest that short-cycle product classes as proposed in the NOPR are unnecessary. (No. 0044, pp. 2–5, 6–8).

NEEA's market data showed that a shorter cycle option is already available on the majority of bestselling clothes washers, both top- and front-loading styles. Short or fast cycles are widely available, with 79 percent of washers offering this option. NEEA noted that the wide availability of these and alternative cycles supported the conclusion that a product class based on cycle time is unnecessary. NEEA also commented that, based on high consumer demand for efficient washers, consumers are currently satisfied with the current cycle and technology options. NEEA also relied on high market penetration for ENERGY STAR-qualified washers to indicate a strong consumer demand for washers with high efficiency and satisfaction with current cycle times. Additionally, NEEA noted that consumer demand for efficient machines continues to grow based on its consumer-use data that showed consumers use fast cycles relatively infrequently, with a NEEA's RBSA Laundry Study revealing that consumers only use the fast cycle 8 percent of the time. Consumers select the Normal cycle most frequently, at about 59 percent of the time. NEAA noted that there is also good cleaning performance for many fast wash cycles available today. NEEA's laundry study also showed that while Normal is the most common cycle, consumers also select a variety of alternative wash cycles, which include Delicate (6 percent), Heavy Duty (4 percent), and others that also use more water and energy than the Normal cycle. Thus, having a fast cycle as the Normal cycle does not offer consumers a unique utility given that most consumers can

access fast cycle choices on many machines. (No. 0044, pp. 2–5).

Similar to clothes washers, NEEA's market data showed that current clothes dryer models already offer consumers fast cycles. Additionally, consumer demand for efficient clothes dryers remains high, which indicates that consumers are satisfied with the available technology and cycle times. Similar high market penetration for ENERGY STAR qualified dryers also exists and provides additional support for consumer satisfaction with cycle times and demand for high efficiency products. NEAA argued that the availability of setting options offered with today's dryers sufficiently meets the demand for fast dryer cycle times. NEEA's RBSA Laundry Study revealed that medium heat is the most common temperature selection for dryers (52 percent). Virtually all dryers have a fast (high heat) cycle option for use when a shorter cycle is needed, but high heat can cause more wear and tear on cotton fabric and is often not recommended at all for synthetic fabrics. Fabric care guidelines and consumer concern about clothing wear and tear contribute to the lower use of high heat, which is used about one-third of the time. Taken together, NEEA concluded that today's dryers sufficiently meet consumer demand for fast dryer cycle times. (NEEA, No. 44, pp. 6–8).

In response, DOE acknowledges NEEA's comment that, based on high consumer demand for efficient washers and dryers, consumers are currently satisfied with the current cycle and technology options, and that the high market penetration for ENERGY STAR qualified products indicates a strong consumer demand for washers with high efficiency and satisfaction with current cycle times. In both cases, NEEA's data prove only that consumers are purchasing the products that are available. The data has no bearing on whether consumers would purchase a clothes washer or dryer with a short, normal cycle, if such product were available. Moreover, NEEA's data demonstrate that the majority of consumers select the normal cycle for operation of their device, and choose more specific settings in a very small percentage of cycles. The high percentage selection of the normal is cycle would seem to support establishment of a short-cycle product class so that those consumers who want that utility can purchase models designed to provide that cycle as the default, *i.e.,* normal, choice.

In finalizing the short-cycle product classes in this final rule, DOE intends to spur manufacturer innovation and push for the development of short-cycle products, as the normal cycle, which will wash and dry a normal load of laundry and be subject to manufacturers testing. This is distinguishable from calling existing fast or quick cycles the new short normal cycle, as these comments seem to suggest, because those cycles are not designed to satisfy consumers' normal washing and drying needs. Based on descriptions in manufacturer literature, these existing quick cycles are for situations when a consumer wants to, for example, wash lightly soiled garments or get wrinkles out of already dry clothing. DOE's actions here seek to accomplish a very different outcome.

In its comments, NEEA argued that the proposal was unnecessary, in part, because technologies already exist to improve water extraction and reduce dryer energy consumption that could substantially improve the efficiency of washers as measured by the integrated modified energy factor (''IMEF'') rating, which is used in DOE's test procedure. NEEA further asserts that these advances to washers could also include lowering the remaining moisture content to reduce the energy needed for drying. NEEA also states that there are a number of technologies (increased spin speed; increased basket diameter; alternate basket perforation patterns; and ribbed drums) available for both front-and top-loading washers that can reduce remaining moisture without lengthening cycle time and enable faster cycle times. (No. 0044, pp. 2–5). For consumer clothes dryers, NEEA identified technologies available to reduce cycle time and improve efficiency. These technologies include alternate refrigerants and venting, modulating burners, and improved termination controls. (NEEA, No. 44, pp. 6–8).

Additionally, some commenters argued that the proposal rested on a presumption that the current standards for clothes washers and clothes dryers are preventing manufacturers from creating products with shorter cycle times. Commenters noted that such a presumption was unsupported by the evidence included in the NOPR and also lacks consideration of the impact shorter, hotter dryer cycles could have on clothing. (ASAP et al., No. 0033, p. 3; Northwest Power and Conservation Council No. 0021, p. 2; Anonymous, No. 0002).

In response, Consumers' Research argued against this comment by noting that under the current standards, cycle times for clothes washers have in fact become very long for some consumers. (No. 0037, p. 2) This commenter agreed with DOE that even though quick or alternative cycles are available, those cycles are recommended only for lightly soiled clothing meaning that a quick cycle will not clean or dry normally soiled clothing. DOE's proposal therefore provides consumers with added choice and convenience. (No. 0037, p. 2)

Countering those commenters that contented short cycles were unnecessary or lacked a justified utility, CEI noted that consumers are already forced to sacrifice their time when cleaning and drying their clothing. DOE's proposal offered consumers a benefit by increasing the range of products on the market that would allow those consumers with a need or desire for short washer or dryer cycles to purchase the product that best fit their lifestyle. The proposal therefore eliminated impediments to these choices and provided manufacturers the means of meeting consumer demand for new products. CEI based this position on the feedback it received from consumers who have expressed a need for clothes washers and dryers that operate faster with comparable performance. CEI's comments also recognized the growing consumer dissatisfaction with current cycle times that have increased in length due to water and energy use regulations that have added time needed so that detergents can penetrate clothes and remove soils as a result of decreased water and agitation. CEI also noted that while current products offer faster cycles for lightly soiled clothing, those cycles are ineffective on normally soiled garments. (No. 0031, pp. 2–3).

DOE realizes that consumers have different opinions on the current length of time needed to run a full normal cycle for washing and drying clothing. AHAM's comments indicated that consumers do value cycle time as an important feature and noted that if cycle time becomes too long, consumers will not be satisfied with their products. (No. 0030, p. 2). In the NOPR and comments received from CEI and 60 Plus Association, DOE's rulemaking has shown that some consumers already believe cycle times are in fact too long and that shorter cycles are possible to support of the necessity of the proposal. DOE seeks to use this rulemaking as an opportunity for manufacturers to respond to the consumer utility recognized in this rulemaking for short normal cycle clothes washers and clothes dryers. DOE will consider appropriate standards in a separate energy conservation standards rulemaking, analyzing the factors specified in 42 U.S.C. 6295(o).

Some commenters argued that the conditions precedent to DOE's application of the product class provision have not been satisfied in this rulemaking. Commenters assert that DOE may only create a new product class when there are products that have a capacity or other performance-related feature which other like products do not have. This feature then justifies a different standard after taking into consideration the utility the consumer receives from the feature at issue. (No. 0041, p. 4). Commenters look to support their position by arguing that the product class provision uses the present tense to describe a feature that may trigger DOE action whereas the NOPR presents the provision as offering DOE the discretion to determine that some products should have a capacity or other performance-related feature they presently lack. (Joint Environmental Commenters, No. 0041, pp. 4–5). Commenters conclude that DOE's interpretation is incorrect and inconsistent with prior rulemakings because 42 U.S.C. 6295(q) actually enables DOE to react to features that manufacturers bring to market and does not facilitate the introduction of nonexistent features into existing products. (No. 0041, p. 6 referencing 76 FR 22454, 22485 (Apr. 21, 2011)).

In response, DOE affirms that EPCA does not specify how prevalent a specific feature must be on the market (*i.e.,* stipulate that DOE can act only when there are covered products with that feature already part of an existing product class) when establishing a new product class under 42 U.S.C. 6295(q). If this were true, such products may never come onto the market because they may not comply with existing energy conservation standards and therefore be unlawful to produce. In addition, and as a point of reference, DOE is currently exploring the energy use associated with the network connectivity of covered products. Network connectivity is clearly a desirable consumer utility and is quickly becoming a common component of new models of covered products. Network connectivity, however, comes with attendant energy use. EPCA's product class provision cannot be read to prohibit DOE from establishing product classes for products that offer network mode connectivity simply because that feature is not currently common on the market.[13] Such a reading of the statute would prevent manufacturers from innovating and developing new product designs in response to consumer demand and technological developments. Likewise, for clothes washers and clothes dryers, EPCA's product class provision authorizes DOE to establish standards for new product features that provide consumer utilities, such as shorter cycle times.

Even if products with short normal cycle times for clothes washers and clothes dryers were readily available, the product class provision would still be appropriately applied in this rulemaking. DOE has previously established product classes based on existing features. Ventless clothes dryers had been on the market for at least 25 years before the Department established separate energy conservation standards because ventless clothes dryers could not comply with the energy conservation standards applicable to vented units. There, DOE reasoned that because ventless clothes dryers provided a unique utility to consumers (available for installation in areas where vents were otherwise impossible to install) that a separate product class was justified. 76 FR 22454, 22485 (Apr. 21, 2011). DOE reiterates that the impact of this rulemaking is not to require manufacturers to develop clothes washers and dryers with short normal cycle times, but rather to establish product classes based on that criterion and incentivize manufacturers to develop such products.

Comments submitted by the Joint Environmental Commenters and others argued that the Department cannot use the product class provision to avoid prescribing energy conservation standards for the new product classes. These commenters explain that DOE misapplies the new product class provision in the NOPR by attempting to exempt certain clothes washers and dryers from the applicable energy conservation standard by postponing the adoption of replacement standards. These commenters believe that DOE must read EPCA's product class provision with the requirements for conservation standards and to do otherwise ignores the limitations placed on the Department's discretion when creating a new product class. (No. 0041, pp. 6–7; WVWD, No. 0017, pp. 1–2; Northwest Power and Conservation Council, No. 0021, p. 3; Davis, No. 0022, p. 1). Some commenters also note that such a process makes it increasingly difficult for manufacturers to accurately predict the costs associated with the new product classes. (AHAM, No. 0030, p. 9).

Other commenters note that the associated impact of finalizing these product classes without accompanying standards would result in the creation of unregulated products that would then negatively impact consumers by causing product confusion, increased water and energy use, and higher utility bills. (MNGWPD, No. 0025, p. 1; AWE, et al., No. 0029, p. 1 Northwest Power and Conservation Council, No. 0021, p. 3).

Similarly, comments submitted by the Attorneys General and the Corporation Counsel of the City of New York argued that DOE has violated 42 U.S.C. 6295(q)(1) by failing to specify a level of energy use in the NOPR for the new product classes. Section 6295(q)(2) is also violated by DOE's failure to provide an explanation on the basis for which a lower or higher level was established because DOE offers no such accompanying explanation. (No. 0035, p. 6) These and other commenters argued that all clothes washers and dryers must adhere to the current energy and water use standards regardless of cycle time. (City of Sacramento Department of Utilities, No. 0020, p. 2; CEC, No. 0038, pp. 3–4). These commenters contend that DOE believes it can override the existing efficiency standards for clothes washers and dryers by stating that the proposed product classes would not be subject to energy or water conservations standards. (No. 0035, p. 8).

Consumers' Research supported a future standards rulemaking for short cycle products and stated that it would be the appropriate next step. (No. 0037, p. 2).

As stated in the NOPR, DOE intends to complete the necessary conservation standards rulemaking once the product classes for short cycle clothes washers and clothes dryers are established. 85 FR 49297, 49300 (Aug. 13, 2020). DOE has previously explained that EPCA, 42 U.S.C. 6295(q)(1)(B), does not require the Department to simultaneously establish energy conservation standards in the same rulemaking as the determination of a new product class. DOE reminds commenters that the establishment of a new product class is similar to situations where DOE has finalized a coverage determination and a covered product exists without an applicable standard until the Department completes a test procedure rulemaking for that product. *See* 42 U.S.C. 6292(b). Commenters can look to the Department's 2009 beverage vending machines (''BVM'') energy conservations standard rulemaking and

[13] Similarly, EPCA's anti-backsliding provision cannot be used to prohibit the development of product classes that allow for covered products to be connected to a network simply because standards for those products were established prior to the development of network connectivity and eliminating the ability to implement this option.

the 2007 distribution transformer energy conservation standards rulemaking as examples of prior instances where DOE established a new product class without simultaneously prescribing an associated conservation standard. 81 FR 44914, 44920 (Aug. 31, 2009); 72 FR 58190, 58197 (Oct. 12, 2007).

When DOE initially considered energy conservation standards for BVMs, DOE did not consider combination vending machines as a separate equipment class, but instead considered that equipment with all other Class A and Class B BVMs. DOE later recognized that combination vending machines offered a distinct utility and concluded that those machines were a separate class of BVMs. DOE was unable to determine, at the same time as the product class determination, whether energy conservation standards for combination vending machines were economically justified and would result in significant energy savings. DOE subsequently decided to not set standards for the equipment class at that time. DOE reserved standards for combination vending machines and modified the definition of Class A and Class B BVMs to accommodate a definition for combination vending machines. 74 FR 44914, 44920 (Aug. 31, 2009). DOE's action thereby reserved a place for the development of future standards for combination vending machines that DOE then established in 2016. 81 FR 1028, 1035 (Jan. 08, 2016).

Similarly, the energy conservation standards rulemaking for distribution transformers in 2007 provides another example of this activity by the Department. There, DOE clarified that although it believed underground mining distribution transformers were within the scope of coverage, it recognized that mining transformers were subject to unique and extreme dimensional constraints that impacted their efficiency and performance capabilities, and decided to not establish energy conservation standards for underground mining transformers. In the final rule DOE established a separate equipment class for mining transformers and reserved a section with the intent to develop the analysis required to establish an appropriate energy conservation standard in the future. 72 FR 58190, 58197 (Oct. 12, 2007). DOE later reached a similar conclusion in 2013 when it decided to again not set standards for mining distribution transformers. 78 FR 23336, 23353 (Apr. 18, 2013). In both rulemakings, DOE reserved a place for the future development of the necessary standards and did not set standards at the same time as creating the separate product classes.

Here, DOE is following the same practice by first establishing new product classes for short normal cycle clothes washers and clothes dryers and reserving a place for future energy conservation standards. DOE intends to conduct the necessary rulemakings that will consider and evaluate the energy and water consumption limits for the new product classes to determine the applicable standards that provide the maximum energy efficiency that is technologically feasible and economically justified, and will result in a significant conservation of energy, 42 U.S.C. 6295(o)(2)(A). DOE will provide interested members of the public an opportunity to comment on any preliminary rulemaking documents and proposed energy conservation standards for these product classes during these future rulemaking proceedings. See, 85 FR 68723, 68733 (Oct. 30, 2020). These rulemakings will be completed following the procedures set out in the Process Rule, and will provide manufacturers with the opportunity to provide information on the costs associated with complying with any standards established by DOE.

B. Anti-Backsliding Consideration, 42 U.S.C. 6295(o)(1)

In the context of establishing new product classes, DOE acknowledges EPCA's general prohibition against prescribing amended standards that increase the maximum allowable use, or in the case of showerheads, faucets, water closets, or urinals, water use, or decreases the minimum required energy efficiency, of a covered product in any rulemaking to establish standards for a separate product class. (42 U.S.C. 6295(o); the ''anti-backsliding provisions'') Consistent with its prior rules, DOE maintains that the anti-backsliding prohibition is read in conjunction with the Department's product class authority in 42 U.S.C. 6295(q), and does not prohibit the establishment of product classes as proposed in this document. 84 FR 33869, 33871–33873 (July 16, 2019); 85 FR 68723, 68734 (Oct. 30, 2020). DOE applies this provision in conjunction with the authority set out in 42 U.S.C. 6295(q) to specify ''a level of energy use or efficiency higher or lower than that which applies (or would apply) for such type or class . . .'' if the Secretary determine that covered products within such group consume a different type of energy or have a capacity or other performance-related feature that justifies ''a higher or lower standard from that which applies (or will apply) to other products within such type (or class).'' EPCA explicitly acknowledges, through this provision, that product features may arise that require the designation of a product class with a standard lower than that applicable to other product classes for that covered product. 85 FR 68723, 68734 (Oct. 30, 2020).

Commenters opposing the new short normal cycle product classes for clothes washers and clothes dryers contended that the finalization of these product classes will weaken existing efficiency standards for such products, and argue that the Department's use of the product class provision cannot bypass the anti-backsliding provision's requirements.

Commenters asserted that DOE has failed to give full meaning to all of EPCA's provisions and that the NOPR contradicts section 6295(o)(1)–(2). These commenters argued that the anti-backsliding provision, which was enacted in 1992 subsequent to section 6295(q)'s enactment in 1987, should control in this situation. Commenters also looked to support their position by referencing the Second Circuit's review of EPCA's legislative history as discussed in *NRDC* v. *Abraham,* 355 F.3d 179 (2005), to conclude that DOE may not render the anti-backsliding provision inoperative through the proposal's use of section 6295(q). (No. 0035, p. 7; Joint Environmental Commenters, No. 0041, p. 3). The Joint Environmental Commenters also contended that the language of the anti-backsliding provision must be interpreted in light of the appliance program's goals of steadily increasing a covered product's energy efficiency. According to these commenters, the NOPR incorrectly reasons that the use of multiple tenses in the product class provision authorizes DOE to weaken the standard that applies to a product. DOE's interpretation reads the text of the product class provision in a vacuum, and ignores that EPCA's statutory context, history, and purposes must inform the meaning of the words used. The Joint Environmental Commenters argued the that the correct reading of EPCA provides that the anti-backsliding provision constrains the product class provision to authorize DOE's creation of a separate product class only when available versions of the covered product already possess the desired feature. Relaxing a current standard would never be justified. (No. 0041, pp. 1–3).

In support of the proposal, CEI noted that DOE has the statutory authority to designate a new class of clothes washers and dryers, allowing new standards to be promulgated within that class without regard to anti-backsliding

controls otherwise applicable to existing product classes. (No. 0031, p. 4).

In response, DOE actions in issuing this final rule are not rendering the anti-backsliding provision inoperative through the use of section 6295(q) to establish short normal cycle product classes. As stated in the NOPR, DOE recognizes that section 6295(q)'s use of the present tense, ''a higher or lower standard than that which applies,'' authorizes the Department to reduce the stringency of the standard currently applicable to the products covered under the newly established separate product class. Additional evidence supporting the Department's application of this provision to current standards is found in the reference to standards that are not yet applicable, as in standards that ''would apply'' or ''will apply''. If the product class provision were to only apply in situation where no standard had yet to be established for a covered product then there would be no need to indicate that the provision applied to future standards. There would also be no purpose to including a reference in the text of the statute to the potential for higher or lower standards, as there would be no reference to measure the potential changes against. DOE understands 42 U.S.C. 6295(q) to authorize the Department to reduce the stringency of the currently applicable standard upon making the determinations required by 6295(q). 85 FR 49297, 49306 (Aug. 13, 2020); 85 FR 68723, 68735 (Oct. 30, 2020).

Commenters challenged DOE's assertion that section 6295(q) cannot prohibit DOE from establishing standards that allow for technological advances or product features that could yield significant consumer benefits and associated reference to the 2011 ventless clothes dryer product class determination and prospective rulemaking regarding network-connected products. Commenters agreed that DOE is correct that section 6295(q) does not prohibit standards from considering technological advances but that subsection 6295(o)(1) still prohibits the weakening of prescribed energy efficiency standards for covered products. This means DOE must accommodate technological innovation within those bounds. Commenters agreed that DOE correctly referenced the 2011 ventless clothes dryers' product class rulemaking as energy efficiency standards were not lowered there because the product class was not previously subject to any standards. Alternatively, clothes washers and dryers regardless of cycle time are presently subject to the existing energy and water conservation standards. The proposal would therefore result in a lowering or elimination of standards because it offers no standards to apply to the proposed new product classes. (Attorneys General and the Corporation Counsel of the City of New York, No. 0035, p. 7; CEC, No. 0038, pp. 4–5; ASAP et al., No. 0033, p. 4).

Commenters incorrectly referred to DOE's 2011 ventless clothes dryer product class rulemaking in this context. Prior to the establishment of the product class, ventless clothes dryers were subject to the standards set for the product class as a whole. However, as these dryers could not at the time be tested using the applicable test procedure, ventless clothes dryer manufacturers subsequently sought and received waivers from test procedure requirements from the Department. 76 FR 33271 (June 8, 2011). Because DOE issued waivers for the test procedure for these dryers, it can only mean that these products were subject to DOE testing and standards compliance requirements prior to the establishment of the separate product class. Commenters are mistaken to claim that ventless clothes dryers were not subject to any standard and that the subsequent creation of standards for this product class, once established, did not result in a lowering of existing standards. DOE continues to read EPCA's provisions together to authorize the establishment of future standards for short cycle clothes washer and clothes dryer product classes at levels different from, and potentially less stringent than, the existing standards, if necessary.

Some commenters argued that because all clothes washers and clothes dryers are currently subject to energy and water conservation standards, regardless of the cycle time, that the proposal will result in an amendment or weakening of the current standards for these products in violation of EPCA's anti-backsliding provision. (Attorneys General and the Corporation Counsel of the City of New York, No. 0035, pp. 3–4, 5; CEC, No. 0038, pp. 3–4; LADWP, No. 0023, p. 1; NEEA, No. 0044, p. 8). Commenters argued that because the product classes lack accompanying standards, the rulemaking will result in an illegal backsliding for an uncertain period of time. (Valley Water, No. 0042, p. 1; WVWD, No. 0017, pp. 2–3; NEEA, No. 0044, p. 8). The new product classes will therefore contribute to the degradation of future energy and water savings as well as cause widespread resource waste to the detriment of utilities and consumers. (City of Tucson, No. 0039, p. 1; MNGWPD, No. 0025, p. 2; AWE, et al., No. 0029, pp. 2–3). Based on the investment manufacturers have already made in meeting current standards, AHAM notes that these product classes would undermine decades of improvements. (AHAM, No. 0030, p. 8).

DOE reiterates that it has yet to determine the standards that would be applicable to the new short cycle product classes for clothes washers and clothes dryers. Following the requirements of the Process Rule, DOE intends to establish standards through the standard-setting rulemaking process. Until such rulemakings are initiated, neither DOE nor the commenters can reasonably conclude whether or to what extent the potentially applicable standards for these new product classes will be lower than the standards currently applicable to the other clothes washers and clothes dryers product classes. As some commenters have noted, there are products on the market already offering normal cycle times close to the normal short cycle times that DOE has adopted for the new product classes that operate within the current conservation standards. (CEC, No. 0038, pp. 3–4). Until DOE completes its future rulemakings, it is premature to presume what standard will be applied to the new product classes and whether it will result in a lowering of existing standards as these commenters suggest.

As stated previously in this final rule, EPCA does not require the establishment of conservation standards simultaneously with the establishment of a new product class, *see* section III.A. Commenters' concerns regarding this matter are premature at this time.

Some commenters noted that DOE cannot argue that the anti-backsliding provision does not apply to clothes washer water efficiency standards while also arguing that the product class provision applies to those standards. DOE's contention that the text of EPCA's anti-backsliding provision forecloses its application to clothes washer water efficiency standards, at 85 FR 49307, leaves the Department no room to argue that the product class provision somehow applies to those standards, notwithstanding that the text of the product class provision addresses energy standards exclusively. (Joint Environmental Commenters, No. 0041, p. 8).

DOE maintains that the concerns raised by commenters regarding the overall applicability of EPCA's anti-backsliding provision to clothes washers is too broad and ignores the limitations that EPCA itself places on the scope of the anti-backsliding provision, 42 U.S.C. 6295(o)(1). DOE reminds commenters that EPCA's anti-backsliding provision

is limited in its applicability with regard to water use to four specified products, *i.e.,* showerheads, faucets, water closets, or urinals. DOE's existing energy conservation standard for clothes washers is comprised of both energy and water use components. As residential clothes washers are not one of the products listed in the text of the anti-backsliding provision with respect to water use, there is no prohibition on DOE specifying a maximum amount of water use for clothes washers that is greater than the existing standard.

Some commenters also challenged the proposed new product classes by claiming that DOE cannot argue section 42 U.S.C. 6295(o)(4) prohibits the Department from establishing standards that would eliminate certain product attributes from the market only to then claim that it is authorized to use the product class provision to reanimate features no longer available. Commenters argued that DOE cannot justify an attempt to claw back established energy conservation standards that would be contrary to the anti-backsliding provision and are unsupported by the product class provision under the guise of product unavailability. (Joint Environmental Commenters, No. 0041, p. 8).

Comments from Consumers' Research proposed that DOE's current energy efficiency standards have degraded clothes washer and dryer performance causing the disappearance of shorter, more effective cycles for these products. These commenters took this to mean that the current standards are actually in conflict with the policy of 42 U.S.C. 6295(o)(4), which prohibits the DOE from establishing standards that would result in the unavailability of any covered type (or class) of performance characteristics that were available prior to the adoption the a regulation. (No. 0037, pp. 2–3). Extended average cycle times, these commenters argued, may have caused a significant reduction in a product's utility that some consumers receive while others might voluntarily choose the longer cycle to save on their utility bill. All consumers should be able to choose between better performance and savings without losing the benefits received from shorter cycle times. (No. 0037, p. 3).

DOE is not relying on 42 U.S.C. 6295(o)(4) of EPCA to authorize the establishment of the new short, normal cycle product classes for clothes washers and clothes dryers. EPCA's product class provision provides that DOE may set standards for different product classes based on features that provide a consumer utility that is separate from other products within the same original product class. In this final rule, DOE maintains that products that can clean or dry clothing more quickly offer a specific consumer utility not available from appliances that require longer cycles to accomplish the same task. DOE asserts that the utility consumers will receive is the time saved resulting from the shorter normal wash or dry cycles. DOE reaffirms that while 42 U.S.C. 6295(o)(4) prohibits the establishment of standards that would eliminate certain product attributes from the market, Section 6295(q) of EPCA authorizes DOE to establish product classes and standards that recognize new technologies and product features which may no longer be available in the market. DOE's reading of the statute is consistent with DOE's prior acknowledgment that its determination of what constitutes a performance-related feature justifying a different standard may change depending on the technology and the consumer utility at issue, and that as a result, certain products may disappear from (or reappear in) the market entirely due to changing consumer demand. This reading is also consistent with DOE's prior statements that DOE determines this value on a case-by-case basis through its own research as well as public comments received. 80 FR 13120, 13138 (Mar. 12, 2015). In addition, once DOE makes a determination that a certain product attribute is a feature, DOE cannot later set a standard that would eliminate that feature. 85 FR 68723, 68737 (Oct. 30, 2020).

C. Other Statutory Challenges

Some commenters have argued that by categorically excluding this rulemaking from environmental review, DOE has violated the National Environmental Policy Act (''NEPA''), 42 U.S.C. 4321, *et seq.,* by determining that the new product classes would result in no environmental impacts. These commenters believed that this conclusion mischaracterizes the rulemaking, on the ground that DOE's actions would result in no efficiency standard from applying to the new product classes, and that this would cause unlimited amounts of energy and water to be used. In these commenters' view, the categorical exclusion DOE has selected is, therefore, not applicable, and commenters call for DOE to complete the NEPA analysis that they contend is necessary. (ASAP, et al., No. 0033, p. 4; Attorneys General and the Corporation Counsel of the City of New York, No. 0035, pp. 11, 12–14; Joint Environmental Commenters, No. 0041, pp. 8–9; CEC, No. 0038, p. 8–9; Public Meeting Transcript, No. 0026, pp. 13–14). The Attorneys General and the Corporation Counsel of the City of New York argued that amending existing regulations by adding new product classes not subject to any conservation standards would undoubtedly change the environmental effect of the rule, and that DOE must consider and explain how the increased energy use and pollution resulting from the proposal will impact the environment. (No. 0035, pp. 14–15) Some commenters also asserted that by applying a categorical exclusion to evade NEPA's review process, DOE has failed to provide any analysis on the potential impacts to water or energy resources that will result from finalizing the rulemaking without any accompanying efficiency standards. (Cohen, No. 0009; Valley Water, No. 0042, p. 1). Commenters requested that DOE provide more information concerning the potential environmental impacts of the new product classes. (Rubang, No. 0011).

DOE maintains that this rulemaking, once finalized, will only establish new product classes for clothes washers and clothes dryers with a short normal cycles of 30 or 45 minutes. Finalization of the rule will not cause adverse environmental impacts as commenters indicate, and the rule falls within the scope of Department activities excluded from NEPA review by the A5 Categorical Exclusion under 10 CFR part 1021, subpart D. This categorical exclusion applies to any rulemaking that interprets or amends an existing rule without changing the environmental effect of that rule. DOE maintains that establishing a new product classes for covered products will not result in a change to the environmental effect of the existing clothes washers and clothes dryers. As stated previously, DOE will engage in the rulemaking process to identify and select the applicable energy conservation standards for these new product classes once this rule is finalized. That future rulemaking will provide for the maximum improvement in energy efficiency that is technologically feasible and economically justified, and will result in a significant conservation of energy. 42 U.S.C. 6295(o)(2)(A). This action, which only establishes a product class for clothes washers and dryers with a short normal cycle of 30 or 45 minutes, therefore falls within the scope of the A5 Categorical Exclusion.

DOE also received comments challenging the rulemaking as violating EPCA and the Administrative Procedure Act (''APA''), 5 U.S.C. 551, *et seq.,* by failing to provide a satisfactory

explanation and a rational connection between the facts found and choice made that support finding sufficient justification for any requirement of 42 U.S.C. 6295(q). Specifically, these commenters argued that DOE provided no demonstration that quicker cycle times justify higher or lower standards, ignored evidence counter to DOE's position, and relied on pure speculation and assumptions that current standards are preventing manufacturers from developing shorter cycle times. (Attorneys General and the Corporation Counsel of the City of New York, No. 0035, pp. 15–17). Commenters also looked to the data provided by NEEA for clothes washers and dryers to conclude that consumers use quick cycle options relatively infrequently and instead choose to prioritize more efficient cycles over speed. (No. 0035, pp. 15–17).

The Department maintains that it has met the APA's requirements for providing a sufficient explanation of its reasoning for establishing new short cycle product classes for clothes washers and clothes dryers in the notice of proposed rulemaking, public meeting, and this final rule. DOE has responded to the information submitted through the public comment process and has concluded that the public would derive a utility from the time saved through the future availability of short normal cycle washers and dryers that are presently not available.

DOE also received comments challenging the validity of the rulemaking under the Paperwork Reduction Act, 42 U.S.C. 3501. One commenter disagreed with DOE's statement that the proposed rule did not impose new information or record keeping requirements. This commenter argued that under the correct definition of ''collection of information'', that the proposed rule, if finalized, is an instrument that constitutes a collection of information and should be subject to the procedural and substantive requirements of the Paperwork Reduction Act. Further, the commenter argued that DOE referenced the incorrect OMB control number and recommended that the Department reconsider the PRA. (60 Plus Association, No. 0043, p. 2).

DOE disagrees with these comments. The finalization of this rulemaking, which establishes product classes for residential clothes washers and consumer clothes dryers with cycle times of 30 or 45 minutes, does not establish standards or new testing requirements, nor does it impose new information or record keeping requirements. This is because the rule does not amend the reporting, recordkeeping, or certification requirements contained in the Department's currently-approved information collection process. Clearance by the Office of Management and Budget is not required under the PRA for this rulemaking.

D. Additional Comments

DOE also received a variety of additional comments expressing other concerns and support for the new product classes for residential clothes washers and consumer clothes dryers with cycle times of 30 or 45 minutes.

AHAM submitted a series of comments suggesting a number of unintended consequences of finalizing the proposed rule. AHAM remains skeptical that the finalization of the rule would actually achieve DOE's goals, especially for clothes dryers. Because manufacturers may elect to reduce spin time to establish a shorter normal wash cycle, this will cause more moisture to remain in the fabric and require longer, hotter, and more energy intense drying times. This, AHAM suggests, would make it difficult to sync DOE's dryer normal cycle time for the new product class along with the shorter cycle time for clothes washers as laundry products are sold and used as a pair. (No. 0030, p. 9; Public Meeting Transcript, No. 0026, p. 38). In response, DOE affirms that it is finalizing this rulemaking with the intent that the new product classes will motivate and encourage manufacturer innovation. Based on DOE's historic experience with the regulatory scheme, DOE has sound reason to believe that given the opportunity, manufacturers will use the technology available to them to develop products to meet the specific criteria set for new short normal cycle washers and dryers so that these products can continue to be used together and in less time.

DOE also received comments regarding the impacts of differing cycle times between clothes washers and clothes dryers that result from the use of automatic termination settings. These commenters argued that while it may be unlikely that clothes washer cycle times may not vary much from the tested cycle time, clothes dryer cycle times for automatic termination normal cycles could vary widely depending on a number of external factors. Commenters recommended that DOE must also consider the impact that higher temperature, a result of faster dryer cycles, could have on fabric care and the level of risk that consumers may be willing to accept in exchange for short cycle times. Commenters also noted that if DOE's proposal is finalized, it would possibly create disharmony between the US and Canada's standards, contrary to the goals of both the United States-Mexico- Canada Trade Agreement and the US-Canada Regulatory Cooperation Council. Commenters also note that the new product classes will increase the test burden for clothes washers and clothes dryers by requiring cycle time to be measured using Appendix D2, with no benefit to either consumers or energy conservation. (AHAM, No. 0030, pp. 8–9).

The potential unintended consequences that AHAM raises here are premature at this time and can be addressed, as appropriate, in future rulemakings concerning standards for these new product classes. DOE's actions in this rulemaking involve the establishment of new product classes, and do not result in the establishment of applicable standards or test procedures. Commenters will have ample opportunities to raise these matters in the appropriate future rulemakings, where DOE will consider costs, benefits, and many of the potential unintended consequences that AHAM described.

Additionally, AHAM noted that DOE's creation of the new product classes would cause added regulation based on the new investment that would be needed to meet the new standards once imposed. Such action, AHAM claims, would conflict with Executive Order 13771. (No. 0030, p. 8). GEA also commented that the proposal has the potential to add regulatory burdens to the industry through the costs associated with the designing, building, stocking, marketing, and selling of new models. (No. 0045, p. 3). As DOE explained in the NOPR, this rulemaking is a deregulatory action. 85 FR 49297, 49309 (Aug. 13, 2020). Finalization of this rulemaking will establish separate product classes for short cycle clothes washers and dryers and enable manufacturers to develop products that better meet consumers' needs as identified above. DOE does not require manufacturers to produce products that would meet the cycle times characterizing these product classes. It remains a manufacturer's choice whether to invest in the development of products for these new product classes.

DOE received comments requesting that the Department abandon this discretionary rulemaking action and instead focus its resources and attention on the many other delayed standards rulemakings that are required by EPCA. (CEC, No. 0038, pp. 1–2). DOE remains committed to providing opportunities to introduce products for consumers that will meet their specific needs by

engaging in this rulemaking. DOE continues to work towards meeting its other rulemaking responsibilities while advocating for consumer choice and enabling manufacturer innovation.

Some commenters challenged DOE's reliance on CEI's 2018 petition for short cycle dishwasher product class rulemaking as being misplaced in this rulemaking. (Public Meeting Transcript, No. 0026, p. 30, 32). Like challenges to the dishwasher short cycle product class, some commenters similarly called DOE's cycle times for clothes washers and clothes dryers to be arbitrarily proposed. (AHAM, No. 0030, pp. 2–3). Commenters asserted that CEI's petition does not address consumer satisfaction and utility regarding energy efficiency and conservation, environmental impacts, and affordable consumer consumption. (Rubang, No. 0011). Other commenters supported the similarities that DOE recognized between the values that both sets of products can offer consumers through short normal cycle times. (Consumers' Research, No. 0037, pp. 1–3).

DOE recognizes that there are many similarities between consumers' uses of residential dishwashers, residential clothes washers, and consumer clothes dryers respectively. Such similarities include the consumer utility over discrete cycles with programmed cycle times and the amount of time consumers spend running multiple cycles on average per week. DOE has used CEI's petition as a starting point to consider the types of improvements that may be achievable through decreased cycle times for clothes washers and dryers. DOE will continue to consider the impact for shorter normal cycles in subsequent rulemakings as required through EPCA's standards and test procedure provisions.

Some commenters claimed that the proposal would harm consumers and that DOE failed to consider such consumer impacts when issuing the proposal. Commenters claimed that the proposal would arbitrarily deny consumers access to accurate information about the energy use and operating costs associated with using their washer and dryer. (Joint Environmental Commenters. No. 0041, p. 9; City of Tucson, No. 0039, p. 1). Similarly, in the absence of accompanying conservation standards, some commenters argued that consumers will be stuck with products that significantly increase their utilities bills without providing a noticeably shorter cycle time than what was already available. In addition to increasing water and energy use, this could also negatively impact domestic manufacturers and U.S. jobs through the influx of low-cost products from foreign manufacturers. (ASAP et al., No. 0033, p. 2; Public Transcript, No. 0026, p. 14). The LADWP expressed its concern that the absence of conservation standards could have a significant impact to rebate and incentive programs currently available to utility customers. (No. 0023 p. 1). DOE is aware of these commenters' concern for the negative impacts they propose will result as a product of this rulemaking on consumers. In this rulemaking DOE is finalizing the establishment of new product classes for short normal cycle clothes washers and clothes dryers. DOE is not setting a mandate that consumers must purchase future products that meet the criteria of these product classes. In response to the concern raised by the utilities regarding existing rebates or incentives, it is within their authority to modify existing programs in light of this rulemaking, and nothing in this rule would prevent such activity if the utility decided to adopt such modifications. When this rulemaking is completed, consumers will be able to purchase the product that best meets their individual needs and interests. DOE's actions here serve as an opportunity for manufacturers to develop and provide new products that expand the choices available to consumers when selecting the best products for their needs.

Many commenters voiced their concern regarding the lack of analysis completed by the Department concerning the associated increase of water use and depletion of resources that would result from this rulemaking. (WVWD, No. 0017, p. 2; AWE, et al., No. 0029, p. 2; Save Water, No. 0006; WMWD, No. 0019, p. 1). Commenters believed that the increased water use caused by the rulemaking will negatively impact the current water demand projections many local utilities and programs depend upon for operation. (City of Tucson, No. 0039, p. 1). Some commenters noted that the proposal would conflict with state water conservation initiatives and legislation as well as cause water demands to exceed the available supply. (City of Sacramento Department of Utilities, No. 0020, p. 2). Commenters noted that under the current standard, the combined savings from various plumbing fixtures and appliances, such as clothes washers, are anticipated to reduce future municipal water demands. Reducing the water efficiency standard for clothes washers through the proposed rulemaking would likely reduce the anticipated water savings and increase future demands. (TWDB, No. 0032, pp. 1–2). DOE recognizes the importance of dependable water supply predictions and the many water availability issues that impact parts of the nation. As stated previously, this rulemaking does not serve to set water (or energy) conservation standards for clothes washers. While the various concerns expressed by the commenters may well be valid as a general matter, raising them in this rulemaking is premature and it is too soon to speculate on the impact of conservation standards that have yet to be set. EPCA prescribes that when DOE establishes new conservation standards, DOE shall consider the need for national energy and water conservation as part of determining whether a potential standard is economically justified. 42 U.S.C. 6295(o)(b)(i)(VI). DOE will consider these concerns in that future standards rulemaking.

CEC claimed that the rulemaking amounted to an energy conservation standard rulemaking and must follow the Department's Process Rule, specifically section 6. (Appendix A to subpart C of part 430). CEC argued that in order to be consistent with its own procedural requirement, DOE should withdraw the proposal and issue an early assessment for amended standards and better engage the public. (No. 0038, p. 9).

CEC is mistaken that this rulemaking equates to an energy conservation standard rulemaking. In this rulemaking DOE is establishing short normal cycle product classes for residential clothes washers and consumer clothes dryers that offer 30 or 45 minute cycles. DOE is not setting associated conservation standards or test procedures for those covered products at this time. DOE intends to complete these necessary rulemakings once the new product classes are established and will follow the procedures set out in the Process Rule as well as the requirements prescribed in EPCA. (Public Meeting Transcript, No. 0026, p. 36). Under the Process Rule, DOE has 180 days from the completion of a test procedure determination to propose associated conservation standards. Once these new product classes are finalized, DOE will turn its attention to the next step of the process by initiating the required test procedure and conservation standard rulemakings.

IV. Conclusion

DOE has concluded that it has legal authority to establish separate short-cycle product classes for residential clothes washers and consumer clothes dryers pursuant to 42 U.S.C. 6295(q). In this rulemaking, DOE has established

separate product classes for top-loading standard-size and front-loading standard-size residential clothes washers with cycle times of less than 30 and 45 minutes, respectively, and for vented electric standard-size and vented gas clothes dryers with a cycle time of less than 30 minutes. DOE will consider test procedures and energy conservation standards in separate rulemakings that will include an analysis of energy and water consumption limits in order to determine standards for each product class that provide for the maximum energy efficiency that is technologically feasible and economically justified, and will result in a significant conservation of energy. (42 U.S.C. 6295(o)(2)(A)) DOE will provide additional opportunity for comment on any proposed energy conservation standards for short-cycle residential clothes washers and consumer clothes dryers.

DOE will update the requirements for the residential clothes washer and consumer clothes dryer standards at 10 CFR 430.32(g)(4) and (h)(3), respectively. The current requirements included in these tables specify the applicable energy conservation standards. DOE will include new paragraphs following each table showing the current requirements to specify that top-loading standard-size and front-loading standard-size residential clothes washers with an average cycle time of less than 30 and 45 minutes, respectively, are not currently subject to energy or water conservation standards, and that vented electric standard-size and vented gas clothes dryers with a cycle time of less than 30 minutes are not currently subject to energy conservation standards.

V. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866 ''Regulatory Planning and Review''

This final rule is a ''significant regulatory action'' under the criteria set out in section 3(f) of Executive Order 12866, ''Regulatory Planning and Review.'' 58 FR 51735 (October 4, 1993). Accordingly, this action was subject to review by the Office of Information and Regulatory Affairs (''OIRA'') in the Office of Management and Budget (''OMB''). DOE does not anticipate that the creation of the new product classes will result in any quantifiable costs or benefits. Such costs or benefits would derive from the applicable test procedures and energy conservations standards, which the Department will prescribe in separate rulemakings.

B. Review Under Executive Orders 13771 and 13777

On January 30, 2017, the President issued Executive Order (''E.O.'') 13771, ''Reducing Regulation and Controlling Regulatory Costs.'' 82 FR 9339. E.O. 13771 stated the policy of the executive branch is to be prudent and financially responsible in the expenditure of funds, from both public and private sources. E.O. 13771 stated it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations. In addition, on February 24, 2017, the President issued Executive Order 13777, ''Enforcing the Regulatory Reform Agenda.'' (82 FR 12285 (March 1, 2017)). The order requires the head of each agency to designate an agency official as its Regulatory Reform Officer (RRO). Each RRO is tasked with overseeing the implementation of regulatory reform initiatives and policies to ensure that individual agencies effectively carry out regulatory reforms, consistent with applicable law. Further, E.O. 13777 requires the establishment of a regulatory task force at each agency. The regulatory task force is required to make recommendations to the agency head regarding the repeal, replacement, or modification of existing regulations, consistent with applicable law.

DOE has determined that this final rule is a deregulatory action under E.O. 13771. This rule establishes separate product classes for short-cycle residential clothes washers and consumer clothes dryers with cycle times of less than 30 or 45 minutes. DOE has designated this rulemaking as ''deregulatory'' under E.O. 13771 because it is an enabling regulation pursuant to OMB memo M–17–21. Manufacturers could design and manufacture new products in this product class to meet consumer demand. DOE will seek data to assist its determination of the appropriate standard levels for such product classes in subsequent rulemakings.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (''IRFA'') for any rule that by law must be proposed for public comment and final regulatory flexibility analysis (''FRFA'') for any such rule that an agency adopts as a final rule, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made these procedures and policies available on the Office of the General Counsel's website (*http://energy.gov/gc/office-general-counsel*).

DOE reviewed this rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. DOE has concluded that this rule will not have a significant impact on a substantial number of small entities. The factual basis for this determination is as follows:

The Small Business Administration (''SBA'') considers a business entity to be a small business, if, together with its affiliates, it employs less than a threshold number of workers or earns less than the average annual receipts specified in 13 CFR part 121. The threshold values set forth in these regulations use size standards and codes established by the North American Industry Classification System (''NAICS'') that are available at: *https://www.sba.gov/document/support--table-size-standard.* The threshold number for NAICS classification code 335220, major household appliance manufacturing, which includes clothes dryer and clothes washer manufacturers, is 1,500 employees. Manufacturers must certify compliance of their products to DOE prior to distributing them in commerce. Most of the manufacturers supplying residential clothes washers and consumer clothes dryers into the United States are large multinational corporations. DOE collected data from DOE's compliance certification database [14] to identify manufacturers of residential clothes washers and consumer clothes dryers. DOE then consulted publicly available data, purchased company reports from vendors such as Dun and Bradstreet, to determine whether they meet the SBA's definition of a ''small business manufacturer'' and have their manufacturing facilities located within the United States. Based on this analysis, DOE did not identify any small businesses that manufacture residential clothes washers or consumer clothes dryers. In addition, this rulemaking establishes product classes for residential clothes washers and

[14] *https://www.regulations.doe.gov/certification-data.*

consumer clothes dryers with cycle times less than 30 or 45 minutes and does not impose new requirements on small entities. Therefore, no new costs will result from the rulemaking. Appropriate standard levels will be established in subsequent rulemakings, which will include consideration of potential new costs. As a result, DOE certifies that this rule will not have a significant impact on a substantial number of small entities. DOE will transmit the certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

D. Review Under the Paperwork Reduction Act of 1995

This rulemaking, which establishes product classes for residential clothes washers and consumer clothes dryers with cycle times less than 30 or 45 minutes, but does not establish standards or new testing requirements that would be required for testing such products, imposes no new information or record keeping requirements. Accordingly, Office of Management and Budget clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.*)

Manufacturers of covered products generally must certify to DOE that their products comply with any applicable energy conservation standards. To certify compliance, manufacturers must first obtain test data for their products according to the DOE test procedures, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including residential clothes washers and consumer clothes dryers. (*See generally* 10 CFR part 429). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (''PRA''). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 35 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any 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.

E. Review Under the National Environmental Policy Act of 1969

Pursuant to the National Environmental Policy Act (''NEPA'') of 1969, DOE has analyzed this action in accordance with NEPA and DOE's NEPA implementing regulations (10 CFR part 1021). DOE has determined that this rule qualifies for categorical exclusion (''CX'') under 10 CFR part 1021, subpart D, appendix A5, because it is an interpretive rulemaking that does not change the environmental effect of the rule and meets the requirements for application of a CX. See 10 CFR 1021.410. Therefore, DOE has determined that promulgation of this rule is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA, and does not require an environmental assessment or an environmental impact statement.

F. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (Aug. 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this final rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297) No further action is required by Executive Order 13132.

G. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity, (2) write regulations to minimize litigation, and (3) provide a clear legal standard for affected conduct rather than a general standard and (4) promote simplification and burden reduction. 61 FR 4729 (Feb. 7, 1996). Section 3(b) of Executive Order 12988 specifically requires that executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any, (2) clearly specifies any effect on existing Federal law or regulation, (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction, (4) specifies the retroactive effect, if any, (5) adequately defines key terms, and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

H. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (''UMRA'') requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental

consultation under UMRA (62 FR 12820) (also available at *http://energy.gov/sites/prod/files/gcprod/documents/umra_97.pdf*). This final rule contains neither an intergovernmental mandate nor a mandate that may result in the expenditure of $100 million or more in any year, thus, the requirements under the Unfunded Mandates Reform Act do not apply.

I. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Public Law 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This final rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

J. Review Under Executive Order 12630

The Department has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 15, 1988), that this final rule would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

K. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

L. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that (1)(i) is a significant regulatory action under Executive Order 12866, or any successor order; and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits for energy supply, distribution, and use. This rule, which establishes product classes for residential clothes washers and consumer clothes dryers with cycle times less than 30 or 45 minutes, would not have a significant adverse effect on the supply, distribution, or use of energy and has not otherwise been designated by the OIRA Administrator as a significant energy action. The rule, therefore, is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects on this rule.

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule before its effective date. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

VI. Approval of the Office of the Secretary

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

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Signing Authority

This document of the Department of Energy was signed on December 2, 2020, by Daniel R Simmons, Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on December 3, 2020.

Treena V. Garrett,

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

For the reasons set forth in the preamble, DOE is amending part 430 of chapter II, subchapter D, of title 10 of the Code of Federal Regulations, as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. Section 430.32 is amended by revising paragraphs (g)(4) and (h)(3) to read as follows:

§ 430.32 Energy and water conservation standards and their compliance dates.

* * * * *

(g) * * *

(4)(i) Except as provided in paragraph (g)(4)(ii) of this section, clothes washers manufactured on or after January 1, 2018, shall have an Integrated Modified Energy Factor no less than, and an Integrated Water Factor no greater than:

Product class	Integrated modified energy factor (cu.ft./kWh/cycle)	Integrated water factor (gal/cycle/cu.ft.)
(A) Top-loading, Compact (less than 1.6 ft3 capacity)	1.15	12.0
(B) Top-loading, Standard (1.6 ft3 or greater capacity)	1.57	6.5
(C) Front-loading, Compact (less than 1.6 ft3 capacity)	1.13	8.3

Product class	Integrated modified energy factor (cu.ft./kWh/cycle)	Integrated water factor (gal/cycle/cu.ft.)
(D) Front-loading, Standard (1.6 ft3 or greater capacity)	1.84	4.7

(ii) Top-loading, standard clothes washers with an average cycle time of less than 30 minutes and front-loading, standard clothes washers with an average cycle time of less than 45 minutes are not currently subject to energy or water conservation standards.

(h) * * *

(3)(i) Except as provided in paragraph (h)(3)(ii) of this section, clothes dryers manufactured on or after January 1, 2015, shall have a combined energy factor no less than:

Product class	Combined energy factor (lbs/kWh)
(A) Vented Electric, Standard (4.4 ft3 or greater capacity)	3.73
(B) Vented Electric, Compact (120V) (less than 4.4 ft3 capacity)	3.61
(C) Vented Electric, Compact (240V) (less than 4.4 ft3 capacity)	3.27
(D) Vented Gas	3.30
(E) Ventless Electric, Compact (240V) (less than 4.4 ft3 capacity)	2.55
(F) Ventless Electric, Combination Washer-Dryer	2.08

(ii) Vented, electric standard clothes dryers and vented gas clothes dryers with a cycle time of less than 30 minutes are not currently subject to energy conservation standards.

* * * * *

[FR Doc. 2020–26976 Filed 12–15–20; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–3343; Product Identifier 2015–SW–078–AD; Amendment 39–21353; AD 2020–25–11]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2014–12–12, which applied to certain Airbus Helicopters Model EC120B and EC130B4 helicopters. AD 2014–12–12 required inspecting and, if necessary, replacing parts of the sliding door star support attachment assembly. This AD requires modifying the sliding door star support stringer as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference (IBR). This AD was prompted by several incidents involving helicopter left-hand side doors (both swinging and sliding) that revealed weaknesses in the locking mechanism. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 21, 2021.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 21, 2021.

ADDRESSES: For material incorporated by reference in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this material on the EASA website at *https://ad.easa.europa.eu.* You may view this material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2016–3343.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2016–3343; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Kathleen Arrigotti, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA; telephone 206–231–3218; email *kathleen.arrigotti@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2020–0095, dated April 29, 2020 (EASA AD 2020–0095), to correct an unsafe condition for certain Airbus Helicopters Model EC120B and EC130B4 helicopters.

The FAA issued a supplemental notice of proposed rulemaking (SNPRM) to amend 14 CFR part 39 by adding an AD to supersede AD 2014–12–12, Amendment 39–17873 (79 FR 36638, June 30, 2014) (AD 2014–12–12). AD 2014–12–12 applied to certain Airbus Helicopters Model EC120B and EC130B4 helicopters. The SNPRM published in the **Federal Register** on September 22, 2020 (85 FR 59454). The FAA preceded the SNPRM with a notice of proposed rulemaking (NPRM) that published in the **Federal Register** on October 26, 2016 (81 FR 74362). The NPRM was prompted by the determination to expand the applicability to all serial-numbered EC120B helicopters with affected sliding doors installed and require compliance with revised service information. The NPRM proposed to require inspecting each upper and lower locking pin control rod end fitting and replacing it if necessary, cleaning and dye-penetrant inspecting the star support pin for cracking and replacing it if necessary, and reinforcing the sliding door star support stringer. The SNPRM proposed to require modifying the door locking/unlocking mechanism, as specified in EASA AD 2020–0095.

The FAA is proposing this AD to address failure of the sliding door star support, which could inhibit the operation of the sliding door from the inside, delaying the evacuation of passengers during an emergency. See EASA AD 2020–0095 for additional background information.

Comments

The FAA gave the public the opportunity to participate in developing this final rule. The FAA received no comments on the SNPRM or on the determination of the cost to the public.

Conclusion

The FAA reviewed the relevant data and determined that air safety and the public interest require adopting this final rule as proposed, except for minor editorial changes and an exception that does not affect helicopters of U.S. registry. The FAA has determined that these minor changes:

- Are consistent with the intent that was proposed in the SNPRM for addressing the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in-the SNPRM.

Related Service Information Under 1 CFR Part 51

The FAA reviewed EASA AD 2020–0095, which describes improved procedures for modifying the door locking/unlocking mechanism (*e.g.* modifying the sliding door star support by installing a reinforcing bracket and replacing rod ends).

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

Differences Between This AD and the EASA AD

EASA AD 2020–0095 specifies to do the modification within 24 months. This AD requires the modification be done within 460 hours time-in-service (TIS), based on an average of 230 hours TIS per year. The FAA has determined this compliance time represents the maximum interval of time allowable for the affected helicopters to continue to safely operate before the modification is done. While EASA AD 2020–0095 allows credit for Airbus Helicopters Alert Service Bulletin No. EC120–52A018, Revision 0, dated November 13, 2015 (ASB EC120–52A018 at original issue), this AD does not because the applicable helicopter is not U.S.-registered.

Costs of Compliance

The FAA estimates that this AD would affect 261 helicopters of U.S. Registry. Labor rates are estimated at $85 per work-hour. Based on these numbers, the FAA estimates that operators may incur the following costs in order to comply with this proposed AD.

Modifying the door locking/unlocking mechanism takes about 20 work-hours and parts cost about $642 for an estimated cost of $2,342 per helicopter and $611,262 for the U.S. fleet.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive (AD) 2014–12–12, Amendment 39–17873 (79 FR 36638, June 30, 2014); and

■ b. Adding the following new AD:

2020–25–11 Airbus Helicopters: Amendment 39–21353; Docket No. FAA–2016–3343; Product Identifier 2015–SW–078–AD.

(a) Effective Date

This airworthiness directive (AD) is effective January 21, 2021.

(b) Affected ADs

This AD replaces AD 2014–12–12, Amendment 39–17873 (79 FR 36638, June 30, 2014).

(c) Applicability

This AD applies to Airbus Helicopters Model EC120B and EC130B4 helicopters, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2020–0095, dated April 29, 2020 (EASA AD 2020–0095).

(d) Subject

Joint Aircraft System Component (JASC) Code 5200, Doors.

(e) Reason

This AD was prompted by reports of passengers not being able to open a helicopter's left-hand door after landing. The FAA is issuing this AD to address failure of the sliding door star support, which could inhibit the operation of the sliding door from the inside, delaying the evacuation of passengers during an emergency.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2020–0095.

(h) Exceptions to EASA AD 2020–0095

(1) Where EASA AD 2020–0095 refers to its effective date, this AD requires using the effective date of this AD.

(2) Where paragraph (1) of EASA AD 2020–0095 specifies to complete the actions within 24 months after its effective date, this AD requires completion within 460 hours time-in-service after the effective date of this AD.

(3) The ''Remarks'' section of EASA AD 2020–0095 does not apply to this AD.

(4) Although the service information referenced in EASA AD 2020–0095 specifies to discard certain parts, this AD does not include that requirement.

(5) Where EASA AD 2020–0095 allows credit for Airbus Helicopters Alert Service Bulletin No. EC120–52A018, Revision 0, dated November 13, 2015 (ASB EC120–52A018 at original issue), this AD does not.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Strategic Policy Rotorcraft Section, FAA, may approve AMOCs for this AD. Send your proposal to: Manager, Strategic Policy Rotorcraft Section, FAA, 10101 Hillwood Pkwy, Fort Worth, TX 76177; telephone 817–222–5110; email *9/ASW/FTW/AMOC-Requests@faa.gov.*

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

(j) Related Information

For more information about this AD, contact Kathleen Arrigotti, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA; telephone 206–231–3218; email *kathleen.arrigotti@faa.gov.*

(k) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2020–0095, dated April 29, 2020.

(ii) [Reserved]

(3) For EASA AD 2020–0095, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.*

(4) You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy, Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2016–3343.

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

Issued on December 3, 2020.

Gaetano A. Sciortino,

Deputy Director for Strategic Initiatives, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–27659 Filed 12–15–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0592; Project Identifier AD–2020–00251–E; Amendment 39–21352; AD 2020–25–10]

RIN 2120–AA64

Airworthiness Directives; General Electric Company Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all General Electric Company (GE) GEnx-1B64/P2, GEnx-1B67/P2, GEnx-1B70/75/P2, GEnx-1B70/P2, GEnx-1B70C/P2, GEnx-1B74/75/P2, GEnx-1B76/P2, GEnx-1B76A/P2, and GEnx-2B67/P model turbofan engines with a certain high-pressure turbine (HPT) rotor stage 2 disk installed. This AD was prompted by a report of the potential for undetected subsurface anomalies formed during the manufacturing process that could result in uncontained failure of the HPT rotor stage 2 disk. This AD requires an immersion ultrasonic inspection (USI) of the HPT rotor stage 2 disk and, depending on the results of the inspection, replacement of the HPT rotor stage 2 disk with a part eligible for installation. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 21, 2021.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of January 21, 2021.

ADDRESSES: For service information identified in this final rule, contact General Electric Company, GE Aviation, Room 285, 1 Neumann Way, Cincinnati, OH 45215; phone: (513) 552–3272; email: *aviation.fleetsupport@ge.com.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (781) 238–7759. It is also available at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0592.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0592; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Mehdi Lamnyi, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7743; fax: (781) 238–7199; email: *Mehdi.Lamnyi@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all GE GEnx-1B64/P2, GEnx-1B67/P2, GEnx-1B70/75/P2, GEnx-1B70/P2, GEnx-1B70C/P2, GEnx-1B74/75/P2, GEnx-1B76/P2, GEnx-1B76A/P2, and GEnx-2B67/P model turbofan engines with a certain HPT rotor stage 2 disk installed. The NPRM published in the **Federal Register** on June 12, 2020 (85 FR 35816). The NPRM was prompted by a report of the potential for undetected subsurface anomalies formed during the manufacturing process that could result in uncontained failure of the HPT rotor stage 2 disk. In the NPRM, the FAA proposed to require an immersion USI of the HPT rotor stage 2 disk and, depending on the results of the inspection, replacement of the HPT rotor stage 2 disk with a part eligible for installation. The FAA is issuing this AD to address the unsafe condition on these products.

Discussion of Final Airworthiness Directive

Comments

The FAA received comments from six commenters. The commenters were Air Line Pilots Association, International (ALPA); The Boeing Company (Boeing); Cargolux Airlines International S.A. (Cargolux); GE Aviation; United Airlines (UAL) Engineering; and Qantas Airways Limited (Qantas). One commenter requested that the FAA update the Affected ADs paragraph of this AD. One commenter requested that the HPT rotor stage 2 disks be replaced instead of inspected. One commenter requested that the FAA update the Definitions paragraph of this AD. Two commenters requested adding credit for previous action. Three commenters supported the AD. The following presents the comments received on the NPRM and the FAA's response to each comment.

Request To Update Affected ADs

UAL Engineering requested that the FAA update paragraph (b), Affected ADs, of this AD to note the impact of the reduced life limits imposed by AD 2020–20–11 (85 FR 60898, September 29, 2020) (AD 2020–20–11) when complying with this AD. UAL Engineering reasoned that multiple HPT rotor stage 2 disks are affected by both rules, and leaving paragraph (b) blank creates ambiguity for operators generating compliance documentation for the dual-affected disks and engines.

The FAA disagrees. Paragraph (b) of this AD identifies superseded or revised ADs, or other ADs if the requirements of those ADs are affected (*i.e.,* terminating actions). This AD does not meet any of those conditions. Although this AD affects certain HPT rotor stage 2 disks that also affected AD 2020–20–11, the ADs address separate root causes and have different compliance actions and times. To comply with this AD, the affected HPT rotor stage 2 disks must be inspected and replaced if a rejectable indication is found. If, in accordance with AD 2020–20–11, an affected HPT rotor stage 2 disk has already been removed from service, then no further action is necessary to comply with the requirements of this AD.

Request To Replace Certain HPT Rotor Stage 2 Disks

GE Aviation requested that HPT rotor stage 2 disks with serial numbers TMT3UA34, TMT3UA55, TMT4CT46, or TMT4CT47, be replaced instead of inspected. GE reasoned that AD 2020–20–11 supersedes this AD, and the disks should be replaced in accordance with AD 2020–20–11.

The FAA disagrees. AD 2020–20–11 does not supersede this AD. Both ADs address separate root causes and have different compliance actions and times. AD 2020–20–11 requires replacement of certain HPT rotor stage 2 disks before accumulating a specified number of cycles since new. This AD requires a USI of certain HPT rotor stage 2 disks and, depending on the results of the inspection, replacement of the HPT rotor stage 2 disk. This AD may require replacement of an HPT rotor stage 2 disk prior to the required compliance time specified in AD 2020–20–11. If, however, an HPT rotor stage 2 disk is removed from service per AD 2020–20–11, then the affected turbofan engine would no longer have an affected HPT rotor stage 2 disk installed and would fall outside of the applicability of this AD.

Request To Update Definition of Engine Shop Visit

Qantas requested that the FAA update the definition of an ''engine shop visit'' to exclude engines with 2,000 or fewer cycles since new (CSN) that install the new retaining clips for the HPT stage 2 nozzle assembly (retaining clips) introduced in GEnx-1B Service Bulletin (SB) 72–0398 during a ''Quick Turn'' shop visit. Qantas reasoned that the definition of an ''engine shop visit'' in the NPRM would require the removal and inspection of an affected HPT rotor stage 2 disk during their planned low-time engine elective ''Quick Turn'' shop visit for installation of the new retaining clips. Qantas concluded that additional disassembly, cost, and engine shop turn time will significantly affect the viability of the GE retaining clip ''Quick Turn'' program.

The FAA disagrees with excluding low-time engines that install the new retaining clips for the HPT Stage 2 Nozzle Assembly during a ''Quick Turn'' shop visit. Changing the definition to exclude the ''Quick Turn'' shop visit would possibly postpone the immersion USI of the HPT rotor stage 2 disk required by this AD until a subsequent shop visit. As a result, the risk of failure of the HPT rotor stage 2 disk would increase. Qantas did not provide documentation to show that excluding the ''Quick Turn'' shop visit from the definition of an engine shop visit offers an acceptable level of safety. The FAA, however, will consider requests for alternative methods of compliance if submitted documentation supports an acceptable level of safety.

Request To Add Credit for Previous Action

Cargolux and GE Aviation requested credit for previous performance of the immersion USI of the HPT rotor stage 2 disk using GE GEnx-1B Cleaning, Inspection and Repair Manual (CIR) 72–53–41, Special Procedure 001, or GE GEnx-2B CIR 72–53–41, Special Procedure 001. Cargolux reasoned that GE GEnx-2B SB 72–0402 R00, dated November 20, 2019, refers to GEnx-2B CIR 72–53–41, Special Procedure 001.

The FAA disagrees. This AD does not require the use of GE GEnx-1B CIR GEK112862, CIR 72–53–41, Special Procedure 001, Rev 31, dated January 31, 2020, or GE GEnx-2B CIR GEK114120, CIR 72–53–41, Special Procedure 001, Rev 24, dated January 31, 2020, to perform the immersion USI of the HPT rotor stage 2 disk. The CIR are referred to in the service information referenced in paragraph (i), Credit for Previous Action. Therefore, if an operator performs the actions using the CIR, the operator is performing the action using the service information and has complied with this AD. The FAA did not change this AD.

Support for the AD

ALPA, Boeing, and UAL Engineering expressed support for the AD as written.

Conclusion

The FAA reviewed the relevant data, considered any comments received, and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products.

Related Service Information Under 1 CFR Part 51

The FAA reviewed GE GEnx-1B SB 72–0463 R01, dated January 6, 2020, and GE GEnx-2B SB 72–0402 R01, dated January 8, 2020. This service information describes procedures for performing an immersion USI of the affected HPT rotor stage 2 disks on GEnx-1B and GEnx-2B model turbofan engines, respectively. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

Costs of Compliance

The FAA estimates that this AD affects 276 engines installed on airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
USI of HPT rotor stage 2 disk	8 work-hours × $85 per hour = $680	$0	$680	$187,680

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Remove and replace the HPT rotor stage 2 disk	2 work-hours x $85 per hour = $170	$458,900	$459,070

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–25–10 General Electric Company: Amendment 39–21352; Docket No. FAA–2020–0592; Project Identifier AD–2020–00251–E.

(a) Effective Date

This airworthiness directive (AD) is effective January 21, 2021.

(b) Affected ADs

None.

(c) Applicability

(1) This AD applies to all General Electric Company (GE) GEnx-1B64/P2, GEnx-1B67/P2, GEnx-1B70/75/P2, GEnx-1B70/P2, GEnx-1B70C/P2, GEnx-1B74/75/P2, GEnx-1B76/P2, and GEnx-1B76A/P2 model turbofan engines that have a high-pressure turbine (HPT) rotor stage 2 disk, part number (P/N) 2383M86P02, and a serial number (S/N) listed in paragraph 4, Appendix—A, Table 1, Table 2, or Table 3, of GE GEnx-1B Service Bulletin (SB) 72–0463 R01, dated January 6, 2020, installed.

(2) This AD applies to all GE GEnx-2B67/P model turbofan engines that have a HPT rotor stage 2 disk, P/N 2383M86P02, and a S/N listed in paragraph 4, Appendix—A, Table 1, Table 2, or Table 3, of GE GEnx-2B SB 72–0402 R01, dated January 8, 2020, installed.

(d) Subject

Joint Aircraft System Component (JASC) Code 7250, Turbine Section.

(e) Unsafe Condition

This AD was prompted by a report of the potential for undetected subsurface anomalies formed during the manufacturing process that could result in uncontained failure of the HPT rotor stage 2 disk. The FAA is issuing this AD to prevent failure of the HPT rotor stage 2 disk. The unsafe condition, if not addressed, could result in uncontained HPT rotor stage 2 disk release, damage to the engine, and damage to the airplane.

(f) Compliance

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

(g) Required Actions

(1) For affected GE GEnx-1B engines, at the next engine shop visit after the effective date of this AD, or before the HPT rotor stage 2 disk has accumulated 6,500 cycles since new (CSN), whichever occurs first, perform an immersion ultrasonic inspection (USI) of the HPT rotor stage 2 disk using paragraph 3.B.(1) of GE GEnx–1B SB 72–0463 R01, dated January 6, 2020.

(2) If, during the USI required by paragraph (g)(1) of this AD, a rejectable indication is found, before further flight, remove the HPT rotor stage 2 disk from service and replace it with a part eligible for installation.

(3) For affected GE GEnx-2B engines, at the next engine shop visit after the effective date of this AD, or before the HPT rotor stage 2 disk has accumulated 6,500 CSN, whichever occurs first, perform an immersion USI of the HPT rotor stage 2 disk using paragraph 3.B.(1) of GE GEnx-2B SB 72–0402 R01, dated January 8, 2020.

(4) If, during the USI required by paragraph (g)(3) of this AD, a rejectable indication is found, before further flight, remove the HPT rotor stage 2 disk from service and replace it with a part eligible for installation.

(h) Definitions

(1) For the purpose of this AD, an ''engine shop visit'' is when a major engine flange is separated for purposes other than the removal of the fan for transportation.

(2) For the purposes of this AD, a ''part eligible for installation'' is:

(i) An HPT rotor stage 2 disk that does not have an S/N listed in paragraph 4, Appendix—A, Table 1, Table 2, or Table 3, of GE GEnx-1B SB 72–0463 R01, dated January 6, 2020, or GE GEnx-2B SB 72–0402 R01, dated January 8, 2020; or,

(ii) An HPT rotor stage 2 disk that has successfully passed the immersion USI required by paragraph (g)(1) or (3) of this AD, or passed the immersion USI using GE GEnx-1B SB 72–0463 R00, dated November 20, 2019, or GE GEnx-2B SB 72–0402 R00, dated November 20, 2019, before the effective date of this AD.

(i) Credit for Previous Action

You may take credit for the immersion USI of the HPT rotor stage 2 disk required by paragraph (g)(1) or (3) of this AD if you performed this inspection before the effective date of this AD using GE GEnx-1B SB 72–0463 R00, dated November 20, 2019, or GE

GEnx-2B SB 72–0402 R00, dated November 20, 2019.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, ECO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in Related Information. You may email your request to: *ANE-AD-AMOC@faa.gov.*

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

(k) Related Information

For more information about this AD, contact Mehdi Lamnyi, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7743; fax: (781) 238–7199; email: *Mehdi.Lamnyi@faa.gov.*

(l) Material Incorporated by Reference

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

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

(i) General Electric Company (GE) GEnx-1B Service Bulletin (SB) 72–0463 R01, dated January 6, 2020, and

(ii) GE GEnx-2B SB 72–0402 R01, dated January 8, 2020.

(3) For GE service information identified in this AD, contact General Electric Company, GE Aviation, Room 285, 1 Neumann Way, Cincinnati, OH 45215; phone: (513) 552–3272; email: *aviation.fleetsupport@ge.com.*

(4) You may view this service information at FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (781) 238–7759.

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

Issued on December 3, 2020.

Gaetano A. Sciortino,

Deputy Director for Strategic Initiatives, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–27628 Filed 12–15–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0842; Product Identifier 2020–NM–101–AD; Amendment 39–21350; AD 2020–25–08]

RIN 2120–AA64

Airworthiness Directives; Yaborã Indústria Aeronáutica S.A. (Type Certificate Previously Held by Embraer S.A.) Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Yaborã Indústria Aeronáutica S.A. Model ERJ 170 airplanes and Model ERJ 190–100 STD, –100 LR, –100 ECJ, –100 IGW, –200 STD, –200 LR, and –200 IGW airplanes. This AD was prompted by reports of installation of inverted poles of the horizontal stabilizer pitch trim switches on the control yokes, which causes opposite commands for the horizontal stabilizer. This AD requires installing supports for the horizontal stabilizer control yoke pitch trim switches and re-identifying the control yokes, as specified in two Agência Nacional de Aviação Civil (ANAC) ADs, which are incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 21, 2021.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of January 21, 2021.

ADDRESSES: For material incorporated by reference (IBR) in this AD, contact National Civil Aviation Agency (ANAC), Aeronautical Products Certification Branch (GGCP), Rua Dr. Orlando Feirabend Filho, 230—Centro Empresarial Aquarius—Torre B—Andares 14 a 18, Parque Residencial Aquarius, CEP 12.246–190—São José dos Campos—SP, BRAZIL, Tel: 55 (12) 3203–6600; Email: *pac@anac.gov.br;* internet *www.anac.gov.br/en/.* You may find this IBR material on the ANAC website at *https://sistemas.anac.gov.br/certificacao/DA/DAE.asp.* You may view this IBR material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0842.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0842; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Krista Greer, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3221; *Krista.Greer@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The ANAC, which is the aviation authority for Brazil, has issued ANAC AD 2020–05–01, effective May 26, 2020; and ANAC AD 2020–05–02, effective May 26, 2020 (ANAC AD 2020–05–01 and ANAC AD 2020–05–02) (also referred to as the Mandatory Continuing Airworthiness Information, or the MCAI); to correct an unsafe condition for certain Yaborã Indústria Aeronáutica S.A. Model ERJ 170 airplanes and Model ERJ 190–100 STD, –100 LR, –100 ECJ, –100 IGW, –100 SR, –200 STD, –200 LR, and –200 IGW airplanes. Model ERJ 190–100 SR airplanes are not certificated by the FAA and are not included on the U.S. type certificate data sheet; this AD therefore does not include those airplanes in the applicability.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Yaborã Indústria Aeronáutica S.A. Model ERJ 170 airplanes and Model ERJ 190–100 STD, –100 LR, –100 ECJ, –100 IGW, –200 STD, –200 LR, and –200 IGW airplanes. The NPRM published in the **Federal Register** on September 17, 2020 (85 FR 58004). The NPRM was prompted by reports of installation of inverted poles of the horizontal stabilizer pitch trim switches on the control yokes, which causes opposite commands for the horizontal stabilizer. The NPRM proposed to require installing supports

for the horizontal stabilizer control yoke pitch trim switches and re-identifying the control yokes, as specified in ANAC AD 2020–05–01 and ANAC AD 2020–05–02.

The FAA is issuing this AD to address inverted poles of the horizontal stabilizer pitch trim switches on the control yokes, which could result in reduced controllability of the airplane. See the MCAI for additional background information.

Comments

The FAA gave the public the opportunity to participate in developing this final rule. The FAA has considered the comment received. The National Transportation Safety Board (NTSB) stated its support for the NPRM.

Clarification Since the NPRM Was Issued

The FAA has added a new paragraph (i) to this AD to clarify that although the service information referenced in ANAC AD 2020–05–01 and ANAC AD 2020–05–02 specifies to submit certain information to the manufacturer, this AD does not include that requirement. The FAA has re-identified subsequent paragraphs accordingly.

Conclusion

The FAA reviewed the relevant data, considered the comment received, and determined that air safety and the public interest require adopting this final rule with the change described previously and minor editorial changes. The FAA has determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for addressing the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

The FAA also determined that these changes will not increase the economic burden on any operator or increase the scope of this final rule.

Related Service Information Under 1 CFR Part 51

ANAC AD 2020–05–01 and ANAC AD 2020–05–02 describe procedures for installing supports for the horizontal stabilizer control yoke pitch trim switches and re-identifying the control yokes. These documents are distinct since they apply to different airplane models. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

The FAA estimates that this AD affects 324 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Up to 7 work-hours × $85 per hour = Up to $595	Up to $267	Up to $862	Up to $279,288.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–25–08 Yaborã Indústria Aeronáutica S.A. (Type Certificate Previously Held by Embraer S.A.): Amendment 39–21350; Docket No. FAA–2020–0842; Product Identifier 2020–NM–101–AD.

(a) Effective Date

This airworthiness directive (AD) is effective January 21, 2021.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Yaborã Indústria Aeronáutica S.A. Model airplanes identified in paragraphs (c)(1) and (2) of this AD, certificated in any category.

(1) Model ERJ 170–100 LR, –100 STD, –100 SE, –100 SU, –200 LR, –200 SU, –200 STD, and –200 LL airplanes, as identified in Agência Nacional de Aviação Civil (ANAC) AD 2020–05–01, effective May 26, 2020 (ANAC AD 2020–05–01).

(2) Model ERJ 190–100 STD, –100 LR, –100 ECJ, –100 IGW, –200 STD, –200 LR, and –200 IGW airplanes, as identified in ANAC AD 2020–05–02, effective May 26, 2020 (ANAC AD 2020–05–02).

(d) Subject

Air Transport Association (ATA) of America Code 27, Flight controls.

(e) Reason

This AD was prompted by reports of installation of inverted poles of the horizontal stabilizer pitch trim switches on the control yokes, which causes opposite commands for the horizontal stabilizer. The FAA is issuing this AD to address this condition, which could result in reduced controllability of the airplane.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, ANAC AD 2020–05–01 and ANAC AD 2020–05–02, as applicable.

(h) Exceptions to ANAC AD 2020–05–01 and ANAC AD 2020–05–02

(1) Where ANAC AD 2020–05–01 and ANAC AD 2020–05–02 refer to their effective date, this AD requires using the effective date of this AD.

(2) The ''Alternative method of compliance (AMOC)'' section of ANAC AD 2020–05–01 and ANAC AD 2020–05–02 does not apply to this AD.

(3) Where ANAC AD 2020–05–01 and ANAC AD 2020–05–02 prohibit installing certain parts, this AD prohibits their installation as of the applicable compliance time specified by paragraph (h)(3)(i) or (ii) of this AD.

(i) If the modification required by this AD was done before the effective date of this AD, installation is prohibited as of the effective date of this AD.

(ii) If the modification required by this AD is done after the effective date of this AD, installation is prohibited after accomplishment of the modification required by this AD.

(i) No Reporting Requirement

Although the service information referenced in ANAC AD 2020–05–01 and ANAC AD 2020–05–02 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

(j) Other FAA AD Provisions

The following provisions also apply to this AD:

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

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, Large Aircraft Section, International Validation Branch, FAA; or ANAC; or ANAC's authorized Designee. If approved by the ANAC Designee, the approval must include the Designee's authorized signature.

(k) Related Information

For more information about this AD, contact Krista Greer, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3221; *Krista.Greer@faa.gov.*

(l) Material Incorporated by Reference

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

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

(i) Agência Nacional de Aviação Civil (ANAC) AD 2020–05–01, effective May 26, 2020.

(ii) Agência Nacional de Aviação Civil (ANAC) AD 2020–05–02, effective May 26, 2020.

(3) For ANAC AD 2020–05–01 and ANAC AD 2020–05–02, contact National Civil Aviation Agency (ANAC), Aeronautical Products Certification Branch (GGCP), Rua Dr. Orlando Feirabend Filho, 230—Centro Empresarial Aquarius—Torre B—Andares 14 a 18, Parque Residencial Aquarius, CEP 12.246–190—São José dos Campos—SP, BRAZIL, Tel: 55 (12) 3203–6600; Email: *pac@anac.gov.br;* internet *www.anac.gov.br/en/.* You may find this IBR material on the ANAC website at *https://sistemas.anac.gov.br/certificacao/DA/DAE.asp.*

(4) You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0842.

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

Issued on December 1, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–27618 Filed 12–15–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0840; Project Identifier MCAI–2020–00907–T; Amendment 39–21344; AD 2020–25–02]

RIN 2120–AA64

Airworthiness Directives; Saab AB, Support and Services (Formerly Known as Saab AB, Saab Aeronautics) Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Saab AB, Support and Services Model 340A (SAAB/SF340A) and SAAB 340B airplanes; and Model SAAB 2000 airplanes. This AD was prompted by reports that certain nose landing gear (NLG) door attachment bolts are susceptible to hydrogen embrittlement. This AD requires replacing certain NLG door attachment bolts with serviceable bolts, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 21, 2021.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 21, 2021.

ADDRESSES: For material incorporated by reference (IBR) in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* You may view this IBR material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0840.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–

0840; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Shahram Daneshmandi, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206 231 3220; email Shahram. *Daneshmandi@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2020–0149, dated July 7, 2020 (EASA AD 2020–0149) (also referred to as the Mandatory Continuing Airworthiness Information, or the MCAI), to correct an unsafe condition for all Saab AB, Support and Services Model 340A (SAAB/SF340A) and SAAB 340B airplanes; and Model SAAB 2000 airplanes.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Saab AB, Support and Services Model 340A (SAAB/SF340A) and SAAB 340B airplanes; and Model SAAB 2000 airplanes. The NPRM published in the **Federal Register** on September 15, 2020 (85 FR 57168). The NPRM was prompted by reports that certain NLG door attachment bolts are susceptible to hydrogen embrittlement. The NPRM proposed to require replacing certain NLG door attachment bolts with serviceable bolts, as specified in an EASA AD.

The FAA is issuing this AD to address NLG door attachment bolts that were incorrectly manufactured and are susceptible to hydrogen embrittlement, decreasing the mechanical characteristics. This condition could lead to failure of the affected parts, which would impair the link between the NLG and NLG door and could prevent the extension or retraction of the NLG, and cause consequent damage to the airplane and possible loss of control during landing. See the MCAI for additional background information.

Comments

The FAA gave the public the opportunity to participate in developing this final rule. The FAA received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

The FAA reviewed the relevant data and determined that air safety and the public interest require adopting this final rule as proposed, except for minor editorial changes. The FAA has determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for addressing the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

EASA AD 2020–0149 describes procedures for identifying and replacing certain NLG door attachment bolts with serviceable bolts. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

The FAA estimates that this AD affects 103 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS *

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
2 work-hours × $85 per hour = $170	*$	*$170	*$17,510

*The FAA has received no definitive data that would enable the FAA to provide parts cost estimates for the bolt replacement specified in this AD.

According to the manufacturer, some or all of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected individuals. The FAA does not control warranty coverage for affected individuals. As a result, the FAA has included all known costs in the cost estimate.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–25–02 Saab AB, Support and Services (Formerly Known as Saab AB, Saab Aeronautics): Amendment 39–21344; Docket No. FAA–2020–0840; Project Identifier MCAI–2020–00907–T.

(a) Effective Date

This airworthiness directive (AD) is effective January 21, 2021.

(b) Affected Airworthiness Directives (ADs)

None.

(c) Applicability

This AD applies to all Saab AB, Support and Services (Formerly Known as Saab AB, Saab Aeronautics) Model 340A (SAAB/SF340A) and SAAB 340B airplanes; and Model SAAB 2000 airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 32, Landing Gear.

(e) Reason

This AD was prompted by reports that certain nose landing gear (NLG) door attachment bolts are susceptible to hydrogen embrittlement. The FAA is issuing this AD to address NLG door attachment bolts that were incorrectly manufactured and are susceptible to hydrogen embrittlement, decreasing the mechanical characteristics. This condition could lead to failure of the affected parts, which would impair the link between the NLG and NLG door and could prevent the extension or retraction of the NLG, and cause consequent damage to the airplane and possible loss of control during landing.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2020–0149, dated July 7, 2020 (EASA AD 2020–0149).

(h) Exceptions to EASA AD 2020–0149

(1) Where EASA AD 2020–0149 refers to its effective date, this AD requires using the effective date of this AD.

(2) The ''Remarks'' section of EASA AD 2020–0149 does not apply to this AD.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

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

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, Large Aircraft Section, International Validation Branch, FAA; or EASA; or Saab AB, Support and Services' EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(j) Related Information

For more information about this AD, contact Shahram Daneshmandi, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3220; email *Shahram.Daneshmandi@faa.gov.*

(k) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2020–0149, dated July 7, 2020.

(ii) [Reserved].

(3) For EASA AD 2020–0149, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.*

(4) You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0840.

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

Issued on November 23, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–27620 Filed 12–15–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0584; Product Identifier 2020–NM–069–AD; Amendment 39–21349; AD 2020–25–07]

RIN 2120–AA64

Airworthiness Directives; Embraer S.A. Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Embraer S.A. Model EMB–550 and EMB–545 airplanes. This AD was prompted by reports of cracks, delamination, and failure of the flight deck side windows during certification fatigue tests. This AD requires repetitive inspections of the flight deck side windows for any cracking or delamination, corrective action if necessary, and eventual replacement of the windows, as specified in an Agência Nacional de Aviação Civil (ANAC) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 21, 2021.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 21, 2021.

ADDRESSES: For material incorporated by reference (IBR) in this AD, contact National Civil Aviation Agency (ANAC), Aeronautical Products Certification Branch (GGCP), Rua Dr. Orlando Feirabend Filho, 230—Centro Empresarial Aquarius—Torre B—Andares 14 a 18, Parque Residencial Aquarius, CEP 12.246–190—São José dos Campos—SP, BRAZIL, Tel: 55 (12) 3203–6600; Email: *pac@anac.gov.br;* internet *www.anac.gov.br/en/.* You may find this IBR material on the ANAC website at *https://sistemas.anac.gov.br/certificacao/DA/DAE.asp.* You may view this IBR material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For

information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0584.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0584; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Kathleen Arrigotti, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3218; *Kathleen.Arrigotti@faa.gov*.

SUPPLEMENTARY INFORMATION:

Discussion

The ANAC, which is the aviation authority for Brazil, has issued ANAC AD 2020–04–01R01, effective May 22, 2020 (''ANAC AD 2020–04–01R01'') (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Embraer S.A. Model EMB–550 and EMB–545 airplanes.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Embraer S.A. Model EMB–550 and EMB–545 airplanes. The NPRM published in the **Federal Register** on July 17, 2020 (85 FR 43496). The NPRM was prompted by reports of cracks, delamination, and failure of the flight deck side windows during certification fatigue tests. The NPRM proposed to require repetitive inspections of the flight deck side windows for any cracking or delamination, corrective action if necessary, and eventual replacement of the windows, as specified in ANAC AD 2020–04–01R01.

The FAA is issuing this AD to address cracks and delamination, which could cause the flight deck side windows to fail and lead to an in-flight depressurization event. See the MCAI for additional background information.

Comments

The FAA gave the public the opportunity to participate in developing this final rule. The following presents the comment received on the NPRM and the FAA's response to each comment.

Request To Revise Exception to ANAC AD 2020–04–01R01 When No Crack, Delamination, or Damage Is Found

Embraer requested that the FAA revise the exception to ANAC AD 2020–04–01R01 in paragraph (h)(3) of the proposed AD. Embraer proposed the language be revised to: ''Where Brazilian AD 2020–04–01R01 refers to, ''in case of no crack, delamination or any other damage which do not allow to properly perform the required inspection by this AD, no action is required at this time,'' this AD requires that in the case of no findings in item (i) or (ii), no action is required by this AD until the next inspection interval.'' Embraer stated that its concern is that the current language in paragraph (h)(3) of the proposed AD may have an interpretation other than the original intent, which is to give instruction for the case of no damage is found as defined in paragraphs (b)(1)(i) and (b)(1)(ii) of ANAC AD 2020–04–01R01.

Embraer also stated that, since delamination (commonly defined as a reduced adhesion or separation of the interlayer between the acrylic plies) is found in airplane windows, the concern was to define this with additional detail in ANAC AD 2020–04–01R01 with the conditions related to the unsafe condition, which is the presence of cracks in the bolt holes. Embraer commented that delamination in the bolt holes area is not considered a critical structural concern; however, it could impede or make the crack inspection inconclusive. Embraer also pointed out that the window is required to be replaced with a window having the new part number when delamination is found.

Embraer stated that the NPRM could be interpreted to require immediate window replacement, even though delamination typically found in the visible areas of windows and other typical damage (scratches, crazing, etc.) are not immediate structural issues. Embraer pointed out that this delamination and damage are more of a visual aspect that many times result in early window replacements. Embraer also commented that the maintenance procedures are provided with the typical limits defined by the windows manufacturer for typical damages.

The FAA agrees with the commenter for the reasons provided above. Therefore, the FAA has revised paragraph (h)(3) of this AD as suggested by Embraer. This revision of paragraph (h)(3) of this AD provides further clarification of the exception to the requirements of paragraphs (b)(1)(i) and (ii) of ANAC AD 2020–04–01R01.

Conclusion

The FAA reviewed the relevant data, considered the comment received, and determined that air safety and the public interest require adopting this final rule with the change described previously and minor editorial changes. The FAA has determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for addressing the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

The FAA also determined that these changes will not increase the economic burden on any operator or increase the scope of this final rule.

Related Service Information Under 1 CFR Part 51

ANAC AD 2020–04–01R01 describes procedures for repetitive detailed inspections of the flight deck side windows for any cracking or delamination, and replacement of the windows. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

The FAA estimates that this AD affects 49 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
10 work-hour × $85 per hour = $850	$0	$850	$41,650

The FAA estimates the following costs to do any necessary on-condition action that would be required based on the results of any required actions. The FAA has no way of determining the number of aircraft that might need this on-condition action:

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
9 work-hours × $85 per hour = $765	$9,280 per window	$10,045

According to the manufacturer, some or all of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected individuals. The FAA does not control warranty coverage for affected individuals. As a result, the FAA has included all known costs in our cost estimate.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–25–07 Embraer S.A.: Amendment 39–21349; Docket No. FAA–2020–0584; Product Identifier 2020–NM–069–AD.

(a) Effective Date

This AD is effective January 21, 2021.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Embraer S.A. Model EMB–550 and EMB–545 airplanes, certificated in any category, as identified in Agência Nacional de Aviação Civil (ANAC) AD 2020–04–01R01, effective May 22, 2020 (''ANAC AD 2020–04–01R01'').

(d) Subject

Air Transport Association (ATA) of America Code 56, Windows.

(e) Reason

This AD was prompted by reports of cracks, delamination, and failure of the flight deck side windows during certification fatigue tests. The FAA is issuing this AD to address such cracks and delamination, which could cause the flight deck side windows to fail and lead to an in-flight depressurization event.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, ANAC AD 2020–04–01R01.

(h) Exceptions and Clarifications to Brazilian AD 2020–04–01R01

(1) Where ANAC AD 2020–04–01R01 refers to its effective date, or ''17 April, 2020, the effective date of the original issue of this [ANAC] AD,'' this AD requires using the effective date of this AD.

(2) Where ANAC AD 2020–04–01R01 refers to the compliance time of the repetitive inspections, ''at each 750 Flight Hours (FH),'' this AD requires a compliance time of, ''at intervals not to exceed 750 flight hours.''

(3) Where ANAC AD 2020–04–01R01 refers to, ''in case of no crack, delamination or any other damage which do not allow to properly perform the required inspection by this [ANAC] AD, no action is required at this time,'' this AD requires that in the case of no findings in paragraphs (b)(1)(i) and (ii) of ANAC AD 2020–04–01R01, no action is required by this AD until the next inspection interval.

(4) Where ANAC AD 2020–04–01R01 refers to the compliance time for the replacement of the flight deck side windows as, ''before the airplane logs 3,400 Flight Cycles Since New (FCSN),'' this AD requires a compliance time of ''before the airplane logs 3,400 FCSN, or within 50 flight cycles, whichever occurs later.''

(5) Replacement of the flight deck side windows as specified in paragraph (c)(1) of ANAC AD 2020–04–01R01 terminates the repetitive inspections for the flight deck side windows specified in paragraph (b)(2) of ANAC AD 2020–04–01R01.

(6) The ''Alternative method of compliance (AMOC)'' section of ANAC AD 2020–04–01R01 does not apply to this AD.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Large Aircraft Section, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the Large Aircraft Section, International Validation Branch, send it to the attention of the person identified in paragraph (j) of this AD. Information may be emailed to: *9-AVS-AIR-*

730-AMOC@faa.gov. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, Large Aircraft Section, International Validation Branch, FAA; or ANAC; or ANAC's authorized Designee. If approved by the ANAC Designee, the approval must include the Designee's authorized signature.

(j) Related Information

For more information about this AD, contact Kathleen Arrigotti, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3218; *Kathleen.Arrigotti@faa.gov.*

(k) Material Incorporated by Reference

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

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

(i) Agência Nacional de Aviação Civil (ANAC) AD 2020–04–01R01, effective May 22, 2020.

(ii) [Reserved]

(3) For ANAC AD 2020–04–01R01, contact ANAC, Aeronautical Products Certification Branch (GGCP), Rua Dr. Orlando Feirabend Filho, 230—Centro Empresarial Aquarius—Torre B—Andares 14 a 18, Parque Residencial Aquarius, CEP 12.246–190—São José dos Campos—SP, BRAZIL, Tel: 55 (12) 3203–6600; Email: *pac@anac.gov.br;* internet *www.anac.gov.br/en/.* You may find this IBR material on the ANAC website at *https://sistemas.anac.gov.br/certificacao/DA/DAE.asp.*

(4) You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0584.

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

Issued on December 1, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–27619 Filed 12–15–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

[Docket No. DEA–671]

Schedules of Controlled Substances: Exempt Anabolic Steroid Products

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Order with opportunity for comment.

SUMMARY: The Drug Enforcement Administration is denying applications to designate four in-process preparations containing trenbolone acetate as exempt anabolic steroid products under the Controlled Substances Act.

DATES: This order is effective December 16, 2020. Written comments must be postmarked, and electronic comments must be sent, on or before February 16, 2021.

ADDRESSES: To ensure proper handling of comments, please reference ''Docket No. DEA–671'' on all electronic and written correspondence, including any attachments.

Electronic comments: The Drug Enforcement Administration (DEA) encourages all comments be submitted electronically through the Federal eRulemaking Portal which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *http://www.regulations.gov/* and follow the online instructions at that site for submitting comments. Upon completion of your submission, you will receive a Comment Tracking Number for your comment. Please be aware that submitted comments are not instantaneously available for public view on *Regulations.gov*. If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment.

Paper comments: Paper comments that duplicate electronic submissions are not necessary and are discouraged. Should you wish to mail a paper comment *in lieu of* an electronic comment, it should be sent via regular or express mail to: Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152.

FOR FURTHER INFORMATION CONTACT: Terrence L. Boos, Drug and Chemical Evaluation, Diversion Control Division, Drug Enforcement Administration; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152; Telephone: (571) 362–3249.

SUPPLEMENTARY INFORMATION:

Posting of Public Comments

Please note that all comments received are considered part of the public record. They will, unless reasonable cause is given, be made available by DEA for public inspection online at *http://www.regulations.gov.* Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter. The Freedom of Information Act applies to all comments received. If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be made publicly available, you must include the phrase ''PERSONAL IDENTIFYING INFORMATION'' in the first paragraph of your comment. You must also place all the personal identifying information you do not want publicly available in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be made publicly available, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment.

Comments containing personal identifying information and confidential business information identified as directed above will generally be made publicly available in redacted form. If a comment has so much confidential business information or personal identifying information that it cannot be effectively redacted, all or part of that comment may not be made publicly available. Comments posted to *http://www.regulations.gov* may include any personal identifying information (such as name, address, and phone number) included in the text of your electronic submission that is not identified as directed above as confidential.

An electronic copy of this document is available at *http://www.regulations.gov* for easy reference.

Legal Authority

Anabolic steroids are listed in schedule III of the Controlled Substances Act (CSA). 21 U.S.C. 802(41) and 812(c), Schedule III(e). The CSA further provides that the Attorney General may, by regulation, exempt from any or all CSA provisions any

''compound, mixture, or preparation which contains any anabolic steroid, which is intended for administration to a human being or an animal, and which, because of its concentration, preparation, formulation or delivery system, does not present any significant potential for abuse.'' 21 U.S.C. 811(g)(3)(C). The authority to exempt these products has been delegated from the Attorney General to the Administrator of the Drug Enforcement Administration (DEA) (28 CFR 0.100(b)), who in turn, re-delegated this authority to the Assistant Administrator of Diversion Control (DC) (28 CFR part 0, Appendix to Subpart R, section 7(g)). The procedures for implementing this section are found at 21 CFR 1308.33.

Findings of Fact

DEA received an application from Ivy Animal Health, Inc. (Ivy), dated March 27, 2015, seeking to exempt two anabolic steroid-containing product preparations containing trenbolone acetate from control under the CSA. Letter from Ivy Animal Health, Inc. to DEA (Mar. 27, 2015), at 1. Specifically, the product preparations were Component TE–H in-process granulation and Component TE–H in-process pellets in bulk containers. *Id.*

Ivy based its application on the grounds that DEA had previously exempted other in-process granulations and pellets containing trenbolone acetate, and the Component TE–H ''product formulations contain the same active ingredients Trenbolone acetate and Estradiol'' as the other in-process materials that are currently exempt. *Id.* Ivy's application further stated that ''[t]he presence of Estradiol in the formulation with Trenbolone acetate renders the Component TE–H in process granulation and pellets unusable for anabolic steroid abuse.'' *Id.* at 4–5. Ivy noted that DEA has ''previously identified Component TE–S in process granulation and in process pellets as exempt from the CSA as the presence of Estradiol in the formulation prevented significant potential for abuse.'' *Id.* at 5.

Upon review of the application, DEA accepted it for filing. On April 29, 2015, DEA provided a copy of Ivy's application to the Secretary of Health and Human Services (HHS) and requested an evaluation and a recommendation.

DEA also received an application from Ivy Animal Health, Inc., dated April 30, 2015, seeking to exempt two anabolic steroid-containing product preparations containing trenbolone acetate from control under the CSA. Letter from Ivy Animal Health, Inc. to DEA (Apr. 30, 2015), at 1. Specifically, the product preparations were Component T–H in-process granulation and Component T–H in-process pellets in bulk containers. *Id.*

Ivy based its application on the grounds that DEA had ''previously identified Component TE–S in process granulation and in process pellets as exempt from the CSA as the formulation prevented significant potential for abuse.'' *Id.* The application noted that the ''combination of [trenbolone acetate] with the excipient materials under the manufacturing process conditions removes significant potential for abuse of the anabolic steroid in the granulation mixture and resultant in process pellets.'' *Id.* Ivy further noted that this formulation ''is identical to that of the Component® T–H packaged product pellets and presents no more potential for abuse than that of the excluded packaged implant product.'' *Id.* at 4. Ivy claimed that for Component T–H in-process granulation and Component T–H in-process pellets, ''[c]omplicated manipulation of the material, including dissolution, separation, and reconstituting, would be required to convert the in process material to Trenbolone acetate and prepare it for injection or some other delivery method.'' *Id.* at 5.

Upon review of the application, DEA accepted it for filing. On June 4, 2015, DEA provided a copy of Ivy's application to the Secretary of HHS and requested an evaluation and a recommendation.

On October 8, 2019, the Assistant Secretary for Health (ASH) provided HHS's evaluation and recommendation to DEA for both applications. Letter from Assistant Secretary for Health, HHS, to Acting Administrator, DEA, at 1 (Oct. 8, 2019) (ASH Letter). HHS found that ''[a]lthough there is no evidence that trenbolone is being obtained from in-process materials there is evidence that it is being abused.'' *Id.* HHS noted the availability of ''protocols or kits to purify trenbolone from marketed cattle pellets'' and concluded that these ''do-it-yourself kits'' makes the ''in-process materials easy to abuse.'' *Id.*

With respect to the inclusion of estradiol in Component TE–H in-process granulation and Component TE–H in-process pellets, HHS found that ''protocols and kits have been developed to purify trenbolone from estradiol.'' *Id.* Although HHS had previously ''recommended that DEA exempt in-process substances containing trenbolone and estradiol'' on the basis that ''inclusion of estradiol deterred abuse,'' because these kits and protocols are now available, ''it can no longer be concluded that the addition of estradiol to a substance containing trenbolone acetate deters the abuse of trenbolone acetate.'' *Id.*

HHS thus concluded ''that the products Component T–H in-process granulation and Component T–H in-process pellets, and Component TE–H in-process granulation and Component TE–H in-process pellets do not fit into the category of having no significant potential for abuse based on concentration, preparation, formulation, or delivery system.'' *Id.* The ASH thus recommended that Ivy's ''products be denied exemption from scheduling under the CSA.'' *Id.*

Further, after a review of the available kits and protocols, DEA finds this information credible, easy to understand, and requires no specialized skill or experience to carry out the required steps. Thus, DEA concludes that trenbolone acetate can be easily separated from estradiol and other excipient materials used to make Component TE–H in-process granulation, Component TE–H in-process pellets, Component T–H in-process granulation, and Component T–H in-process pellets. The composition of these in-process materials containing significant quantities of trenbolone acetate does not prevent significant potential for abuse.

Conclusions of Law

Based on the evaluation and recommendation of the ASH, as well as DEA's review of available evidence of diversion of these types of products, the Assistant Administrator does not find that ''because of [their] concentration, preparation, formulation, or delivery system,'' Ivy's Component TE–H in-process granulation, Component TE–H in-process pellets, Component T–H in-process granulation, and Component T–H in-process pellets ''ha[ve] no significant potential for abuse.'' 21 CFR 1308.33(a).

Therefore, the Assistant Administrator, Diversion Control Division, hereby orders that the above products containing anabolic steroids not be exempted from application of any section of the CSA, and they are not to be included in the list of products described in 21 CFR 1308.34. These in-process materials remain controlled as an anabolic steroid in schedule III. Unless specifically excepted, to the extent Ivy handles trenbolone acetate in the manufacturing process, Ivy must comply with all applicable registration, security and recordkeeping requirements set forth in the CSA and DEA regulations. Exemptions granted or denied under 21 CFR 1308.33 are

product- and manufacturer-specific, and the present order does not address any other product currently listed in 21 CFR 1308.34.

This order does not apply to the final, packaged, and labeled products ''containing an anabolic steroid, that are expressly intended for administration through implants to cattle or other nonhuman species'' where the products ''have been approved by the Secretary of Health and Human Services for such administration.'' 21 CFR 1308.26(a). Under 21 U.S.C. 802(41)(B)(i), such products are excepted from the definition of an anabolic steroid without undergoing the exemption process described in 21 CFR 1308.33, and without any evaluation or determination of their abuse potential.

Opportunity for Comment

Pursuant to 21 CFR 1308.33, any interested person may submit written comments on, or objections to, the denial of an exemption for any product listed in this order, within 60 days of the date of publication of this order, as specified above. If any comments or objections raise significant issues regarding any finding of fact or conclusion of law upon which this order is based, the Assistant Administrator, Diversion Control Division, may reconsider the application in light of the comments and objections filed. 21 CFR 1308.33. Thereafter, the Assistant Administrator shall amend his original order as he determines appropriate. *Id.*

William T. McDermott,

Assistant Administrator.

[FR Doc. 2020–25288 Filed 12–15–20; 8:45 am]

BILLING CODE 4410–09–P

AGENCY FOR INTERNATIONAL DEVELOPMENT

22 CFR Part 228

[AID–2020–0004]

RIN 0412–AB02

Procurement of Certain Essential Medical Supplies To Address the COVID–19 Pandemic; Correction

AGENCY: Agency for International Development.

ACTION: Correcting amendments.

SUMMARY: On October 23, 2020, the United States Agency for International Development (USAID) issued a Temporary Final Rule (TFR) amending our regulations to allow USAID to waive ''Source and Nationality'' rules to provide for increased flexibility, targeting, and speed of procurement of Emergency Medical Supplies (EMS) required to address the COVID–19 pandemic worldwide. That TFR inadvertently resulted in the deletion of defined terms. This document corrects the TFR by restoring those definitions.

DATES: The rule is effective on December 16, 2020, through April 30, 2021, and is applicable beginning October 23, 2020.

FOR FURTHER INFORMATION CONTACT: Natalie J. Freeman (or designee), Attorney Advisor, Office of the General Counsel, USAID, 1300 Pennsylvania Ave. NW, Washington, DC 20523, *GCFEDREGMailbox@usaid.gov.*

SUPPLEMENTARY INFORMATION: This document corrects 22 CFR 228.01, which was amended by the TFR published in the **Federal Register** on October 23, 2020 (85 FR 67443). The TFR revised the definitions in § 228.01 by adding a new definition for ''Essential medical supplies.'' This new definition was intended to be added to the existing list in alphabetical order, but it inadvertently resulted in the deletion of the terms previously defined in § 228.01. After publication, stakeholders notified USAID of the missing definitions, which are used throughout 22 CFR part 228. This document effectuates the intent of the TFR by restoring the definitions in § 228.01 and adding the definition of ''Essential medical supplies'' to the alphabetical list. This correction does not otherwise affect the changes made by the TFR to 22 CFR part 228, or its effective dates of October 23, 2020, through April 30, 2021.

List of Subjects in 22 CFR Part 228

Government procurement.

For the reasons discussed above, 22 CFR part 228 is corrected by making the following correcting amendments:

PART 228—RULES FOR PROCUREMENT OF COMMODITIES AND SERVICES FINANCED BY USAID

■ 1. The authority citation for 22 CFR part 228 continues to read as follows:

Authority: Sec. 621, Pub. L. 87–195, 75 Stat. 445 (22 U.S.C. 2381), as amended, E.O. 12163, Sept. 29, 1979, 44 FR 56673: 3 CFR 1979 Comp., p. 435.

■ 2. Revise § 228.01 to read as follows:

§ 228.01 Definitions.

As used in this part, the following terms shall have the following meanings:

Advanced developing countries mean those countries that are categorized by the World Bank as upper middle income countries according to their gross national income per capita, except for those countries in which USAID provides assistance. USAID will maintain a list of advanced developing countries primarily based on the most recent World Bank determinations, and will make the list available in USAID's Automated Directives System, ADS 310. This list will include determinations made under § 228.17 of this part.

Available for purchase means for commodities, that the commodity is offered for sale in a country in the authorized principal geographic code at the time of purchase from the supplier, irrespective of the place of manufacture or production, unless it is a prohibited source country. If applicable, the commodity must also be able to be serviced, and, if warrantied, have a valid warranty. For services, available for purchase means the service is offered from a vendor which has complied with nationality and foreign government-owned organization requirements of this regulation, and is otherwise organized in a country in the authorized principal geographic code designated in an implementing instrument. This definition does not apply to procurements under the geographic Code 935, see § 228.03 of this part, because that geographic code is for any country or area except for prohibited source countries.

Commission means any payment or allowance by a supplier to any person for the contribution which that person has made to secure the sale or contract for the supplier or which that person makes to securing on a continuing basis similar sales or contracts for the supplier.

Commodities or *goods* means any material, article, supply, good, or equipment.

Commodity-related services means delivery services and/or incidental services.

Cooperating country or *recipient country* means the country receiving the USAID assistance subject to this part 228, and includes all the countries receiving assistance under a regional program or project.

Delivery means the transfer to, or for the account of, an importer of the right to possession of a commodity, or, with respect to a commodity-related service, the rendering to, or for the account of, an importer of any such service.

Delivery service means any service customarily performed in a commercial export or import transaction which is necessary to affect a physical transfer of commodities to the cooperating/recipient country. Examples of such

services are the following: Export packing, local drayage in the source country (including waiting time at the dock), ocean and other freight, loading, heavy lift, wharfage, tollage, switching, dumping and trimming, lighterage, insurance, commodity inspection services, and services of a freight forwarder. ''Delivery service'' may also include work and materials necessary to meet USAID marking requirements.

Developing countries means those countries that are categorized by the World Bank as low or lower middle income economies according to their gross national income per capita, and also includes all countries to which USAID provides assistance. USAID will maintain a list of developing countries primarily based on the most recent World Bank determinations, and will make the list available in USAID's Automated Directives System, ADS 310.

Essential medical supplies means personal protective equipment, medical products and equipment, pharmaceuticals, and other medical countermeasures needed to address the COVID–19 pandemic, which are in short supply, as identified in the ''Notice of Designation of Scarce Materials or Threatened Materials Subject to COVID–19 Hoarding Prevention Measures'' issued by the Department of Health and Human Services (HHS) on March 25, 2020, as updated. USAID may designate additional materials as ''emergency medical supplies'' if deemed necessary and will publish notice of these additional materials in the **Federal Register.**

Free Port or *Bonded Warehouse* is a special customs area with favorable customs regulations (or no customs duties and controls for transshipment).

Implementing instrument means a binding relationship established between USAID and an outside party or parties to carry out USAID programs, by authorizing the use of USAID funds and/or nonfinancial resources for the procurement of services or commodities and/or commodity related services. Implementing instruments include specific conditions that apply to each such procurement. Examples of such instruments include contracts, grants, cooperating agreements, and interagency agreements.

Incidental services means services such as installation, erection, maintenance, or upgrading of USAID-financed equipment, or the training of personnel in the maintenance, operation and use of such equipment, or similar services provided for the authorized disposition of such commodities.

Long term lease means, for purposes of subpart B, a single lease of more than 180 calendar days; or repetitive or intermittent leases under a single award within a one-year period, which cumulatively total more than 180 calendar days. A single lease may consist of lease of one or more of the same type of commodity within the same lease term.

Motor vehicles means self-propelled vehicles with passenger carriage capacity, such as highway trucks, passenger cars and buses, motorcycles, scooters, motorized bicycles, ATVs, and utility vehicles. Excluded from this definition are ambulances, snowmobiles, industrial vehicles for materials handling and earthmoving, such as lift trucks, tractors, graders, scrapers, off-the-highway trucks (such as off-road dump trucks), boats, and other vehicles that are not designed for travel at normal road speeds (40 kilometers per hour and above).

Mission means the USAID Mission, office or representative in a cooperating/recipient country.

Nationality refers to the place of legal organization, ownership, citizenship, or lawful permanent residence (or equivalent immigration status to live and work on a continuing basis) of suppliers of commodities and services.

Pharmaceutical means any substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of diseases in humans or animals; any substances (other than food) intended to affect the structure or any function of the body of humans or animals; and, any substance intended for use as a component in the above. The term includes drugs, vitamins, oral rehydration salts, biologicals, and some in-vitro diagnostic reagents/test kits; but does not include devices or their components, parts, or accessories. Contraceptives, including condoms, are not included in this definition.

Prohibited sources means countries to which assistance is prohibited by the annual appropriations acts of Congress or other statutes, or those subject to other executive branch restrictions, such as applicable sanctions administered by the U.S. Treasury Department's Office of Foreign Assets Control. USAID maintains a list of prohibited sources, available in USAID's Automated Directives System, ADS 310.

Recipients and contractors. Recipient has the same meaning as defined in 22 CFR 226.02, except that it shall include non-U.S. individuals, entities and organizations, as well as subrecipients. *Contractors* mean those entities which enter into a contract, as the term is defined in 48 CFR part 2, with the U.S. Government, and includes subcontractors.

Services means the performance of identifiable tasks, rather than the delivery of an end item of supply.

Source means the country from which a commodity is shipped to the cooperating/recipient country or the cooperating/recipient country itself if the commodity is located therein at the time of the purchase, irrespective of the place of manufacture or production, unless it is a prohibited source country. Where, however, a commodity is shipped from a free port or bonded warehouse in the form in which received therein, ''source'' means the country from which the commodity was shipped to the free port or bonded warehouse.

Supplier means any person or organization, governmental or otherwise, who furnishes services, commodities, and/or commodity related services, including delivery or incidental services, financed by USAID.

United States means the United States of America, any State(s) of the United States, the District of Columbia, and areas of U.S. associated sovereignty, including commonwealths, territories and possessions.

USAID means the United States Agency for International Development or any successor agency, including when applicable, each USAID Mission or office abroad.

USAID Principal Geographic Code means a USAID code which designates a country, a group of countries, or an otherwise defined area. The USAID principal geographic codes for purposes of procurement are described in § 228.03 of this part.

Suk J. Jin,

Deputy General Counsel, U.S. Agency for International Development.

[FR Doc. 2020–27766 Filed 12–15–20; 8:45 am]

BILLING CODE 6116–02–P

DEPARTMENT OF TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9939]

RIN 1545–BP49

Qualified Transportation Fringe, Transportation and Commuting Expenses Under Section 274

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final Regulations.

SUMMARY: This document contains final regulations to implement legislative

changes to section 274 of the Internal Revenue Code (Code) effective for taxable years beginning after December 31, 2017. Specifically, the final regulations address the elimination of the deduction under section 274 for expenses related to certain transportation and commuting benefits provided by employers to their employees. The final regulations provide guidance to determine the amount of such expenses that is nondeductible and apply certain exceptions under section 274(e) that may allow such expenses to be deductible. These final regulations affect taxpayers who pay or incur such expenses.

DATES:

Effective Date: These regulations are effective on December 16, 2020.

Applicability Date: These regulations apply to taxable years beginning on or after December 16, 2020. Notwithstanding the preceding sentence, taxpayers may choose to apply § 1.274–13(b)(14)(ii) to taxable years ending after December 31, 2019.

FOR FURTHER INFORMATION CONTACT: Patrick Clinton of the Office of Associate Chief Counsel (Income Tax and Accounting), (202) 317–7005 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains final regulations under section 274 of the Code that amend the Income Tax Regulations (26 CFR part 1). In general, section 274 limits or disallows deductions for certain expenditures that otherwise would be allowable under chapter 1 of the Code (chapter 1), primarily under section 162(a), which allows a deduction for ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

On December 22, 2017, section 274 was amended by section 13304 of Public Law 115–97 (131 Stat. 2054), commonly referred to as the Tax Cuts and Jobs Act (TCJA), to disallow a deduction for the expense of any qualified transportation fringe (QTF) as defined in section 132(f) provided to an employee of the taxpayer, effective for amounts paid or incurred after December 31, 2017.

The TCJA also added section 274(l), which provides that no deduction is allowed under chapter 1 for any expense incurred for providing any transportation, or any payment or reimbursement, to an employee of the taxpayer in connection with travel between the employee's residence and place of employment, except as necessary for ensuring the safety of the employee, effective for transportation and commuting expenses paid or incurred after December 31, 2017.

On December 24, 2018, the Department of the Treasury (Treasury Department) and the IRS published Notice 2018–99, 2018–52 I.R.B. 1067, ''Parking Expenses for Qualified Transportation Fringes under § 274(a)(4) and § 512(a)(7) of the Internal Revenue Code.'' Notice 2018–99, in part, provided interim guidance for taxpayers to determine the amount of parking expenses for QTFs that is nondeductible under section 274(a)(4).

On June 23, 2020, the Treasury Department and the IRS published a notice of proposed rulemaking (REG–119307–19) in the **Federal Register** (85 FR 37599) containing proposed regulations under section 274 (proposed regulations) to implement the TCJA's amendments to section 274. The proposed regulations would add a new section at § 1.274–13 to address parking and other QTF expenses under section 274(a)(4), including the application of certain exceptions in section 274(e) to QTF expenses. The proposed regulations also would add a new section at § 1.274–14 to address transportation and commuting expenses under section 274(l).

Pending the issuance of these final regulations, taxpayers were allowed to rely on the proposed regulations or the guidance provided in Notice 2018–99 for parking expenses, other QTF expenses, and transportation and commuting expenses, as applicable, paid or incurred in taxable years beginning after December 31, 2017.

The Treasury Department and the IRS received one request to speak at a public hearing that was later withdrawn. Therefore, no public hearing was held. The Treasury Department and the IRS received 12 written and electronic comments responding to the proposed regulations. All comments were considered and are available at *https://www.regulations.gov* or upon request. The comments addressing the proposed regulations are summarized in the Summary of Comments and Explanation of Revisions section. However, comments recommending statutory revisions or addressing issues outside the scope of these final regulations are not discussed in this preamble.

After full consideration of the comments received on the proposed regulations, this Treasury decision adopts the proposed regulations with modifications in response to certain comments, as described in the Summary of Comments and Explanation of Revisions section.

Summary of Comments and Explanation of Revisions

1. Qualified Transportation Fringes

A. In General

Section 274(a)(4), as added by the TCJA, provides that no deduction is allowed under chapter 1 for the expense of any QTF (as defined in section 132(f)) provided by taxpayers to their employees for expenses paid or incurred after December 31, 2017. Section 132 generally excludes from employees' gross income the value of certain fringe benefits. Section 132(a)(5) generally provides that gross income does not include any fringe benefit that qualifies as a QTF under section 132(f). QTFs are defined in section 132(f)(1) to mean any of the following provided by an employer to an employee: (1) Transportation in a commuter highway vehicle between the employee's residence and place of employment, (2) any transit pass, (3) qualified parking, and (4) any qualified bicycle commuting reimbursement. Section 132(f)(5)(A), (B), (C), and (F)(i) define transit pass, commuter highway vehicle, qualified parking, and qualified bicycle commuting reimbursement, respectively. Section 132(f)(2) provides that the amount of QTFs provided by an employer to any employee that can be excluded from gross income under section 132(a)(5) cannot exceed a maximum monthly dollar amount, adjusted for inflation. The adjusted maximum monthly excludable amount for 2020 is $270.

The proposed regulations restated the statutory rules under section 274(a)(4), defined relevant terms, and provided a general rule and three simplified methodologies to determine the amount of nondeductible parking expenses when a parking facility is owned or leased by the taxpayer. Additionally, the proposed regulations included rules addressing the deduction disallowance for expenses related to providing employees transportation in a commuter highway vehicle and transit pass QTFs. Finally, the proposed regulations applied the applicable exceptions in section 274(e) to all QTF expenses.

Specifically, the proposed regulations provided that if the taxpayer pays a third party for its employee's QTF, the section 274(a)(4) disallowance is generally calculated as the taxpayer's total annual cost of the QTF paid to the third party. With regard to QTF parking expenses, the proposed regulations provided that if the taxpayer owns or leases all or a portion of one or more parking facilities, the section 274(a)(4) disallowance may be calculated using a

general rule or any one of three simplified methodologies. The proposed regulations provided taxpayers the option to apply the general rule or a simplified methodology for each taxable year and for each parking facility. The proposed regulations included special rules and definitions for allocating certain mixed parking expenses, aggregating parking spaces by geographic location, removing inventory/unusable spaces from available parking spaces, defining general public for multi-tenant building parking facilities, disregarding five or fewer reserved parking spaces if the reserved spaces are 5 percent or less of total parking spaces, and determining employee use of parking on a typical business day. The preamble to the proposed regulations provided that taxpayers may use statistical sampling with the general rule or simplified methodologies if they follow the procedures in Rev. Proc. 2011–42, 2011–37 I.R.B. 318, as corrected by Ann. 2013–46, 2013–48 I.R.B. 593.

The general rule in the proposed regulations allowed taxpayers to calculate the disallowance based on a reasonable interpretation of section 274(a)(4). However, the proposed regulations required taxpayers to use the expense paid or incurred in providing a QTF and not its value to an employee, allocate parking expenses to reserved employee spaces, and properly apply the exception for parking made available to the general public. The proposed regulations allowed a special rule for aggregating parking spaces by geographic location to be used with the general rule.

The proposed regulations also included three simplified methodologies as alternatives to the general rule. Under the first simplified methodology, the ''qualified parking limit methodology,'' taxpayers calculate the disallowance by multiplying the total number of spaces used by employees during the peak demand period, or, alternatively, the total number of the taxpayer's employees, by the section 132(f)(2) monthly per employee limitation on exclusion for qualified parking ($270 for 2020), for each month in the taxable year.

The second simplified methodology, the ''primary use methodology,'' is largely based on the method deemed reasonable in Notice 2018–99, modified in response to comments received on the Notice. The proposed regulations permitted the use of special rules for allocating certain mixed parking expenses and aggregating parking spaces by geographic location. The proposed regulations also provided definitions for employee, general public, parking facility, total parking spaces, reserved employee spaces, reserved nonemployee spaces, primary use, and total parking expenses, geographic location, inventory/unusable spaces, available parking spaces, peak demand period, and mixed parking expense.

The third simplified methodology provided in the proposed regulations is the ''cost per space methodology,'' which allows taxpayers to calculate the disallowance by multiplying the cost per parking space by the number of available parking spaces used by employees during the peak demand period. The proposed regulations provided that cost per space is calculated by dividing total parking expenses (including expenses for inventory/unusable spaces) by total parking spaces (including inventory/unusable spaces). The proposed regulations also permitted special rules for allocating certain mixed parking expenses and aggregating parking spaces by geographic location to be used with the cost per space methodology.

Finally, the proposed regulations provided that the deduction disallowance under section 274(a)(4) does not apply to expenditures for QTFs that meet the requirements of section 274(e)(2), (7), or (8), the three exceptions in section 274(e) that are relevant for QTFs. Pursuant to section 274(e)(2), the proposed regulations provided that the disallowance under section 274(a) does not apply to expenditures for QTFs to the extent the taxpayer properly treats the expenses as compensation to the employee on the taxpayer's Federal income tax return as originally filed, and as wages to the employee for purposes of withholding under chapter 24 of the Code (chapter 24) relating to collection of Federal income tax at source on wages. The proposed regulations also provided, in accordance with section 274(e)(7), that any taxpayer expense for transportation in a commuter highway vehicle, a transit pass, or parking that otherwise qualifies as a QTF under section 132(f)(1) is not subject to the deduction disallowance under section 274(a) to the extent such transportation, transit pass, or parking is made available to the general public. Finally, consistent with section 274(e)(8), the proposed regulations provided that any taxpayer expense for transportation in a commuter highway vehicle, a transit pass, or parking that otherwise qualifies as a QTF under section 132(f)(1) that is sold to customers in a bona fide transaction for an adequate and full consideration in money or money's worth is not subject to the deduction disallowance under section 274(a).

The final regulations substantially adopt the proposed regulations, with certain modifications and clarifications, as discussed in this Summary of Comments and Explanation of Revisions. In applying the final regulations, taxpayers may continue to use statistical sampling with the general rule or simplified methodologies if they follow the procedures in Rev. Proc. 2011–42, 2011–37 I.R.B. 318, as corrected by Ann. 2013–46, 2013–48 I.R.B. 593.

B. Definitions

As described in this part 1.B., the final regulations generally include the definitions from the proposed regulations, modified and clarified in response to comments.

i. Qualified Transportation Fringe

The final regulations adopt the proposed regulations' definition for the term ''qualified transportation fringe.'' The definition is based on section 132(f)(1), except that it does not include qualified bicycle commuting reimbursements. Although section 132(f)(1) includes qualified bicycle commuting reimbursements as a QTF, section 132(f)(8) provides that the inclusion of qualified bicycle commuting reimbursements in the definition of a QTF is suspended for taxable years beginning after December 31, 2017, and before January 1, 2026. Accordingly, for such taxable years, qualified bicycle commuting reimbursements are not excluded from an employee's income as a QTF. Because qualified bicycle commuting reimbursements are not QTFs, deductions for qualified bicycle commuting reimbursements are not disallowed under section 274(a)(4) for taxable years beginning after December 31, 2017 and before January 1, 2026. Thus, the final regulations provide that the term ''qualified transportation fringe'' means any of the following provided by an employer to an employee: (1) Transportation in a commuter highway vehicle if such transportation is in connection with travel between the employee's residence and place of employment (as described in section 132(f)(1)(A) and (f)(5)(B)), (2) any transit pass (as described in section 132(f)(1)(B) and (f)(5)(A)), or (3) qualified parking (as described in section 132(f)(1)(C) and (f)(5)(C)).

Under section 132(f)(1)(C) and (f)(5)(C), the term ''qualified parking'' includes parking provided by an employer to an employee on or near the business premises of the employer. A

commenter requested that the final regulations define ''parking provided to an employee'' to include only parking spaces that are reserved or otherwise set aside exclusively for employee use. The Treasury Department and the IRS decline to adopt this suggestion. Section 1.132–9, Q/A–4(d) provides that parking is provided by an employer to an employee if the parking is on property that the employer owns or leases, the employer pays for the parking, or the employer reimburses the employee for parking expense. Thus, the definition of qualified parking as a QTF under section 132(f) is not limited to parking that is reserved or otherwise set aside exclusively for employee use.

Another commenter suggested that parking with no objective value to an employee, such as parking in industrial, remote, or rural areas (that is, areas where the general public would not pay to park) is not a QTF and therefore, that section 274(a)(4) should not disallow the deduction of the expenses. The Treasury Department and the IRS note that there is nothing in section 132 or § 1.132–9 that supports the proposition that the value of parking to an employee is relevant in determining whether the parking itself constitutes qualified parking and a QTF. Thus, the Treasury Department and the IRS do not agree with the commenter that qualified parking with no objective value to an employee is not a QTF. However, see part 1.E.iii. of this Summary of Comments and Explanation of Revisions section for a discussion of the applicability of the section 274(e)(8) exception to parking with no objective value to an employee.

ii. Employee

The proposed regulations defined the term ''employee'' based on definitions in §§ 1.132–1(b)(2)(i) and 1.132–9(b), Q/A–5 and Q/A–24. The term ''employee'' for Federal tax purposes generally is understood to refer to a common-law employee. Whether a service provider is a common-law employee generally turns on whether the service recipient has the right to direct and control the service provider, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. *See, e.g.,* § 31.3121(d)–1(c)(2) of the Employment Taxes and Collection of Income Tax at Source Regulations. The determination does not depend on whether or how the individual is compensated, or by which person. The regulations under section 132 also include certain statutory employees such as officers of corporations in the definition of employee for purposes of QTFs. No comments were received on the proposed definition of ''employee''. Thus, the final regulations adopt this definition without modification.

iii. General Public

Commenters on Notice 2018–99 raised concerns that, for taxpayers that lease space in a multi-tenant building, the Notice did not include employees, partners, 2-percent shareholders of S corporations (as defined in section 1372(b)), independent contractors, clients, or customers of unrelated tenants in the building as members of the general public. In response to these comments, the proposed regulations provided that ''general public'' includes employees, partners, 2-percent shareholders of S corporations (as defined in section 1372(b)), sole proprietors, independent contractors, clients, or customers of unrelated tenants in multi-tenant buildings, as well as customers, clients, or visitors of the taxpayer, individuals delivering goods or services to the taxpayer, students of an educational institution, and patients of a health care facility.

A commenter on the proposed regulations raised concerns that the definition of the term ''general public'' in the proposed regulations gives tenants of multi-tenant buildings an unfair advantage in comparison to tenants in buildings with only one tenant and suggested all tenants be treated the same. The Treasury Department and the IRS decline to adopt this suggestion because any alternative would likely impose an undue administrative burden on taxpayers in a multi-tenant building to determine the use of the parking facility by numerous other tenants.

A commenter also asked why taxpayers that own or lease space in a multi-tenant building may include independent contractors in the definition of general public. The Treasury Department and the IRS note that the proposed regulations defined general public to include independent contractors of unrelated taxpayers in a multi-tenant building because unlike independent contractors of the taxpayer, independent contractors of unrelated tenants do not have a relationship with the taxpayer. The final regulations continue to provide that independent contractors of unrelated tenants in multi-tenant buildings are included in the general public. However, independent contractors of the taxpayer continue to be excluded from the general public regardless of whether the taxpayer owns or leases space in a multi-tenant building.

A commenter requested that a car dealership's parking spaces occupied by customers' vehicles being repaired or serviced be excluded from the definition of inventory/unusable spaces and instead be included in the definition of spaces available to the general public because the parking spaces are used by customers and are not available for employee parking. The Treasury Department and the IRS agree with the commenter and have revised the definition of general public in the final regulations accordingly. Thus, the final regulations follow the definition of the term general public as provided in the proposed regulations with the clarification that parking spaces that are used to park vehicles owned by members of the general public while the vehicles await repair or service by the taxpayer also are treated as provided to the general public.

iv. Parking Facility

The final regulations include a definition of the term ''parking facility'' that follows the definition of qualified parking in section 132(f)(5)(C) and includes one or more indoor or outdoor garages and other structures, as well as parking lots and other areas where employees may park. Commenters on Notice 2018–99 suggested that because qualified parking as defined in section 132(f)(5)(C) and § 1.132–9(b), Q/A–4(c) does not include any parking on or near property used by the employee for residential purposes, including parking for resident employees of residential rental buildings, the definition of ''total parking spaces'' in the proposed regulations should exclude such spaces. In response to these comments, the proposed regulations specifically excluded parking spaces on or near property used by the employee for residential purposes from the definition of parking facility. The final regulations adopt this definition, without modification.

v. Geographic Location

Consistent with the proposed regulations, the final regulations allow the taxpayer to aggregate the number of parking spaces in a single geographic location to determine the section 274(a)(4) disallowance using the general rule, primary use methodology, or cost per space methodology.

The proposed regulations defined the term ''geographic location'' as contiguous tracts or parcels of land owned or leased by the taxpayer. Two or more tracts or parcels of land are contiguous if they share common boundaries or would share common boundaries but for the interposition of a

road, street, railroad, stream, or similar property. Tracts or parcels of land which touch only at a common corner are not contiguous.

A commenter suggested that the definition of geographic location be expanded to allow parking lots located within reasonable distance (¼ mile) of a principal parking lot to be aggregated as part of a single geographic location. The commenter explained that automotive dealers often have overflow parking lots not designated for any purpose available relatively close to the business location in the event the inventory levels exceed the spaces available at the principal location.

The Treasury Department and the IRS considered this comment and decline to adopt it because the term ''reasonable distance'' is difficult to define and, as the commenter explained, overflow parking facilities are typically utilized for excess inventory vehicles, instead of parking for the general public. The Treasury Department and the IRS believe that expanding the definition of geographic location to include noncontiguous tracts or parcels of land would introduce unnecessary complexity without providing a meaningful benefit to taxpayers. Thus, the final regulations adopt the proposed regulations' definition of geographic location, without modification.

vi. Total Parking Spaces

The proposed regulations defined the term ''total parking spaces'' as the total number of parking spaces, or the taxpayer's portion thereof, in the parking facility. No comments were received on this definition, and the final regulations adopt it without modification.

vii. Reserved Employee Spaces

A commenter on Notice 2018–99 recommended that the definition of the term ''reserved employee spaces'' be limited to parking spaces actually used by employees on a typical business day. Because section 274(a)(4) disallows the deduction for the expense of providing a QTF to an individual employee, the commenter reasoned that the taxpayer should identify the expense for each QTF provided to each individual employee when determining the amount that is disallowed.

After considering the comment, the Treasury Department and the IRS, in the proposed regulations, provided that costs allocated to reserved employee spaces would be disallowed regardless of actual use of the reserved spaces. However, the proposed regulations also included a special rule in step 1 of the primary use methodology providing that there is no disallowance for reserved employee spaces if the primary use of the available parking spaces is to provide parking to the general public, there are five or fewer reserved employee spaces, and the number of reserved employee spaces is 5 percent or less of the total parking spaces in the parking facility. The final regulations adopt the disallowance of costs allocated to reserved employee spaces and the special rule in step 1 of the primary use methodology provided in the proposed regulations, without modification.

viii. Reserved Nonemployee Spaces

A commenter on Notice 2018–99 suggested that parking spaces reserved for drivers with disabilities be treated as ''reserved nonemployee spaces'' and thus, any related expenses not be disallowed under section 274(a)(4). After considering the comment, the Treasury Department and the IRS declined to include parking spaces reserved for drivers with disabilities from the definition of reserved nonemployee spaces in the proposed regulations. The Treasury Department and the IRS reasoned that unlike parking spaces reserved for customers or visitors, parking spaces reserved for drivers with disabilities may be used by employees (with disabilities), and section 274(a)(4) would then apply to disallow the expense. The proposed regulations also did not include parking spaces reserved for drivers with disabilities in ''reserved employee spaces'' because they may or may not be exclusively reserved for employees. The final regulations adopt the proposed regulations' definitions of reserved nonemployee spaces and reserved employee spaces, without modification.

ix. Inventory/Unusable Spaces

The Treasury Department and the IRS received questions and comments in response to Notice 2018–99 on how parking spaces reserved for, or used by, inventoried vehicles are to be treated for purposes of determining the disallowance. For example, taxpayers asked whether parking spaces reserved exclusively for, or used by, vehicles to be sold or leased to customers at a car dealership or car rental agency are treated as spaces available to the general public.

In response to the comments and questions received, the proposed regulations added a new definition for the term ''inventory/unusable spaces'' that includes parking spaces used exclusively for inventoried vehicles, qualified nonpersonal use vehicles (as described in § 1.274–5(k)), other fleet vehicles used in a taxpayer's trade or business, or otherwise not usable for parking by employees.

A commenter on the proposed regulations suggested that inventory spaces should be included in the definition of spaces available to the general public in cases where inventory spaces may at times be used by customers and are not available for employee parking. The Treasury Department and the IRS note that spaces used by customers should not be included in inventory/unusable spaces. Therefore, the final regulations adopt the definition of ''inventory/unusable spaces'' included in the proposed regulations, with the clarification that inventory/unusable spaces are otherwise not usable for parking by the general public.

Inventory/unusable spaces are specifically excluded from the definitions of ''available parking spaces,'' discussed later, and ''reserved nonemployee spaces,'' discussed earlier, under the primary use methodology and primary use test in the final regulations. The final regulations exclude inventory/unusable spaces because those spaces are not available to employees or the general public but are instead used exclusively for other purposes. Inventory/unusable spaces are included in total parking spaces under the cost per space methodology because taxpayers do incur costs in maintaining the spaces.

A commenter on the proposed regulations requested that a safe harbor be added to the final regulations to determine the number of inventory spaces at a car dealership because of extreme fluctuations of inventory over a car dealer's tax year. The commenter suggested that the safe harbor should be based on an annualization of the number of spaces occupied by inventory vehicles at the end of the month during the tax year with lowest inventory, or alternatively, based on the average number of spaces occupied by inventory vehicles at the end of each month. The commenter further suggested that inventory per month should be determined based on inventory levels a car dealer reports to the vehicle manufacturer on monthly financial reporting.

The Treasury Department and the IRS note that the proposed regulations did not specifically describe how taxpayers should determine the number of inventory/unusable spaces in the parking facility. Thus, the Treasury Department and the IRS have added a rule in these final regulations providing that taxpayers may use any reasonable methodology to determine the number

of inventory/unusable spaces in the parking facility. In addition, in response to the commenter's alternative suggestion, the final regulations provide that a reasonable methodology may include using the average of monthly inventory counts.

x. Available Parking Spaces

The proposed regulations included a definition of ''available parking spaces'' to clarify that reserved employee spaces and inventory/unusable spaces are not included in determining primary use under the primary use methodology. No comments were received on this definition, and the final regulations adopt it without modification.

xi. Primary Use

The proposed regulations provided that for purposes of the primary use test of the primary use methodology, ''primary use'' means greater than 50 percent of actual or estimated usage of the parking spaces in the parking facility by the general public. A commenter on the proposed regulations suggested that the final regulations provide that primary use should mean 30 percent or greater for healthcare facilities, including skilled nursing and assisted living healthcare facilities, because the employees at these types of healthcare businesses provide essential and life-saving care services to the public, especially during the ongoing Coronavirus Disease (COVID–19) pandemic.

After considering this comment, the Treasury Department and the IRS have decided to retain the primary use test as described in the proposed regulations. The Treasury Department and the IRS continue to believe that this primary use test is a reasonable interpretation of the exception in section 274(e)(7) for parking made available to the general public. Further, this interpretation is consistent with recent final regulations addressing the application of the section 274(e)(7) exception to the limitation on the deduction for meals and entertainment expenses, which apply the section 274(e)(7) exception to food and beverages ''primarily consumed'' by the general public, meaning greater than 50 percent of actual or reasonably estimated consumption. *See* TD 9925, 85 FR 64026 (October 9, 2020).

The Treasury Department and the IRS understand that the primary use of a parking facility could be affected by a federally declared disaster such as the COVID–19 pandemic. Thus, as discussed in part 1.B.xiv. of this Summary of Comments and Explanation of Revisions section, the final regulations modify the definition of ''peak demand period'' to provide flexibility for taxpayers affected by a federally declared disaster to determine the primary use of parking spaces used by employees during the peak demand period.

xii. Total Parking Expenses

Commenters on Notice 2018–99 suggested that safety-related expenses, such as lighting, snow and ice removal, leaf removal, trash removal, cleaning, and security, should be excluded from the definition of ''total parking expenses.'' Commenters reasoned that including the expenses may encourage unsafe parking conditions and neglect of care in maintaining the parking facilities. Commenters on the Notice also requested the removal of indirect costs, such as utility costs, insurance, property taxes, snow and ice removal, leaf removal, trash removal, cleaning, parking lot attendant expenses, and security. Multiple commenters on the Notice also suggested adding depreciation to total parking expenses, reasoning that these are costs of parking facilities.

After considering the comments received, the Treasury Department and the IRS determined that the proposed regulations should include the definition of the term ''total parking expenses'' from Notice 2018–99, and the final regulations adopt this definition without modification. Section 274(a)(4) disallows a deduction for the expense of providing a QTF, without regard to whether the expense is required for safety reasons. Further, QTF parking expenses include indirect costs such as allocable salaries for security and maintenance personnel, property taxes, repairs and maintenance, etc. *See* Joint Committee on Taxation, *General Explanation of Public Law 115–97* (JCS–1–18), at 190, December 2018. However, a deduction for an allowance for depreciation is not included in total parking expenses because it is an allowance for the exhaustion, wear and tear, and obsolescence of property, and not a parking expense.

xiii. Mixed Parking Expense

Numerous commenters on Notice 2018–99 expressed concerns and asked questions about how to determine the amount of expenses allocable to a parking facility if the invoice does not separate parking facility expenses from nonparking facility expenses. Commenters explained that determining and allocating expenses may impose excessive and unduly burdensome recordkeeping requirements on taxpayers and may be difficult for taxpayers and the IRS to administer. Commenters noted that such expenses for parking and nonparking property may include rent or lease payments, repairs, maintenance, utility costs, insurance, property taxes, interest, snow or ice removal, and security. In response to the comments, the Treasury Department and the IRS included in the proposed regulations a definition for the term ''mixed parking expense'' and a special rule for allocating certain mixed parking expenses. The proposed regulations defined ''mixed parking expense'' as an amount paid or incurred by a taxpayer for both a parking facility and nonparking facility property that a taxpayer owns or leases. The proposed regulations provided that mixed parking expenses may be allocated using any reasonable methodology but provided a special rule for allocating certain mixed costs that taxpayers could chose to apply in conjunction with certain of the methodologies for determining disallowed parking expenses.

The final regulations adopt the definition of ''mixed parking expenses'' included in the proposed regulations, as well as the rule allowing the use of any reasonable methodology to allocate mixed parking expenses. However, the final regulations make certain modifications to the allowance of the special rule in the proposed regulations for allocating certain mixed parking expenses. The special rule for allocating certain mixed parking expenses to a parking facility and the modifications made in the final regulations is explained in part 1.C of this Summary of Comments and Explanation of Revisions section.

A commenter on the proposed regulations suggested using property tax assessments and/or acreage to determine the amount of mixed parking expenses allocable to a parking facility. The Treasury Department and the IRS note that taxpayers may use any reasonable methodology to allocate mixed parking expenses. However, the Treasury Department and the IRS decline to adopt a specific methodology as reasonable for this purpose. The Treasury Department and the IRS further note that the methodology must be reasonable for the expense being allocated. Thus, one methodology for multiple expenses may be used only if the methodology is reasonable for all such expenses.

xiv. Peak Demand Period

In the proposed regulations, several of the methodologies for determining the section 274(a)(4) disallowance for parking facilities require the taxpayer to determine the total number of parking spaces used by employees during the

peak demand period for employee parking on a typical business day. The proposed regulations provided that for purposes of § 1.274–13, the term ''peak demand period'' means the period of time on a typical business day when the greatest number of the taxpayer's employees are utilizing parking spaces in the taxpayer's parking facility. If a taxpayer's employees work in shifts, the peak demand period would take into account the shift during which the largest number of employees park in the taxpayer's parking facility. However, a brief transition period during which two shifts overlap in their use of parking spaces, as one shift of employees is getting ready to leave and the next shift is reporting to work, may be disregarded.

A commenter on the proposed regulations explained that it is overly burdensome for taxpayers at healthcare facilities to determine how many employees are at each location 24 hours a day, 7 days a week and instead suggested using an average based on the primary location of each employee and the amount of time each employee typically works each week. The Treasury Department and the IRS considered the comment and have determined that the proposed rules regarding ''peak demand period'' should be adopted in the final regulations, subject to an optional rule for parking facilities located in a federally declared disaster area as discussed later in this part 1.B.xiv. of this Summary of Comments and Explanation of Revisions section. However, the Treasury Department and the IRS note that the definition of peak demand period allows for flexibility based on taxpayer facts and circumstances by allowing taxpayers to choose a typical business day during the taxable year and to use any reasonable methodology to determine the total number of spaces used by employees. For example, a taxpayer may determine the total number of spaces used by employees based on periodic inspections or employee surveys.

The ongoing COVID–19 pandemic highlights that taxpayers may experience significant variations in employee parking during the taxable year due to a national emergency or other type of disaster. In the preamble to the proposed regulations, the Treasury Department and the IRS requested comments on what additional rules, if any, are needed to address significant variations in employee parking during the taxable year due to the COVID–19 pandemic. One commenter suggested that the final regulations allow for a COVID–19 exception for employees not working at the workplace location and thus not using employee parking during the period of the COVID–19 pandemic. Specifically, the commenter requested that taxpayers be permitted to calculate their disallowance under one of the simplified methodologies in § 1.274–13(d)(2), and then reduce their disallowance by a certain amount based on the taxpayer's ''COVID relief period'' and the reduction in their workforce during that period.

Although the commenter's example would not be permitted under any of the simplified methodologies in the proposed or final regulations because taxpayers must use one methodology for the entire year, taxpayers may achieve a similar result using any reasonable method under the general rule. Taxpayers also may achieve a similar result by using a monthly computation method such as the qualified parking limit methodology or the cost per space methodology. A taxpayer using the cost per space methodology generally computes the cost per space and multiplies it by the number of spaces used by employees during the peak demand period. Although the proposed regulations did not specify whether the cost per space must be based on one peak demand period in the taxable year, these final regulations clarify that the cost per space calculation may be performed on a monthly basis.

A taxpayer using the primary use methodology would be allowed a full deduction for parking expenses (except for expenses related to reserved employee spaces) if the primary use of the parking facility during the peak demand period is for the general public. The proposed regulations defined ''peak demand period'' as the period of time on a typical business day when the greatest number of the taxpayer's employees are utilizing parking spaces in the taxpayer's parking facility. As discussed previously in this part 1.B.xiv. of this Summary of Comments and Explanation of Revisions section, the final regulations retain this general definition. However, to provide relief to taxpayers affected by the COVID–19 pandemic or other federally declared disasters, the final regulations add an optional rule in the definition of ''peak demand period'' for taxpayers who own or lease a parking facility that is located in a federally declared disaster area, as defined in section 165(i)(5). A taxpayer that uses this rule may identify a typical business day for the taxable year in which the disaster occurred by reference to a typical business day in that taxable year prior to the date that the taxpayer's operations were impacted by the federally declared disaster. For example, a restaurant that transitioned from a dine-in restaurant to take-out service due to the COVID–19 pandemic could determine its parking disallowance under the primary use test based on the usage of parking on a typical business day prior to its transition to take-out service. Alternatively, under this rule, a taxpayer may choose to identify a typical business day for the month(s) of the taxable year in which the disaster occurred by reference to a typical business day in the same month(s) of the taxable year immediately preceding the taxable year in which the disaster first occurred. For purposes of this rule, the taxable year in which the disaster occurred is determined without regard to whether the taxpayer makes an election under section 165(i). In order to allow taxpayers affected by the COVID–19 pandemic to benefit from this rule, the final regulations allow a taxpayer to apply this rule to taxable years ending after December 31, 2019. This rule is intended to provide relief to both calendar and fiscal year taxpayers, as well as taxpayers with a seasonal business, that are affected by a federally declared disaster.

C. Optional Rules for QTF Parking Expenses

The proposed regulations included a special rule for allocating certain mixed parking expenses to reduce administrative burdens for taxpayers and simplify calculations in complying with section 274(a)(4). Specifically, the proposed regulations provided that a taxpayer may choose to allocate 5 percent of certain mixed parking expenses to the parking facility. This special rule applies to mixed parking expenses related to payments under a lease or rental agreement, and payments for utilities, insurance, interest and property taxes. However, the proposed regulations provided that the special rule for allocating certain mixed parking expenses may only be used in applying the primary use methodology and cost per space methodology and may not be used in applying the general rule or the qualified parking limit methodology. The proposed regulations did not require taxpayers to use the special rule for allocating certain mixed parking expenses and provided that taxpayers may instead use any reasonable methodology for mixed parking expenses.

A commenter on the proposed regulations requested that the final regulations allow taxpayers to use this special rule for applicable mixed parking expenses when using the general rule to calculate the

disallowance of deductions for QTFs based on a reasonable interpretation of section 274(a)(4). In response to the commenter's request, these final regulations have extended the 5 percent optional rule for allocating certain mixed parking expenses to the general rule as a further attempt to reduce administrative burdens for taxpayers and to simplify calculations in complying with section 274(a)(4). The optional rule for allocating certain mixed parking expenses in these final regulations may therefore be used in applying the general rule, the primary use methodology, and the cost per space methodology. In addition, this optional rule may be used by taxpayers using the qualified parking methodology, but solely for the purpose of determining total parking expenses. As revised, this optional rule may be used to determine total parking expenses under any of the parking methodologies permitted in the proposed and final regulations. Thus, the final regulations relocate this rule from § 1.274–13(c) to the definition of total parking expenses in § 1.274–13(b)(12).

A commenter suggested that the 5 percent special rule for allocating mixed parking expenses be expanded to include any parking expense that is not allocated by a service provider to a parking facility or is not accounted for separately on the taxpayer's books, including expenses for maintenance, snow and ice removal, landscape costs, security, cleaning. The Treasury Department and the IRS continue to believe that this optional rule should apply only to mixed parking expenses related to payments under a lease or rental agreement, and payments for utilities, insurance, interest and property taxes, and therefore, decline to adopt this comment. However, the final regulations clarify that a taxpayer who chooses to apply the 5 percent optional rule is not required to apply the rule to allocate all eligible mixed parking expenses. Thus, a taxpayer may choose to apply the 5 percent optional rule to allocate one or more of the eligible mixed parking expenses, while using a reasonable methodology to allocate remaining eligible mixed parking expenses. Certain types of expenses, such as parking facility maintenance, snow and ice removal, landscape costs, security, and parking facility cleaning are more likely to be separately billed and/or primarily allocable to the parking facility. Taxpayers may, however, continue to use any reasonable methodology to allocate these mixed parking expenses.

Consistent with the proposed regulations, the final regulations permit taxpayers using certain methodologies to aggregate the number of parking spaces in a single geographic location if they so choose. The final regulations adopt the proposed definition of the term ''geographic location,'' which is based on tracts or parcels of land that are contiguous. The optional rule for aggregation of parking spaces in a single geographic location may be used in applying the general rule, primary use methodology, and cost per space methodology, but may not be used with the qualified parking limit methodology. The final regulations clarify that a taxpayer that chooses to apply this optional aggregation rule must treat the aggregated parking spaces as one parking facility for purposes of determining total parking expenses.

D. Calculation of Disallowance of QTF Parking Expenses

Like the proposed regulations, the final regulations provide that if a taxpayer pays one or more third parties an amount for its employees' QTFs, the section 274(a)(4) disallowance is equal to the taxpayer's total annual cost for the QTFs paid or incurred to third parties. The Treasury Department and the IRS determined that amounts paid to a third party for qualified parking should be disallowed regardless of actual employee use of the spaces because the taxpayer paid or incurred the expense for its employees' QTFs regardless of employee use.

If instead, the taxpayer owns or leases a parking facility, the final regulations continue to provide that a taxpayer may use the general rule or choose any of the following three simplified methodologies for each parking facility to determine the section 274(a)(4) disallowance for each taxable year. The general rule and three simplified methodologies are substantially the same as those provided in the proposed regulations, with the following modifications based on comments received.

i. General Rule

Consistent with the proposed regulations, under the general rule provided in the final regulations taxpayers may calculate the disallowance based on a reasonable interpretation of section 274(a)(4), as long as the taxpayer's methodology does not use the value of a QTF instead of its expense, fail to allocate parking expense to reserved employee spaces, or improperly apply the exception for qualified parking made available to the public (for example, by treating a parking facility regularly used by employees as available to the public merely because the public has access to the parking facility).

In response to the proposed regulations, a commenter recommended that taxpayers be permitted to elect to use historic information to calculate the current year disallowance to reduce the compliance burden of annually calculating the disallowance under section 274(a)(4). For example, the commenter suggested that the average disallowed amount for the prior two years may be used as the disallowance for the next five years or, alternatively, if the primary use of the available parking spaces is to provide parking to the general public for two out of three years, then the taxpayer may treat the primary use of the available parking spaces as providing parking to the general public for the next five years. The Treasury Department and the IRS considered this comment and do not believe that section 274(a)(4) permits taxpayers to compute the amount of a permanently disallowed deduction for a taxable year based on the amount of the disallowance in one or more different taxable years.

ii. Qualified Parking Limit Methodology

Consistent with the proposed regulations, the final regulations provide that the maximum monthly dollar amount under section 132(f)(2), adjusted for inflation, may be used as a simple estimate of the taxpayer's monthly total cost per parking space. The adjusted maximum monthly excludable amount for 2020 is $270 per employee. Taxpayers using the qualified parking limit methodology may determine the disallowance simply by multiplying the section 132(f)(2) monthly per employee limitation on the exclusion by the total number of spaces used by employees during the peak demand period. Alternatively, taxpayers using this methodology may instead multiply the section 132(f)(2) monthly per employee limitation on the exclusion by the total number of the taxpayer's employees.

A commenter recommended the adoption of an alternative monthly rate of $25 per parking space, instead of the maximum monthly dollar amount under section 132(f)(2), to estimate a taxpayer's monthly total cost per parking space for parking facilities located outside the city limits of the 20 most populous cities in the United States. The commenter explained that this will encourage the use of the qualified parking limit methodology by manufacturers and employers with parking spaces in less populous areas. The Treasury Department and the IRS decline to adopt this comment because

the commenter provided no evidence that the monthly rate of $25 per parking space is the appropriate cost for all parking spaces located outside the city limits of the 20 most populous cities in the United States.

Section 274(e)(2) provides that the section 274(a)(4) disallowance for QTFs does not apply to the extent that a QTF is treated as compensation to an employee on the taxpayer's return and as wages to the employee. Under § 1.274–13(e)(2)(i) of the proposed regulations, a taxpayer using this qualified parking limit methodology who has monthly expenses per parking space exceeding the section 132(f)(2) monthly per employee limitation on the exclusion could deduct those excess expenses without regard to how much (if any) of the value of the parking space to the employee exceeds the section 132(f)(2) monthly per employee limitation on exclusion. However, the proposed regulations provided that the qualified parking limit methodology could be used only if the value of the QTF, to the extent it exceeds the sum of the amount paid (if any) by the employee for the QTF and the applicable statutory monthly limit in section 132(f)(2), is included on the taxpayer's Federal income tax return as originally filed as compensation paid to the employee and as wages to the employee for purposes of withholding under chapter 24 (relating to collection of Federal income tax at source on wages). The final regulations adopt this rule from the proposed regulations without change.

iii. Primary Use Methodology

The Treasury Department and the IRS received numerous comments on Notice 2018–99 related to the four-step method provided in the Notice. The proposed regulations adopted the four-step method provided in the Notice, with revisions in response to comments, and renamed it the ''primary use methodology.'' No comments were received on the primary use methodology included in the proposed regulations, and the final regulations adopt the primary use methodology without modification.

iv. Cost Per Space Methodology

The proposed regulations also provided a cost per space methodology, which allows taxpayers to calculate the disallowance by multiplying the cost per space by the number of available parking spaces used by employees. Taxpayers must identify the number of total parking spaces used by employees during the peak demand period. Cost per space is calculated by dividing total parking expenses (including expenses related to inventory/unusable spaces) by total parking spaces (including inventory/unusable spaces).

In response to the proposed regulations, a commenter pointed out that a taxpayer using the cost per space methodology calculates the disallowance of deductions for QTF parking expenses by multiplying the cost per space by the total number of ''available parking spaces'' used by employees during the peak demand period rather than the ''total parking spaces'' used by employees. The commenter suggested that ''total parking spaces'' should be used instead of ''available parking spaces'' because reserved spaces are excluded from the definition of ''available parking spaces.'' The Treasury Department and the IRS agree with this suggestion and modify the cost per space methodology provided in the proposed regulations by specifying that ''total parking spaces'' is used to calculate the disallowance under the final regulations. In addition, as discussed in part 1.B.xiv. of this Summary of Comments and Explanation of Revisions section, the final regulations clarify that the cost per space calculation may be performed on a monthly basis.

v. Expenses for Transportation in a Commuter Highway Vehicle and Transit Pass QTFs

Consistent with the proposed regulations, the final regulations include rules addressing the disallowance of deductions for expenses for transportation in a commuter highway vehicle and transit pass QTFs, as well as the applicability of certain exceptions under section 274(e). The general rules are unchanged from those in the proposed regulations.

E. Specific Exceptions to Section 274(a) for QTF Expenses

Section 274(e) provides that the deduction disallowance under section 274(a) does not apply to any expense described in section 274(e). Consistent with the proposed regulations, the final regulations provide that the deduction disallowance does not apply to expenditures for QTFs that meet the requirements of section 274(e)(2), (7), or (8), which are the three exceptions in section 274(e) that are relevant for QTFs.

A commenter suggested that the IRS implement a moratorium on enforcement of the deduction disallowance for the expense of QTFs during the ongoing COVID–19 pandemic. In addition, a commenter requested that healthcare facilities, including skilled nursing and assisted living healthcare facilities, be excepted from the section 274(a)(4) disallowance because the employees at these types of healthcare businesses provide essential and life-saving care services to the public.

The Treasury Department and the IRS note that exceptions for QTFs during the COVID–19 pandemic or for healthcare facility taxpayers are not provided for in any of the exceptions under section 274(e) and therefore are not exceptions to the section 274(a)(4) disallowance that the Treasury Department and the IRS may allow. However, as discussed in part 1.B.xiv. of this Summary of Comments and Explanation of Revisions section, the Treasury Department and the IRS are modifying the definition of ''peak demand period'' to provide additional flexibility for taxpayers affected by the COVID–19 pandemic or other federally declared disaster in applying the methodologies for determining the section 274(a)(4) disallowance for parking facilities.

i. Certain QTF Expenses Treated as Compensation Under Section 274(e)(2)

Section 274(e)(2) provides an exception to section 274(a) for expenses for goods, services, and facilities, to the extent that the expenses are treated by the taxpayer, with respect to the recipient of the entertainment, amusement, or recreation, as compensation to its employees under chapter 1 and as wages to its employees under chapter 24. Pursuant to section 274(e)(2), the proposed regulations provided that the disallowance under section 274(a) does not apply to expenditures for QTFs to the extent the taxpayer properly treats the expenses as compensation to the employee on the taxpayer's Federal income tax return as originally filed, and as wages to the employee for purposes of withholding under chapter 24 relating to collection of Federal income tax at source on wages. Because section 132(a)(5) excludes the value of QTFs from an employee's gross income up to the limitations on exclusion provided by section 132(f)(2), the proposed regulations provided that the exception in section 274(e)(2) does not apply to expenses paid or incurred for QTFs the value of which (including a purported value of zero) is excluded from an employee's gross income under section 132(a)(5). The proposed regulations further provided that section 274(e)(2) applies to expenses paid or incurred for QTFs, the value of which exceeds the sum of the amount, if any, paid by the employee for the fringe benefits and any amount excluded from gross income

under section 132(a)(5), if treated as compensation on the taxpayer's Federal income tax return as originally filed and as wages to the employee for purposes of withholding under chapter 24.

Section 1.61–21(b)(1) provides rules for the valuation of fringe benefits and requires that an employee must include in gross income the amount by which the fair market value of the fringe benefit exceeds the sum of the amount paid for the benefit by or on behalf of the recipient and the amount, if any, specifically excluded from gross income under the Code. Thus, in the case of reimbursements by a recipient, the amount of the reimbursement is taken into account in determining the amount properly includible in the recipient's income and does not affect the taxpayer's ability to use the exception in section 274(e)(2).

To prevent taxpayers from inappropriately claiming a full deduction under section 274(e)(2) by including a value that is less than the amount required to be included under § 1.61–21, the proposed regulations provided that the exception in section 274(e)(2) does not apply to expenses for QTFs for which the taxpayer calculates a value that is less than the amount required to be included in gross income under § 1.61–21.

Commenters on the proposed regulations under section 274 limiting deductions for meals and entertainment expenses (proposed §§ 1.274–11 and 1.274–12 (REG–100814–19)) asserted that a rule disallowing the application of section 274(e)(2) to expenses for which an improper amount is included in compensation and wages or in gross income, as applicable, is unduly harsh given the difficulty in determining the value of a fringe benefit under § 1.61–21 and the possibility of good faith errors. *See* TD 9925, 85 FR 64026, 64031 (October 9, 2020). In addition, a commenter noted that the ''to the extent that'' language in section 274(e)(2)(A) does not support applying an ''all or nothing'' rule against the taxpayer.

The Treasury Department and the IRS agree that the ''all or nothing'' rule in proposed §§ 1.274–13 and 1.274–14 may lead to unduly harsh results. Therefore, in response to these comments, the Treasury Department and the IRS have revised the rules in proposed § 1.274–13(e)(2)(i) to allow a taxpayer to apply section 274(e)(2) even if the taxpayer includes less than the proper amount in compensation and wages as required under § 1.61–21. In such a case, however, the amount of a taxpayer's deduction is limited to the amount included in compensation and wages, taking into account the amount, if any, reimbursed to the taxpayer by the employee (referred to as the ''dollar-for-dollar'' methodology in this preamble). This is consistent with the rule provided in section 274(e)(2)(B) for QTFs provided to specified individuals.

The final regulations also provide that if the value of a QTF exceeds the monthly per employee limitations on exclusion provided by section 132(f)(2) ($270 per employee for 2020), so that only a portion of the value is included in the employees' wages, the taxpayer may apply section 274(e)(2). However, in this case, the taxpayer must use the dollar-for-dollar methodology.

ii. Expenses for Transportation in a Commuter Highway Vehicle, Transit Pass, or Parking Made Available to the Public

Section 274(e)(7) provides an exception to section 274(a) for expenses for goods, services, and facilities made available by the taxpayer to the general public. Pursuant to section 274(e)(7), the proposed regulations provided that any taxpayer expense for transportation in a commuter highway vehicle, a transit pass, or parking that otherwise qualifies as a QTF under section 132(f)(1) is not subject to the deduction disallowance under section 274(a) to the extent such transportation, transit pass, or parking is made available to the general public. No comments were received on this provision, and the final regulations adopt it without modification. As described further in part 1.B.iii. of this Summary of Comments and Explanation of Revisions section, ''general public'' includes, but is not limited to, customers, clients, visitors, individuals delivering goods or services to the taxpayer, and patients of a health care facility. The general public does not include employees, partners, 2-percent shareholders of S corporations (as defined in section 1372(b)), sole proprietors, or independent contractors of the taxpayer. If a taxpayer owns or leases space in a multi-tenant building, employees, partners, 2-percent shareholders of S corporations (as defined in section 1372(b)), sole proprietors, independent contractors or customers of unrelated tenants in the building are included in the definition of general public.

iii. Expenses for Transportation in a Commuter Highway Vehicle, Transit Pass, or Parking Sold to Customers

Section 274(e)(8) provides an exception to section 274(a) for expenses for goods or services (including the use of facilities) which are sold by the taxpayer in a bona fide transaction for an adequate and full consideration in money or money's worth. Pursuant to section 274(e)(8), the proposed regulations provided that any taxpayer expense for transportation in a commuter highway vehicle, a transit pass, or parking that otherwise qualifies as a QTF under section 132(f)(1) that is sold to customers in a bona fide transaction for an adequate and full consideration in money or money's worth is not subject to the deduction disallowance under section 274(a). The proposed regulations also provided that for purposes of this section, the term ''customer'' includes an employee of the taxpayer who purchases the transportation in a commuter highway vehicle, transit pass, or parking in a bona fide transaction for an adequate and full consideration in money or money's worth. The final regulations adopt these provisions.

A commenter requested guidance in the final regulations for a situation in which employees are charged for parking at a parking facility. If a taxpayer charges its employees for parking at its parking facilities in a bona fide transaction for adequate and full consideration in money or money's worth, the employees are the taxpayer's customers for this purpose and the exception in section 274(e)(8) and § 1.274–13(e)(2)(iii) would apply. On the other hand, if an employee pays less than adequate and full consideration, this exception would not apply because the parking was not sold to the employee for full consideration. In this case, however, the taxpayer may apply the exception in section 274(e)(2) and § 1.274–13(e)(2)(i) to the extent of the reimbursement.

Another commenter suggested that the deduction disallowance for the expense of any QTF should not apply to expenses for parking that has no objective value to the taxpayer's employees, such as parking in industrial, remote, or rural areas (that is, areas where the general public would not pay to park). In response to this comment, the Treasury Department and the IRS have determined that the exception in section 274(e)(8) and the final regulations at § 1.274–13(e)(2)(iii) should apply if in a bona fide transaction, the adequate and full consideration for qualified parking is zero. The final regulations provide that to apply the exception in such a case, the taxpayer bears the burden of proving that the fair market value of the qualified parking is zero. However, a taxpayer will be treated as satisfying this burden if the qualified parking is provided in a rural, industrial, or remote area in which no commercial parking is available and an individual other than

an employee ordinarily would not pay to park. The final regulations also provide an example illustrating the application of this rule.

2. Transportation and Commuting Expenses

Section 274(l)(1), as added by the TCJA, provides that no deduction is allowed under chapter 1 for any expense incurred for providing any transportation, or any payment or reimbursement, to an employee of the taxpayer in connection with travel between the employee's residence and place of employment, except as necessary for ensuring the safety of the employee. The provision applies to expenses paid or incurred after December 31, 2017. Section 274(l)(2) provides that the disallowance of a deduction for commuting and transportation expenses under section 274(l) is suspended for any qualified bicycle commuting reimbursement (described in section 132(f)(5)(F)) paid or incurred after December 31, 2017, and before January 1, 2026. Thus, for such period, deductions for qualified bicycle commuting reimbursements, which, also for such period, are not excluded from an employee's income under section 132(f)(8), are not disallowed under section 274(l).

Section 1.274–14 addresses the disallowance of deductions under section 274(l). Section 1.274–14 of the proposed regulations provided that travel between the employee's residence and place of employment includes travel that originates at a transportation hub near the employee's residence or place of employment. For example, an employee who commutes to work by airplane from an airport near the employee's residence to an airport near the employee's place of employment is traveling between the residence and place of employment.

A commenter suggested that the final regulations clarify that section 274(l) applies to commuting expenses only and does not apply to business travel. The commenter further requested that the concept of transportation originating at a hub near the employee's residence or place of employment be removed from the proposed regulations because it may disallow business travel between two places of employment. In addition, the commenter noted that it is incorrect to describe a commute as originating at a transportation hub because an individual's commute will always begin at the residence, even if the individual first travels from the residence to the transportation hub. Thus, the commenter suggested that instead of the hub reference, the final regulations provide that the application of section 274(l) to travel between a residence and place of employment is not affected by the use of different modes of transportation on the trip.

The Treasury Department and the IRS agree with these suggestions. The final regulations do not include a reference to a transportation hub and instead explain that travel between the employee's residence and place of employment is not affected by the use of different modes of transportation, or by whether the employer pays for all modes of transportation during the commute. The final regulations also state that the disallowance under section 274(l) does not apply to business expenses under section 162(a)(2) paid or incurred while traveling away from home.

A commenter suggested that only the marginal cost of commuting should be disallowed, similar to spouse and dependent travel in section 274(m)(3). The Treasury Department and the IRS decline to adopt this suggestion because the language of section 274(l) broadly refers to ''any expense'' incurred for the provision of commuting to an employee. Further, the Treasury Department and the IRS are not aware of any evidence that Congress intended to disallow only the marginal cost of commuting.

A commenter requested that the final regulations include a definition of ''employee'' for purposes of section 274(l). In response to this comment, the Treasury Department and the IRS include a definition of employee in the final regulations. Under the final regulations, the term ''employee'' means an employee of the taxpayer as defined in section 3121(d)(1) and (2) (that is, officers of a corporate taxpayer and employees of the taxpayer under the common law rules).

The proposed regulations provided a definition for an employee's ''residence,'' referencing the definition of the term ''residence'' in § 1.121–1(b)(1). Under § 1.121–1(b)(1), whether property is used by the taxpayer as the taxpayer's residence depends upon all the facts and circumstances. A property used by the taxpayer as the taxpayer's residence may include a houseboat, a house trailer, or the house or apartment that the taxpayer is entitled to occupy as a tenant-stockholder in a cooperative housing corporation.

A commenter requested that the final regulations limit the definition of ''residence'' to the residence to or from which the employee regularly commutes, which generally is the employee's principal residence. The Treasury Department and the IRS decline to adopt this comment because nothing in the language of section 274(l) indicates that commuting is limited to transportation from a principal residence. An employee could, for example, regularly commute from a vacation home to the workplace. Thus, the final regulations continue to define ''residence'' by referencing the definition of the term ''residence'' in § 1.121–1(b)(1), and specifically provide that this definition may include a residence that is not a principal residence.

The proposed regulations also defined the term ''safety of the employee,'' referencing the description of a bona fide business-oriented security concern in § 1.132–5(m). Several commenters suggested that the proposed rules for determining when transportation provided by an employer is necessary for the safety of the employee were too narrow and should be expanded to apply beyond a bona fide business-oriented security concern in § 1.132–5(m). These commenters generally suggested that the final regulations should instead define ''safety of the employee'' by reference to § 1.61–21(k)(5). Section 1.61–21(k)(5) provides that unsafe conditions exist if a reasonable person would, under the facts and circumstances, consider it unsafe for the employee to walk to or from home, or to walk to or use public transportation at the time of day the employee must commute. One of the factors indicating whether it is unsafe is the history of crime in the geographic area surrounding the employee's workplace or residence at the time of day the employee must commute.

The Treasury Department and the IRS agree with this suggestion. Accordingly, the final regulations clarify that a transportation or commuting expense is necessary for ensuring the safety of the employee if unsafe conditions, as described in § 1.61–21(k)(5), exist for the employee.

To further clarify the exception, a commenter also suggested that examples be included illustrating situations in which transportation provided by an employer is necessary for the safety of the employee. The Treasury Department and the IRS believe that further clarification is unnecessary in light of the final regulations' reference to unsafe conditions as described in § 1.61–21(k)(5).

A commenter suggested that temporary or occasional places of employment should not be considered an employee's place of employment for purpose of section 274(l). The commenter pointed to prior guidance issued by the IRS as well as to case law that provides that travel to a temporary place of employment is not treated as

commuting. The Treasury Department and the IRS agree with this comment and have modified the final regulations to explain that temporary or occasional places of employment are not an employee's place of employment under section 274(l). However, the final regulations provide that an employee must have at least one regular or principal place of business.

The Treasury Department and the IRS have determined that the exceptions in section 274(e) do not apply to deductions disallowed by section 274(l), because the statutory language in section 274 applies the exceptions in 274(e) only to expenses that are otherwise disallowed or limited by section 274(a), (k), and (n). A commenter pointed out that although the exceptions in section 274(e) are applicable only to expenses disallowed or limited by section 274(a), (k), and (n), the Treasury Department and the IRS have previously extended the exceptions in 274(e)(2) to expenses otherwise disallowed by other subsections of section 274. Specifically, the commenter noted that the exception in section 274(e)(2) was extended to the spouse travel disallowance in § 274(m)(3), pursuant to § 1.274–2(f)(2)(iii).

The Treasury Department and the IRS considered this comment but do not believe that the exception in section 274(e)(2) should be extended to commuting expenses disallowed by section 274(l). The Joint Committee on Taxation's ''Bluebook'' describing the TCJA confirms that the exception in section 274(e)(2) does not apply to section 274(l) expenses:

> The provision is intended to include qualified transportation fringe expenses in the exception to the deduction disallowance for expenses that are treated as compensation. Any expenses incurred for providing any form of transportation which are not qualified transportation fringes (or any payment or reimbursement) for commuting between the employee's residence and place or employment, even if included in compensation, are not eligible for this exception.

Joint Committee on Taxation, *General Explanation of Public Law 115–97* (JCS–1–18), at 190 (December 20, 2018). Thus, the final regulations do not apply the section 274(e) exceptions, including section 274(e)(2), to commuting expenses disallowed by section 274(l).

Applicability Date

These regulations apply to taxable years beginning on or after December 16, 2020. Notwithstanding the preceding sentence, taxpayers may choose to apply § 1.274–13(b)(14)(ii) of these final regulations to taxable years ending after December 31, 2019.

Taxpayers may continue to rely on proposed §§ 1.274–13 through 1.274–14, which were issued in a notice of proposed rulemaking (REG–119307–19) and published on June 23, 2020, in the **Federal Register** (85 FR 37599) or the guidance provided in Notice 2018–99 for parking expenses, other QTF expenses, and transportation and commuting expenses, as applicable, paid or incurred in taxable years beginning after December 31, 2017 and before December 16, 2020.

Special Analyses

These final regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that this final rule will not have a significant economic impact on a substantial number of small entities. Although the rule may affect a substantial number of small entities, the economic impact of the regulations is not likely to be significant. Data are not readily available about the number of taxpayers affected, but the number is likely to be substantial for both large and small entities because the rule may affect entities that incur QTF or commuting expenses. The economic impact of these regulations is not likely to be significant, however, because these final regulations substantially incorporate prior guidance and otherwise clarify the application of the TCJA changes to section 274 related to QTF and commuting expenses. These final regulations will assist taxpayers in understanding the changes to section 274 and make it easier for taxpayers to comply with those changes. Accordingly, the Secretary of the Treasury's delegate certifies that the rule will not have a significant economic impact on a substantial number of small entities. Notwithstanding this certification, the Treasury Department and the IRS welcome comments on the impact of these regulations on small entities.

Pursuant to section 7805(f), these final regulations have been submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comment on their impact on small business. No comments on the proposed regulations were received from the Chief Counsel for the Office of Advocacy of the Small Business Administration.

Effect on Other Documents

The following publications are obsolete as of December 16, 2020.

Notice 2018–99 (2018–52 I.R.B. 1067).

Statement of Availability of IRS Documents

Notices cited in this preamble are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at *http://www.irs.gov.*

Drafting Information

The principal author of this final regulation is Patrick Clinton, Office of the Associate Chief Counsel (Income Tax & Accounting). Other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income Taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAX

■ **Paragraph 1.** The authority citation for part 1 is amended by adding entries in for §§ 1.274–13 and 1.274–14 in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805.

* * * * *

Section 1.274–13 also issued under 26 U.S.C. 274.

Section 1.274–14 also issued under 26 U.S.C. 274.

* * * * *

■ **Par. 2.** Section 1.274–13 is added to read as follows:

§ 1.274–13 Disallowance of deductions for certain qualified transportation fringe expenditures.

(a) *In general.* Except as provided in this section, no deduction otherwise allowable under chapter 1 of the Internal Revenue Code (Code) is allowed for any expense of any qualified transportation fringe as defined in paragraph (b)(1) of this section.

(b) *Definitions.* The following definitions apply for purposes of this section:

(1) *Qualified transportation fringe.* The term *qualified transportation fringe* means any of the following provided by an employer to an employee:

(i) Transportation in a commuter highway vehicle if such transportation is in connection with travel between the employee's residence and place of employment (as described in sections 132(f)(1)(A) and 132(f)(5)(B));

(ii) Any transit pass (as described in sections 132(f)(1)(B) and 132(f)(5)(A)); or

(iii) Qualified parking (as described in sections 132(f)(1)(C) and 132(f)(5)(C)).

(2) *Employee.* The term *employee* means a common law employee or other statutory employee, such as an officer of a corporation, who is currently employed by the taxpayer. See § 1.132–9 Q/A–5. Partners, 2-percent shareholders of S corporations (as defined in section 1372(b)), sole proprietors, and independent contractors are not employees of the taxpayer for purposes of this section. See § 1.132–9 Q/A–24.

(3) *General public.* (i) *In general.* The term *general public* includes, but is not limited to, customers, clients, visitors, individuals delivering goods or services to the taxpayer, students of an educational institution, and patients of a health care facility. The term general public does not include individuals that are employees, partners, 2-percent shareholders of S corporations (as defined in section 1372(b)), sole proprietors, or independent contractors of the taxpayer. Also, an exclusive list of guests of a taxpayer is not the general public. Parking spaces that are available to the general public but empty are treated as provided to the general public. Parking spaces that are used to park vehicles owned by the general public while the vehicles await repair or service by the taxpayer are also treated as provided to the general public.

(ii) *Multi-tenant building.* If a taxpayer owns or leases space in a multi-tenant building, the term *general public* includes employees, partners, 2-percent shareholders of S corporations (as defined in section 1372(b)), sole proprietors, independent contractors, clients, or customers of unrelated tenants in the building.

(4) *Parking facility.* The term *parking facility* includes indoor and outdoor garages and other structures, as well as parking lots and other areas, where a taxpayer provides qualified parking (as defined in section 132(f)(5)(C)) to one or more of its employees. The term *parking facility* may include one or more parking facilities but does not include parking spaces on or near property used by an employee for residential purposes.

(5) *Geographic location.* The term *geographic location* means contiguous tracts or parcels of land owned or leased by the taxpayer. Two or more tracts or parcels of land are contiguous if they share common boundaries or would share common boundaries but for the interposition of a road, street, railroad, stream, or similar property. Tracts or parcels of land which touch only at a common corner are not contiguous.

(6) *Total parking spaces.* The term *total parking spaces* means the total number of parking spaces, or the taxpayer's portion thereof, in the parking facility.

(7) *Reserved employee spaces.* The term *reserved employee spaces* means the spaces in the parking facility, or the taxpayer's portion thereof, exclusively reserved for the taxpayer's employees. Employee spaces in the parking facility, or portion thereof, may be exclusively reserved for employees by a variety of methods, including, but not limited to, specific signage (for example, ''Employee Parking Only'') or a separate facility or portion of a facility segregated by a barrier to entry or limited by terms of access. Inventory/unusable spaces are not included in *reserved employee spaces.*

(8) *Reserved nonemployee spaces.* The term *reserved nonemployee spaces* means the spaces in the parking facility, or the taxpayer's portion thereof, exclusively reserved for nonemployees. Such parking spaces may include, but are not limited to, spaces reserved exclusively for visitors, customers, partners, sole proprietors, 2-percent shareholders of S corporations (as defined in section 1372(b)), vendor deliveries, and passenger loading/unloading. Nonemployee spaces in the parking facility, or portion thereof, may be exclusively reserved for nonemployees by a variety of methods, including, but not limited to, specific signage (for example, ''Customer Parking Only'') or a separate facility, or portion of a facility, segregated by a barrier to entry or limited by terms of access. Inventory/unusable spaces are not included in *reserved nonemployee spaces.*

(9) *Inventory/unusable spaces.* The term *inventory/unusable spaces* means the spaces in the parking facility, or the taxpayer's portion thereof, exclusively used or reserved for inventoried vehicles, qualified nonpersonal use vehicles described in § 1.274–5(k), or other fleet vehicles used in the taxpayer's business, or that are otherwise not usable for parking by employees or the general public. Examples of such parking spaces include, but are not limited to, parking spaces for vehicles that are intended to be sold or leased at a car dealership or car rental agency, parking spaces for vehicles owned by an electric utility used exclusively to maintain electric power lines, or parking spaces occupied by trash dumpsters (or similar property). Taxpayers may use any reasonable methodology to determine the number of inventory/unusable spaces in the parking facility. A reasonable methodology may include using the average of monthly inventory counts.

(10) *Available parking spaces.* The term *available parking spaces* means the total parking spaces, less reserved employee spaces and less inventory/unusable spaces, that are available to employees and the general public.

(11) *Primary use.* The term *primary use* means greater than 50 percent of actual or estimated usage of the available parking spaces in the parking facility.

(12) *Total parking expenses*—(i) *In general.* The term *total parking expenses* means all expenses of the taxpayer related to total parking spaces in a parking facility including, but not limited to, repairs, maintenance, utility costs, insurance, property taxes, interest, snow and ice removal, leaf removal, trash removal, cleaning, landscape costs, parking lot attendant expenses, security, and rent or lease payments or a portion of a rent or lease payment (if not broken out separately). A taxpayer may use any reasonable methodology to allocate mixed parking expenses to a parking facility. A deduction for an allowance for depreciation on a parking facility owned by a taxpayer and used for parking by the taxpayer's employees is an allowance for the exhaustion, wear and tear, and obsolescence of property, and not included in *total parking expenses* for purposes of this section. Expenses paid or incurred for nonparking facility property, including items related to property next to the parking facility, such as landscaping or lighting, also are not included in *total parking expenses.*

(ii) *Optional rule for allocating certain mixed parking expenses.* A taxpayer may choose to allocate 5 percent of any the following mixed parking expenses to a parking facility: Lease or rental agreement expenses, property taxes, interest expense, and expenses for utilities and insurance.

(13) *Mixed parking expense.* The term *mixed parking expense* means a single expense amount paid or incurred by a taxpayer that includes both parking facility and nonparking facility expenses for a property that a taxpayer owns or leases.

(14) *Peak demand period*—(i) *In general.* The term *peak demand period* refers to the period of time on a typical business day during the taxable year when the greatest number of the taxpayer's employees are utilizing

parking spaces in the taxpayer's parking facility. If a taxpayer's employees work in shifts, the *peak demand period* would take into account the shift during which the largest number of employees park in the taxpayer's parking facility. However, a brief transition period during which two shifts overlap in their use of parking spaces, as one shift of employees is getting ready to leave and the next shift is reporting to work, may be disregarded. Taxpayers may use any reasonable methodology to determine the total number of spaces used by employees during the *peak demand period* on a typical business day. A reasonable methodology may include periodic inspections or employee surveys.

(ii) *Optional rule for federally declared disasters.* If a taxpayer owns or leases a parking facility that is located in a federally declared disaster area, as defined in section 165(i)(5), the taxpayer may choose to identify a typical business day for the taxable year in which the disaster occurred by reference to a typical business day in that taxable year prior to the date that the taxpayer's operations were impacted by the federally declared disaster. Alternatively, a taxpayer may choose to identify a typical business day during the month(s) of the taxable year in which the disaster occurred by reference to a typical business day during the same month(s) of the taxable year immediately preceding the taxable year in which the disaster first occurred. For purposes of applying the optional rule for federally declared disasters, the taxable year in which the disaster occurs is determined without regard to whether an election under section 165(i) is made with respect to the disaster.

(c) *Optional aggregation rule for calculating total parking spaces; taxpayer owned or leased parking facilities.* For purposes of determining total parking spaces in calculating the disallowance of deductions for qualified transportation fringe parking expenses under the general rule in paragraph (d)(2)(i) of this section, the primary use methodology in paragraph (d)(2)(ii)(B) of this section, or the cost per space methodology in paragraph (d)(2)(ii)(C) of this section, a taxpayer that owns or leases more than one parking facility in a single geographic location may aggregate the number of spaces in those parking facilities. For example, parking spaces at an office park or an industrial complex in the geographic location may be aggregated. However, a taxpayer may not aggregate parking spaces in parking facilities that are in different geographic locations. A taxpayer that chooses to aggregate its parking spaces under this paragraph (c) must determine its total parking expenses, including the allocation of mixed parking expenses, as if the aggregated parking spaces constitute one parking facility.

(d) *Calculation of disallowance of deductions for qualified transportation fringe expenses*—(1) *Taxpayer pays a third party for parking qualified transportation fringe.* If a taxpayer pays a third party an amount for its employees' parking qualified transportation fringe, the section 274(a)(4) disallowance generally is calculated as the taxpayer's total annual cost of employee parking qualified transportation fringes paid to the third party.

(2) *Taxpayer provides parking qualified transportation fringe at a parking facility it owns or leases.* If a taxpayer owns or leases all or a portion of one or more parking facilities where its employees park, the section 274(a)(4) disallowance may be calculated using the general rule in paragraph (d)(2)(i) of this section or any of the simplified methodologies in paragraph (d)(2)(ii) of this section. A taxpayer may choose to use the general rule or any of the following methodologies for each taxable year and for each parking facility.

(i) *General rule.* A taxpayer that uses the general rule in this paragraph (d)(2)(i) must calculate the disallowance of deductions for qualified transportation fringe parking expenses for each employee receiving the qualified transportation fringe based on a reasonable interpretation of section 274(a)(4). A taxpayer that uses the general rule in this paragraph (d)(2)(i) may use the aggregation rule in paragraph (c) of this section for determining total parking spaces. An interpretation of section 274(a)(4) is not reasonable unless the taxpayer applies the following rules when calculating the disallowance under this paragraph (d)(2)(i).

(A) *A taxpayer must not use value to determine expense.* A taxpayer may not use the value of employee parking to determine expenses allocable to employee parking that is either owned or leased by the taxpayer because section 274(a)(4) disallows a deduction for the expense of providing a qualified transportation fringe, regardless of its value.

(B) *A taxpayer must not deduct expenses related to reserved employee spaces.* A taxpayer must determine the allocable portion of total parking expenses that relate to any reserved employee spaces. No deduction is allowed for the parking expenses that relate to reserved employee spaces.

(C) *A taxpayer must not improperly apply the exception for qualified parking made available to the public.* A taxpayer must not improperly apply the exception in section 274(e)(7) or paragraph (e)(2)(ii) of this section to parking facilities, for example, by treating a parking facility regularly used by employees as available to the general public merely because the general public has access to the parking facility.

(ii) *Additional simplified methodologies.* Instead of using the general rule in paragraph (d)(2)(i) of this section for a taxpayer owned or leased parking facility, a taxpayer may use a simplified methodology under paragraph (d)(2)(ii)(A), (B), or (C) of this section.

(A) *Qualified parking limit methodology.* A taxpayer that uses the qualified parking limit methodology in this paragraph (d)(2)(ii)(A) must calculate the disallowance of deductions for qualified transportation fringe parking expenses by multiplying the total number of spaces used by employees during the peak demand period, or the total number of taxpayer's employees, by the section 132(f)(2) monthly per employee limitation on exclusion (adjusted for inflation), for each month in the taxable year. The result is the amount of the taxpayer's expenses that are disallowed under section 274(a)(4). In applying this methodology, a taxpayer calculates the disallowed amount as required under this paragraph (d)(2)(ii)(A), regardless of the actual amount of the taxpayer's total parking expenses. This methodology may be used only if the taxpayer includes the value of the qualified transportation fringe in excess of the sum of the amount, if any, paid by the employee for the qualified transportation fringe and the applicable statutory monthly limit in section 132(f)(2) as compensation paid to the employee under chapter 1 of the Code (chapter 1) and as wages to the employee for purposes of withholding under chapter 24 of the Code (chapter 24), relating to collection of Federal income tax at source on wages. In addition, the exception to the disallowance for amounts treated as employee compensation provided for in section 274(e)(2) and in paragraph (e)(2)(i) of this section cannot be applied to reduce a section 274(a)(4) disallowance calculated using this method. A taxpayer using this methodology may not use the aggregation rule in paragraph (c) of this section.

(B) *Primary use methodology.* A taxpayer that uses the primary use methodology in this paragraph

(d)(2)(ii)(B) must use the following four-step methodology to calculate the disallowance of deductions for qualified transportation fringe parking expenses for each parking facility for which the taxpayer uses the primary use methodology. A taxpayer using this methodology may use the aggregation rule in paragraph (c) of this section for determining total parking spaces.

(*1*) *Step 1—Calculate the disallowance for reserved employee spaces.* A taxpayer must identify the total parking spaces in the parking facility, or the taxpayer's portion thereof, exclusively reserved for the taxpayer's employees. The taxpayer must then determine the percentage of reserved employee spaces in relation to total parking spaces and multiply that percentage by the taxpayer's total parking expenses for the parking facility. The product is the amount of the deduction for total parking expenses that is disallowed under section 274(a)(4) for reserved employee spaces. There is no disallowance for reserved employee spaces if the following conditions are met:

(*i*) The primary use (as defined in paragraphs (b)(11) and (d)(2)(ii)(B)(*2*) of this section) of the available parking spaces is to provide parking to the general public;

(*ii*) There are five or fewer reserved employee spaces in the parking facility; and

(*iii*) The reserved employee spaces are 5 percent or less of the total parking spaces.

(*2*) *Step 2—Determine the primary use of available parking spaces.* A taxpayer must identify the available parking spaces in the parking facility and determine whether their primary use is to provide parking to the general public. If the primary use of the available parking spaces in the parking facility is to provide parking to the general public, then total parking expenses allocable to available parking spaces at the parking facility are excepted from the section 274(a)(4) disallowance by the general public exception under section 274(e)(7) and paragraph (e)(2)(ii) of this section. Primary use of available parking spaces is based on the number of available parking spaces used by employees during the peak demand period.

(*3*) *Step 3—Calculate the allowance for reserved nonemployee spaces.* If the primary use of a taxpayer's available parking spaces is not to provide parking to the general public, the taxpayer must identify the number of available parking spaces in the parking facility, or the taxpayer's portion thereof, exclusively reserved for nonemployees. A taxpayer that has no reserved nonemployee spaces may proceed to Step 4 in paragraph (d)(2)(ii)(B)(*4*) of this section. If the taxpayer has reserved nonemployee spaces, it may determine the percentage of reserved nonemployee spaces in relation to remaining total parking spaces and multiply that percentage by the taxpayer's remaining total parking expenses. The product is the amount of the deduction for remaining total parking expenses that is not disallowed because the spaces are not available for employee parking.

(*4*) *Step 4—Determine remaining use of available parking spaces and allocable expenses.* If a taxpayer completes Steps 1—3 in paragraph (d)(2)(ii)(B) of this section and has any remaining total parking expenses not specifically categorized as deductible or nondeductible, the taxpayer must reasonably allocate such expenses by determining the total number of available parking spaces used by employees during the peak demand period.

(C) *Cost per space methodology.* A taxpayer using the cost per space methodology in this paragraph (d)(2)(ii)(C) must calculate the disallowance of deductions for qualified transportation fringe parking expenses by multiplying the cost per space by the number of total parking spaces used by employees during the peak demand period. The product is the amount of the deduction for total parking expenses that is disallowed under section 274(a)(4). A taxpayer may calculate cost per space by dividing total parking expenses by total parking spaces. This calculation may be performed on a monthly basis. A taxpayer using this methodology may use the aggregation rule in paragraph (c) of this section for determining total parking spaces.

(3) *Expenses for transportation in a commuter highway vehicle or transit pass.* If a taxpayer pays a third party an amount for its employees' commuter highway vehicle or a transit pass qualified transportation fringe, the section 274(a)(4) disallowance generally is equal to the taxpayer's total annual cost of employee commuter highway vehicle or a transit pass qualified transportation fringes paid to the third party. If a taxpayer provides transportation in a commuter highway vehicle or transit pass qualified transportation fringes in kind directly to its employees, the taxpayer must calculate the disallowance of deductions for expenses for such fringes based on a reasonable interpretation of section 274(a)(4). However, a taxpayer may not use the value of the qualified commuter highway vehicle or transit pass fringe to the employee to determine expenses allocable to such fringe because section 274(a)(4) disallows a deduction for the expense of providing a qualified transportation fringe, regardless of its value to the employee.

(e) *Specific exceptions to disallowance of deduction for qualified transportation fringe expenses*—(1) *In general.* The provisions of section 274(a)(4) and paragraph (a) of this section (imposing limitations on deductions for qualified transportation fringe expenses) are not applicable in the case of expenditures set forth in paragraph (e)(2) of this section. Such expenditures are deductible to the extent allowable under chapter 1 of the Code. This paragraph (e) cannot be construed to affect whether a deduction under section 162 or 212 is allowed or allowable. The fact that an expenditure is not covered by a specific exception provided for in this paragraph (e) is not determinative of whether a deduction for the expenditure is disallowed under section 274(a)(4) and paragraph (a) of this section.

(2) *Exceptions to disallowance.* The expenditures referred to in paragraph (e)(1) of this section are set forth in paragraphs (e)(2)(i) through (iii) of this section.

(i) *Certain qualified transportation fringe expenses treated as compensation*—(A) *Expenses includible in income of persons who are employees and are not specified individuals.* In accordance with section 274(e)(2)(A), and except as provided in paragraph (e)(2)(i)(C) of this section, an expense paid or incurred by a taxpayer for a qualified transportation fringe, if an employee who is not a specified individual is the recipient of the qualified transportation fringe, is not subject to the disallowance of deductions provided for in paragraph (a) of this section to the extent that the taxpayer—

(*1*) Properly treats the expense relating to the recipient of the qualified transportation fringe as compensation to an employee under chapter 1 and as wages to the employee for purposes of chapter 24; and

(*2*) Treats the proper amount as compensation to the employee under § 1.61–21.

(B) *Specified Individuals.* In accordance with section 274(e)(2)(B), in the case of a specified individual (as defined in section 274(e)(2)(B)(ii)), the disallowance of deductions provided for in paragraph (a) of this section does not apply to an expense for a qualified transportation fringe of the specified individual to the extent that the amount of the expense does not exceed the sum of—

(*1*) The amount treated as compensation to the specified individual under chapter 1 and as wages to the specified individual for purposes of chapter 24; and

(*2*) Any amount the specified individual reimburses the taxpayer.

(C) *Expenses for which an amount is excluded from income or is less than the proper amount.* Notwithstanding paragraph (e)(2)(i)(A) of this section, in the case of an expense paid or incurred by a taxpayer for a qualified transportation fringe for which an amount is wholly or partially excluded from a recipient's income under subtitle A of the Code (other than because the amount is reimbursed by the recipient), or for which an amount included in compensation and wages to an employee is less than the amount required to be included under § 1.61–21, the disallowance of deductions provided for in paragraph (a) of this section does not apply to the extent that the amount of the expense does not exceed the sum of—

(*1*) The amount treated as compensation to the recipient under chapter 1 and as wages to the recipient for purposes of chapter 24; and

(*2*) Any amount the recipient reimburses the taxpayer.

(ii) *Expenses for transportation in a commuter highway vehicle, transit pass, or parking made available to the public.* Under section 274(e)(7) and this paragraph (e)(2)(ii), any expense paid or incurred by a taxpayer for transportation in a commuter highway vehicle, a transit pass, or parking that otherwise qualifies as a qualified transportation fringe is not subject to the disallowance of deductions provided for in paragraph (a) of this section to the extent that such transportation, transit pass, or parking is made available to the general public. With respect to parking, this exception applies to the entire amount of the taxpayer's parking expense, less any expenses specifically attributable to employees (for example, expenses allocable to reserved employee spaces), if the primary use of the parking is by the general public. If the primary use of the parking is not by the general public, this exception applies only to the costs attributable to the parking used by the general public.

(iii) *Expenses for transportation in a commuter highway vehicle, transit pass, or parking sold to customers.* Under section 274(e)(8) and this paragraph (e)(2)(iii), any expense paid or incurred by a taxpayer for transportation in a commuter highway vehicle, a transit pass, or parking that otherwise qualifies as a qualified transportation fringe to the extent such transportation, transit pass, or parking is sold to customers in a bona fide transaction for an adequate and full consideration in money or money's worth, is not subject to the disallowance of deductions provided for in paragraph (a) of this section. For purposes of this paragraph (e)(2)(iii), the term *customer* includes an employee of the taxpayer who purchases transportation in a commuter highway vehicle, a transit pass, or parking in a bona fide transaction for an adequate and full consideration in money or money's worth. If in a bona fide transaction, the adequate and full consideration for qualified parking is zero, the exception in this paragraph (e)(2)(iii) applies even though the taxpayer does not actually sell the parking to its employees. To apply the exception in this case, the taxpayer bears the burden of proving that the fair market value of the qualified parking is zero. However, solely for purposes of this paragraph (e)(2)(iii), a taxpayer will be treated as satisfying this burden if the qualified parking is provided in a rural, industrial, or remote area in which no commercial parking is available and an individual other than an employee ordinarily would not pay to park in the parking facility.

(f) *Examples.* The following examples illustrate the provisions of this section related to parking expenses for qualified transportation fringes. For each example, unless otherwise stated, assume the parking expenses are otherwise deductible expenses paid or incurred during the 2020 taxable year; all or some portion of the expenses relate to a qualified transportation fringe under section 132(f); the section 132(f)(2) monthly per employee limitation on an employee's exclusion is $270; the fair market value of the qualified parking is not $0; all taxpayers are calendar-year taxpayers; and the length of the 2020 taxable year is 12 months.

(1) *Example 1.* Taxpayer A pays B, a third party who owns a parking garage adjacent to A's place of business, $100 per month per parking space for each of A's 10 employees to park in B's garage, or $12,000 for parking in 2020 (($100 × 10) × 12 = $12,000). The $100 per month paid for each of A's 10 employees for parking is excludible from the employees' gross income under section 132(a)(5), and none of the exceptions in section 274(e) or paragraph (e) of this section are applicable. Thus, the entire $12,000 is subject to the section 274(a)(4) disallowance under paragraphs (a) and (d)(1) of this section.

(2) *Example 2.* (i) Assume the same facts as in paragraph (f)(1) of this section (*Example 1*), except A pays B $300 per month for each parking space, or $36,000 for parking for 2020 (($300 × 10) × 12 = $36,000). Of the $300 per month paid for parking for each of 10 employees, $270 is excludible under section 132(a)(5) for 2020 and none of the exceptions in section 274(e) or paragraph (e) of this section are applicable to this amount. A properly treats the excess amount of $30 ($300 − $270) per employee per month as compensation and wages. Thus, $32,400 (($270 × 10) × 12 = $32,400) is subject to the section 274(a)(4) disallowance under paragraphs (a) and (d)(1) of this section.

(ii) The excess amount of $30 per employee per month is not excludible under section 132(a)(5). As a result, the exceptions in section 274(e)(2) and paragraph (e)(2)(i) of this section are applicable to this amount. Thus, $3,600 ($36,000 − $32,400 = $3,600) is not subject to the section 274(a)(4) disallowance and remains deductible.

(3) *Example 3.* (i) Taxpayer C leases from a third party a parking facility that includes 200 parking spaces at a rate of $500 per space, per month in 2020. C's annual lease payment for the parking spaces is $1,200,000 ((200 × $500) × 12 = $1,200,000). The number of available parking spaces used by C's employees during the peak demand period is 200.

(ii) C uses the qualified parking limit methodology described in paragraph (d)(2)(ii)(A) of this section to determine the disallowance under section 274(a)(4). Under this methodology, the section 274(a)(4) disallowance is calculated by multiplying the number of available parking spaces used by employees during the peak demand period, 200, the section 132(f)(2) monthly per employee limitation on exclusion, $270, and 12, the number of months in the applicable taxable year. The amount subject to the section 274(a)(4) disallowance is $648,000 (200 × $270 × 12 = $648,000). This amount is excludible from C's employees' gross incomes under section 132(a)(5) and none of the exceptions in section 274(e) or paragraph (e) of this section are applicable to this amount. The excess $552,000 ($1,200,000 − $648,000) for which C is not disallowed a deduction under 274(a)(4) is included in C's employees' gross incomes because it exceeds the section 132(f)(2) monthly per employee limitation on exclusion.

(4) *Example 4.* (i) *Facts.* Taxpayer D, a big box retailer, owns a surface parking facility adjacent to its store. D incurs $10,000 of total parking expenses for its store in the 2020 taxable year. D's parking facility has 510 spaces that are used by its customers, employees, and its fleet vehicles. None of D's parking

spaces are reserved. The number of available parking spaces used by D's employees during the peak demand period is 50. Approximately 30 nonreserved parking spaces are empty during D's peak demand period. D's fleet vehicles occupy 10 parking spaces.

(ii) *Methodology.* D uses the primary use methodology in paragraph (d)(2)(ii)(B) of this section to determine the amount of parking expenses that are disallowed under section 274(a)(4).

(iii) *Step 1.* Because none of D's parking spaces are exclusively reserved for employees, there is no amount to be specifically allocated to reserved employee spaces under paragraph (d)(2)(ii)(B)(*1*) of this section.

(iv) *Step 2.* D's number of available parking spaces is the total parking spaces reduced by the number of reserved employee spaces and inventory/unusable spaces or 500 (510 − 0 − 10 = 500). The number of available parking spaces used by D's employees during the peak demand period is 50. Of the 500 available parking spaces, 450 are used to provide parking to the general public, including the 30 empty nonreserved parking spaces that are treated as provided to the general public. The primary use of D's available parking spaces is to provide parking to the general public because 90% (450/500 = 90%) of the available parking spaces are used by the general public under paragraph (d)(2)(ii)(B)(*2*) of this section. Because the primary use of the available parking spaces is to provide parking to the general public, the exception in section 274(e)(7) and paragraph (e)(2)(ii) of this section applies and none of the $10,000 of total parking expenses is subject to the section 274(a)(4) disallowance.

(5) *Example 5.* (i) *Facts.* Taxpayer E, a manufacturer, owns a surface parking facility adjacent to its plant. E incurs $10,000 of total parking expenses in 2020. E's parking facility has 500 spaces that are used by its visitors and employees. E reserves 25 of these spaces for nonemployee visitors. The number of available parking spaces used by E's employees during the peak demand period is 400.

(ii) *Methodology.* E uses the primary use methodology in paragraph (d)(2)(ii)(B) of this section to determine the amount of parking expenses that are disallowed under section 274(a)(4).

(iii) *Step 1.* Because none of E's parking spaces are exclusively reserved for employees, there is no amount to be specifically allocated to reserved employee spaces under paragraph (d)(2)(ii)(B)(*1*) of this section.

(iv) *Step 2.* The primary use of E's parking facility is not to provide parking to the general public because 80% (400/500 = 80%) of the available parking spaces are used by its employees. Thus, expenses allocable to those spaces are not excepted from the section 274(a) disallowance by section 274(e)(7) and paragraph (e)(2)(ii) of this section under the primary use test in paragraph (d)(2)(ii)(B)(*2*) of this section.

(v) *Step 3.* Because 5% (25/500 = 5%) of E's available parking spaces are reserved nonemployee spaces, up to $9,500 ($10,000 × 95% = $9,500) of E's total parking expenses are subject to the section 274(a)(4) disallowance under this step as provided in paragraph (d)(2)(ii)(B)(*3*) of this section. The remaining $500 ($10,000 × 5% = $500) of expenses allocable to reserved nonemployee spaces is excepted from the section 274(a) disallowance and continues to be deductible.

(vi) *Step 4.* E must reasonably determine the employee use of the remaining parking spaces by using the number of available parking spaces used by E's employees during the peak demand period and determine the expenses allocable to employee parking spaces under paragraph (d)(2)(ii)(B)(*4*) of this section.

(6) *Example 6.* (i) *Facts.* Taxpayer F, a manufacturer, owns a surface parking facility adjacent to its plant. F incurs $10,000 of total parking expenses in 2020. F's parking facility has 500 spaces that are used by its visitors and employees. F reserves 50 spaces for management. All other employees park in nonreserved spaces in F's parking facility; the number of available parking spaces used by F's employees during the peak demand period is 400. Additionally, F reserves 10 spaces for nonemployee visitors.

(ii) *Methodology.* F uses the primary use methodology in paragraph (d)(2)(ii)(B) of this section to determine the amount of parking expenses that are disallowed under section 274(a)(4).

(iii) *Step 1.* Because F reserved 50 spaces for management, $1,000 ((50/500) × $10,000 = $1,000) is the amount of total parking expenses that is nondeductible for reserved employee spaces under section 274(a)(4) and paragraphs (a) and (d)(2)(ii)(B)(*1*) of this section. None of the exceptions in section 274(e) or paragraph (e) of this section are applicable to this amount.

(iv) *Step 2.* The primary use of the remainder of F's parking facility is not to provide parking to the general public because 89% (400/450 = 89%) of the available parking spaces in the facility are used by its employees. Thus, expenses allocable to these spaces are not excepted from the section 274(a)(4) disallowance by section 274(e)(7) and paragraph (e)(2)(ii) of this section under the primary use test in paragraph (d)(2)(ii)(B)(*2*) of this section.

(v) *Step 3.* Because 2% (10/450 = 2.22%) of F's available parking spaces are reserved nonemployee spaces, the $180 allocable to those spaces (($10,000 − $1,000) × 2%) is not subject to the section 274(a)(4) disallowance and continues to be deductible under paragraph (d)(2)(ii)(B)(*3*) of this section.

(vi) *Step 4.* F must reasonably determine the employee use of the remaining parking spaces by using the number of available parking spaces used by F's employees during the peak demand period and determine the expenses allocable to employee parking spaces under paragraph (d)(2)(ii)(B)(*4*) of this section.

(7) *Example 7.* (i) *Facts.* Taxpayer G, a financial services institution, owns a multi-level parking garage adjacent to its office building. G incurs $10,000 of total parking expenses in 2020. G's parking garage has 1,000 spaces that are used by its visitors and employees. However, one floor of the parking garage is segregated by an electronic barrier that can only be accessed with a card provided by G to its employees. The segregated parking floor contains 100 spaces. The other floors of the parking garage are not used by employees for parking during the peak demand period.

(ii) *Methodology.* G uses the primary use methodology in paragraph (d)(2)(ii)(B) of this section to determine the amount of parking expenses that are disallowed under section 274(a)(4).

(iii) *Step 1.* Because G has 100 reserved spaces for employees, $1,000 ((100/1,000) × $10,000 = $1,000) is the amount of total parking expenses that is nondeductible for reserved employee spaces under section 274(a)(4) and paragraph (d)(2)(ii)(B)(*1*) of this section. None of the exceptions in section 274(e) or paragraph (e) of this section are applicable to this amount.

(iv) *Step 2.* The primary use of the available parking spaces in G's parking facility is to provide parking to the general public because 100% (900/900 = 100%) of the available parking spaces are used by the public. Thus, expenses allocable to those spaces, $9,000, are excepted from the section 274(a)(4) disallowance by section 274(e)(7) and paragraph (e)(2)(ii) of this section under the primary use test in paragraph (d)(2)(ii)(B)(*2*).

(8) *Example 8.* (i) *Facts.* Taxpayer H, an accounting firm, leases a parking facility adjacent to its office building. H incurs $10,000 of total parking expenses related to the lease payments in 2020. H's leased parking facility has 100 spaces that are used by its clients and

employees. None of the parking spaces are reserved. The number of available parking spaces used by H's employees during the peak demand period is 60.

(ii) *Methodology.* H uses the primary use methodology in paragraph (d)(2)(ii)(B) of this section to determine the amount of parking expenses that are disallowed under section 274(a)(4).

(iii) *Step 1.* Because none of H's leased parking spaces are exclusively reserved for employees, there is no amount to be specifically allocated to reserved employee spaces under paragraph (d)(2)(ii)(B)(*1*) of this section.

(iv) *Step 2.* The primary use of H's leased parking facility under paragraph (d)(2)(ii)(B)(2) of this section is not to provide parking to the general public because 60% (60/100 = 60%) of the lot is used by its employees. Thus, H may not utilize the general public exception from the section 274(a)(4) disallowance provided by section 274(e)(7) and paragraph (e)(2)(ii) of this section.

(v) *Step 3.* Because none of H's parking spaces are exclusively reserved for nonemployees, there is no amount to be specifically allocated to reserved nonemployee spaces under paragraph (d)(2)(ii)(B)(*3*) of this section.

(vi) *Step 4.* H must reasonably determine the use of the parking spaces and the related expenses allocable to employee parking. Because the number of available parking spaces used by H's employees during the peak demand period is 60, H reasonably determines that 60% (60/100 = 60%) of H's total parking expenses or $6,000 ($10,000 × 60% = $6,000) is subject to the section 274(a)(4) disallowance under paragraph (d)(2)(ii)(B)(*4*) of this section.

(9) *Example 9.* (i) *Facts.* Taxpayer I, a large manufacturer, owns multiple parking facilities adjacent to its manufacturing plant, warehouse, and office building at its complex in the city of X. All of I's tracts or parcels of land at its complex in city X are located in a single geographic location. I owns parking facilities in other cities. I incurs $50,000 of total parking expenses related to the parking facilities at its complex in city X in 2020. I's parking facilities at its complex in city X have 10,000 total parking spaces that are used by its visitors and employees of which 500 are reserved for management. All other spaces at parking facilities in I's complex in city X are nonreserved. The number of nonreserved spaces used by I's employees other than management during the peak demand period at I's parking facilities in city X is 8,000.

(ii) *Methodology.* I uses the primary use methodology in paragraph (d)(2)(ii)(B) of this section to determine the amount of parking expenses that are disallowed under section 274(a)(4). I chooses to apply the aggregation rule in paragraph (c) of this section to aggregate all parking facilities in the geographic location that comprises its complex in city X. However, I may not aggregate parking facilities in other cities with its parking facilities in city X because they are in different geographic locations.

(iii) *Step 1.* Because 500 spaces are reserved for management, $2,500 ((500/10,000) × $50,000 = $2,500) is the amount of total parking expenses that is nondeductible for reserved employee spaces for I's parking facilities in city X under section 274(a)(4) and paragraphs (a) and (d)(2)(ii)(B)(*1*) of this section.

(iv) *Step 2.* The primary use of the remainder of I's parking facility is not to provide parking to the general public because 84% (8,000/9,500 = 84%) of the available parking spaces in the facility are used by its employees. Thus, expenses allocable to these spaces are not excepted from the section 274(a)(4) disallowance by section 274(e)(7) or paragraph (e)(2)(ii) of this section under the primary use test in paragraph (d)(2)(ii)(B)(*2*) of this section.

(v) *Step 3.* Because none of I's parking spaces in its parking facilities in city X are exclusively reserved for nonemployees, there is no amount to be specifically allocated to reserved nonemployee spaces under paragraph (d)(2)(ii)(B)(*3*) of this section.

(vi) *Step 4.* I must reasonably determine the use of the remaining parking spaces and the related expenses allocable to employee parking for its parking facilities in city X. Because the number of available parking spaces used by I's employees during the peak demand period in city X during an average workday is 8,000, I reasonably determines that 84.2% (8,000/9,500 = 84.2%) of I's remaining parking expense or $39,900 (($50,000 − $2,500) × 84% = $39,900) is subject to the section 274(a)(4) disallowance under paragraph (d)(2)(ii)(B)(*4*) of this section.

(10) *Example 10.* (i) Taxpayer J, a manufacturer, owns a parking facility and incurs the following mixed parking expenses (along with other parking expenses): Property taxes, utilities, insurance, security expenses, and snow removal expenses. In accordance with paragraph (b)(12)(i) and (ii) of this section, J determines its total parking expenses by allocating 5% of its property tax, utilities, and insurance expenses to its parking facility. J uses a reasonable methodology to allocate to its parking facility an applicable portion of its security and snow removal expenses. J determines that it incurred $100,000 of total parking expenses in 2020. J's parking facility has 500 spaces that are used by its visitors and employees. The number of total parking spaces used by J's employees during the peak demand period is 475.

(ii) J uses the cost per space methodology described in paragraph (d)(2)(ii)(C) of this section to determine the amount of parking expenses that are disallowed under section 274(a)(4). Under this methodology, J multiplies the cost per space by the number of total parking spaces used by J's employees during the peak demand period. J calculates the cost per space by dividing total parking expenses by the number of total parking spaces ($100,000/500 = $200). J determines that $95,000 ($200 × 475 = $95,000) of J's total parking expenses is subject to the section 274(a)(4) disallowance and none of the exceptions in section 274(e) or paragraph (e) of this section are applicable.

(11) *Example 11.* Taxpayer K operates an industrial plant with a parking facility in a rural area in which no commercial parking is available. K provides qualified parking at the plant to its employees free of charge. Further, an individual other than an employee ordinarily would not consider paying any amount to park in the plant's parking facility. Although K does not charge its employees for the qualified parking, the exception in section 274(e)(8) and this paragraph (e)(3)(iii) will apply to K's total parking expenses if in a bona fide transaction, the adequate and full consideration for the qualified parking is zero. In order to treat the adequate and full consideration as zero, K bears the burden of proving that the parking has no objective value. K is treated as satisfying this burden because the parking is provided in a rural area in which no commercial parking is available and in which an individual other than an employee ordinarily would not consider paying any amount to park in the parking facility. Therefore, the exception in paragraph (e)(2)(iii) of this section applies to K's total parking expenses and a deduction for the expenses is not disallowed by reason of section 274(a)(4).

(g) *Applicability date.* This section applies to taxable years beginning on or after December 16, 2020. However, taxpayers may choose to apply § 1.274–13(b)(14)(ii) to taxable years ending after December 31, 2019.

■ **Par. 3.** Section 1.274–14 is added to read as follows:

§ 1.274–14 Disallowance of deductions for certain transportation and commuting benefit expenditures.

(a) *General rule.* Except as provided in this section, no deduction is allowed for any expense incurred for providing any transportation, or any payment or reimbursement, to an employee of the taxpayer in connection with travel between the employee's residence and place of employment. The disallowance is not subject to the exceptions provided in section 274(e). The disallowance applies regardless of whether the travel between the employee's residence and place of employment includes more than one mode of transportation, and regardless of whether the taxpayer provides, or pays or reimburses the employee for, all modes of transportation used during the trip. For example, the disallowance applies if an employee drives a personal vehicle to a location where a different mode of transportation is used to complete the trip to the place of employment, even though the taxpayer may not incur any expense for the portion of travel in the employee's personal vehicle. The rules in section 274(l) and this section do not apply to business expenses under section 162(a)(2) paid or incurred while traveling away from home. The rules in section 274(l) and this section also do not apply to any expenditure for any qualified transportation fringe (as defined in section 132(f)) provided to an employee of the taxpayer. All qualified transportation fringe expenses are required to be analyzed under section 274(a)(4) and § 1.274–13.

(b) *Exception.* The disallowance for the deduction for expenses incurred for providing any transportation or commuting in paragraph (a) of this section does not apply if the transportation or commuting expense is necessary for ensuring the safety of the employee. The transportation or commuting expense is necessary for ensuring the safety of the employee if unsafe conditions, as described in § 1.61–21(k)(5), exist for the employee.

(c) *Definitions.* The following definitions apply for purposes of this section:

(1) *Employee.* The term *employee* means an employee of the taxpayer as defined in section 3121(d)(1) and (2) (that is, officers of a corporate taxpayer and employees of the taxpayer under the common law rules).

(2) *Residence.* The term *residence* means a residence as defined in § 1.121–1(b)(1). An employee's residence is not limited to the employee's principal residence.

(3) *Place of employment.* The term *place of employment* means the employee's regular or principal (if more than one regular) place of business. An employee's place of employment does not include temporary or occasional places of employment. An employee must have at least one regular or principal place of business.

(d) *Applicability date.* This section applies to taxable years beginning on or after December 16, 2020.

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

Approved: December 4, 2020.

David J. Kautter,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2020–27505 Filed 12–15–20; 8:45 am]

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DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 50

[Docket No. OAG 163; AG Order No. 4927–2020]

RIN 1105–AB62

Prohibition on Settlement Payments to Non-Governmental Third Parties

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This final rule amends the Department's regulations to set forth the principles of the Attorney General's Memorandum of June 5, 2017, prohibiting the inclusion of provisions in settlement agreements directing or providing for a payment or loan to a non-governmental person or entity that is not a party to the dispute, except in defined circumstances.

DATES: *Effective Date:* December 16, 2020.

FOR FURTHER INFORMATION CONTACT: Robert Hinchman, Senior Counsel, Office of Legal Policy, U.S. Department of Justice, Room 4252 RFK Building, 950 Pennsylvania Avenue NW, Washington, DC 20530, telephone (202) 514–8059 (not a toll-free number).

SUPPLEMENTARY INFORMATION: On June 5, 2017, then-Attorney General Sessions issued a Memorandum to the Heads of all Department of Justice Components and to all United States Attorneys titled, ''Prohibition on Settlement Payments to Third Parties.'' In this Memorandum, he stated: ''Our Department is privileged to represent the United States and its citizens in courts across our country. We take this responsibility seriously. In the course of this representation, there may come a time when it is in the best interests of the United States to settle a lawsuit or end a criminal prosecution. Settlements, including civil settlement agreements, deferred prosecution agreements, non-prosecution agreements, and plea agreements, are a useful tool for Department attorneys to achieve the ends of justice at a reasonable cost to the taxpayer. The goals of any settlement are, first and foremost, to compensate victims, redress harm, or punish and deter unlawful conduct.''

However, certain previous settlement agreements involving the Department included provisions requiring payments to various non-governmental, third-party organizations as a condition of settlement with the United States. Those third-party organizations were neither victims nor parties to the lawsuits.

The June 5, 2017, Memorandum announced that the Department would no longer engage in this practice. Pursuant to the June 5, 2017, Memorandum, except in specific limited circumstances, ''Department attorneys may not enter into any agreement on behalf of the United States in settlement of federal claims or charges, including agreements settling civil litigation, accepting plea agreements, or deferring or declining prosecution in a criminal matter, that directs or provides for a payment or loan to any non-governmental person or entity that is not a party to the dispute.'' This policy is already incorporated into the Justice Manual at *https://www.justice.gov/jm/jm/1-17000-settlement-payments-third-parties.*

This final rule amends the Department's regulations to reflect this policy, with certain changes from the June 5, 2017, Memorandum to clarify the scope of exceptions. This rule specifically clarifies that the policy extends to a payment or loan, whether in cash or in kind, to any non-governmental person or entity that is not a party to the dispute. The Miscellaneous Receipts Act provides that Government officials ''receiving money for the Government from any source shall deposit that money with the Treasury.'' *See* 31 U.S.C. 3302(b). ''Receiving money for the Government'' includes the ''constructive receipt'' of money ''if a federal agency could have accepted possession and retains discretion to direct the use of the money.'' *See* Effect of 31 U.S.C. 484 on the Settlement Authority of the Attorney General, 4B Op. O.L.C. 684, 688 (1980). This rule thus similarly forbids circumvention of the policy reflected in this statute via the use of in-kind payments.

This rule also revises the exceptions to the prohibition. Under the rule, there are four limited exceptions to the policy's prohibition. First, the prohibition does not apply to an otherwise lawful payment or loan that provides restitution or compensation to a victim, though in no case shall any settlement agreement require defendants in environmental cases, in lieu of payment to the Federal Government, to expend funds to provide goods or services to third parties for Supplemental Environmental Projects. Second, the prohibition does not apply when, in cases of foreign official corruption, a trusted third party is required to facilitate the repatriation and use of funds to directly benefit those harmed by the foreign corruption. Third, the prohibition does not apply to payments for legal or other professional services rendered in connection with the case. Fourth, the prohibition does not apply to payments expressly authorized by statute or regulation, including restitution and forfeiture. Finally, this rule also deletes some examples of exception (c)(1).

The policy set forth in this final rule applies to all civil and criminal cases litigated under the direction of the Attorney General and includes civil settlement agreements, *cy pres* agreements or provisions, plea agreements, non-prosecution agreements, and deferred prosecution agreements.

Regulatory Certifications

Administrative Procedure Act

This rule relates to a matter of agency management or personnel and is a rule of agency organization, procedure, or practice. Accordingly, this rule is exempt from the usual requirements of prior notice and comment and a 30-day delay in effective date. *See* 5 U.S.C. 553(a)(2), (b), and (d).

Regulatory Flexibility Act

This regulation will not have an impact on small entities because it pertains to personnel and administrative matters affecting the Department. An analysis under the Regulatory Flexibility Act was not required for this final rule because the Department was not required to publish a general notice of proposed rulemaking for this matter. *See* 5 U.S.C. 601(2), 604(a).

Executive Orders 12866, 13563, and 13771—Regulatory Review

This regulation has been drafted and reviewed in accordance with section 1(b) of Executive Order 12866, ''Regulatory Planning and Review,'' and section 1(b) of Executive Order 13563, ''Improving Regulation and Regulatory Review.''

This final rule is ''limited to agency organization, management, or personnel matters'' and thus is not a ''rule'' for purposes of review by the Office of Management and Budget under section 3(d)(3) of Executive Order 12866. Accordingly this rule has not been reviewed by the Office of Management and Budget.

This rule is not subject to the requirements of Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs,'' because it is not a significant regulatory action under Executive Order 12866, and because it is ''related to agency organization, management, or personnel'' and thus not a ''rule'' under Executive Order 13771, section 4(b).

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, ''Civil Justice Reform.''

Executive Order 13132—Federalism

This rule 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. It is a rule of internal agency practice and procedure. Therefore, in accordance with Executive Order 13132, ''Federalism,'' the Department has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Unfunded Mandates Reform Act of 1995

This rule will not 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, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.*

Congressional Review Act

This action is not a major rule as defined by the Congressional Review Act, 5 U.S.C. 804. This action pertains to agency management, personnel, and organization and does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a ''rule'' as that term is used by the Congressional Review Act, 5 U.S.C. 804(3)(B),(C). Therefore, the reporting requirements of 5 U.S.C. 801 do not apply.

List of Subjects in 28 CFR Part 50

Administrative practice and procedure.

Accordingly, by virtue of the authority vested in me as Attorney General, including 5 U.S.C. 301 and 28 U.S.C. 509, 510, part 50 of title 28 of the Code of Federal Regulations is amended as follows:

PART 50—STATEMENTS OF POLICY

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

Authority: 5 U.S.C. 301; 18 U.S.C. 1162; 28 U.S.C. 509, 510, 516, and 519; 42 U.S.C. 1921 *et seq.,* 1973c; and Pub. L. 107–273, 116 Stat. 1758, 1824.

■ 2. Add § 50.28 to read as follows:

§ 50.28 Prohibition on settlement payments to non-governmental third parties.

(a) The goals of a settlement agreement between the Department of Justice and a private party are to compensate victims, redress harm, or punish and deter unlawful conduct. It is generally not appropriate to use a settlement agreement to require, as a condition of settlement, payment to non-governmental, third-party organizations who are not victims or parties to the lawsuit.

(b) Except as provided in paragraph (c) of this section, Department attorneys shall not enter into any agreement on behalf of the United States in settlement of federal claims or charges, including agreements settling civil litigation, accepting plea agreements, or deferring or declining prosecution in a criminal matter, that directs or provides for a payment or loan, in cash or in kind, to any non-governmental person or entity that is not a party to the dispute.

(c) Department attorneys may only enter into such agreements in four specific situations:

(1) When the otherwise lawful payment or loan, in cash or in kind, provides restitution or compensation to a victim, though in no case shall any such agreements require defendants in environmental cases, in lieu of payment to the Federal Government, to expend funds to provide goods or services to third parties for Supplemental Environmental Projects;

(2) When, in cases of foreign official corruption, a trusted third party is required to facilitate the repatriation and use of funds to directly benefit those harmed by the foreign corruption;

(3) When payment is for legal or other professional services rendered in connection with the case; or

(4) When payment is expressly authorized by statute or regulation, including restitution and forfeiture.

(d) This policy applies to all civil and criminal cases litigated under the direction of the Attorney General and includes civil settlement agreements, *cy pres* agreements or provisions, plea agreements, non-prosecution agreements, and deferred prosecution agreements.

Dated: December 4, 2020.

William P. Barr,

Attorney General.

[FR Doc. 2020–27189 Filed 12–15–20; 8:45 am]

BILLING CODE 4410–BB–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 424

[Docket No. FWS–HQ–ES–2020–0047, FF09E23000 FXES1111090FEDR 212; Docket No. 201210–0335]

RIN 1018–BE69; 0648–BJ44

Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat

AGENCY: U.S. Fish and Wildlife Service, Interior; National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively referred to as the ''Services'' or ''we''), add a definition of ''habitat'' to our regulations that implement section 4 of the Endangered Species Act of 1973, as amended (Act). This rulemaking responds to Supreme Court case law regarding the designation of critical habitat and provides transparency, clarity, and consistency for stakeholders.

DATES:

Effective date: This final regulation is effective on January 15, 2021.

Applicability date: This revised regulation applies to critical habitat rulemakings for which a proposed rule is published after January 15, 2021.

ADDRESSES: Public comments and materials received, as well as supporting documentation used in the preparation of this final regulation, are available on the internet at *http://www.regulations.gov* in Docket No. FWS–HQ–ES–2020–0047.

FOR FURTHER INFORMATION CONTACT: Gary Frazer, U.S. Fish and Wildlife Service, Department of the Interior, Washington, DC 20240, telephone (202) 208–4646; or Samuel D. Rauch, III, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910, telephone (301) 427–8403. If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Background

On August 5, 2020, the Services published a proposed regulatory definition of ''habitat'' in the **Federal Register** (85 FR 47333); the definition would be added to title 50 of the Code of Federal Regulations in part 424 (50 CFR part 424). In that proposed rule, we provided the background for our proposed definition in terms of the statute, legislative history, and case law.

In this final rule, we focus our discussion on changes from the proposed rule based on comments we received during the comment period and our further consideration of the issues raised. For background on the statutory and legislative history and case law relevant to this regulation, we refer the reader to the proposed rule (85 FR 47333, August 5, 2020).

In finalizing the specific changes to the regulation in this document and setting out the accompanying clarifying discussion in this preamble, the Services are establishing a prospective standard only. Although this regulation is effective 30 days from the date of publication as indicated in **DATES** above, it will apply only to relevant rulemakings for which the proposed rule is published after that date. Thus, the prior version of the regulations at 50 CFR part 424 will continue to apply to any rulemakings for which a proposed rule was published before the effective date of this rule. Nothing in this final revised regulation is intended to require that any previously completed critical habitat designation be reevaluated on the basis of this final regulation.

Discussion of Changes From the Proposed Rule

In this section, we discuss changes between the proposed regulatory definition and the definition we are finalizing for the term ''habitat,'' as that term is used in the context of critical habitat designations and which will be set forth in the implementing regulations at 50 CFR 424.02.

We proposed a regulatory definition of ''habitat'' as that term is used in the context of critical habitat designations under the Act. In addition to the proposed definition, we also sought comment on an alternative definition. The Act defines ''critical habitat'' in section 3(5)(A), establishing separate criteria depending on whether the relevant area is within or outside of the geographical area occupied by the species at the time of listing, but it does not define the broader term ''habitat.'' *See* 16 U.S.C. 1532(5)(A). The Services have not previously adopted a definition of the term ''habitat'' through regulations or policy; rather, we have traditionally applied the criteria from the definition of ''critical habitat'' based on the implicit premise that any specific area satisfying that definition was habitat.

However, the Supreme Court recently held that an area must logically be ''habitat'' in order for that area to meet the narrower category of ''critical habitat'' as defined in the Act *Weyerhaeuser Co.* v. *U.S. FWS,* 139 S. Ct. 361 (2018). The Court stated: ''. . . Section 4(a)(3)(A)(i) does not authorize the Secretary to designate [an] area as *critical* habitat unless it is also *habitat* for the species.'' *Id.* at 368; *see id.* at 369 n.2 (''we hold that an area is eligible for designation as critical habitat under section 4(a)(3)(A)(i) only if it is habitat for the species''). Given this holding in the Supreme Court's opinion in *Weyerhaeuser,* we are adding a regulatory definition of ''habitat.''

Under the text and logic of the statute, the definition of ''habitat'' must inherently be at least as broad as the statutory definition of ''critical habitat.'' To give effect to all of section 3(5)(A), the definition of ''habitat'' we are finalizing is broad enough to include both occupied areas and unoccupied areas, because the statute defines ''critical habitat'' to include both occupied and unoccupied areas. 139 S. Ct. at 369 (''[h]abitat can, of course, include areas where the species does not currently *live,* given that the statute defines critical habitat to include unoccupied areas'').

We received numerous comments that the proposed and alternative definitions lacked clarity, were ambiguous, and used terms that needed to be defined further. Additionally, commenters identified specific issues with some of the terms used in the proposed and alternative definitions and were

concerned overall that the definition could have unintended consequences on implementation of other parts of the Act or on other Federal programs involving habitat. In response to these comments and upon further consideration, the Services have revised the regulatory definition of ''habitat'' to be added to 50 CFR 424.02 to read as follows:

> For the purposes of designating critical habitat only, habitat is the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species.

By reducing the definition to a single sentence, this structure is more logical, and eliminates any apparent contradiction between the first sentence and the second sentence of both the proposed and alternative definitions on which we sought comment in the proposed rule.

We added an introductory phrase to the final definition (''For the purposes of designating critical habitat only'') that explicitly limits the scope of applicability to the designation of critical habitat. We added this explicit statement in response to public comments that raised concerns about the potential for the definition to apply to other sections of the Act or other Federal programs that use the term ''habitat'' and thus have unintended consequences on implementation of these other sections and programs. This addition provides clarity that the definition applies only to the process of designating critical habitat.

We replaced the phrase ''physical places'' with the phrase ''abiotic and biotic setting.'' Abiotic means derived from non-living sources such as soil, water, temperature, or physical processes. Biotic means derived from living sources such as a plant community type or prey species. We intend for the word ''setting'' to have its common meaning, such as the time, place, and circumstances in which something occurs or develops. The addition of this phrase responds to comments that habitat is more than simply a physical location. As we stated in the proposed rule, we intentionally chose not to use the statutory phrase ''physical or biological features'' to avoid conflating the statutory language regarding occupied critical habitat with that of the broader definition of ''habitat'' promulgated here. However, we consider ''abiotic and biotic setting'' to be inclusive of ''physical or biological features.'' Additionally, it addresses the concerns raised by commenters that natural spatial and temporal variations in habitat were not encompassed in the proposed definition. Finally, this use of the phrase ''abiotic and biotic setting'' avoids the undefined term ''attributes,'' which commenters found to be vague, poorly defined, or confusing.

We included the phrase ''resources and conditions'' to make clear that the definition of ''habitat'' is inclusive of all qualities of an area that can make that area important to the species. We intend for the word ''resources'' to describe the common ecological concept—which in general is a source or supply from which a benefit is produced and that has some utility. Likewise, we intend the word ''condition'' to describe a particular state that something is in. Examples of resources and conditions can include dynamic processes (*e.g.,* riverine sand bar formation or fire disturbance), a set of environmental conditions (*e.g.,* temperature, pH, and salinity), or any characteristics that can satisfy life-history needs (*e.g.,* food, shelter). Additionally, this plain language takes the place of the phrase ''existing attributes'' that commenters stated was vague, unclear, and confusing.

We solicited comments on whether the phrase ''depend upon'' or the word ''use'' better describes the relationship between a species and its habitat. We received many comments on these phrases. We chose to use the phrase ''necessary to support'' to replace the phrase ''depend upon to carry out'' from the proposed definition or the phrase ''use to carry out'' from the alternative definition. Many commenters stated that both ''depend upon'' and ''use'' were too broad and would encompass areas that should not be considered habitat, or were too narrow and would leave areas out that should be considered habitat. We intend that the phrase ''necessary to support'' applies to areas needed for one or more of a species' life processes. Inclusion of this phrase is plain language, and we intend for this phrase to convey its common meaning.

We adopted the phrases ''resources and conditions,'' ''necessary to support,'' and currently or periodically contains.'' As discussed in the preamble to the proposed rule, we intend the definition of ''habitat'' to include ephemeral habitats—areas that ''may be variable, both temporally and spatially, such as beach overwash areas, early-successional riparian communities, or riverine sandbars.'' 85 FR at 47335. Therefore, we included ''periodically'' to clarify that habitat includes ephemeral habitat, which are areas where the resources and conditions are not consistently present but appear at certain times.

We have retained the phrase ''one or more life processes'' from the proposed definition for similar reasons, in that we intend for habitat to include areas used during a particular season (*e.g.,* for migratory species) or at a particular phase in the species' life cycle (*e.g.,* fresh-water spawning habitat versus adult marine habitat). We intend this phrase to have the common biological meaning, that is, to include a series of functions—such as movement, respiration, growth, reproduction, excretion, and nutrition—that are essential to sustain a living being. Retaining this phrase is consistent with terms that commenters suggested should be included in the definition—such as ''reproduction,'' ''recruitment,'' or ''survival''—but avoids limiting the definition to a particular set of life-history needs that may not be applicable to all species.

We removed the second sentence of the proposed definition because we incorporated some of its concepts (*e.g.,* attributes) into the first sentence and the remainder of the sentence is now unnecessary. As discussed earlier, the addition of the phrase ''resources and conditions'' to the first sentence clarifies and takes the place of the phrase ''existing attributes,'' which commenters stated was vague, unclear, and confusing. The inclusion of ''or periodically'' addresses the clarification in the second sentence that ''habitat'' includes ephemeral habitat. In the preamble to the proposed definition, we described ephemeral habitat as habitat that ''may be variable, both temporally and spatially, such as beach overwash areas, early-successional riparian communities, or riverine sandbars. For example, the sand bars that interior least terns use in a river may develop during particular times of the year correlating to changes in flow rates of a stream or river system.'' In light of that description, defining ''habitat'' as settings that ''currently or periodically contains the resources and conditions'' includes ephemeral habitat because, although we are not able to predict exactly where within the general setting a specific attribute or feature will form, we know that the area contains the resources and conditions for the attribute or feature to form within that general setting. Similarly, as long as the area currently or periodically contains the ''resources and conditions necessary to support one or more life processes'' of the species, the term ''existing'' attributes from the second sentence does not add meaning. At the same time, notwithstanding the inclusion of ephemeral and seasonal habitat in the

definition, the definition excludes areas that do not currently or periodically contain the requisite resources and conditions, even if such areas could meet this requirement in the future after restoration activities or other changes occur.

We note that this understanding of ''habitat'' is consistent with the interpretive requirement that any conception of ''habitat'' in this context be broad enough to include currently unoccupied areas that nonetheless meet the definition of ''critical habitat.'' For example, a species may be extirpated in a particular area due to over-exploitation, disease, or a stochastic event. If that area nonetheless provides ''the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species,'' it will remain ''habitat'' for the species despite the absence of the species.

Summary of Comments and Responses

In our proposed rule published on August 5, 2020 (85 FR 47333), we requested public comments on a proposed definition of ''habitat'' and an alternative definition, with the intention of adding a definition of this term to our implementing regulations in 50 CFR part 424. In particular, we requested comment on whether either definition is too broad or narrow or otherwise proper or improper. We also sought public comment on specific terms and phrases in the proposed definition and alternative definition, such as ''depend upon'' or ''use,'' and whether the phrase ''where the necessary attributes to support the species *presently* exist'' expressly limits what could qualify as unoccupied critical habitat for a species. During the public comment period, we received several requests for public hearings. Public hearings are not required for regulation revisions of this type, and we elected not to hold public hearings. After considering several requests for extensions of the public comment period beyond the original 30-day public comment period, we also decided not to extend the public comment period.

The APA does not specify a minimum number of days for a comment period, but the comment period must be long enough to afford the public a meaningful opportunity to comment, which usually leads agencies to allow a comment period of at least 60 days. Consistent with this principle, courts give broad discretion to agencies in determining the reasonableness of a comment period. Courts have frequently upheld comment periods that were shorter than 60 days. *See, e.g., Connecticut Light & Power Co.* v. *Nuclear Regulatory Comm'n,* 673 F.2d 525, 534 (D.C. Cir. 1982) (upholding a 30-day comment period and stating that ''neither statute nor regulation mandates that the agency do more''). In addition to the length of a comment period, courts consider the number of comments received and whether comments had an effect on an agency's final rule, in assessing whether the public had a meaningful opportunity to comment. Although the comment period here was shorter than 60 days, the public had a meaningful opportunity to comment on the proposed rule. The Services received more than 48,000 public submissions representing more than 167,000 individual commenters. Among the submissions were multiple letters from organizations signed by thousands of individuals expressing general opposition to the rule. Although many of the other individual comments were non-substantive in nature, expressing either general support for, or opposition to, the proposed rule with no supporting information or analysis, we also received many detailed substantive comments with specific rationales for support of, or opposition to, specific portions of the proposed rule, and many commenters also provided unique revised definitions for our consideration in the final rule. In addition, the Services were responsive to the received comments by making revisions to the definition in the final rule to address them. Below, we summarize the significant, substantive public comments sent by the September 4, 2020, deadline and indicate where we made revisions to the definition in response to those comments.

Comment 1: The Services received comments stating that the proposed definition contradicted the intent of the Act, providing varied reasons. Many commenters cited to the purposes of the Act (16 U.S.C. 1531(b)) and provisions regarding critical habitat (*id.* §§ 1532(5), 1533) to support their views that any definition must be broad enough to serve the long-term conservation of the species. Commenters stated that the proposed and alternative definitions would significantly limit the areas eligible for critical habitat designations and, as a result, run counter to Congressional intent that critical habitat designations identify areas essential to a species' survival and recovery.

Other commenters argued that the proposed and alternative definitions were too broad and ran contrary to the spirit of the definition of ''habitat'' most widely accepted among the scientific community. Some commenters stated that the text of the Act and the *Weyerhaeuser* decision both use present tense; therefore, the definition should require all attributes to be present. Those commenters argued the proposed and alternative definitions have the potential to contradict Congress's legislative intent and engage in regulatory overreach.

Response: The Supreme Court recently held that an area must logically be ''habitat'' before that area could meet the narrower category of ''critical habitat'' as defined in the Act. *Weyerhaeuser Co.* v. *U.S. FWS,* 139 S. Ct. 361 (2018). Given the need to address this particular holding from the Supreme Court's opinion in *Weyerhaeuser,* we decided to develop a regulatory definition of ''habitat.'' Under the text and logic of the statute, the definition of ''habitat'' must inherently be at least as broad as the statutory definition of ''critical habitat.'' To give effect to all of section 3(5)(A), the definition of ''habitat'' we are finalizing today is sufficiently broad to include both the occupied areas and unoccupied areas described in the statutory definition of ''critical habitat''; therefore, it is consistent with the legislative intent and the statute regarding the role of critical habitat in achieving the Act's purpose of species conservation. Furthermore, the revised definition is consistent with the *Weyerhaeuser* opinion (*see* 139 S. Ct. at 369 (''[h]abitat can, of course, include areas where the species does not currently *live,* given that the statute defines critical habitat to include unoccupied areas'')). Finally, because the scope of the final definition is necessary to encompass the full definition of ''critical habitat'' under the statute, it is not regulatory overreach.

Comment 2: Many commenters requested the Services make clear that the definition of ''habitat'' applies only to critical habitat designations. They noted the term ''habitat'' is used multiple times in the Act and is not limited to critical habitat. Some commenters expressed concern regarding unintended consequences of applying this definition to other provisions of the Act, stating that the proposed rule did not address potential impacts of the ''habitat'' definition to other Act-based actions such as conservation planning, species and habitat restoration, permitting, mitigation, enforcement, and recovery implementation.

Commenters also expressed concern that the definition of ''habitat'' could have impacts beyond the Endangered Species Act, including a number of

other Federal and State programs to conserve and enhance wildlife habitats. One State expressed concern about the impact of this definition on their State endangered species act. Multiple commenters stated that a regulatory definition should not be used in any federal grant program to restrict the allocation, or to use federal funds, for the restoration or creation of new habitat in areas of non-habitat.

Response: Although the Services indicated in the preamble of the proposed rule that our intent was to limit the definition of ''habitat'' to the designation of critical habitat, it was not explicitly stated in the regulatory definition. Thus, we have revised the definition to explicitly limit it to the context of designating (or revising) critical habitat. We did this by adding ''For the purposes of designating critical habitat only'' to the beginning of the definition. The addition of this phrase will make clear that the definition of ''habitat'' only applies in the context of critical habitat designations and will avoid any unforeseen or unintended consequences of the definition being applied in situations where it is not appropriate.

Comment 3: Multiple commenters stated that application of this regulation should not be limited to cases in which ''genuine questions exist'' (as we stated in the proposed rule), and that this regulation should instead establish a required procedural step in which the Services first determine whether an area is habitat before proceeding to a determination that the area meets the requirements for designation as critical habitat. These commenters stated that we cannot rely on the statutory definition of ''critical habitat'' to fulfill the requirement of ensuring an area is habitat for the species, and some explained that this is a necessary step because even areas within the occupied range of the species do not all necessarily qualify as habitat. However, other commenters agreed with the position taken in the proposed rule that this regulation should not be used to create an additional regulatory procedure or step. Some commenters noted that the proposed rule's claim that this definition would apply only in limited cases was unclear because the rule would establish a regulatory definition for all habitat and would therefore apply to all cases.

Response: In response to these and other comments, we have further clarified in this final rule that the regulatory definition of ''habitat'' will not be used to create a new procedural step or regulatory process, nor will it result in any new regulatory burdens for landowners or other parties. As indicated by the revised wording of the definition, this regulatory definition is applicable only within the context of a critical habitat designation or revision, and it does not create a new category or type of regulated area. Therefore, this rule has no bearing on, and will not affect, other habitat programs or habitat-management activities.

As we discussed in the proposed rule, if an area is occupied by the listed species, then as a matter of logic and rational inference, the area must also be habitat for the species. Similarly, given the more exacting criteria set forth in the regulations for designating unoccupied areas as critical habitat (see 50 CFR 424.12(b)(2)), which were recently revised to address the Supreme Court's decision in *Weyerhaeuser,* questions regarding whether an unoccupied area qualifies as habitat are far less likely to occur. Those regulations, which were revised in 2019 (see 84 FR 54020, August 27, 2019), indicate that unoccupied critical habitat will be considered for designation only if (1) the occupied areas are not adequate to ensure the conservation of the species and (2) there is a reasonable certainty both that the unoccupied areas will contribute to the species' conservation and that the unoccupied areas contain one or more of the physical or biological features essential to the conservation of the species (50 CFR 424.12(b)(2)). This is not to say, as was asserted by some commenters, that we are using or intend to use the statutory definition of ''critical habitat'' to define what is habitat for a species. We are instead stating that an added step of first assessing whether an area meets the regulatory definition of ''habitat'' before assessing whether it meets the definition of and criteria for ''critical habitat'' will, in most cases, be an unnecessary step. Therefore, we do not agree with comments that we should use this rule to institute a new procedure or process through which all areas must first be evaluated to determine whether or not the areas are in fact habitat for a species before we determine whether they meet the narrower definition and criteria for critical habitat.

Comment 4: Commenters stated that the Services should state that any identification of ''habitat'' for a particular species will not impose additional regulatory consequences for landowners, project proponents, or other affected parties. The identification of ''habitat'' should be a purely administrative action in preparation for critical habitat designation.

Response: The Services have clarified that the revised regulatory definition of ''habitat'' will be applicable only in the context of critical habitat designation and revision. The definition does not create a new procedural or regulatory process, nor will it impose any additional regulatory consequences for landowners, project proponents, or other affected parties.

Comment 5: Multiple commenters stated we should clarify that this rule will not affect projects that are already pending approval when this rule becomes effective. Some commenters noted this rule should apply to future critical habitat designations, as well as future revisions of existing critical habitat. Several commenters had the converse view and stated that, following conclusion of this rulemaking, we should review previously designated critical habitats and revise them as appropriate to ensure that only existing habitat is designated as critical habitat.

Response: As stated in the proposed rule, the regulatory definition of ''habitat'' will apply only to critical habitat rules that are proposed after the effective date of this final rule. Thus, it does not apply to critical habitat that was designated or proposed for designation prior to the effective date of this rule. This final rule will not have a bearing on consultations under section 7 for any projects with a Federal nexus unless the project may affect areas for which a critical habitat designation or revision was proposed after the effective date of this rule. After this rule becomes effective, we do not intend to conduct a systematic review of all previous critical habitat designations. The Act provides a process by which designated critical habitat may be revised, and we will continue to employ that process. Lastly, as indicated in the proposed rule, in the vast majority of cases, we expect application of this definition of ''habitat'' to be unnecessary because most designations include occupied areas only, and we conclude that the occupancy of the species confirms that the areas constitute habitat for that species.

Comment 6: Some commenters stated that the proposed rule represents a departure from the Act's requirement to rely on the best scientific data available. Commenters stated that the concept of habitat is species-specific and should be defined based on the best available science for that species, not by a set of regulatory standards. Commenters asserted that application of a regulatory definition of ''habitat'' would unnecessarily constrain what qualifies as habitat.

Response: Section 4(b)(2) of the Act requires that we designate, and make revisions to, critical habitat on the basis of the best scientific data available and after taking into consideration the economic, national security, and other relevant impacts of specifying any particular area as critical habitat. We will continue to apply this statutory requirement when designating critical habitat, and we will also apply the best scientific data available when determining what areas meet the regulatory definition of ''habitat.'' Furthermore, because this regulatory definition of ''habitat'' is intentionally broad enough to encompass both occupied and unoccupied critical habitat as defined in section 3 of the Act and as further detailed in the implementing regulations in 50 CFR 424.12, application of this definition will not constrain the application of the best scientific data available to which areas qualify as critical habitat and are ultimately designated as critical habitat under the Act. We see no tension between the final definition and the requirements of the Act and the implementing regulations.

Comment 7: We received numerous comments that provided various alternative definitions of the term ''habitat.'' Some were wholesale re-writes of the definitions; others used many of the same terms used in the proposed and alternative definitions from the proposed rule but with slight variations; some referred to dictionary definitions or definitions in published relevant ecological or conservation-biology literature; and some used different terms and phrases from the ones used in the proposed rule. Some commenters provided multiple variations in the same comment letter.

Response: We considered the various alternative definitions provided and have revised the definition of ''habitat'' accordingly. After considering the substantive comments, we made the changes summarized in the preamble to arrive at the final definition in this rule. In short, our edits relative to the proposed and alternative definitions in the proposed rule were focused on making the final definition clearer by using more commonly understood words. We also explain certain words and phrases (*e.g.,* ''support'') later in this response-to-comments section, again to help where additional clarity was requested. We have explained more fully the relationship between our final definition and those of published definitions of ''habitat'' that we considered (see the relevant comment and response below). We determined that our final definition could not be identical to these published definitions because it has to fit within the regulatory framework of the Act. This concept is explained further in our response to the comment below regarding the relationship of our definition to those in the scientific literature.

Comment 8: Multiple commenters requested to review the scientific literature that the Services used in developing the proposed and alternate definitions of habitat. Commenters also requested that we further explain our rationale by providing an analysis of the literature relative to the final rule's definition and by describing why other existing definitions of ''habitat'' were insufficient for our regulatory framework. The commenters also provided examples of existing literature that describes definitions of ''habitat'' used within the conservation biology community, as well as a recently developed definition of ''habitat'' for use within a regulatory context (Rylander et. al 2020).

Response: In developing our final regulatory definition of ''habitat,'' we considered several published definitions from the ecological and conservation-biology literature.

Two definitions that we considered in detail were Odum's (1971) definition, ''the place where an organism lives, or the place where one would go to find it,'' and Kearney's (2006) definition, ''a description of a physical place, at a particular scale of space and time, where an organism either actually or potentially lives.'' Neither these nor other definitions in the scientific literature are well-suited to our particular purpose here, which is to define the term within the legal framework for designation of critical habitat under the Act. The Act defines ''critical habitat'' not just in terms of where a species may be found, but also in terms of which areas provide resources that further the species' conservation. Further, we find that none of the existing definitions clearly incorporate areas that are not currently occupied by the species but that may still satisfy the requirements to be considered unoccupied critical habitat. Our definition includes unoccupied areas, and therefore complies with the intent of the Act, which requires the Secretaries to designate as critical habitat not only areas that are occupied by the species, but also those areas that are ''outside the geographical area occupied by the species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species'' (16 U.S.C. 1532(3)).

We also considered the definition used by Canada's Species at Risk Act (SARA; Canada § 2(1)). Under SARA, ''habitat'' is defined as ''(a) in respect of aquatic species, spawning grounds and nursery, rearing, food supply, migration and any other areas on which aquatic species depend directly or indirectly in order to carry out their life processes, or areas where aquatic species formerly occurred and have the potential to be reintroduced; and (b) in respect of other wildlife species, the area or type of site where an individual or wildlife species naturally occurs or depends on directly or indirectly in order to carry out its life processes or formerly occurred and has the potential to be reintroduced.'' Our definition has similar concepts as SARA's without differentiating between aquatic species and other wildlife. Specifically, both definitions include currently unoccupied areas along with occupied habitat, and both definitions take into account the potential for habitat to be suitable for a species only some of the time. Both definitions are also based on the ecological conditions a species needs to survive. In the case of SARA, these are described as ''the areas on which . . . species depend directly or indirectly in order to carry out its life processes.'' In our definition, it is ''the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species.'' One difference is that we altered the final definition from our proposed definition to avoid the use of the word ''depend,'' which commenters stated was vague (see specific response to these comments below).

Comment 9: Commenters stated that many of the terms used in both the proposed and alternative definition were ambiguous, unclear, and undefined. Commenters stated that the lack of clarity or of clear definitions of the terms used in both the proposed and alternative definition could lead to confusion in implementation, increased regulatory uncertainty, and increased litigation. Commenters recommended that we clearly define the terms that are used in the definition in the final rule.

Response: In response to these and other comments, we have revised the definition of ''habitat'' in this final rule. These changes are described in the preamble to this regulation and throughout this responses-to-comments section. Changes include removal of words or terms, the substitution of new wording to reduce ambiguity, and the description of intended meanings of particular words used in the final definition. For example, we removed both ''depend upon'' and ''use,'' words

which generated many comments both in favor of and opposed to their inclusion, and replaced them with ''necessary to support,'' which describes the ''resources and conditions'' in question.

We further describe (below, in another response to comment) that our intent is for the meaning of ''support'' to be consistent with the purposes of the Act to recover listed species to the point at which they no longer need the protections of the Act. The ''resources and conditions'' in question must contribute to this outcome, at least incrementally.

Other changes made to the proposed definition in light of commenters' requests for increased clarity include the deletion of the words ''attributes'' and ''physical places'' from the final definition. ''Physical places'' was removed from the definition and replaced with ''biotic and abiotic setting'' because the substituted phrase captures a broader set of characteristics, conditions, and processes and addresses the concern raised by multiple commenters that natural spatial and temporal variations in habitat were not encompassed in the proposed definition. ''Attributes'' was removed in favor of the plain-language terminology ''resources and conditions necessary to support one or more life processes of a species,'' which is further described in a separate comment below.

Wording of the Proposed Definition

Comment 10: Commenters' views on the terms ''depend upon'' and ''use'' within the definition of ''habitat'' varied greatly. Some commenters expressed support for using ''depend upon'' instead of ''use,'' whereas other commenters expressed the opposite view. Some commenters supported inclusion of both terms within the definition because this construction would capture the ideas both that the species relies on the area and that individuals are in fact using the area. Other commenters discussed how both of these closely related terms were too vague and could be interpreted in various ways, narrowly as well as broadly, with some commenters suggesting that both terms be used in the definition, and other commenters suggesting that one or both of the terms be replaced with other, clearer terminology—such as ''supports the species.''

Commenters in favor of using ''depend upon'' stated that this phrasing more accurately reflects the relationship between species and their habitat and is consistent with the well-established principle in the scientific literature that habitat is more than just areas that a species physically uses. Some commenters also asserted that ''depend upon'' is preferable to ''use'' because it is consistent with the language in section 2 of the Act stating that the purpose of the Act is to provide a means by which the ecosystems that endangered species and threatened species depend upon may be conserved. Some commenters noted that ''use'' is vague and may imply that a negligible level of reliance on an area or incidental use of an area is sufficient for the area to qualify as habitat, or it may be interpreted to refer to concepts of habitat use or resource use rather than what constitutes habitat.

In contrast, commenters in favor of the word ''use'' or ''may use'' stated that ''depend upon'' could be applied too narrowly in that it may imply obligate use (restricted to one) , and it is too similar in meaning to the word ''essential'' in the statutory definition of ''critical habitat.'' Other commenters stated that ''use'' is preferable because it more accurately describes the relationship between species and their environments. Some commenters preferred ''use'' because it acknowledges that habitat may include areas where the species does not currently exist.

Response: Given the large number of comments for and against using each of the two terms—''depend upon'' and ''use''—in the regulatory definition of ''habitat,'' we have revised the final definition to eliminate use of these terms altogether. Based on the public comments, we have replaced these terms with other, plain-language words that more clearly indicate the intended meaning of the term ''habitat'' and avoid the types of ambiguity and misinterpretations discussed by the commenters. Specifically, we have focused the definition on the abiotic and biotic setting that provides resources and conditions ''necessary to support'' one or more life processes of the species. What is considered ''necessary to support'' the species will be grounded in the best available science for the particular species and the common-sense application of ecological principles. We also find that this phrasing better demonstrates how the definition of ''habitat'' is inclusive of both areas that would qualify as occupied critical habitat and areas that would qualify as unoccupied critical habitat.

Comment 11: Commenters found the phrase ''capacity to support'' to be ambiguous and subject to misinterpretation, and requested that the Services provide a definition to clarify this ambiguity, especially with respect to how ''capacity to support'' relates to either ''depend upon'' or ''use.'' Some of their concern related to how the word ''capacity'' could be interpreted—whether narrowly, to exclude marginal-quality habitat because it refers only to areas that contain all necessary attributes to support the species, or broadly, to include areas of any quality because it includes areas that have or could develop some attributes that could support the species if restored. Commenters also expressed uncertainty as to whether ''support'' only means that the species can survive, or whether the habitat can sustain the species into the future.

Response: As discussed earlier, we have removed the second sentence from the definition because the changes to the first sentence have made it unnecessary. Therefore, the term ''capacity'' no longer appears in the definition or raises these questions. The term ''support'' remains in the definition, but now appears in the first sentence. We use that term consistent with the intent of the Act—to further the conservation of listed species. Specifically, to ''support'' a listed species' life processes, resources and conditions must contribute, at least incrementally, to bringing the species ''to the point at which the measures provided pursuant to . . . [the Act] . . . are no longer necessary'' (16 U.S.C. 1532(3)). This approach is also consistent with our recent revisions to the procedures used to designate critical habitat (50 CFR 424.12(b)(2); 84 FR 45020, August 27, 2019), which specify that the Secretary must determine, in part, that there is a reasonable certainty that the area will contribute to the conservation of the species.

Comment 12: A number of commenters expressed concern that the proposed and alternative definitions focus too narrowly on ''physical places'' and do not recognize habitat is the resources and conditions found in those physical places that provide for the needs of the species. Some suggested the definition of ''habitat'' should emphasize the biotic and abiotic components that comprise a species' habitat and noted that it is not a static location on a map. At least one commenter that supported the use of ''physical places'' suggested that we use ''types of places'' to provide a broader application that reflects habitat linkages and the principle that unoccupied areas can be habitat.

Response: We have removed the words ''physical places'' from the definition. The definition now refers to

the ''biotic and abiotic setting,'' which captures a broader set of characteristics, conditions, and processes, and accomplishes the intent that the comment sought to accomplish.

Comment 13: Commenters stated that the definition should not just consider attributes that are present. Areas where attributes are absent because a given location simply cannot support any or all of the necessary attributes needed by a species, or because human activity or a natural event has altered one or more attributes, should be considered habitat if the site is capable of providing the attributes. Commenters stated that using ''presently'' makes the definition too narrow and does not include enough areas that have the capacity to support the species. Additionally, commenters believe the terms ''existing attributes'' and ''necessary attributes'' are vague and should be clarified. Other commenters stated that the definition should include ''all necessary attributes'' and the definition should focus on attributes that can support populations rather than individuals.

Response: We have added the phrase ''resources and conditions necessary to support one or more life processes of a species'' to the definition. This revision removes the term ''existing attributes'' that commenters criticized as being vague and unclear. Resources and conditions allow for the inclusion of the aspects of habitat that are important to the species, including dynamic processes (*e.g.,* riverine sandbar formation or fire disturbance) or a set of environmental conditions (*e.g.,* temperature, pH, and salinity). By avoiding inclusion of areas that cannot currently or periodically support the species, this simplified phrasing addresses commenters' concerns that the final definition would be overly broad.

Comment 14: Commenters expressed various concerns that both the proposed and alternative definitions of habitat emphasized ''individuals of the species'' as a frame of reference and noted that it could be interpreted as something more or less than intended. Some commenters felt this phrasing could be applied to limit habitat protections in smaller areas that supported some individuals but that were not sufficiently large to support recovery of the species, whereas other commenters felt that this phrasing could be applied to include areas where only a single member of the species was present without considering the ecological relationship between the individual and the particular setting. Some commenters stated that, for an area to qualify as habitat, the species as a whole must use and need the area. These commenters stated that reference to the ''species'' is consistent with the Act, existing regulations, and the Supreme Court opinion in *Weyerhaeuser.* In contrast, some commenters stated that habitat must also include areas that support even a single individual of a listed species. These commenters stated that such an interpretation is consistent with the plain meaning and dictionary definitions of ''habitat'' in that there is no requirement that the area support an entire population or species in order to qualify as habitat. These commenters recommended that, to avoid misinterpretation and misapplication of the definition, we clarify that the term ''habitat'' encompasses all areas that support the species, populations, or individuals of the species.

Response: Both the proposed and alternative definitions provided in the proposed rule defined habitat in terms of areas that ''individuals of the species'' depend upon or use. The phrase ''individuals of the species'' was not intended to artificially restrict what qualifies as habitat to something less than what would be necessary to sustain the species, nor was it intended to artificially expand what qualifies as habitat to areas where, for example, only vagrant individuals are present. We agree that what qualifies as habitat for a given species should be based on the ecology of that species so that it reflects the specific relationship between the environment and individuals, populations, and the species as a whole. Because this phrase received extensive public comments indicating an unintended ambiguity, we have removed this phrase from the definition of ''habitat'' provided in this final rule. The final definition is instead oriented around life processes of the species and the setting that supports those life processes. We find that this revised definition removes the potential confusion identified by the commenters and is sufficiently broad to encompass what would constitute habitat at the relevant and appropriate biological scale—*i.e.,* individual members of a species, populations, and the species as a whole.

While the word ''species'' still occurs in the final definition, it is not used in a manner that constrains the definition of ''habitat'' to a single biological level, such as the whole species. Rather, this term is used as an inclusive term in the context of the definition. In other words, use of the term ''species'' does not preclude consideration of the necessary ecological linkages between individuals, populations, and metapopulations when assessing what constitutes habitat for a species.

Other Topics

Comment 15: Commenters stated that the definition should neither require occupancy nor limit critical habitat designations to occupied habitat. Some commenters noted that habitat should not be limited to occupied areas because occupancy can be difficult to determine for certain species. Other commenters stated a concern that designating habitat where a species does not exist (*i.e.,* unoccupied habitat) has significant impacts to private property rights and the ability to engage in economic activities.

Response: The revised regulatory definition of ''habitat'' must be sufficiently broad to encompass both occupied and unoccupied areas that satisfy the definition of ''critical habitat'' in section 3 of the Act. Application of this definition will not constrain what qualifies as critical habitat because it complements the existing regulations at 50 CFR 424.12, which prescribe when and how the Services will consider designating, and ultimately designate, unoccupied areas as critical habitat under the Act. The definition does not create a new procedural or regulatory process, nor will it result in any additional regulatory consequences for landowners, project proponents, or other affected parties.

Comment 16: Commenters stated that the proposed definition was too narrow, in particular that it may not account for all geographic areas that are or could be suitable across a species' entire range, or all sites that a species may use, because of the limitation of the phrase ''existing attributes.'' Conversely, other commenters stated that the proposed definition of ''habitat'' should be limited to specific geographic areas, and that the Services should clarify the relationship between the range, habitat, and critical habitat of a species.

Response: As noted in the preamble above, the text and logic of the statute inherently require that the definition of ''habitat'' must be at least as broad as the statutory definition of ''critical habitat.'' We have therefore created this definition to be sufficiently broad to include both occupied and unoccupied areas. As for the relationship between range and habitat, the current range of a species is the general geographic area within which a species can be found. Therefore, depending on the facts surrounding a given species, the areas that constitute occupied habitat for the species are a subset of, or are the same as, its current range.

Comment 17: Commenters noted that the proposed definition, including the phrase ''existing attributes,'' may preclude identifying as habitat areas that experience rapid changes in ecology driven by habitat loss and fragmentation or areas that may develop over time, as a result of changing or shifting conditions due to climate change, to the point that they can support the species. Additionally, other commenters noted that the effects of climate change may make some current habitat unsuitable for species while over time other areas that are not currently suitable habitat may become suitable. Conversely, some commenters stated that the Services must determine whether areas qualify as habitat based on current conditions, not on the expected future ability of an area to become habitat as a result of climate change.

Response: Consistent with our longstanding practice, we will consider the best scientific data available, including data regarding changing climate, in determining what areas currently or periodically contains the resources and conditions necessary to support one or more life processes of the species. We must evaluate a species' habitat use and requirements on a case-by-case and species-specific basis because we must take into account the particular species' life history and ecology, including factors such as mobility, adaptability, resilience, phenology (the timing of recurring natural events), and home-range sizes. As noted previously (see response to Comment 13), the Services have removed the words ''existing attributes'' from the final definition.

For areas that are outside the geographical area occupied by the species at the time of listing, we evaluate whether the best available scientific data indicate that an area currently or periodically contains the resources and conditions necessary to support life history needs of the particular species. We recognize that, due to varying levels of uncertainty regarding effects of climate change and the complexity of biotic and abiotic interactions within a given ecosystem, it may not always be possible to make reasonable predictions regarding how habitat is changing in response. Even if areas are initially determined not to be habitat, they may be subsequently determined to be habitat; however, there is not an automatic assumption that those areas would be considered to be critical habitat. If, in the future, conditions change or new information becomes available indicating that areas that were not previously considered to be habitat have the necessary resources and conditions at that time in the future, critical habitat can be revised.

Comment 18: Some commenters stated that restoration of marginal or degraded areas is a necessary and proven recovery strategy for many species, and because the proposed definition seemingly precludes identification of areas needing restoration, the definition of ''habitat'' is contrary to the conservation purposes of the Act. In particular, they believe this limitation would prohibit the Services from protecting areas that are currently unoccupied but may become necessary to the survival and recovery of a species. Commenters provided examples of circumstances in which currently unoccupied areas may become necessary for the conservation of the species, including: (1) The species' current habitat becomes degraded or destroyed, or is insufficient for recovery; (2) those currently unoccupied areas (including formerly occupied habitat) are restored; or (3) the areas are likely to become suitable in the future as a result of ecological processes such as succession. Other commenters stated that the definition must include areas that may require some restoration because, if remaining habitat were enough for a species, it is likely the species would not have been listed as an endangered or threatened species.

Other commenters took the opposing view, stating that any definition of ''habitat'' must not include areas that need even a de minimis amount of habitat restoration because that would stretch the scientific understanding of the definition of ''habitat'' too far. These commenters stated that, if intentional restoration is required for an area, then it should not qualify as habitat.

Response: The Services agree that some unoccupied areas may be essential to the conservation of the species; however, we disagree that the definition of ''habitat'' precludes the designation of such areas as critical habitat. However, habitat, whether occupied or unoccupied, must still have (currently or periodically) the resources and conditions necessary to support one of the life processes for the species.

As noted above, the definition of ''habitat'' we are finalizing today is consistent with the legislative intent and the statute regarding the role of critical habitat in achieving the Act's purpose of species conservation. The definition respects the statutory text by distinguishing between habitat and areas that are not habitat (but can become habitat in the future, whether by virtue of restoration activities or because of other changes). As further noted above, even if areas are initially determined not to be habitat, they may be subsequently determined to be habitat. In addition, we note that in addition to designating areas as critical habitat, other tools and mechanisms are available to the Services and our partners to identify or protect areas in need of restoration to support the conservation of a species. The Services also note, as indicated in the preamble and in responses to comments, that we have clarified that ''habitat'' is defined here for the purposes of designating critical habitat and would not be used in other contexts.

Comment 19: The Services received comments stating that the proposed definition violates the Administrative Procedure Act because it failed to provide a reasoned explanation or rational basis for the proposed definitions. Commenters stated that referring to the need to address the Supreme Court's decision in *Weyerhaeuser* is not a reasoned explanation because nothing in that decision required that the Services define ''habitat,'' encouraged the Services to adopt a restrictive definition, or even took issue with the Services' long-standing approach of defining habitat in accordance with the life history and ecology of each species.

Response: Although the Supreme Court's opinion in *Weyerhaeuser* did not require promulgation of a definition of ''habitat,'' given the Court's holding that the Act does not give the Secretaries the authority to designate an area as critical habitat unless it is also habitat for the species, we proposed to define the term to ''provide transparency, clarity, and consistency for stakeholders.'' *See* 85 FR at 47334, August 5, 2020. In the proposed rule, we identified our objectives in developing the proposed and alternative definitions (sufficient breadth to include both occupied and unoccupied areas and to accommodate the wide variety of abiotic and biotic attributes that the vast array of species need) and how we went about developing them (incorporation of useful concepts from the ecological literature while adding concepts to ensure sufficient breadth based on the statute and our experience) (*id.*). The proposed rule also sought comments from the public on specific terms and phrases in the definitions, and our comment responses above provide a detailed and reasoned explanation of why the specific terminology in the definition accomplishes the purposes of the definition and the conservation goals of the Act. Therefore, we have provided a reasoned explanation and

rational basis for our action as required by the Administrative Procedure Act.

Comment 20: The Services received comments stating that the proposal violated the Administrative Procedure Act because the absence of a rational explanation for the proposed definitions deprived the public of a meaningful opportunity to comment. In particular, commenters stated that the proposed rule did not disclose specifically what information we did consider, or provide citations to the ecological literature that formed the basis for the proposal or to studies showing how the proposed or alternative definition reflects the principle that a species' habitat is based on its ecology.

Response: Contrary to what these comments suggest, the public had a meaningful opportunity to comment on the proposed and alternative definitions. The proposed rule transparently communicated that, although concepts from ecological literature provided a starting point for the Services' definitions, ''no pre-existing definition was adequate to address the particular regulatory framework.'' As a result, the proposed rule did not provide citations to specific studies because the Services had not relied on specific studies, but instead ''incorporated useful concepts from the literature to the extent appropriate and added concepts based on our decades of expertise.'' The public thus was provided with a meaningful opportunity to comment in light of the explanation in the proposed rule, combined with the specific questions for which the proposed rule sought comment.

Comment 21: Several commenters supported invoking the NEPA categorical exclusion for ''[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature'' under the Services' NEPA implementing regulations (43 CFR 46.210(i) and NOAA NEPA Manual at Appendix E, Categorical Exclusion G7). Commenters maintained that the definition does not establish any new requirements that may change the scope of critical habitat designations, or impose any additional procedural steps for designating critical habitat, and some suggested that the fact that the Services are developing the definition in response to the Supreme Court's decision in *Weyerhaeuser* also supports the conclusion that the categorical exclusion applies. Alternatively, we also received comments opposing the invocation of a categorical exclusion for the proposed definitions of ''habitat.'' Some asserted that the definition would constitute a major substantive change in the law and would likely cause significant, negative environmental impacts to imperiled species and their habitat (for example, by undercutting both habitat and species recovery and restoration efforts). Others stated that the specific categorical exclusion that we invoked (43 CFR 46.210(i) and Categorical Exclusion G7 from NOAA NEPA Manual at Appendix E) does not apply to this rulemaking and that we did not explain why any of the Services' categorical exclusions applies to this rulemaking.

Response: We conclude that the categorical exclusion for ''[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature'' (43 CFR 46.210(i) and NOAA NEPA Manual, Appendix E, Categorical Exclusion G7) applies to this rulemaking. As we made clear in the proposed rule, the objective of this rulemaking is to ''provide transparency, clarity, and consistency for stakeholders'' because the *Weyerhaeuser* decision may raise questions in some instances as to whether areas of unoccupied critical habitat are ''habitat.'' Adoption of the final definition would not create a new procedural step that the Services would need to undertake every time we designate critical habitat because in the vast majority of cases there is no question that the areas that qualify as critical habitat are ''habitat.'' The question of whether areas within a critical habitat definition qualify as ''habitat'' would arise only in the relatively rare situations when there is a question as to whether any of the unoccupied areas that we are considering designating as critical habitat qualifies as ''habitat.'' In such a situation, the *Weyerhaeuser* opinion would require the Services to undertake the analysis reflected in this definition, that is, to determine—based on concepts in the ecological literature, combined with the Services' regulatory and scientific experience and expertise—whether the unoccupied areas meet the definition of ''habitat.'' The result of promulgating this definition, therefore, is merely to inform the public and the Services' employees of the mechanics of how that consideration will work, so that the process of designating critical habitat is more straightforward, more efficient, and more transparent. Accordingly, this rulemaking is of a technical nature.

Comment 22: Several commenters stated that, even if the proposed definition fell within a potential categorical exclusion, it would be inappropriate to invoke the categorical exclusion because one or more ''extraordinary circumstances'' are present under FWS's NEPA regulations and NMFS's NEPA Manual. For example, commenters asserted that the definition could have significant impacts on ecologically significant or critical areas, migratory birds, species listed or proposed for listing under the Endangered Species Act, or Tribal lands; violate Tribal law requirements imposed for protection of the environment (such as by limiting ceremonial use of Indian sacred sites); be subject to public controversy; or have highly controversial effects and highly uncertain and potentially significant environmental effects. In addition, the definition could have a significant impact on areas designated as critical habitat both for future designations and for review of current designations.

Response: We conclude that none of the ''extraordinary circumstances'' apply in this situation. First, this definition is limited to the context of designating critical habitat. Second, promulgating this definition does not alter the outcomes for any species or critical habitat designations because even before we finalize this definition, the *Weyerhaeuser* decision already required the Services to ensure that areas they designate as critical habitat qualify as ''habitat.'' Moreover, this final definition incorporates concepts from ecological literature, with adaptations that the Services put in place in light of the statutory context and their regulatory and technical expertise. The adaptations we have made are designed to ensure that the definition is sufficiently broad to apply to both occupied and unoccupied areas under consideration for designation as critical habitat and to the vast array of species and their life histories that may need protection under the Act. Even without promulgating this definition, the Services would undertake this analysis and would adopt and adapt the concepts from the ecological literature in designating critical habitat. Promulgating the definition through rulemaking merely makes the analysis express and transparent, and it therefore does not have an impact upon any species, critical habitat, or area of land. Finally, because the definition is pulled from concepts in ecological literature and the Services' practical regulatory experience, promulgating this definition is technical or administrative in nature and does not have any uncertain impacts on any species, critical habitat, or area of land.

Required Determinations

Regulatory Planning and Review—Executive Orders 12866 and 13563

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is significant.

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

Executive Order 13771

This final rule is an Executive Order 13771 ''other'' action.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*), whenever a Federal 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 government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency, or his designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

This rulemaking responds to applicable Supreme Court case law regarding designating critical habitat under the Endangered Species Act and provides transparency, clarity, and consistency for stakeholders. The changes to these regulations do not alter the reach of designations of critical habitat.

NMFS and FWS are the only entities that are directly affected by this rule because we are the only entities that designate critical habitat under the Endangered Species Act. No external entities, including any small businesses, small organizations, or small governments, will experience any economic impacts from this rule. At the proposed rule stage, we certified that this rule would not have a significant economic effect on a substantial number of small entities. Nothing in this final rule changes that conclusion.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) On the basis of information contained in the Regulatory Flexibility Act section above, this final rule would not ''significantly or uniquely'' affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, that this rule would not impose a cost of $100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments would not be affected because this final rule would not place additional requirements on any city, county, or other local municipalities.

(b) This rule would not produce a Federal mandate on State, local, or Tribal governments or the private sector of $100 million or greater in any year; that is, this final rule is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. This rule would impose no obligations on State, local, or Tribal governments.

Takings (E.O. 12630)

In accordance with Executive Order 12630, this rule would not have significant takings implications. This rule would not directly affect private property, nor would it cause a physical or regulatory taking. It would not result in a physical taking because it would not effectively compel a property owner to suffer a physical invasion of property. Further, the rule would not result in a regulatory taking because it would not deny all economically beneficial or productive use of the land or aquatic resources and would not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

In accordance with Executive Order 13132, we have considered whether this rule would have significant federalism effects and have determined that a federalism summary impact statement is not required. This rule pertains only to designation of critical habitat under the Endangered Species Act, and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform (E.O. 12988)

This rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988. This rule pertains only to designation of critical habitat under the Endangered Species Act.

Government-to-Government Relationship With Tribes

In accordance with Executive Order 13175 ''Consultation and Coordination with Indian Tribal Governments,'' the Department of the Interior's manual at 512 DM 2, and the Department of Commerce (DOC) ''Tribal Consultation and Coordination Policy'' (May 21, 2013), DOC Departmental Administrative Order (DAO) 218–8, and NOAA Administrative Order (NAO) 218–8 (April 2012), we have considered possible effects of this final rule on federally recognized Indian Tribes. The following Tribes and Tribal entities stated that Government-to-Government consultation is required or requested Government-to-Government consultation: Jamestown S'Klallam Tribe, Northwest Indian Fisheries Commission, Port Gamble S'Klallam Tribe, Skokomish Tribe, Confederated Tribes of the Chehalis Reservation, Spokane Tribe of Indians, Point No Point Treaty Council, Confederated Tribes of the Colville Reservation Fish and Wildlife, Confederated Tribes of the Colville Reservation, Yurok Tribe, Kootenai Tribe of Idaho, Miccosukee Tribe of Indians of Florida, National Congress of American Indians, Confederated Tribes of the Umatilla Indian Reservation, and the Upper Snake River Tribes Foundation, Inc. The Services have reviewed these comments

from the Tribes and conclude that the changes to these implementing regulations make general changes to the Act's implementing regulations and do not directly affect specific species or Tribal lands or interests. This regulation defines the term ''habitat'' as it is applied to designating critical habitat and directly affect only the Services. With or without these regulatory revisions, the Services would be obligated to continue to list species and to designate critical habitat based on the best available data. Therefore, we conclude that this regulation does not have ''tribal implications'' under section 1(a) of E.O. 13175, and formal government-to-government consultation is not required by the executive order and related policies of the Departments of Commerce and the Interior. We will continue to collaborate with Tribes on issues related to federally listed species and their habitats and work with them as we implement the provisions of the Act. *See* Joint Secretarial Order 3206 (''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act,'' June 5, 1997).

Paperwork Reduction Act

This rule does not contain any new collections of information that require approval by the OMB under the Paperwork Reduction Act and does not alter the existing collection of information approved under OMB Control Number 1018–0165. 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.

National Environmental Policy Act

We analyzed this final rule in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR 46.10–46.450), the Department of the Interior Manual (516 DM 8), the NOAA Administrative Order 216–6A, and the NOAA Companion Manual (CM), ''Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities'' (effective January 13, 2017). This rulemaking responds to recent Supreme Court case law.

As a result, we conclude that the categorical exclusion found at 43 CFR 46.210(i) applies to this regulation. At 43 CFR 46.210(i), the Department of the Interior has found that the following category of actions would not have a significant effect on the human environment and, therefore, that these actions are categorically excluded from the requirement for completion of an environmental assessment or environmental impact statement: ''Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature.''

NOAA's NEPA procedures include a similar categorical exclusion for ''preparation of policy directives, rules, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature.'' (Categorical Exclusion G7, at CM Appendix E).

We have considered the extent to which this regulation has a significant impact on the human environment and determined that it falls within one of the categorical exclusions for actions that have no effect on the quality of the human environment.

Energy Supply, Distribution or Use (E.O. 13211)

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This regulation is not expected to have a significant adverse effect on the supply, distribution, or use of energy, and it has not been otherwise designated by the Administrator of OIRA as a significant energy action. Therefore, this action is a not a significant energy action, and no Statement of Energy Effects is required.

Authority

We issue this final rule under the authority of the Endangered Species Act, as amended (16 U.S.C. 1531 *et seq.*).

List of Subjects in 50 CFR Part 424

Administrative practice and procedure, Endangered and threatened species.

George Wallace,

Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior.

Christopher Wayne Oliver,

Assistant Administrator, National Marine Fisheries Service, National Oceanic and Atmospheric Administration.

Regulation Promulgation

For the reasons set out in the preamble, we hereby amend part 424, subchapter A of chapter IV, title 50 of the Code of Federal Regulations, as set forth below:

PART 424—LISTING ENDANGERED AND THREATENED SPECIES AND DESIGNATING CRITICAL HABITAT

■ 1. The authority citation for part 424 continues to read as follows:

Authority: 16 U.S.C. 1531 *et seq.*

■ 2. Amend § 424.02 by adding a definition for ''Habitat'' in alphabetical order to read as follows:

§ 424.02 Definitions.

* * * * *

Habitat. For the purposes of designating critical habitat only, habitat is the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species.

* * * * *

[FR Doc. 2020–27693 Filed 12–15–20; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 201209–0332; RTID 0648–XX064]

Fisheries of the Northeastern United States; Atlantic Bluefish Fishery; 2021 Bluefish Specifications

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

ACTION: Final rule.

SUMMARY: NMFS issues final specifications for the 2021 Atlantic bluefish fishery. This action is necessary to establish allowable harvest levels to prevent overfishing, consistent with the most recent scientific information, as required by the Magnuson-Stevens Fishery Conservation and Management Act and the Atlantic Bluefish Fishery Management Plan. This rule also informs the public of the final fishery specifications for the 2021 fishing year.

DATES: Effective on January 1, 2021.

ADDRESSES: The Mid-Atlantic Fishery Management Council prepared a Supplemental Information Report (SIR) for these specifications that describes the action and any changes from the original environmental assessment (EA) and analyses for the revised 2020 and 2021 specifications action. Copies of the SIR, original EA, and other supporting documents for this action, are available upon request from Dr. Christopher M.

Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201, 800 N State Street, Dover, DE 19901. These documents are also accessible via the internet at *https://www.mafmc.org/supporting-documents.*

FOR FURTHER INFORMATION CONTACT: Cynthia Ferrio, Fishery Policy Analyst, (978) 281–9180.

SUPPLEMENTARY INFORMATION:

Background

The Mid-Atlantic Fishery Management Council and the Atlantic States Marine Fisheries Commission jointly manage the bluefish fishery under the Atlantic Bluefish Fishery Management Plan (FMP). The FMP requires the specification of the acceptable biological catch (ABC), annual catch limit (ACL), annual catch targets (ACT), commercial quota, recreational harvest limit, and other management measures for up to 3 years at a time. This action implements bluefish specifications for the 2021 fishing year.

The August 2019 bluefish operational assessment concluded that the Atlantic bluefish stock is overfished but not subject to overfishing. The most recent data update (2020) showed increases in both commercial and recreational catch in 2019 from 2018, but no change in the stock status determination from the 2019 assessment. Based on this best available scientific information, 2021 specifications were proposed with no changes from those implemented for 2020, except for a reduction of 1.14 million lb (515,811 kg) in the recreational total allowable landings (TAL) and recreational harvest limit (RHL) to account for higher reported recreational discards in 2019 than initially projected.

The proposed rule for this action published in the **Federal Register** on November 5, 2020 (85 FR 70573), and comments were accepted through November 20, 2020. Additional background information regarding the development of these specifications was provided in the proposed rule and is not repeated here. NMFS received five comments from the public, and no changes to the final rule are necessary as a result of those comments (see Comments and Responses for additional detail).

Final Specifications

This action implements the Council and Commission's recommendations for 2021 bluefish catch specifications (Table 1), as outlined in the proposed rule. These specifications are status quo relative to 2020, except for a 12-percent reduction in the recreational TAL and RHL to account for the most recent catch data. The recreational fishery is expected to fully achieve the RHL. Therefore, this action does not include a quota transfer to the commercial fishery, which is authorized in the FMP up to a specified amount only if the recreational fishery is not projected to achieve the RHL. This action does not change any other 2021 fishery management measures, including the daily recreational bag limits.

TABLE 1—SUMMARY OF FINAL 2021 BLUEFISH SPECIFICATIONS *

	Final 2021 specifications	
	million pounds	metric tons
Overfishing Limit	37.98	17,228
ABC = ACL	16.28	7,385
Commercial ACT	2.77	1,255
Recreational ACT	13.51	6,130
Commercial TAL	2.77	1,255
Recreational TAL	8.34	3,785
Sector Transfer	0.00	0
Commercial Quota	2.77	1,255
Recreational Harvest Limit	8.34	3,785

* Specifications are derived from the ABC in metric tons (mt). When values are converted to millions of pounds the numbers may slightly shift due to rounding. The conversion factor used is 1 mt = 2204.62262 lb.

The state commercial quota allocations for 2021 (Table 2) are based on the final coastwide commercial quota for 2021, and the allocation percentages defined in the FMP. No state exceeded its allocated quota in 2019, nor is projected to do so in 2020; therefore, no accountability measures are necessary for the 2021 commercial fishery.

TABLE 2—2021 BLUEFISH STATE COMMERCIAL QUOTA ALLOCATIONS

State	Percent share	Quota (lb)	Quota (kg)
Maine	0.67	18,503	8,391
New Hampshire	0.41	11,473	5,203
Massachusetts	6.72	185,904	84,310
Rhode Island	6.81	188,434	85,458
Connecticut	1.27	35,049	15,895
New York	10.39	287,438	130,357
New Jersey	14.82	410,082	185,978
Delaware	1.88	51,985	23,576
Maryland	3.00	83,084	37,680
Virginia	11.88	328,800	149,116
North Carolina	32.06	887,377	402,438
South Carolina	0.04	974	442
Georgia	0.01	263	119
Florida	10.06	278,432	126,273

TABLE 2—2021 BLUEFISH STATE COMMERCIAL QUOTA ALLOCATIONS—Continued

State	Percent share	Quota (lb)	Quota (kg)
Total	100.00	2,767,793	1,255,235

The Council is developing a rebuilding plan for the bluefish stock that will be implemented by the end of November 2021. This rebuilding plan will inform development of the next set of specifications for fishing year 2022.

Comments and Responses

The public comment period for the proposed rule ended on November 20, 2020, and NMFS received five comments from the public. No changes to the proposed specifications were made as a result of these comments.

Comment 1: One comment voiced support for the action.

Response: NMFS agrees and is implementing the proposed specifications for the reasons outlined in the preamble to this rule.

Comment 2: Two comments were submitted by the same individual, who expressed frustration with the slow government process and suggested that an immediate shutdown of the fishery would be the best way to end overfishing and protect the bluefish stock. These comments also questioned the science used to determine the proposed catch limits.

Response: NMFS emphasizes the importance of the regulatory public process and is proceeding as quickly as possible within the applicable law. All of the analyses for this action have been conducted with the best scientific data available, and indicate that it is not necessary to fully close the bluefish fishery to promote stock recovery. A stable and sustainable bluefish fishery can be maintained while the stock rebuilds with minimal risk to the resource.

Comment 3: Another commenter disagreed with the way bluefish population is monitored and data used to determine stock health. The comment went on to claim that all available data indicates that bluefish stock is healthy and not overfished. The commenter then recommended that the proposed specifications should remain consistent with earlier years' catch limits, not reduce the RHL, and enable a transfer of quota to the commercial sector because the healthy stock status does not justify the proposed restrictions.

Response: NMFS disagrees with the commenter's evaluation of the bluefish stock. The August 2019 operational stock assessment incorporated data from several fishery dependent and independent surveys as well as the Marine Recreational Information Program. This assessment was peer reviewed before publication, and is the best scientific information available concerning bluefish stock health. The assessment determined the bluefish stock to be overfished, and a data update this year (2020) confirmed this status has not changed. Restrictions to management measures were implemented in February 2020 (85 FR 11863; February 28, 2020) to prevent overfishing on the overfished stock, as required by the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). These specifications reduce the RHL to further reduce the risk of overfishing to an acceptable level, and there is no sector quota transfer to the commercial fishery because the recreational sector is expected to fully catch its entire allocated quota.

Comment 4: The final commenter asked about the differences between state commercial quotas in the proposed specifications compared to 2020, and how NMFS calculates the coastwide bluefish population.

Response: The proposed coastwide commercial quota is unchanged from 2020, and the percentage that each state is allocated has not changed since the allocations were established in Amendment 1 to the FMP (65 FR 45844; July 26, 2000). There may be a perceived proportional difference in final state quotas due to state-to-state transfers that have taken place throughout the 2020 fishing year. These transfers are authorized in the FMP, completed through mutual agreement between respective state agencies, and are not an accountability measure. Revision of state allocations is being reviewed in Bluefish Amendment 7, currently in development. The bluefish stock is evaluated through regular stock assessments, which incorporate data from a variety of fishery dependent and independent surveys.

Changes From the Proposed Rule

There are no substantive changes from the proposed rule.

Classification

Pursuant to section 304(b)(3) of the Magnuson-Stevens Act, the NMFS Administrator, Greater Atlantic Region, has determined that this final rule is necessary for the conservation and management of the Atlantic bluefish fishery, and that it is consistent with the Atlantic Bluefish FMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

The Assistant Administrator for Fisheries, NOAA, finds good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effective date for this rule to ensure that the final specifications are in place as close as practicable to the start of the bluefish fishing year on January 1, 2021. This action establishes the final specifications (*i.e.,* ACLs) for the 2021 bluefish fishery. A delay in effectiveness well beyond the start of the fishing year would be contrary to the public interest, as it could create confusion in the commercial bluefish industry.

Furthermore, this rule is being issued at the earliest possible date. The proposed rule was prepared in October and published by early November 2020, and the public comment period ended on November 20, 2020. Ideally, this final rule should publish in time to be effective for the January 1 start of the fishing year to allow state agencies to use the implemented commercial quota allocations to set annual state management measures. A 30-day delay in effectiveness would needlessly postpone implementation of final 2021 specifications well into the fishing year, which is contrary to the public interest. The longer these specifications are delayed, the longer it will take for some states to implement respective regulations.

The 30-day delay in implementation for this rule is also unnecessary because this rule contains no new measures (*e.g.,* requiring new nets or equipment) for which regulated entities need time to prepare or revise their current practices. Unlike actions that require an adjustment period to comply with new rules, bluefish fishery participants will not have to purchase new equipment or otherwise expend time or money to comply with these status quo management measures. Therefore, there would be no benefit to delaying the implementation of these specifications.

For these reasons, NMFS finds that a 30-day delay in effectiveness would be contrary to the public interest, and

therefore waives the requirement consistent with 5 U.S.C. 553(d)(3).

This final rule is exempt from review under Executive Order 12866 because the action contains no implementing regulations.

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

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

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

Dated: December 9, 2020.

Samuel D. Rauch III,

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

[FR Doc. 2020–27522 Filed 12–15–20; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 85, No. 242
Wednesday, December 16, 2020

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 930

[Doc. No. AMS–SC–20–0079; SC20–930–4 PR]

Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin; Modification of Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would implement a recommendation from the Cherry Industry Administrative Board (Board) to decrease the portion of assessments allocated to research and promotion activities and increase the portion allocated to administrative expenses. The overall assessment rate would remain unchanged. The proposed assessment rate would remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Comments must be received by January 15, 2021.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposed rule. Comments must be sent to the Docket Clerk, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; or internet: *https://www.regulations.gov.* Comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *https://www.regulations.gov.* All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Thomas Nalepa, Marketing Specialist, or Christian D. Nissen, Regional Director, Southeast Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (863) 324–3375, Fax: (863) 291–8614, or Email: *Thomas.Nalepa@usda.gov* or *Christian.Nissen@usda.gov.*

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: *Richard.Lower@usda.gov.*

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, proposes an amendment to regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This proposed rule is issued under Marketing Agreement and Order No. 930, both as amended (7 CFR part 930), regulating the handling of tart cherries produced in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. Part 930 (referred to as the ''Order'') is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.'' The Board locally administers the Order and is comprised of producers and handlers of tart cherries operating within the production area, and a public member.

The Department of Agriculture (USDA) is issuing this proposed rule in conformance with Executive Orders 13563 and 13175. This proposed rule falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review. Additionally, because this proposed rule does not meet the definition of a significant regulatory action, it does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled ''Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs' '' (February 2, 2017).

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the Order now in effect, tart cherry handlers are subject to assessments. Funds to administer the Order are derived from such assessments. It is intended that the assessment rate would be applicable to all assessable tart cherries for the 2020–21 crop year and continue until amended, suspended, or terminated.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This proposed rule would decrease the portion of the assessment rate allocated to research and promotion activities from $0.005 to $0.00275 per pound of tart cherries and increase the portion allocated to administrative expenses from $0.00075 to $0.003 per pound of tart cherries. The overall assessment rate established for the Board for the 2020–21 and subsequent fiscal periods would remain unchanged at $0.00575 per pound of tart cherries.

The Order provides authority for the Board, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members are familiar with the Board's needs and with the costs of goods and services in their local areas and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2019–20 fiscal period, the Board recommended, and USDA approved, an assessment rate of $0.00575 per pound of tart cherries that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

During the September 10, 2020 meeting, the Board recommended 2020–21 expenditures of $795,000 and an assessment rate of $0.00575 per pound of tart cherries. In comparison, last year's budgeted expenditures were $1,956,500. The total assessment rate remains unchanged by this action. However, this proposed rule would decrease the portion of the assessment rate allocated to research and promotion activities from $0.005 to $0.00275 per pound of tart cherries and increase the portion allocated to administrative expenses from $0.00075 to $0.003 per pound of tart cherries. This shift in allocation would allow the Board to fund its administrative obligations while continuing limited research and promotion activities to help market this season's below-average crop. The revised allocation would ensure the availability of adequate administrative funds despite a significant draw-down in reserves resulting from the 2019–20 crop year assessment rate reduction.

The major expenditures recommended by the Board for the 2020–21 year include $350,000 for research and promotion, $255,000 for salaries and wages, and $130,000 for other administrative expenses. Budgeted expenses for these items in 2019–2020 were $1,514,500, $250,000, and $130,000, respectively.

The Board derived the recommended assessment rate by considering anticipated administrative expenses, an estimated crop of 141.46 million pounds of tart cherries (down from last year's production of 236.3 million pounds), the current status of reserves, and the needs of the industry with regards to research and promotion activities. Income derived from handler assessments is calculated at $813,395 (141.46 million pounds × $0.00575/pound). The Board anticipates that due to approved exemptions and loss adjustments the actual income from assessments will be closer to $783,992. Assessment income, along with interest income and funds from the Board's authorized reserve, would be adequate to cover budgeted expenses of $795,000. Funds in the reserve are estimated to be $75,096 at the end of the 2020–21 fiscal year.

The assessment rate proposed in this rule would continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Board or other available information.

Although this assessment rate would be in effect for an indefinite period, the Board will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Board meetings are available from the Board or USDA. Board meetings are open to the public and interested persons may express their views at these meetings. USDA would evaluate Board recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking would be undertaken as necessary. The Board's 2020–21 budget and those for subsequent fiscal periods will be reviewed and, as appropriate, approved by USDA.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this proposed rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

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. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 400 producers of tart cherries in the regulated area and approximately 40 handlers of tart cherries who are subject to regulation under the Order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts of less than $1,000,000, and small agricultural service firms have been defined as those whose annual receipts are less than $30,000,000 (13 CFR 121.201).

According to the National Agricultural Statistics Service (NASS) and Board data, the average annual grower price for tart cherries during the 2019–20 season was approximately $0.15 per pound. With total utilization at 236.3 million pounds, the total 2019–20 crop value is estimated at $35.45 million. Dividing the crop value by the estimated number of producers (400) yields an estimated average receipt per producer of $88,613. This is well below the SBA threshold for small producers.

A free on board (FOB) price of $0.82 per pound for processed tart cherries was derived from USDA's 2020 purchases of dried tart cherries at an average price of $4.11 per pound. The dried cherry price was converted to a raw product equivalent price at an industry recognized ratio of five to one. Based on utilization, this price represents a good estimate of the price for processed cherries. Multiplying this FOB price by total utilization of 236.3 million pounds results in an estimated handler-level tart cherry value of $193.8 million. Dividing this figure by the number of handlers (40) yields estimated average annual handler receipts of $4.8 million, which is below the SBA threshold for small agricultural service firms. Assuming a normal distribution, the majority of producers and handlers of tart cherries may be classified as small entities.

This proposal would decrease the portion of the assessment rate allocated to research and promotion activities from $0.005 to $0.00275 per pound of tart cherries and increase the portion allocated to administrative expenses from $0.00075 to $0.003 per pound of tart cherries. The overall assessment rate established for the Board for the 2019–20 and subsequent fiscal periods would remain unchanged at $0.00575 per pound of tart cherries. The volume of assessable tart cherries for the 2020–21 season is estimated at 141.46 million pounds. Thus, the $0.00575 rate should provide $813,395 in assessment income (141.46 million pounds × $0.00575/pound). The Board anticipates that due to approved exemptions and loss adjustments the total income from assessments will be $783,992. Income derived from handler assessments, along with interest income and funds from the Board's authorized reserve, would be adequate to cover budgeted expenses.

The major expenditures recommended by the Board for the 2020–21 year include $350,000 for Research and promotion, $255,000 for salaries and wages, and $130,000 for other administrative expenses. Budgeted expenses for these items in 2019–20 were $1,514,500, $250,000, and $130,000, respectively.

This proposed rule would shift the allocation of the assessment rate to decrease the portion allotted for research and promotion, while increasing the amount allocated for administrative costs. This adjustment

would provide enough funds for the Board's administrative obligations and decrease the funding for research and promotion activities to reflect the significant reduction in the 2020–21 crop.

Prior to arriving at this budget and assessment rate, the Board considered production history, crop estimates, its financial statements, and the need to meet its administrative obligations and maintain some marketing efforts to increase demand for tart cherries. The Board discussed alternatives, including raising the assessment rate and borrowing funds; however, they were rejected due to the burden of increasing assessments on handlers and the cost of debt due to financing. The Board determined that 2020–21 expenditures of $795,000 were appropriate, and the recommended assessment rate and allocation, along with funds from interest income, and funds from reserves, would be adequate to cover the budgeted expenses.

A review of historical information and preliminary information pertaining to the upcoming fiscal year indicates that the average grower price for the 2020–21 season should be approximately $0.19 per pound of tart cherries. According to NASS statistics, this price is the average of the past three years. Therefore, the estimated assessment revenue for the 2020–21 crop year as a percentage of total grower revenue would be approximately 3.0 percent.

This proposed rule would not increase the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, these costs would be offset by the benefits derived by the operation of the marketing order.

The Board's meeting was widely publicized throughout the tart cherry industry. All interested persons were invited to attend the meeting and participate in Board deliberations on all issues. Like all Board meetings, the September 10, 2020, meeting was a public meeting, and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit comments on this proposed rule, including the regulatory and informational impacts of this action on small businesses.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by the OMB and assigned OMB No. 0581–0177, Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. No changes in those requirements would be necessary as a result of this proposed rule. Should any changes become necessary, they would be submitted to OMB for approval.

This proposed rule would not impose any additional reporting or recordkeeping requirements on either small or large tart cherry handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this proposed rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *https://www.ams.usda.gov/rules-regulations/moa/small-businesses.* Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 30-day comment period is provided to allow interested persons to respond to this proposed rule.

List of Subjects in 7 CFR Part 930

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

For the reasons set forth in the preamble, 7 CFR part 930 is proposed to be amended as follows:

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

■ 1. The authority citation for 7 CFR part 930 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 930.200 is revised to read as follows:

§ 930.200 Assessment rate.

On and after October 1, 2020, the assessment rate imposed on handlers shall be $0.00575 per pound of tart cherries grown in the production area and utilized in the production of tart cherry products. Included in this rate is $0.00275 per pound of tart cherries to cover the cost of the research and promotion program and $0.003 per pound of tart cherries to cover administrative expenses.

Bruce Summers,

Administrator, Agricultural Marketing Service.

[FR Doc. 2020–27563 Filed 12–15–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1132; Project Identifier MCAI–2020–01386–R]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2018–15–02, which applies to certain Airbus Helicopters Model AS350B, AS350B1, AS350B2, AS350B3, AS350BA, AS355E, AS355F, AS355F1, AS355F2, AS355N, and AS355NP helicopters. AD 2018–15–02 requires repetitively inspecting the tail rotor (TR) pitch rod for a damaged elastomeric ball joint, and corrective action if necessary. Since the FAA issued AD 2018–15–02, the FAA determined that the manufacturer had developed improved inspection procedures and identified conditions that would allow the repetitive inspection intervals specified in AD 2018–15–02 to be extended to correspond with the intervals for the inspection of the TR pitch rod specified in the airworthiness limitation section of the applicable helicopter maintenance manual. This proposed AD would retain the requirements of AD 2018–15–02 and allow the repetitive inspection interval to be extended under certain conditions, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by February 1, 2021.

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

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

For material that will be incorporated by reference (IBR) in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 89990 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this IBR material on the EASA website at https://ad.easa.europa.eu.You may view this IBR material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1132.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1132; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Katherine Venegas, Aviation Safety Engineer, Cabin Safety, Mechanical and Environmental Systems Section, Los Angeles ACO Branch, FAA, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5353; fax: 562–627–5210; email: *Katherine.Venegas@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2020–1132; Project Identifier MCAI–2020–01386–R'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Katherine Venegas, Aviation Safety Engineer, Cabin Safety, Mechanical and Environmental Systems Section, Los Angeles ACO Branch, FAA, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5353; fax: 562–627–5210; email: *Katherine.Venegas@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Discussion

The FAA issued AD 2018–15–02, Amendment 39–19334 (83 FR 34029, July 19, 2018) (AD 2018–15–02), which applies to certain Airbus Helicopters Model AS350B, AS350B1, AS350B2, AS350B3, AS350BA, AS355E, AS355F, AS355F1, AS355F2, AS355N, and AS355NP helicopters. AD 2018–15–02 requires repetitively inspecting the TR pitch rod for a damaged elastomeric ball joint, and corrective action if necessary. The FAA issued AD 2018–15–02 to address damage to the elastomeric ball joint on the TR pitch change rod. This condition could result in failure of the TR pitch change rod and subsequent loss of control of the helicopter.

Actions Since AD 2018–15–02 Was Issued

Since the FAA issued AD 2018–15–02, the FAA determined that the manufacturer had developed improved inspection procedures and identified conditions that would allow the repetitive inspection intervals specified in AD 2018–15–02 to be expanded to correspond with the intervals for the inspection of the TR pitch rod specified in the airworthiness limitation section of the applicable helicopter maintenance manual.

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2017–0020R1, dated May 22, 2019 (EASA AD 2017–0020R1) (also referred to as the Mandatory Continuing Airworthiness Information, or the MCAI), to correct an unsafe condition for certain Airbus Helicopters Model AS350B, AS350BA, AS350BB, AS350B1, AS350B2, AS350B3, AS355E, AS355F, AS355 F1, AS355F2, AS355N and AS355NP helicopters. Model AS350BB helicopters are not certificated by the FAA and are not included on the U.S. type certificate data sheet; this proposed AD therefore does not include those helicopters in the applicability.

This proposed AD was prompted by a report of several cases of damaged TR pitch rod ball joints. The FAA is proposing this AD to address damage to the elastomeric ball joint on the TR pitch change rod. This condition could result in failure of the TR pitch change rod and subsequent loss of control of the helicopter. See the MCAI for additional background information.

Comments on AD 2018–15–02

The FAA gave the public the opportunity to comment on AD 2018–15–02. The following presents the comments received on AD 2018–15–02 and the FAA's response to those comments.

Request To Allow Pilots To Do the Inspection

Four commenters requested that the FAA allow pilots to do the inspection specified in the required action paragraph of AD 2018–15–02. The commenters observed that the Airbus Helicopters service information specified in AD 2018–15–02 identified qualified personnel as a mechanical engineer technician or a pilot. Three of those commenters also noted that the repetitive inspection required by AD 2018–15–02 is required at intervals not to exceed 10 hours time-in-service (TIS).

These commenters explained that because many of the affected helicopters are utilized for firefighting, law enforcement, and utility applications, operators might not have access to a mechanic to do the inspection every 10 hours TIS, therefore a pilot should be allowed to perform the inspection.

The FAA disagrees. Per 14 CFR 43.3, the persons listed as authorized to perform maintenance do not include pilots. In addition, AD 2018–15–02 requires actions where a device to measure degrees of rotation is needed. Because this precision measuring equipment must be used, a pilot is not allowed to perform the inspection. The FAA did not make any changes to AD 2018–15–02 regarding this issue. However, the FAA reviewed these comments again in light of this NPRM, which proposes to supersede AD 2018–15–02, and to incorporate EASA AD 2017–0020R1 by reference. EASA AD 2017–0020R1 identifies conditions where operators can revert to the original repetitive inspection intervals specified in the applicable airworthiness limitations section for the affected helicopters. The intervals specified in the airworthiness limitations section are every 50 flight hours, and for the purposes of this proposed AD, every 50 hours TIS.

Related Service Information Under 1 CFR Part 51

EASA AD 2017–0020R1 describes procedures for repetitively inspecting the TR pitch rod for a damaged (debonding, extrusion, or cracking) elastomeric ball joint and corrective action. The corrective action includes replacing an affected TR pitch rod with a serviceable TR pitch rod. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to the bilateral agreement with the State of Design Authority, the FAA has been notified of the unsafe condition described in the MCAI referenced above. The FAA is proposing this AD because the FAA evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Explanation of Retained Requirements

Although this proposed AD does not explicitly restate the requirements of AD 2018–15–02, this proposed AD would retain all of the requirements of AD 2018–15–02, except this proposed AD would allow for extended repetitive intervals. Those requirements are referenced in EASA AD 2017–0020R1, which, in turn, is referenced in paragraph (g) of this proposed AD.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in EASA AD 2017–0020R1 described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and civil aviation authorities (CAAs) to use this process. As a result, EASA AD 2017–0020R1 will be incorporated by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2017–0020R1 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in the EASA AD. Service information specified in EASA AD 2017–0020R1 that is required for compliance with EASA AD 2017–0020R1 will be available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1132 after the FAA final rule is published.

Costs of Compliance

The FAA estimates that this proposed AD affects 955 helicopters of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Retained actions from AD 2018–15–02	0.5 work-hour × $85 per hour = $42.50	$0	$42.50	$40,587.50

This new proposed AD adds no new costs to affected operators.

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

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
1 work-hour × $85 per hour = $85	$3,358	$3,443

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2018–15–02, Amendment 39–19334 (83 FR 34029, July 19, 2018), and adding the following new AD:

Airbus Helicopters: Docket No. FAA–2020–1132; Project Identifier MCAI–2020–01386–R.

(a) Comments Due Date

The FAA must receive comments by February 1, 2021.

(b) Affected Airworthiness Directive (ADs)

This AD replaces AD 2018–15–02, Amendment 39–19334 (83 FR 34029, July 19, 2018) (AD 2018–15–02).

(c) Applicability

This AD applies to Airbus Helicopters Model AS350B, AS350B1, AS350B2, AS350B3, AS350BA, AS355E, AS355F, AS355F1, AS355F2, AS355N, and AS355NP helicopters, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2017–0020R1, dated May 22, 2019 (EASA AD 2017–0020R1).

(d) Subject

Joint Aircraft System Component (JASC) Code 6720, Tail Rotor Control System.

(e) Reason

This AD was prompted by a report of several cases of damaged tail rotor (TR) pitch rod ball joints. The FAA is issuing this AD to address damage to the elastomeric ball joint on the TR pitch change rod. This condition could result in failure of the TR pitch change rod and subsequent loss of control of the helicopter.

(f) Compliance

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

(g) New Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2017–0020R1.

(h) Exceptions to EASA AD 2017–0020R1

(1) Where EASA AD 2017–0020R1 refers to its effective date, this AD requires using the effective date of this AD.

(2) Where EASA AD 2017–0020R1 refers to February 9, 2017 (the effective date of EASA AD 2017–0020–E, dated February 9, 2017), this AD required using August 3, 2018 (the effective date of AD 2018–15–02).

(3) The ''Remarks'' section of EASA AD 2017–0020R1 does not apply to this AD.

(4) Although the service information referenced in EASA AD 2017–0020R1 specifies to discard certain parts, this AD does not include that requirement.

(5) Where EASA AD 2017–0020R1 refers to flight hours (FH), this AD requires using hours time-in-service.

(6) Where paragraph (1) of EASA AD 2017–0020R1 specifies an initial compliance time of ''Before exceeding 50 FH [flight hours] since the last inspection per ALS [airworthiness limitations] chapter 04–20–00, or within 10 FH or 7 days, whichever occurs first,'' for this AD, the initial compliance time is within 10 hours time-in-service (TIS).

(7) For the inspections specified in paragraph (1) of EASA AD 2017–0020R1: Accomplishing the actions specified in paragraphs (h)(7)(i) and (ii) of this AD before the effective date of this AD are acceptable for compliance with the inspections specified in in paragraph (1) of EASA AD 2017–0020R1. On or after the effective date of this AD comply with the inspections as specified in paragraph (1) of EASA AD 2017–0020R1.

(i) Manually induce a flapping movement in the TR blade until the pitch change rod rotates a minimum of 10 degrees.

(ii) Inspect both faces of the blade side of the ball joint elastomer for debonding, extrusion, and cracks.

(8) Although the service information referenced in EASA AD 2017–0020R1 permits certain actions to be performed by a mechanical engineering technician or pilot, this AD requires that the actions be performed by a qualified mechanic.

(i) Alternative Methods of Compliance (AMOCs)

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

(j) Related Information

(1) For EASA AD 2017–0020R1, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 89990 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.* You may view this material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1132.

(2) For more information about this AD, contact: Katherine Venegas, Aviation Safety Engineer, Cabin Safety, Mechanical and Environmental Systems Section, Los Angeles ACO Branch, FAA, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5353; fax: 562–627–5210; email: *Katherine.Venegas@faa.gov.*

Issued on December 11, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–27660 Filed 12–15–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–1071; Airspace Docket No. 20–ACE–13]

RIN 2120–AA66

Proposed Amendment of V–175 and V–586; Establishment of T–397; and Revocation of V–424 in the Vicinity of Macon, MO

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend VHF Omnidirectional Range (VOR) Federal airways V–175 and V–586; establish Area Navigation (RNAV) route T–397; and remove VOR Federal airway V–424 in the vicinity of Macon, MO. The Air Traffic Service (ATS) route modifications are necessary due to the planned decommissioning of the VOR portion of the Macon, MO, VOR/Distance Measuring Equipment (VOR/DME) navigation aid (NAVAID). With the exception of RNAV route T–397 proposed to be established, the Marion VOR/DME NAVAID provides navigation guidance for portions of the affected air traffic service (ATS) routes. The VOR is being decommissioned as part of the FAA's VOR Minimum Operational Network (MON) program.

DATES: Comments must be received on or before February 1, 2021.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590; telephone: (800) 647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2020–1071; Airspace Docket No. 20–ACE–13 at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.* FAA Order 7400.11E, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Rules and Regulations Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11E at NARA, email: *fedreg.legal@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would modify the route structure as necessary to preserve the safe and efficient flow of air traffic within the National Airspace System (NAS).

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2020–1071; Airspace Docket No. 20–ACE–13) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the internet at *https://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2020–1071; Airspace Docket No. 20–ACE–13.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified comment closing date will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the comment closing date. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at *https://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *https://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the office of the Operations Support Group, Central Service Center, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020. FAA Order 7400.11E is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11E lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

Background

The FAA is planning decommissioning activities for the VOR portion of the Macon, MO, VOR/DME in October 2021. Although the VOR portion of the Macon VOR/DME is planned for decommissioning, the co-located DME portion of the NAVAID is being retained.

The Macon, MO, VOR is a candidate VOR identified for discontinuance by the FAA's VOR MON program and listed in the final policy statement notice, ''Provision of Navigation Services for the Next Generation Air Transportation System (NextGen) Transition to Performance-Based

Navigation (PBN) (Plan for Establishing a VOR Minimum Operational Network),'' published in the **Federal Register** of July 26, 2016 (81 FR 48694), Docket No. FAA–2011–1082.

The existing ATS route dependencies to the Macon, MO, VOR/DME NAVAID are VOR Federal airways V–175, V–424, and V–586. With the planned decommissioning of the VOR portion of the Macon VOR/DME, the remaining ground-based NAVAID coverage in the area is insufficient to enable the continuity of the affected airways. As such, proposed modifications to the affected airways would result in a gap in one of the airways (V–175), shortening another of the airways (V–586), and removing the remaining airway completely (V–424).

To overcome the gap created in V–175, the loss of route segments at the beginning of V–586, and the loss of V–424, instrument flight rules (IFR) traffic could use adjacent ATS routes, including VOR Federal airways V–4, V–10, V–50, V–63, and V–206, or request air traffic control (ATC) radar vectors to fly through or circumnavigate the affected area. Additionally, IFR pilots equipped with RNAV PBN capabilities could also navigate point to point using the existing fixes that will remain in place to support continued operations though the affected area. Visual flight rules (VFR) pilots who elect to navigate via the airways through the affected area could also take advantage of the adjacent VOR Federal airways or ATC services listed previously.

Further, the FAA proposes to establish RNAV route T–397 between the Walnut Ridge, AR, VORTAC and the Waterloo, IA, VOR/DME to, in part, mitigate the proposed removal of the V–175 airway segment affected by the planned decommissioning of the Macon, MO, VOR. Additionally, establishing T–397 would provide airspace users with continued enroute ATS route structure, using RNAV routing capability, from the Walnut Ridge, AR, area northward to the Cedar Falls, IA, area; as well as, support ongoing FAA NextGen efforts to modernize the NAS to performance-based navigation.

Finally, prior to this NPRM, the FAA published a rule for Docket No. FAA–2020–0667 in the **Federal Register** (85 FR 79422; December 10, 2020), amending VOR Federal airway V–175 by removing the airway segment overlying the Sioux City, IA, VOR/Tactical Air Navigation (VORTAC) between the Des Moines, IA, VORTAC and the Worthington, MN, VOR/DME; and removing the airway segment overlying the Park Rapids, MN, VOR/DME between the Alexandria, MN, VOR/DME and the Winnipeg, MB, Canada, VORTAC. The airway amendments, effective February 25, 2021, are included in this NPRM.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 by modifying VOR Federal airways V–175 and V–586; establishing RNAV route T–397; and removing VOR Federal airway V–424. The planned decommissioning of the VOR portion of the Macon, MO, VOR/DME has made this action necessary.

The proposed VOR Federal airway changes are outlined below.

V–175: V–175 currently extends between the Malden, MO, VORTAC and the Des Moines, IA, VORTAC; and between the Worthington, MN, VOR/DME and the Alexandria, MN, VOR/DME. The FAA proposes to remove the airway segment overlying the Macon, MO, VOR/DME between the Hallsville, MO, VORTAC and the Kirksville, MO, VORTAC. The unaffected portions of the existing airway would remain as charted.

V–424: V–424 currently extends between the Napoleon, MO, VORTAC and the Macon, MO, VOR/DME. The FAA proposes to remove the airway in its entirety.

V–586: V–586 currently extends between the intersection of the Kansas City, MO, VORTAC 077° and Napoleon, MO, VORTAC 005° radials (EXCEL fix) and the Joliet, IL, VORTAC. The FAA proposes to remove the airway segment overlying the Macon, MO, VOR/DME between the intersection of the Kansas City, MO, VORTAC 077° and Napoleon, MO, VORTAC 005° radials (EXCEL fix) and the Quincy, IL, VORTAC. The unaffected portions of the existing airway would remain as charted.

The proposed new RNAV T-route is outlined below.

T–397: T–397 is a proposed new route that would extend between the Walnut Ridge, AR, VORTAC and the Waterloo, IA, VOR/DME. This RNAV route would mitigate the proposed loss of the V–175 airway segment proposed to be removed as noted above and provide RNAV routing capability from the Walnut Ridge, AR, area northward to the Cedar Falls, IA, area.

VOR Federal airways are published in paragraph 6010(a) and United States RNAV T-routes are published in paragraph 6011 of FAA Order 7400.11E dated July 21, 2020, and effective September 15, 2020, which is incorporated by reference in 14 CFR 71.1. The ATS routes listed in this document would be subsequently published in the Order.

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

Regulatory Notices and Analyses

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

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020, is amended as follows:

Paragraph 6010(a) Domestic VOR Federal Airways.

* * * * *

V–175 [Amended]

From Malden, MO; Vichy, MO; to Hallsville, MO. From Kirksville, MO; to Des Moines, IA. From Worthington, MN; Redwood Falls, MN; to Alexandria, MN.

* * * * *

V–424 [Removed]

* * * * *

V–586 [Amended]

From Quincy, IL; Peoria, IL; Pontiac, IL; to Joliet, IL.

* * * * *

Paragraph 6011 United States Area Navigation Routes.

* * * * *

T–397 Walnut Ridge, AR (ARG) to Waterloo, IA (ALO) [New]

Walnut Ridge, AR (ARG)	VORTAC	(Lat. 36°06′36.07″ N, long. 090°57′13.30″ W).
Vichy, MO (VIH)	VOR/DME	(Lat. 38°09′14.66″ N, long. 091°42′24.38″ W).
LEWRP, MO	WP	(Lat. 40°08′06.06″ N, long. 092°35′30.15″ W).
OHGEE, IA	FIX	(Lat. 40°49′06.04″ N, long. 093°08′24.11″ W).
LACON, IA	FIX	(Lat. 41°08′23.43″ N, long. 093°24′09.22″ W).
Des Moines, IA (DSM)	VORTAC	(Lat. 41°26′15.45″ N, long. 093°38′54.81″ W).
Waterloo, IA (ALO)	VOR/DME	(Lat. 42°33′23.39″ N, long. 092°23′56.13″ W).

* * * * *

Issued in Washington, DC, on December 11, 2020.

George Gonzalez,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2020–27631 Filed 12–15–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–1100; Airspace Docket No. 20–AGL–1]

RIN 2120–AA66

Proposed Amendment of V–9, V–63, V–100, V–158, V–171, and T–325; and Revocation of V–127 in the Vicinity of Rockford, IL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend VHF Omnidirectional Range (VOR) Federal airways V–9, V–63, V–100, V–158, and V–171; amend Area Navigation (RNAV) route T–325; and remove VOR Federal airway V–127 in the vicinity of Rockford, IL. The air traffic service (ATS) route modifications are necessary due to the planned decommissioning of the VOR portion of the Rockford, IL, VOR/Distance Measuring Equipment (VOR/DME) navigation aid (NAVAID). Except for RNAV route T–325, the Rockford VOR/DME NAVAID provides navigation guidance for portions of the affected routes listed above. The Rockford VOR is being decommissioned as part of the FAA's VOR Minimum Operational Network (MON) program.

DATES: Comments must be received on or before February 1, 2021.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590; telephone: (800) 647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2020–1100; Airspace Docket No. 20–AGL–1 at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.*

FAA Order 7400.11E, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Rules and Regulations Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11E at NARA, email: *fedreg.legal@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would modify the route structure as necessary to preserve the safe and efficient flow of air traffic within the National Airspace System (NAS).

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2020–1100; Airspace Docket No. 20–AGL–1) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the internet at *https://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2020–1100; Airspace Docket No. 20–AGL–1.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified comment closing date will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the

comment closing date. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at *https://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *https://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the office of the Operations Support Group, Central Service Center, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX, 76177.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020. FAA Order 7400.11E is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11E lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

Background

The FAA is planning decommissioning activities for the VOR portion of the Rockford, IL, VOR/DME in October 2021. The Rockford, IL, VOR is a candidate VOR identified for discontinuance by the FAA's VOR MON program and listed in the final policy statement notice, ''Provision of Navigation Services for the Next Generation Air Transportation System (NextGen) Transition to Performance-Based Navigation (PBN) (Plan for Establishing a VOR Minimum Operational Network),'' published in the **Federal Register** of July 26, 2016 (81 FR 48694), Docket No. FAA–2011–1082.

Although the VOR portion of the Rockford VOR/DME is planned for decommissioning, the co-located DME portion of the NAVAID is being retained.

The existing ATS route dependencies to the Rockford, IL, VOR/DME NAVAID are VOR Federal airways V–9, V–63, V–100, V–127, V–158, and V–171. With the planned decommissioning of the VOR portion of the Rockford VOR/DME, the remaining ground-based NAVAID coverage in the area is insufficient to enable the continuity of the affected airways. As such, proposed modifications to the affected airways would result in creating a gap in three of the airways (V–9, V–63, and V–100), expanding an existing gap in one of the airways (V–171), redefining an airway point to retain one of the airways as charted (V–158); and removing the remaining airway completely (V–127).

To overcome the gaps created or expanded in four of the airways, and the loss of another airway, instrument flight rules (IFR) traffic could use adjacent ATS routes, including VOR Federal airways V–6, V–24, V–158, V–172, and V–216, or request air traffic control (ATC) radar vectors to fly through or circumnavigate the affected area. Additionally, IFR pilots equipped with RNAV PBN capabilities could also navigate point to point using the existing fixes that will remain in place to support continued operations though the affected area. Visual flight rules (VFR) pilots who elect to navigate via the airways through the affected area could also take advantage of the adjacent VOR Federal airways or ATC services listed previously.

To retain V–158 as charted, the FAA is proposing to redefine the airway point defined by the intersection of the Polo, IL, VOR/DME 122° and Rockford, IL, VOR/DME 169° radials (SHOOF fix) by using the existing Polo, IL, VOR/DME 122° radial and replacing the Rockford, IL, VOR/DME radial with a new Davenport, IA, VOR/Tactical Air Navigation (VORTAC) 087°(T)/083°(M) radial. As a result, the V–158 airway would remain unchanged and as currently charted.

The FAA is also proposing to extend RNAV route T–325 from the Terre Haute, IN, area to the Oshkosh, WI, area to, in part, mitigate arrival/departure route issues associated with the proposed loss of the V–9 and V–63 airway segments north of the Rockford VOR/DME. For approximately two weeks each summer, more than 10,000 aircraft converge on Oshkosh, WI, for the Experimental Aircraft Association (EAA) Air Venture Fly-In held at the Aviation Museum located at the Wittman Regional Airport. Extending T–325 to the Oshkosh, WI, area would mitigate the Air Venture Fly-In arrival/departure route issues caused by the proposed V–9 and V–63 modifications, provide airspace users with continued enroute ATS route structure north of the Rockford, IL, area, and support ongoing FAA NextGen efforts to modernize the NAS to performance-based navigation.

Prior to this NPRM, the FAA published a rule for Docket No. FAA–2020–0505 in the **Federal Register** (85 FR 67648; October 26, 2020), amending VOR Federal airway V–63 by removing the airway segment between the Bowie, TX, VORTAC and the Texoma, OK, VOR/DME. That airway amendment, effective December 31, 2020, is included in this NPRM.

Also prior to this NPRM, the FAA published a rule for Docket No. FAA–2020–0667 in the **Federal Register** (85 FR 79422; December 10, 2020), amending VOR Federal airway V–100 by removing the airway segment overlying the Sioux City, IA, VORTAC between the O'Neill, NE, VORTAC and the Fort Dodge, IA, VORTAC. That airway amendment, effective February 25, 2021, is included in this NPRM, as well.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 by modifying VOR Federal airways V–9, V–63, V–100, V–158, and V–171; modifying RNAV route T–325; and removing VOR Federal airway V–127. The planned decommissioning of the VOR portion of the Rockford, IL, VOR/DME has made this action necessary.

The proposed VOR Federal airway changes are outlined below.

V–9: V–9 currently extends between the Leeville, LA, VORTAC and the Houghton, MI, VOR/DME. The FAA proposes to remove the airway segment overlying the Rockford, IL, VOR/DME between the Pontiac, IL, VOR/DME and the Janesville, WI, VOR/DME. The unaffected portions of the existing airway would remain as charted.

V–63: V–63 currently extends between the Razorback, AR, VORTAC and the Oshkosh, WI, VORTAC; and between the Wausau, WI, VOR/DME and the Houghton, MI, VOR/DME. That airspace at and above 10,000 feet MSL from 5 NM north to 46 NM north of Quincy, IL, when the Howard West MOA is active is excluded. The FAA proposes to remove the airway segment overlying the Rockford, IL, VOR/DME between the Davenport, IA, VORTAC and the Janesville, WI, VOR/DME. The unaffected portions of the existing airway would remain as charted and the exclusion language would remain unchanged.

V–100: V–100 currently extends between the Medicine Bow, WY, VOR/DME and the O'Neill, NE, VORTAC; and between the Fort Dodge, IA, VORTAC

and the Litchfield, MI, VOR/DME. The FAA proposes to remove the airway segment overlying the Rockford, IL, VOR/DME between the Dubuque, IA, VORTAC and the Northbrook, IL, VOR/DME. The unaffected portions of the existing airway would remain as charted.

V–127: V–127 currently extends between the Bradford, IL, VORTAC and the Rockford, IL, VOR/DME. The FAA proposes to remove the airway in its entirety.

V–158: V–158 currently extends between the Mason City, IA, VORTAC and the intersection of the Polo, IL, VOR/DME 122° and the Rockford, IL, VOR/DME 169° radials (SHOOF fix). The airspace within R–3302 is excluded. The FAA proposes to retain the airway and redefine the SHOOF fix as the intersection of the existing Polo, IL, VOR/DME 122° radial and the new Davenport, IA, VORTAC, 087°(T)/083°(M) radial. The existing airway would remain as charted and the exclusion language would remain unchanged.

V–171: V–171 currently extends between the Lexington, KY, VOR/DME and the Rockford, IL, VOR/DME; and between the Nodine, MN, VORTAC and the Roseau, MN, VOR/DME. The FAA proposes to remove the airway segment between the Joliet, IL, VOR/DME and the Rockford, IL, VOR/DME. The unaffected portions of the existing airway would remain as charted.

The proposed RNAV T-route changes are outlined below.

T–325: T–325 currently extends between the Bowling Green, KY, DME navigation aid and the Terre Haute, IN, VORTAC. The proposed change would remove the Terre Haute VORTAC and replace it with the JIBKA, IN, waypoint (WP) located near the Terre Haute VORTAC, and extend the route northward from the JIBKA, IN, WP to the Oshkosh, WI, VORTAC. The following points would be added between the JIBKA WP and the Oshkosh VORTAC: CAPPY, IL, WP; SMARS, IL, WP; TRENM, IL, WP; START, IL, WP; GRIFT, IL, WP; DEBOW, WI, WP; LUNGS, WI, WP; and the HOMNY, WI, WP. The unaffected segments of the existing route would remain as charted.

All radials in the VOR Federal airway descriptions below that do not reflect True (T)/Magnetic (M) degree radial information are unchanged and stated in True degrees.

VOR Federal airways are published in paragraph 6010(a) and United States RNAV T-routes are published in paragraph 6011 of FAA Order 7400.11E dated July 21, 2020, and effective September 15, 2020, which is incorporated by reference in 14 CFR 71.1. The ATS routes listed in this document would be subsequently published in the Order.

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

Regulatory Notices and Analyses

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

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020, is amended as follows:

Paragraph 6010(a) Domestic VOR Federal Airways.

* * * * *

V–9 [Amended]

From Leeville, LA; McComb, MS; INT McComb 004° and Magnolia, MS, 194° radials; Magnolia; Sidon, MS; Marvell, AR; Gilmore, AR; Malden, MO; Farmington, MO; St. Louis, MO; Spinner, IL; to Pontiac, IL. From Janesville, WI; Madison, WI; Oshkosh, WI; Green Bay, WI; Iron Mountain, MI; to Houghton, MI.

* * * * *

V–63 [Amended]

From Razorback, AR; Springfield, MO; Hallsville, MO; Quincy, IL; Burlington, IA; Moline, IL; to Davenport, IA. From Janesville, WI; Badger, WI; to Oshkosh, WI. From Wausau, WI; Rhinelander, WI; to Houghton, MI. Excluding that airspace at and above 10,000 feet MSL from 5 NM north to 46 NM north of Quincy, IL, when the Howard West MOA is active.

* * * * *

V–100 [Amended]

From Medicine Bow, WY; Scottsbluff, NE; Alliance, NE; Ainsworth, NE; to O'Neill, NE. From Fort Dodge, IA; Waterloo, IA; to Dubuque, IA. From Northbrook, IL; INT Northbrook 095° and Keeler, MI, 271° radials; Keeler; to Litchfield, MI.

* * * * *

V–127 [Removed]

* * * * *

V–158 [Amended]

From Mason City, IA; INT Mason City 106° and Dubuque, IA, 293° radials; Dubuque; Polo, IL; to INT Polo 122° and Davenport, IA, 087°(T)/083°(M) radials. The airspace within R–3302 is excluded.

* * * * *

V–171 [Amended]

From Lexington, KY; INT Lexington 251° and Louisville, KY, 114° radials; Louisville; Terre Haute, IN; Danville, IL; Peotone, IL; INT Peotone 281° and Joliet, IL, 173° radials; to Joliet. From Nodine, MN; INT Nodine 298° and Farmington, MN, 124° radials; Farmington; Darwin, MN; Alexandria, MN; INT Alexandria 321° and Grand Forks, ND, 152° radials; Grand Forks; to Roseau, MN.

* * * * *

Paragraph 6011 United States Area Navigation Routes.

* * * * *

T–325 Bowling Green, KY (BWG) to Oshkosh, WI (OSH) [Amended]

Bowling Green, KY (BWG) DME (Lat. 36°55′43.47″ N, long. 086°26′36.36″ W).

RENRO, KY	FIX	(Lat. 37°28′50.53″ N, long. 086°39′19.25″ W).
LOONE, KY	WP	(Lat. 37°44′14.43″ N, long. 086°45′18.02″ W).
APALO, IN	FIX	(Lat. 38°00′20.59″ N, long. 086°51′35.27″ W).
BUNKA, IN	FIX	(Lat. 39°04′57.32″ N, long. 087°09′06.58″ W).
JIBKA, IN	WP	(Lat. 39°30′08.93″ N, long. 087°16′26.74″ W).
CAPPY, IL	WP	(Lat. 40°00′06.00″ N, long. 087°44′31.22″ W).
SMARS, IL	WP	(Lat. 41°07′38.18″ N, long. 088°51′38.22″ W).
TRENM, IL	WP	(Lat. 41°17′24.93″ N, long. 089°00′27.53″ W).
START, IL	WP	(Lat. 41°45′24.83″ N, long. 089°00′21.81″ W).
GRIFT, IL	WP	(Lat. 42°17′28.14″ N, long. 088°53′41.42″ W).
DEBOW, WI	WP	(Lat. 42°44′08.30″ N, long. 088°50′48.92″ W).
LUNGS, WI	WP	(Lat. 43°02′43.66″ N, long. 088°56′54.86″ W).
HOMNY, WI	WP	(Lat. 43°31′02.22″ N, long. 088°39′40.15″ W).
Oshkosh, WI (OSH)	VORTAC	(Lat. 43°59′25.56″ N, long. 088°33′21.36″ W).

* * * * *

Issued in Washington, DC, on December 11, 2020.

George Gonzalez,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2020–27632 Filed 12–15–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 948

[SATS No. WV–127–FOR; Docket ID: OSM–2020–0003; S1D1S SS08011000 SX064A000 212S180110 S2D2S SS08011000 SX064A000 21XS501520]

West Virginia Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are announcing receipt of a proposed amendment to the West Virginia regulatory program (hereinafter, the West Virginia program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). West Virginia Department of Environmental Protection (WVDEP) seeks to amend its regulatory provisions related to entities authorized to issue surety bonds and the repair and compensation of damage resulting from subsidence.

This document gives the times and locations that the West Virginia program and this proposed amendment to that program are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments on this amendment until 4:00 p.m., Eastern Standard Time (e.s.t.), January 15, 2021. If requested, we may hold a public hearing or meeting on the amendment on January 11, 2021. We will accept requests to speak at a hearing until 4:00 p.m., e.s.t. on December 31, 2020.

ADDRESSES: You may submit comments, identified by SATS No. WV–127–FOR, by any of the following methods:

- *Mail/Hand Delivery:* Mr. Ben Owens, Acting Director, Charleston Field Office, Office of Surface Mining Reclamation and Enforcement, 1027 Virginia Street East, Charleston, West Virginia 25301.
- *Fax:* (304) 347–7170.
- *Federal eRulemaking Portal:* The amendment has been assigned Docket ID: OSM–2020–0003. If you would like to submit comments, go to *http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Comment Procedures'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to review copies of the West Virginia program, this amendment, a listing of any scheduled public hearings or meetings, and all written comments received in response to this document, you must go to the address listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSMRE's Charleston Field Office or the full text of the program amendment is available for you to read at *www.regulations.gov.*

Mr. Ben Owens, Acting Director, Charleston Field Office. Office of Surface Mining Reclamation and Enforcement, 1027 Virginia Street East, Charleston, West Virginia 25301, Telephone: (304) 347–7158, Email: *osm-chfo@osmre.gov.*

In addition, you may review a copy of the amendment during regular business hours at the following location: West Virginia Department of Environmental Protection, 601 57th Street SE, Charleston, West Virginia 25304, Telephone: (304) 926–0490.

FOR FURTHER INFORMATION CONTACT: Mr. Ben Owens, Acting Director, Charleston Field Office, Telephone: (304) 347–7158. Email: *osm-chfo@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the West Virginia Program
II. Description of the Proposed Amendment
III. Public Comment Procedures
IV. Statutory and Executive Order Reviews

I. Background on the West Virginia Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its approved State program includes, among other things, State laws and regulations that govern surface coal mining and reclamation operations in accordance with the Act and consistent with the Federal regulations. *See* 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the West Virginia program on January 21, 1981. You can find additional background information on the West Virginia program, including the Secretary's findings, the disposition of comments, and conditions of approval of the West Virginia program in the January 21, 1981, **Federal Register** (46 FR 5915). You can also find later actions concerning the West Virginia's program and program amendments at 30 CFR 948.10, 948.12, 948.13, 948.15, and 948.16.

II. Description of the Proposed Amendment

By letter dated May 5, 2020 (Administrative Record No. 1640), West Virginia sent us an amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*). The State seeks to amend its regulations to modify language which relate to entities that may issue bond instruments. The State also seeks to amend language relating to the repair of, and compensation for, material damage

resulting from subsidence caused to any structures and facilities. The full text of the program and/or plan amendment is available for you to read at the locations listed above under **ADDRESSES** or at *www.regulations.gov.*

House Bill 4217 (HB 4217) was signed by the Governor on March 25, 2020. HB 4217 proposes to modify language relating to companies that execute surety bonds. HB 4217 also proposes to modify language relating to owner compensation of material damage from subsidence to an owner's structures or facilities.

1. CSR 38–2–11.3.a.3

West Virginia seeks to revise its language relating to the existing requirements for any company that executes surety bonds in the State to be included on the United States Department of the Treasury's listing of approved sureties or to be diligently pursuing such listing. The proposed revision would remove the requirement to be diligently pursuing listing on the Treasury Department's listing of approved sureties for any surety company that submits proof to the West Virginia Department of Environmental Protection that it holds a valid license issued by the West Virginia Insurance Commissioner, and agrees to submit on at least a quarterly basis a certificate of good standing from the West Virginia Insurance Commissioner and such other evidence from the insurance regulator of its domiciliary state, if other than West Virginia, demonstrating that it is also in good standing in that state.

2. CSR 38–2–16.2.c.2

West Virginia seeks to revise its language relating to compensating owners for material damage to any structures or facilities resulting from subsidence. The proposal alters the existing requirement of either repairing the damage or compensating the owner for the full amount of diminution in value resulting from the subsidence, by eliminating the option to repair and replacing that option with compensating the owner in the amount of the cost to repair the damage not to exceed one hundred and twenty percent of the premining value of the structure or facility. The proposal clarifies that the election of options, for either compensation in the amount of the repair or compensation in the full amount of diminution in value resulting from the subsidence, is at the owner's election. The proposal also inserts new language clarifying that this section does not create additional property rights, nor can it be construed as vesting in the secretary the jurisdiction to adjudicate property rights disputes.

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the State program.

Electronic or Written Comments

If you submit written or electronic comments on the proposed rule during the 30-day comment period, they should be specific, confined to issues pertinent to the proposed regulations, and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on the final regulations will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent State or Federal laws or regulations, technical literature, or other relevant publications.

We cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than those listed (see **ADDRESSES**) will be included in the docket for this rulemaking and considered.

Public Availability of Comments

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.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4:00 p.m., e.s.t. on December 31, 2020. If you are disabled and need reasonable accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold a hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at the public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

Public Meeting

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the administrative record.

IV. Statutory and Executive Order Reviews

Executive Order 12866—Regulatory Planning and Review and Executive Order 13563—Improving Regulation and Regulatory Review

Executive Order 12866 provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB) will review all significant rules. Pursuant to OMB guidance, dated October 12, 1993, the approval of State program and is exempted from OMB review under Executive Order 12866. Executive Order 13563, which reaffirms and supplements Executive Order 12866, retains this exemption.

Other Laws and Executive Orders Affecting Rulemaking

When a State submits a program amendment to OSMRE for review, our regulations at 30 CFR 732.17(h) require us to publish a notice in the **Federal Register** indicating receipt of the proposed amendment, its text or a summary of its terms, and an opportunity for public comment. We conclude our review of the proposed amendment after the close of the public comment period and determine whether the amendment should be approved, approved in part, or not approved. At that time, we will also make the determinations and certifications required by the various laws and executive orders governing the rulemaking process and include them in the final rule.

List of Subjects in 30 CFR Part 948

Intergovernmental relations, Surface mining, Underground mining.

Thomas D. Shope,

Regional Director, Regional Director, North Atlantic—Appalachian Region.

[FR Doc. 2020–27601 Filed 12–15–20; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 310

[Docket ID: DoD–2020–OS–0084]

RIN 0790–AK99

Privacy Act of 1974; Implementation

AGENCY: Office of the Secretary of Defense, DoD.

ACTION: Proposed rule.

SUMMARY: The Office of the Secretary of Defense proposes to exempt some records maintained in DoD 0003 ''Mobilization Deployment Management Information System (MDMIS)''. The proposed action is sought to protect classified information for national security purposes. In the course of carrying out collections and analysis of information, exempt records received from other Systems of Records may become part of this system. To the extent that copies of exempt records from those other systems of records are maintained in this system, the Department also claims the same exemptions for the records from those other systems that are maintained in this system, as claimed for the prior system(s) of which they are a part, provided the reason for the exemption remains valid and necessary.

DATES: Send comments on or before February 16, 2021.

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

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

Mail: The DoD cannot receive written comments at this time due to the COVID–19 pandemic. Comments should be sent electronically to the docket listed above.

Instructions: All submissions received must include the agency name and docket number 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 *https://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Cheryl Jenkins at (703) 571–0070.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense proposes to exempt some records maintained in DoD 0003 ''Mobilization Deployment Management Information System (MDMIS)'' from subsections 5 U.S.C. 552a(c)(3), (d)(1), (2), (3), and (4) of the Privacy Act, pursuant to 5 U.S.C. 552a(k)(1). This proposed modification to 32 CFR part 310 adds a new Privacy Act exemption rule for the Mobilization Deployment Management Information System (MDMIS), a system which accounts for the mobilization and deployment of every unit and military member in an automated and auditable information technology platform.

Some information within the MDMIS may be classified pursuant to executive order. Information classified pursuant to executive order, as implemented by DoD Instruction (DoDI) 5200.01 and DoD Manual (DoDM) 5200.01, Volumes 1 and 3, may be exempt pursuant to 5 U.S.C. 552a(k)(1). Granting unfettered access to information that is properly classified pursuant to those authorities may cause damage to the national security.

Regulatory Analysis

Executive Order 12866, ''Regulatory Planning and Review'' and Executive Order 13563, ''Improving Regulation and Regulatory Review''

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, distribute 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. It has been determined that this rule is not a significant regulatory action and has not been reviewed by the Office of Management and Budget under these Executive Orders.

Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs''

This rule has been deemed not significant under Executive Order (E.O.) 12866, ''Regulatory Planning and Review.'' Therefore, the requirements of E.O. 13771, ''Reducing Regulation and Controlling Regulatory Costs,'' do not apply.

Congressional Review Act

This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C Chapter 6)

It has been certified that this rule does not have a significant economic impact on a substantial number of small entities because it is concerned only with the administration of Privacy Act systems of records within DoD. A Regulatory Flexibility Analysis is not required.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

It has been determined that this rule does not impose additional information collection requirements on the public under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Section 202, Public Law 104–4, ''Unfunded Mandates Reform Act''

It has been determined that this rule does not involve a Federal mandate 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 and that it will not significantly or uniquely affect small governments.

Executive Order 13132, ''Federalism''

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

List of Subjects in 32 CFR Part 310

Privacy.

Accordingly, 32 CFR part 310 is proposed to be amended as follows:

PART 310—PROTECTION OF PRIVACY AND ACCESS TO AND AMENDEMENT OF INDIVIDUAL RECORDS UNDER THE PRIVACY ACT OF 1974

■ 1. The authority citation for 32 CFR part 310 continues to read as follows:

Authority: 5 U.S.C. 552a.

■ 2. Section 310.13 is amended by adding paragraph (e)(3) as follows:

§ 310.13 Procedures for exemptions.

* * * * *

(e) * * *

(3) *System identifier and name.* DoD 0003 ''Mobilization Deployment

Management Information System (MDMIS).''

(i) *Exemptions.* This system of records is exempt from subsections 5 U.S.C. 552a(c)(3), (d)(1), (d)(2), (d)(3), and (d)(4) of the Privacy Act.

(ii) *Authority.* 5 U.S.C. 552a(k)(1).

(iii) *Exemption from the particular subsections.* Exemption from the particular subsections is justified for the following reasons:

(A) From subsection (c)(3) (accounting of disclosures) because common enterprise records may contain information properly classified pursuant to Executive Order; some disclosure accountings of such records may also contain information properly classified pursuant to executive order that if disclosed could damage national security.

(B) From subsections (d)(1), (2), (3), and (4) (record subject's right to access and amend records) because access to, amendment of, or release of the accounting of disclosures of such records could disclose information properly classified pursuant to executive order that could damage national security.

(iv) Exempt records from other systems. In addition, in the course of carrying out the overall purpose for this system, exempt records from other systems records may in turn become part of the records maintained in this system. To the extent that copies of exempt records from those other systems of records are maintained in this system, the DoD claims the same exemptions for the records from those other systems that are entered into this system, as claimed for the prior system(s) of which they are a part, provided the reason for the exemption remains valid and necessary.

Dated: December 4, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–27095 Filed 12–15–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Inspector General

42 CFR Part 1001

Solicitation of New Safe Harbors and Special Fraud Alerts

AGENCY: Office of Inspector General (OIG), Department of Health and Human Services (HHS).

ACTION: Notification of intent to develop regulations.

SUMMARY: In accordance with section 205 of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), this annual notification solicits proposals and recommendations for developing new, or modifying existing, safe harbor provisions under section 1128B(b) of the Social Security Act (the Act), the Federal anti-kickback statute, as well as developing new OIG Special Fraud Alerts.

DATES: To ensure consideration, public comments must be delivered to the address provided below by no later than 5 p.m. on February 16, 2021.

ADDRESSES: In commenting, please refer to file code OIG–128–N. Because of staff and resource limitations, we cannot accept comments by facsimile (fax) transmission. You may submit comments in one of three ways (no duplicates, please):

1. *Electronically.* You may submit electronic comments on specific recommendations and proposals through the Federal eRulemaking Portal at *http://www.regulations.gov.*

2. *By regular, express, or overnight mail.* You may send written comments to the following address: OIG, Regulatory Affairs, HHS, Attention: OIG–1117–N, Room 5527, Cohen Building, 330 Independence Avenue SW, Washington, DC 20201. Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By hand or courier.* If you prefer, you may deliver your written comments by hand or courier before the close of the comment period to the following address: OIG, HHS, Cohen Building, Room 5527, 330 Independence Avenue SW, Washington, DC 20201. Because access to the interior of the Cohen Building is not readily available to persons without Federal Government identification, commenters are encouraged to schedule their delivery with one of our staff members at *officeofcounsel@oig.hhs.gov.* For information on the inspection of public comments, please see the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Samantha Flanzer, Office of Inspector General, (202) 619–0335.

SUPPLEMENTARY INFORMATION:

Submitting Comments: We welcome comments from the public on recommendations for developing new or revised safe harbors and Special Fraud Alerts. Please assist us by referencing the file code OIG–1117–N.

Inspection of Public Comments: All comments received before the end of the comment period will be posted for public viewing at *http://www.regulations.gov.*

I. Background

A. OIG Safe Harbor Provisions

Section 1128B(b) of the Act, (42 U.S.C. 1320a–7b(b), the Federal anti-kickback statute), provides for criminal penalties for whoever knowingly and willfully offers, pays, solicits, or receives remuneration to induce or reward, among other things, the referral for, or purchase of, items or services reimbursable under any of the Federal health care programs, as defined in section 1128B(f) of the Act (42 U.S.C. 1320a–7b(f)). The offense is classified as a felony and is punishable by fines of up to $100,000 and imprisonment for up to 10 years. Violations of the Federal anti-kickback statute also may result in the imposition of civil monetary penalties under section 1128A(a)(7) of the Act (42 U.S.C. 1320a–7a(a)(7)), program exclusion under section 1128(b)(7) of the Act (42 U.S.C. 1320a–7(b)(7)), and liability under the False Claims Act (31 U.S.C. 3729–33).

Because of the broad reach of the statute, concern was expressed that some relatively innocuous business arrangements were covered by the statute and, therefore, potentially subject to criminal prosecution. In response, Congress enacted section 14 of the Medicare and Medicaid Patient and Program Protection Act of 1987, Public Law 100–93 (note to section 1128B of the Act; 42 U.S.C. 1320a–7b), which specifically requires the development and promulgation of regulations, the so-called safe harbor provisions, that would specify various payment and business practices that would not be subject to sanctions under the Federal anti-kickback statute, even though they potentially may be capable of inducing referrals of business for which payment may be made under a Federal health care program. Since July 29, 1991, there have been a series of final regulations published in the **Federal Register** establishing safe harbors protecting various payment and business practices.[1] These safe harbor provisions have been developed ''to limit the reach of the statute somewhat by permitting certain non-abusive arrangements, while encouraging beneficial and innocuous

[1] *See e.g.,* Medicare and State Health Care Programs: Fraud and Abuse; Revisions to the Safe Harbors Under the Anti-Kickback Statute and Civil Monetary Penalty Rules Regarding Beneficiary Inducements, 81 FR 88368 (Dec. 7, 2016).

arrangements.'' [2] Health care providers and others may voluntarily seek to comply with the conditions of an applicable safe harbor so that they have the assurance that their payment or business practice will not be subject to sanctions under the Federal anti-kickback statute. The safe harbor regulations promulgated by OIG are found at 42 CFR part 1001.

B. OIG Special Fraud Alerts

OIG periodically issues Special Fraud Alerts to give continuing guidance to health care industry stakeholders regarding practices OIG considers to be suspect or of particular concern.[3] The Special Fraud Alerts encourage industry compliance by giving stakeholders guidance that can be applied to their own practices. OIG Special Fraud Alerts are published in the **Federal Register** and on OIG's website and are intended for extensive distribution.

In developing Special Fraud Alerts, OIG relies on a number of sources and consults directly with experts in the subject field, including those within OIG, other agencies of HHS, other Federal and State agencies, and those in the health care industry.

C. Section 205 of the Health Insurance Portability and Accountability Act of 1996

Section 205 of HIPAA, Public Law 104–191, and section 1128D of the Act (42 U.S.C. 1320a–7d), requires the Department to develop and publish an annual notification in the **Federal Register** formally soliciting proposals for developing additional or modifying existing safe harbors to the Federal anti-kickback statute and Special Fraud Alerts.

In developing or modifying safe harbors under the Federal anti-kickback statute, OIG, in consultation with the Department of Justice, thoroughly reviews the range of factual circumstances that may receive protection by the proposed or modified safe harbor. In doing so, OIG seeks to identify and develop regulatory limitations and controls in order to permit beneficial and innocuous arrangements while, at the same time, protecting Federal health care programs and their beneficiaries from the harms caused by fraud and abuse.

[2] Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, 56 FR 35952, 35958 (July 29, 1991).

[3] *See e.g.,* Special Fraud Alert: Speaker Programs (Nov. 16, 2020), *available at https://oig.hhs.gov/fraud/docs/alertsandbulletins/2020/SpecialFraudAlertSpeakerPrograms.pdf.*

II. Solicitation of Additional New Recommendations and Proposals

OIG seeks recommendations regarding the development of additional or modified safe harbor regulations and new Special Fraud Alerts. A detailed explanation of justifications for, or empirical data supporting, a suggestion for a new or modified safe harbor or Special Fraud Alert would be helpful and should, if possible, be included in any response to this solicitation.

A. Criteria for Modifying and Establishing Safe Harbor Provisions

In accordance with section 205 of HIPAA, we will consider a number of factors in reviewing proposals for additional or modified safe harbor provisions, such as the extent to which the proposals would affect an increase or decrease in:

- Access to health care services,
- the quality of health care services,
- patient freedom of choice among health care providers,
- competition among health care providers,
- the cost to Federal health care programs,
- the potential overutilization of health care services, and
- the ability of health care facilities to provide services in medically underserved areas or to medically underserved populations.

In addition, we will consider other factors, including, for example, the existence (or nonexistence) of any potential financial benefit to health care professionals or providers that may influence their decision whether to: (1) Order a health care item or service or (2) arrange for a referral of health care items or services to a particular practitioner or provider.

B. Criteria for Developing Special Fraud Alerts

In determining whether to issue additional Special Fraud Alerts, we will consider whether, and to what extent, the practices that would be identified in a new Special Fraud Alert may result in any of the consequences set forth above, as well as the volume and frequency of the conduct that would be identified in the Special Fraud Alert.

Dated: November 19, 2020.

Christi A. Grimm,

Principal Deputy Inspector General.

[FR Doc. 2020–26043 Filed 12–15–20; 8:45 am]

BILLING CODE 4152–01–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 192 and 195

[Docket No. PHMSA–2019–0199]

Pipeline Safety: Midstream Facilities Frequently Asked Questions

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA); DOT.

ACTION: Notification and request for comments; extension of comment period.

SUMMARY: PHMSA published a notification in the **Federal Register** seeking public comments on a document titled ''Pipeline Safety: Midstream Facilities Frequently Asked Questions.'' PHMSA has received a request to extend the comment period to allow stakeholders more time to evaluate the frequently asked questions. Upon review of the request, PHMSA is extending the comment period for an additional 30 days.

DATES: The closing date for filing comments is extended from January 4, 2021, to February 4, 2021.

ADDRESSES: You may submit comments, which should be identified by docket number PHMSA–2019–0199, by any of the following methods:

- *Federal eRulemaking Portal:* Comments may be submitted to *http://www.regulations.gov.* Please follow the online instructions to submit comments.
- *Mail:* Comments may be submitted by mailing them to the Dockets Management System, U.S. Department of Transportation, Dockets Operations, M–30, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.
- *Hand Delivery:* Comments may be submitted by hand delivering them to 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001. Comments may be delivered between 9 a.m. and 5 p.m. ET, Monday through Friday, except for Federal holidays.
- *Fax:* Comments may be faxed to 202–493–2251.
- *Instructions:* Identify docket number PHMSA–2019–0199 at the beginning of your comments. If you submit your comments by mail, you must submit two copies. If you wish to receive confirmation that PHMSA received your comments, you must include a self-addressed stamped postcard. Internet users should submit comments at *http://www.regulations.gov.*

• *Privacy Act:* DOT may solicit comments from the public regarding certain general notices. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

• *Confidential Business Information:* Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this document contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this document, it is important that you clearly designate the submitted comments as CBI. Pursuant to 49 CFR 190.343, you may ask PHMSA to give confidential treatment to information you give to the agency by taking the following steps: (1) Mark each page of the original document submission containing CBI as ''Confidential''; (2) send PHMSA, along with the original document, a second copy of the original document with the CBI deleted; and (3) explain why the information you are submitting is CBI. Unless you are notified otherwise, PHMSA will treat such marked submissions as confidential under FOIA, and they will not be placed in the public docket of this notification. Submissions containing CBI should be sent to Sayler Palabrica at *sayler.palabrica@dot.gov.* Any commentary PHMSA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

• *Docket:* The docket containing background documents and received comments is available at *http://www.regulations.gov.* Once on this site, please follow the online instructions for accessing the dockets. Alternatively, you may review these documents in person at the street address listed above.

FOR FURTHER INFORMATION CONTACT: For further information contact Sayler Palabrica at 202–366–0559 or by email at *sayler.palabrica@dot.gov.*

SUPPLEMENTARY INFORMATION:

Background

On November 4, 2020, (85 FR 70124) PHMSA published a document titled ''Pipeline Safety: Midstream Facilities Frequently Asked Questions'' requesting public comments on a set of seven draft frequently asked questions developed by the Midstream Processing Working Group, established by the Gas Pipeline Advisory Committee and the Liquid Pipeline Advisory Committee. On December 4, 2020, PHMSA received a comment extension request submitted by the following entities:

- Association of Oil Pipelines
- American Petroleum Institute
- Interstate Natural Gas Association of America
- American Gas Association
- GPA Midstream Association

This request is available in the docket for this notification. PHMSA believes that extension of the comment period is warranted based on the information provided in the request. Therefore, PHMSA has extended the comment period from January 4, 2021, to February 4, 2021.

Issued in Washington, DC, on December 10, 2020, under authority delegated in 49 CFR 1.97.

Alan K. Mayberry,

Associate Administrator for Pipeline Safety.

[FR Doc. 2020–27560 Filed 12–15–20; 8:45 am]

BILLING CODE 4910–60–P

Notices

Federal Register
Vol. 85, No. 242
Wednesday, December 16, 2020

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

December 10, 2020.

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

Comments regarding this information collection received by January 15, 2021 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

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

Rural Utilities Service

Title: 7 CFR 1776, Household Water Well System Grant Program.

OMB Control Number: 0572–0139.

Summary of Collection: The Rural Utilities Service (RUS) is authorized by Section 306E of the Consolidated Farm and Rural Development Act (7 U.S.C. 1926e) to administer and make grants to qualified private non-profit organizations which will use the funds to establish lending programs for household water wells.

Need and Use of the Information: The purpose of the HWWS Grant Program is to provide funds to private non-profit organizations to assist them in establishing loan programs from which individuals may borrow money for household water well systems. Applicants must show that the project will provide technical and financial assistance to eligible individuals to remedy household well problems. Based on the previous three-year history, Fiscal Years 2014 through 2016, RUS expects to receive and fund on average seven applications annually. Generally, unless there is an ineligible applicant, all applications are funded, but at a reduced dollar amount. Applicants will provide information to be collected as part of the application process through certain documentation, certifications, and completed forms. Failure to collect proper information could result in improper determinations of eligibility, improper use of funds, or hindrances in making grants authorized by the CONACT. The applicant submits 2 an application package, consisting of an application form, narrative proposal (work plan), various other forms, certifications, and supplemental information. The RUS and State Offices staff use the information collected to determine applicant eligibility, project feasibility, and the applicant's ability to meet the grant and regulatory requirements.

Description of Respondents: Not-for-profit institutions.

Number of Respondents: 7.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 770.

Levi S. Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2020–27590 Filed 12–15–20; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Tongass National Forest; Alaska; Mendenhall Glacier Visitor Facility Improvement Project

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an Environmental Impact Statement.

SUMMARY: The U.S. Department of Agriculture, Forest Service will prepare an Environmental Impact Statement (EIS) to analyze a variety of actions to improve visitor experience, increase capacity to meet current and projected demand, and to protect the existing ecosystem of the Mendenhall Glacier Recreation Area (MGRA). The purpose of the project is to provide a range of sustainable recreation experiences that meet Forest Plan goals and objectives for Recreation and Tourism, including opportunities consistent with public demand with an emphasis on locally popular recreation places and those important to the tourism industry. The need to improve the MGRA was identified during the Mendenhall Glacier Master Plan process.

DATES: Comments concerning the scope of the analysis must be received by January 15, 2021. The draft EIS is expected July 2021 and the final EIS is expected January 2022.

ADDRESSES: Electronic comments may be submitted at *https://cara.ecosystem-management.org/Public/CommentInput?project=53780* (preferred) or sent via email to *comments-alaska-tongass-juneau@usda.gov.* Written comments can be sent to Juneau Ranger District, MGRA Project, 8510 Mendenhall Loop Rd., Juneau, Alaska 99801.

FOR FURTHER INFORMATION CONTACT: Cathy Tighe, MGRA Project Manager, Tongass National Forest, 648 Mission Street, Ketchikan, Alaska 99901 or by telephone at 907–228–6274.

Individuals who use telecommunication devices for the deaf

(TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Project Background

The MGRA encompasses about 5,800 acres adjacent to the Mendenhall Glacier on the Juneau Ranger District of the Tongass National Forest near Juneau, Alaska. The project area is located approximately three miles north of the Juneau International Airport. One of every three Alaska visitors comes to the Mendenhall Glacier Visitor Center, making it one of the most popular attractions in the state. The MGRA is also popular with residents.

Management of the Tongass National Forest is guided by the Tongass National Forest Land and Resource Management Plan (Forest Plan), which classifies the MGRA as a Special Interest Area Land Use Designation. The MGRA is further guided by the MGRA Management Plan. Current Management Plan principles include sustaining the natural setting and habitat as much as possible while providing access to recreational opportunities for all visitors. The Management Plan recognizes heavy local use and the MGRA as a major attraction for tourists, and includes an objective to work with the tourism industry to develop opportunities. Portions of the Management Plan will need updates if an action alternative is selected for this project. Those updates, possibly a series of updates, would occur separately after a decision is made on this project since some updates would only be needed if the project is implemented.

This project was initiated as an Environmental Assessment and a prior 30-day scoping comment period began on February 18, 2020. This Notice of Intent signifies a determination to begin the process for an EIS. All previous comments received remain valid, continue to be considered, contributed to the current proposed action, and do not need to be resubmitted.

Purpose and Need for Action

The purpose of the project is to meet Forest Plan goals and objectives to provide a range of sustainable recreation opportunities consistent with public demand, emphasizing locally popular recreation places and those important to the tourism industry, while protecting outstanding scenery, fish and wildlife habitat, and to support local and regional economies (Forest Plan, pages 2–3 to 2–6).

Visitor demand at the MGRA exceeds capacity, resulting in a diminished visitor experience and the potential for environmental impacts. Current demand for commercial use is not being met, and the existing visitor capacity does not allow room for growth within the tourism sector of the local and regional economy. There is a need to review capacity allocations throughout the MGRA, particularly as they relate to potential infrastructure and visitor experience changes.

In addition, the Mendenhall Glacier has been receding at an increased rate over the last twenty years, creating a changed environment. As the glacier continues to recede, the main attraction for visitors to the MGRA could be out of view from the Visitor Center within 20 to 40 years, creating a need for additional types of visitor experiences and education opportunities.

The Mendenhall Glacier Master Plan, completed in 2019, identified a long-term vision for the MGRA, and there is a need to begin implementation of that plan.

Proposed Action

More complete descriptions of the proposed action can be found on the project web page at *https://www.fs.usda.gov/project/?project=53780.* Primary Proposed Action components are:

Transportation—Parking and Access, expanded:

- The two existing parking areas nearest the Visitor Center would be combined to provide more parking and separation between commercial and private vehicles.
- The existing gravel lot about 0.25 mile south of the main parking area would be expanded and paved to provide commercial and overflow parking and staging.

Facility—Welcome Center Complex, new:

- The existing pavilion, parking area shelters, and kiosks would be replaced with a single story, 18,000 square-foot Welcome Center facility near the main parking area.
- Other enhancements include: Interpretive shelters; an amphitheater; and improvements to, connections between, and extensions of existing trails.

Facility—Mendenhall Glacier Visitor Center, expansion:

- The upper floor of the Visitor Center would be expanded to include a defined theater queuing space and more restrooms, and interior spaces would be remodeled.
- Deferred maintenance repairs would be made to the railing and trail leading up to the Visitor Center and a covered area outside the main upper doors would be added.

Trails—Glacier Spur Road Trailheads, new:

- Three paved trailhead parking lots are proposed where existing trails (Powerline, Crystal Lake, and Dredge Lakes) intersect or come close to Glacier Spur Road.

Trails—Lakeshore Trail, new:

- A new trail along the south shore of Mendenhall Lake would connect the Welcome Center Plaza to Mendenhall Campground, and continue through the campground to Skaters Cabin Road. A new pedestrian bridge would cross the Mendenhall River.
- Existing walk-in campsites would be replaced, relocated, or converted to day-use picnic sites in order to construct a new day-use parking area in the campground.
- Extensions and realignments to existing trails would connect currently disconnected trail segments to create a complete recreational loop around the Dredge Lakes area.

Trails—Nugget Falls Trail, expansion:

- Nugget Falls Trail and the informal trail along the lake would connect to form a loop.

Habitat Restoration—Steep Creek:

- About 1,500 feet of Steep Creek would be realigned and restored. Backside Pond on the west side of the creek would be enlarged and connected to the Steep Creek.
- The two existing culverts under Glacier Spur Road would be replaced with a bridge.
- The culvert under Glacier Spur Road leading to Pond of Time would also be replaced.

Trails—Steep Creek Trail, extension:

- The Steep Creek Trail would be realigned and extended from the shore of Mendenhall Lake to the Trail of Time.
- The existing Dike Trail between the Trail of Time and Glacier Spur Road would be decommissioned.

Visitor Experience—Steep Creek Fish Viewing Window, new:

- A fish viewing facility would be accessed from the Steep Creek Trail.

Visitor Experience—Public Use Cabins, new:

- Five new public use rental cabins would be built in the Mendenhall Campground.

Facility—Boat Docks and Related Support Facilities, new:

- Three boat docks would be installed on Mendenhall Lake: One would be accessed from the new Lakeshore trail on the south shore near the Visitor Center; a second would be on the north shore near the glacier visitor area (below); and a permanent boat launch ramp and associated loading dock

would be on the west shore near either Skaters Cabin or the West Glacier trailhead parking.

• A fenced, upland winter storage area would be constructed adjacent to the existing West Glacier parking.

• Commercial (guided) boats on the lake would be allowed under special use authorization with the following stipulations: A maximum capacity of 49 passengers each; use of alternative fuel or low-emissions motors; and a top operating speed to create no or minimal wake.

Facility—Remote Glacier visitor area, new:

• Four seasonal, relocatable structures and restroom facilities would be installed near the glacier. An accessible trail connecting the dock to the glacier facilities would be constructed and would be extended as the glacier retreats.

Trails—West Glacier Spur Trail, new/expansion:

• The existing user-created trail from West Glacier Trail to the glacier visitor area would be upgraded and realigned. A new trail spur trail would link to the existing West Glacier Trail at a higher elevation to create a loop.

• Additional parking stalls would be added in the West Glacier Trailhead parking.

Visitor Capacity, increase:

• Visitor capacity will be increased, with the allocation between commercial and non-commercial users set for the entire MGRA and/or by individual management zones.

• Management zone boundaries will be adjusted to group together similar activities and facilities proposed in this project.

Possible Alternatives

A no action alternative, which represents no change and serves as the baseline for the comparison of action alternatives, will be analyzed. Other alternatives will be developed based on significant issues identified in public comments.

Responsible Official

The Responsible Official for the decision on this project is the Forest Supervisor, Tongass National Forest, Federal Building, 648 Mission Street, Ketchikan, Alaska 99901.

Preliminary Issues

Two preliminary issues have been identified based on previous scoping efforts: (1) Proposed developments and increased visitation could cause visual impacts; disturb area fish and wildlife, particularly bears, nesting birds, migratory birds, and fish; and create increased human-bear interactions; and (2) Increased visitation, particularly in areas that have lower use currently, would negatively impact user experience through increased encounters and larger group sizes.

Scoping Comments and the Objection Process

This notice of intent initiates the scoping process, which guides the development of the EIS through internal and external input on the issues, impacts, and alternatives to consider. Notifcation will also be sent to the project mailing list and posted on the project website at *https://www.fs.usda.gov/project/?project=53780.* An open house was held February 20, 2020 in Juneau, Alaska during a previous 30-day scoping period when this project was initiated as an Environmental Assessment. No scoping meeting is planned during this comment period.

Written comments submitted during the comment period that began February 18, 2020 do not need to be resubmitted, continue to be considered, and are in the project record. Forest Service regulations at 36 CFR 218 subparts A and B, regarding the project-level predecisional administrative review process, apply to projects and activities implementing land management plans that are not authorized under the Healthy Forest Restoration Act. Only individuals or entities who submit timely and specific written comments concerning the project during this or another designated public comment period established by the Responsible Offical will be eligible to file an objection. It is important for reviewers to provide comments at such times and in such a manner to be useful to the agency's preparation of the EIS. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions. Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered; however, anonymous commenters will not gain standing to object as defined in 36 CFR 218.2.

Nature of Decision To Be Made

The Responsible Official will review the no action, the proposed action, other alternatives, and the environmental consequences to make decisions that include: (1) Whether to select the proposed action or another alternative; (2) whether to increase visitor capacity, including the level of commercial use, of the entire MGRA and/or specific management zones; and (3) mitigation measures and monitoring requirements, which may include an adaptive management strategy.

Christine Dawe,

Acting Associate Deputy Chief, National Forest System.

[FR Doc. 2020–27634 Filed 12–15–20; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

National Agricultural Statistics Service

Notice of Intent To Request Approval To Revise and Extend an Information Collection

AGENCY: National Agricultural Statistics Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of the National Agricultural Statistics Service (NASS) to request approval to revise and extend a currently approved information collection, the Milk and Milk Products Surveys. Revision to burden hours will be needed due to changes in the size of the target population, sample design, and/or questionnaire length.

DATES: Comments on this notice must be received by February 16, 2021 to be assured of consideration.

ADDRESSES: You may submit comments, identified by docket number 0535–0020, by any of the following methods:

• *Email: ombofficer@nass.usda.gov.* Include docket number above in the subject line of the message.

• *Efax:* (855) 838–6382.

• *Mail:* Mail any paper, disk, or CD–ROM submissions to: David Hancock, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336, South Building, 1400 Independence Avenue SW, Washington, DC 20250–2024.

• *Hand Delivery/Courier:* Hand deliver to: David Hancock, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336, South Building, 1400 Independence Avenue SW, Washington, DC 20250–2024.

FOR FURTHER INFORMATION CONTACT: Kevin L. Barnes, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, (202) 720–4333. Copies of this information collection and related

instructions can be obtained without charge from David Hancock, NASS Clearance Officer, at (202) 690–2388 or at *ombofficer@nass.usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: Milk and Milk Products Surveys.

OMB Control Number: 0535–0020.

Expiration Date of Approval: June 30, 2021.

Type of Request: To revise and extend a currently approved information collection for a period of three years.

Abstract: The primary objective of the National Agricultural Statistics Service (NASS) is to collect, prepare and issue State and national estimates of crop and livestock production, prices and disposition as well as economic statistics, farm numbers, land values, on-farm pesticide usage, pest crop management practices, as well as the Census of Agriculture. The Milk and Milk Products Surveys obtain basic agricultural statistics on milk production and manufactured dairy products from farmers and processing plants throughout the nation. Data are gathered for milk production, dairy products, evaporated and condensed milk, manufactured dry milk, and manufactured whey products. Milk production and manufactured dairy products statistics are used by the U.S. Department of Agriculture (USDA) to help administer federal programs and by the dairy industry in planning, pricing, and projecting supplies of milk and milk products. Only minor changes are planned for the questionnaires and sample sizes. The Milk Production Survey will continue to be conducted quarterly (January, April, July, and October) and monthly estimates for the non-quarterly months will still be published for the total number of dairy cows, the number of cows milked, and the total milk produced. Estimates for the non-survey months will be generated by using a combination of administrative data, regression modeling, and historic data. In April 2012 NASS discontinued the collection of Dairy Product Prices. This data is now collected by the Agricultural Marketing Service (AMS) in compliance with the Mandatory Price Reporting Act of 2010, and the amended section 273(d) of the Agricultural Marketing Act of 1946.

Authority: Voluntary dairy information reporting is conducted under authority of 7 U.S.C. 2204(a). Individually identifiable data collected under this authority are governed by section 1770 of the Food Security Act of 1985 (7 U.S.C. 2276), which requires USDA to afford strict confidentiality to non-aggregated data provided by respondents.

Mandatory dairy product information reporting is based on the Agricultural Marketing Act of 1946, as amended by the Dairy Market Enhancement Act of 2000 and the Farm Security and Rural Development Act of 2002 (U.S.C. 1637–1637b). This program requires each manufacturer to report to USDA the price, quantity, and moisture content of dairy products sold and each entity storing dairy products to report information on the quantity of dairy products stored. Any manufacturer that processes, markets, or stores less than 1,000,000 pounds of dairy products per year is exempt. USDA is required to maintain information, statistics, or documents obtained under these Acts in a manner that ensures that confidentiality is preserved regarding the identity of persons and proprietary business information, subject to verification by the Agricultural Marketing Service (AMS) under Public Law 106–532. This Notice is submitted in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3501, *et seq.*) and Office of Management and Budget regulations at 5 CFR part 1320. NASS also complies with OMB Implementation Guidance, ''Implementation Guidance for Title V of the E-Government Act, Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA),'' **Federal Register**, Vol. 72, No. 115, June 15, 2007, p. 33362.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average approximately 11 minutes per response. This average is based on the 7 different surveys in the information collection: 2 monthly, 4 quarterly, and 1 annual. The estimated total number of responses is 88,500 annually, with an average annual frequency of 4.37 responses per respondent. NASS will continue to use cover letters to explain the importance and uses of this data series along with how the respondent can access and report their data using the secure internet connection that NASS is using.

Respondents: Farms and businesses.

Estimated Number of Respondents: 20,250.

Estimated Total Annual Burden on Respondents: 15,400 hours.

Comments: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, through the use of appropriate automated, electronic, mechanical, technological or other forms of information technology collection methods. All responses to this notice will become a matter of public record and be summarized in the request for OMB approval.

Signed at Washington, DC, December 4, 2020.

Kevin L. Barnes,

Associate Administrator.

[FR Doc. 2020–27681 Filed 12–15–20; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

[Docket No. RBS–20–BUSINESS–0036]

Notice of Solicitation for Inviting Applications for the Rural Microentrepreneur Assistance Program for Fiscal Year 2021

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Notice.

SUMMARY: This Notice is to invite applications for loans and grants under the Rural Microentrepreneur Assistance Program (RMAP) for fiscal year (FY) 2021, subject to the availability of funding. This notice is being issued in order to allow applicants sufficient time to leverage financing, prepare and submit their applications, and give the Agency time to process applications within FY 2021. Successful applications will be selected by the Agency for funding and subsequently awarded to the extent that funding may ultimately be made available through appropriations. RMAP provides the following types of support: Loan only, combination loan and technical assistance grant, and subsequent technical assistance grants to Microenterprise Development Organizations (MDO). An announcement on the website at *https://www.rd.usda.gov/newsroom/notices-solicitation-applications-nosas* will identify the amount of funding received in the appropriations. All applicants are responsible for any expenses incurred in developing their applications or costs incurred prior to the obligation date.

DATES: The deadline for completed applications to be received in the USDA Rural Development State Office for

quarterly funding competitions is no later than 4:30 p.m. (local time) on: First Quarter, September 30, 2020; Second Quarter, December 31, 2020; Third Quarter, March 31, 2021 and Fourth Quarter, June 30, 2021.

The subsequent microlender technical assistance grant (existing MDOs with a microentrepreneur revolving loan fund) will be made, non-competitively, based on the microlender's microlending activity and availability of funds. The Agency will use the microlender's outstanding balance of microloans as of June 30, 2021 to determine their microlender technical assistance grant award for FY 2021 from available funds. Only MDOs that are eligible for an annual grant in compliance with 7 CFR 4280.313(a) may apply.

ADDRESSES: Applications must be submitted to the USDA Rural Development State Office for the State where the Project is located. Applications may be submitted in paper or electronic format to the appropriate Rural Development State Office and must be received by 4:30 p.m. local time on the deadline date(s). Applicants are encouraged to contact their respective State Office for an email contact to submit an electronic application prior to the submission deadline date(s). A list of the USDA Rural Development State Office contacts can be found at: *http://www.rd.usda.gov/contact-us/state-offices*.

FOR FURTHER INFORMATION CONTACT: Shamika Johnson at (202) 720–1495, *shamika.johnson@usda.gov* or David Chestnut at (202) 692–5233, *david.chestnut@usda.gov,* Program Management Division, Business Programs, Rural Business-Cooperative Service, U.S. Department of Agriculture, 1400 Independence Avenue SW, MS 3226, Room 4202—South, Washington, DC 20250–3226, or call (202) 720–1400. For further information on this notice, please contact the USDA Rural Development State Office in the State in which the applicant's headquarters is located. A list of Rural Development State Office contacts is provided at the following link: *http://www.rd.usda.gov/contact-us/state-offices.*

Overview

Solicitation Opportunity Title: Rural Microentrepreneur Assistance Program.

Announcement Type: Initial Solicitation Announcement.

Catalog of Federal Domestic Assistance Number (CFDA): 10.870.

Dates: The deadline for completed applications to be received in the USDA Rural Development State Office for quarterly funding competitions is no later than 4:30 p.m. (local time) on: First Quarter, September 30, 2020; Second Quarter, December 31, 2020; Third Quarter, March 31, 2021 and Fourth Quarter, June 30, 2021.

I. Funding Opportunity Description

A. *Purpose of the Program.* The purpose of RMAP is to support the development and ongoing success of rural microentrepreneurs and microenterprises as defined in 7 CFR 4280.302.

B. *Statutory Authority.* RMAP is authorized by Section 379E of the Consolidated Farm and Rural Development Act (7 U.S.C. 2008s). Regulations are contained in 7 CFR part 4280, subpart D. Assistance provided to rural areas under this program may include the provision of loans and grants to rural MDOs for the provision of microloans to rural microenterprises and microentrepreneurs; provision of business-based training and technical assistance to rural microborrowers and potential microborrowers; and other such activities as deemed appropriate by the Secretary to ensure the development and ongoing success of rural microenterprises. Awards are made on a competitive basis using specific selection criteria contained in 7 CFR part 4280, subpart D.

C. *Definition of Terms.* The definitions applicable to this Notice are published at 7 CFR 4280.302.

D. *Application Awards.* The Agency will review, evaluate, and score applications received in response to this Notice based on the provisions found in 7 CFR part 4280, subpart D, and as indicated in this Notice. However, the Agency advises all interested parties that the applicant bears the burden in preparing and submitting an application in response to this Notice whether or not funding is appropriated for this program in FY 2021. Information required to be in the application is specified in 7 CFR 4280.315. For entities applying for program loan funds to become an RMAP microlender only, the following items are required: (1) Form RD 1910–11, ''Applicant Certification Federal Collection Policies for Consumer or Commercial Debts;'' (2) Demonstration that the applicant is eligible to apply for participation in this program; (3) Certification by the applicant that it cannot obtain sufficient credit elsewhere to fund the activities called for under this program with similar rates and terms;

Subsequent annual microlender technical assistance grants are subject to funding availability, in accordance with 7 CFR 4280.313(b)(2). Awards will be determined non-competitively based on Agency appropriations for the fiscal year. The MDO must submit a prescribed worksheet, listing the outstanding balance of their microloans and unexpended grant funds as of the date of their request and a letter certifying that their organization still meets all the requirements set forth in 7 CFR part 4280, subpart D, and that no significant changes have occurred within the last year that would affect its ability to carry out the MDO functions. In addition, all MDOs who request Subsequent Annual Microlender Technical Assistance Grants must complete their reporting into the Lenders Interactive Network Connection (LINC) for the Federal fiscal quarter ending June 30, 2021. The deadline for reporting into LINC and requesting a TA grant is no later than 4:30 p.m. (local time) on July 31, 2021.

II. Award Information

Type of Awards: Loans and/or Grants.

Fiscal Year Funds: FY 2021.

Available Funds. Anyone interested in submitting an application for funding under these Programs are encouraged to consult the Rural Development Notices of Solicitation of Applications website at *http://www.rd.usda.gov/newsroom/notices-solicitation-applications-nosas.*

Maximum Award: The Agency anticipates the following maximum amounts per award: Loans—$500,000; Grants—$100,000.

Application Dates: Funding competitions will be held for applications received no later than: First Quarter, September 30, 2020; Second Quarter, December 31, 2020; Third Quarter, March 31, 2021 and Fourth Quarter, June 30, 2021.

III. Eligibility Information

A. *Eligible Applicants.* To be eligible for this program, the applicant must meet the eligibility requirements in 7 CFR 4280.310. All applications must meet the definition of ''rural'' or ''rural area'' as described in 7 U.S.C. 1991(a)(13) of the Consolidated Farm and Rural Development Act (Pub. L. 115–334), as amended. The Further Consolidated Appropriations Act, 2020 (Pub. L. 116–94), sec. 740 designates funding for projects in Persistent Poverty counties. Persistent Poverty counties as defined in sec. 740 is ''any county that has had 20 percent or more of its population living in poverty over the past 30 years, as measured by the 1990 and 2000 decennial censuses, and 2007–2011 American Community Survey 5-year average, or any territory or possession of the United States''. Another provision in sec. 740 expands the eligible population in Persistent

Poverty counties to include any county seat of such a persistent poverty county that has a population that does not exceed the authorized population limit by more than 10 percent.

In addition to the requirements in 7 CFR 4280.310, applicants must not be delinquent on any Federal debt or otherwise disqualified from participation in this program to be eligible to apply. All other restrictions in this Notice will apply.

The Agency requires sufficient information to make an eligibility determination through application materials. Potential microlenders must provide evidence that it: (1) Has demonstrated experience in the management of a revolving loan fund; or (2) Certifies that it, or its employees, have received education and training from a qualified microenterprise development training entity so that the applicant has the capacity to manage such a revolving loan fund; or (3) Is actively and successfully participating as an intermediary lender in good standing under the U.S. Small Business Administration (SBA) Microloan Program or other similar loan programs as determined by the Administrator. Applicants must also provide an attorney's opinion regarding the potential microlender's legal status and its ability to enter into program transactions at the time of initial entry into the program. Subsequent to acceptance into the program, an attorney's opinion will not be required unless the Agency determines significant changes to the microlender have occurred.

B. *Cost Sharing or Matching.* The Federal share of the eligible project cost of a microborrower's project funded under this Notice shall not exceed 75 percent. The cost share requirement shall be met by the microlender in accordance with the requirements specified in 7 CFR 4280.311(d).

The MDO is required to provide a match of not less than 15 percent of the total amount of the grant in the form of matching funds, indirect costs, or in-kind goods or services.

C. *Other Eligibility Requirements.* Applications will only be accepted from eligible MDOs and will be awarded a program score in compliance with 7 CFR 4280.316. Eligible MDOs must score a minimum of 70 points out of 100 available points to be considered to receive an award. Awards for each Federal fiscal quarter will be based on ranking with the highest-ranking applications being funded first, subject to available funding.

None of the funds made available by this or any other Act may be used to enter into a contract, memorandum of understanding, or cooperative agreement with, make a grant to, or provide a loan or loan guarantee to, any corporation that has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability, where the awarding agency is aware of the unpaid tax liability, unless a Federal agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.

None of the funds made available by this or any other Act may be used to enter into a contract, memorandum of understanding, or cooperative agreement with, make a grant to, or provide a loan or loan guarantee to, any corporation that was convicted of a felony criminal violation under any Federal law within the preceding 24 months, where the awarding agency is aware of the conviction, unless a Federal agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.

D. *Completeness Eligibility.* All applications must be submitted as a complete application, in one package. Applications will not be considered for funding if they do not provide sufficient information to determine eligibility or are unbound, not received in one package, are missing required elements or are otherwise not suitable for evaluation. Such applications will be withdrawn with notification provided to the applicant of such action.

IV. Fiscal Year 2021 Application and Submission Information

A. *Requesting an Application Package:* For further information, entities wishing to apply for assistance should contact the Rural Development State Office as identified in the **ADDRESSES** section of this Notice to obtain copies of the application package. Applicants must submit an original complete application to the USDA Rural Development State Office in the State where the applicant's project is located.

An MDO may submit an initial application for a loan with a microlender technical assistance grant, or an initial or subsequent loan-only (without a microlender technical assistance grant). Loan applications may be submitted in paper or electronic format to the appropriate Rural Development State Office and must be received by 4:30 p.m. local time on the deadline date(s). Applicants are encouraged to contact their respective State Office for an email contact to submit an electronic application prior to the submission deadline date(s). Loan applications must be organized in the same order set forth in 7 CFR 4280.315. To ensure timely delivery, applicants are strongly encouraged to submit their paper applications using an overnight, express, or parcel delivery service.

B. *Content and Form of Submission:* An application must contain all of the required elements outlined in 7 CFR 4280.315. Each application must address the applicable scoring criteria presented in 7 CFR 4280.316 for the type of funding being requested.

C. *Submission Dates and Times:* The original complete application for quarterly funding competitions must be received by the USDA Rural Development State Office no later than 4:30 p.m. (local time) on: First Quarter, September 30, 2020; Second Quarter, December 31, 2020; Third Quarter, March 31, 2021 and Fourth Quarter, June 30, 2021, regardless of the postmark date, in order to be considered for funds available in that Federal 2021 fiscal quarter.

Unless withdrawn by the applicant, completed applications that receive a score of at least 70 (the minimum required to be considered for funding), but have not yet been funded, will be retained by the Agency for consideration in subsequent reviews through a total of four consecutive quarterly reviews. Applications that remain unfunded after four quarterly reviews, including the initial quarter in which the application was competed, will not be considered further for an award. The applicant must submit a new application at that time if it desires further funding consideration.

D. *Explanation of Dates:* Applications must be in the USDA Rural Development State Office by the deadline dates and times as indicated above. If the due date falls on a Saturday, Sunday, or Federal holiday, the application is due the next business day.

V. Application Review Information

A. *Criteria.* All eligible and complete applications will be evaluated and scored based on the selection criteria and weights contained in 7 CFR part 4280, subpart D. Failure to address any one of the criteria by the application deadline will result in the application being determined ineligible and the

application will not be considered for funding. An application must receive at least 70 points to be considered for funding in the quarter in which it is scored and competing.

B. *Review and Selection Process.* The State Offices will review applications to determine if they are eligible for assistance based on requirements contained in 7 CFR part 4280, subpart D. If determined eligible, the application will be submitted to the National Office, where it will be reviewed and prioritized by ranking in highest to lowest score order with each application competing in that quarter. All eligible applications will be funded until funds have been exhausted for each funding cycle. Funding of projects is subject to the MDO's satisfactory submission of the additional items required by that subpart and the USDA Rural Development Letter of Conditions.

VI. Award Administration Information

A. *Award Notices.* Successful applicants will receive notification for funding from the USDA Rural Development State Office. Applicants must comply with all applicable statutes and regulations before the award will be approved. Provided the application and eligibility requirements have not changed, an application not selected will be reconsidered for three subsequent funding competitions for a total of four competitions. If an application is withdrawn, it can be resubmitted and will be evaluated as a new application. Unsuccessful applications after four quarterly competitions will receive notification by mail, detailing why the application was unsuccessful.

B. *Administrative and National Policy Requirements.* Additional requirements that apply to MDOs selected for this program can be found in 7 CFR part 4280, subpart D. The USDA and the Agency have adopted the USDA grant regulations at 2 CFR chapter IV. This regulation incorporates the new Office of Management and Budget (OMB) regulations 2 CFR 200 and 2 CFR 400.1 to 400.18 for monitoring and servicing RMAP funding.

C. *Reporting.* In addition to any reports required by 2 CFR 200 and 2 CFR 400.1 to 400.18, the MDO must provide reports as required by 7 CFR part 4280, subpart D. MDOs must collect and maintain data provided by Ultimate Recipients on race, sex, and national origin and ensure Ultimate Recipients collect and maintain this data. Race and ethnicity data will be collected in accordance with OMB **Federal Register** notice, ''Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity'' (62 FR 58782), October 30, 1997. Sex data will be collected in accordance with Title IX of the Education Amendments of 1972. These items should not be submitted with the application but should be available upon request by the Agency.

The applicant and the Ultimate Recipient must comply with Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973, Age Discrimination Act of 1975, Executive Order 12250, Executive Order 13166 Limited English Proficiency (LEP), and 7 CFR part 1901, subpart E.

VII. Agency Contacts

For general questions about this Notice, please contact your USDA Rural Development State Office as provided in the **ADDRESSES** section of this Notice.

VIII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, the information collection requirements associated with the Rural Microentrepreneur Assistance Program, as covered in this Notice, has been approved by the Office of Management and Budget (OMB) under OMB Control Number 0570–0062.

IX. Federal Funding Accountability and Transparency Act

To be eligible (unless you are exempted under 2 CFR 25.110(b), (c) or (d)), you are required to:

(a) Provide a valid DUNS number in your application, which can be obtained at no cost via a toll-free request line at (866) 705–5711;

(b) Register in SAM before submitting your application. You may register in SAM at no cost at *https://www.sam.gov/SAM/.* You must provide your SAM CAGE Code and expiration date. When registering in SAM, you must indicate you are applying for a Federal financial assistance project or program or are currently the recipient of funding under any Federal financial assistance project or program; and

(c) The SAM registration must remain active with current information at all times while the Agency is considering an application or while a Federal grant award or loan is active. To maintain the registration in the SAM database the applicant must review and update the information in the SAM database annually from date of initial registration or from the date of the last update. The applicant must ensure that the information in the database is current, accurate, and complete. Applicants must ensure they complete the Financial Assistance General Certifications and Representations in SAM.

- If you have not fully complied with all applicable DUNS and SAM requirements, the Agency may determine that the applicant is not qualified to receive a Federal award and the Agency may use that determination as a basis for making an award to another applicant. In accordance with OMB Memoranda M–20–11 and M–20–26, the Agency can accept an application without an active SAM registration. However, the registration must be completed before an award is made.

X. Nondiscrimination Statement

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

Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online at *http://www.ascr.usda.gov/complaint_filing_cust.html* and at any USDA office or write a letter addressed to USDA and provide in the letter all the information requested in the form. To request a copy of the complaint form, call (866) 632–9992.

Submit your completed form or letter to USDA by:

(1) *Mail:* U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410;

(2) *Fax:* (202) 690–7442; or

(3) *Email: program.intake@usda.gov.*

Rebeckah Adcock,

Administrator, Rural Business-Cooperative Service.

[FR Doc. 2020–27627 Filed 12–15–20; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–55–2020]

Foreign-Trade Zone (FTZ) 84—Houston, Texas, Authorization of Production Activity, Schlumberger Technology Corporation, Reslink Product Center (Sand Screen and Related Accessories), Baytown and Houston, Texas

On August 13, 2020, Schlumberger Technology Corporation, Reslink Product Center submitted a notification of proposed production activity to the FTZ Board for its facilities within Subzone 84AA, in Baytown and Houston, Texas.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (85 FR 54345, September 1, 2020). On December 11, 2020, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification was authorized, subject to the FTZ Act and the FTZ Board's regulations, including Section 400.14.

Dated: December 11, 2020.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2020–27648 Filed 12–15–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–221–2020]

Foreign-Trade Zone 221—Mesa, Arizona; Application for Subzone; CMC Steel Fabricators, Inc., d/b/a CMC Steel Arizona, Mesa, Arizona

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by the City of Mesa, grantee of FTZ 221, requesting subzone status for the facility of CMC Steel Fabricators, Inc., d/b/a CMC Steel Arizona, located in Mesa, Arizona. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the FTZ Board (15 CFR part 400). It was formally docketed on December 10, 2020.

The proposed subzone (225.8 acres) is located at 11444 East Germann Rd., Mesa, Maricopa County. No authorization for production activity has been requested at this time. The proposed subzone would be subject to the existing activation limit of FTZ 221.

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

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary and sent to: *ftz@trade.gov.* The closing period for their receipt is January 25, 2021. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to February 9, 2021.

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

For further information, contact Qahira El-Amin at *Qahira.El-Amin@trade.gov.*

Dated: December 11, 2020.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2020–27649 Filed 12–15–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–840]

Certain Frozen Warmwater Shrimp From India: Preliminary Results of Antidumping Duty Changed Circumstances Review

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

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that LNSK Greenhouse Agro Products LLP (LNSK Greenhouse Agro) is the successor in interest to Green House Agro Products (Greenhouse Agro) in the context of the antidumping duty order on certain frozen warmwater shrimp from India.

DATES: Applicable December 16, 2020.

FOR FURTHER INFORMATION CONTACT: Adam Simons, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–6172.

SUPPLEMENTARY INFORMATION:

Background

On October 7, 2020, in response to a request by LNSK Greenhouse Agro,[1] Commerce published a notice of initiation of changed circumstances review to consider whether LNSK Greenhouse Agro is the successor in interest to Greenhouse Agro.[2] On October 6, 2020, we issued a supplemental questionnaire to LNSK Greenhouse Agro, to which we received a response on October 20, 2020.[3]

Scope of the Order

The merchandise subject to the order is certain frozen warmwater shrimp.[4] The product is currently classified under the following Harmonized Tariff Schedule of the United States (HTSUS) item numbers: 0306.17.00.03, 0306.17.00.06, 0306.17.00.09, 0306.17.00.12, 0306.17.00.15, 0306.17.00.18, 0306.17.00.21, 0306.17.00.24, 0306.17.00.27, 0306.17.00.40, 1605.21.10.30, and 1605.29.10.10. Although the HTSUS numbers are provided for convenience and customs purposes, the written product description remains dispositive.

Preliminary Results

In this changed circumstances review, pursuant to section 751(b) of the Tariff Act of 1930, as amended (the Act), Commerce conducted a successor-in-interest analysis. In making a successor-in-interest determination, Commerce examines several factors, including, but not limited to, changes in the following: (1) Management; (2) production facilities; (3) supplier relationships; and (4) customer base.[5] While no single

[1] *See* LNSK Greenhouse Agro's Letter, ''LNSK Greenhouse Agro's Request for a Changed Circumstances Review in Certain Frozen Warmwater Shrimp From India, Case No. A–533–840,'' dated August 17, 2020 (LNSK Greenhouse Agro CCR Request).

[2] *See Certain Frozen Warmwater Shrimp from India: Notice of Initiation of Antidumping Duty Changed Circumstances Review,* 85 FR 63252 (October 7, 2020).

[3] *See* LNSK Greenhouse Agro's Letter, ''Supplemental Response in the AD Successor-In-Interest Changed Circumstances Review in Certain Frozen Warmwater Shrimp from India (A–533–840),'' dated October 20, 2020 (SQR).

[4] For a complete description of the scope of the order, *see Certain Frozen Warmwater Shrimp from India: Final Results of Antidumping Duty Administrative Review; 2016–2017,* 83 FR 32835 (July 16, 2018), and accompanying Issues and Decision Memorandum at ''Scope of the Order.''

[5] *See, e.g., Certain Frozen Warmwater Shrimp from India: Initiation and Preliminary Results of*

Continued

factor or combination of factors will necessarily provide a dispositive indication of a successor-in-interest relationship, generally, Commerce will consider the new company to be the successor to the previous company if the new company's resulting operation is not materially dissimilar to that of its predecessor.[6] Thus, if the record evidence demonstrates that, with respect to the production and sale of the subject merchandise, the new company operates as the same business entity as the predecessor company, Commerce may assign the new company the cash deposit rate of its predecessor.[7]

In accordance with 19 CFR 351.216, we preliminarily determine that LNSK Greenhouse Agro is the successor in interest to Greenhouse Agro. Record evidence, as submitted by LNSK Greenhouse Agro, indicates that LNSK Greenhouse Agro operates as essentially the same business entity as Greenhouse Agro with respect to the subject merchandise.[8] For the complete successor-in-interest analysis, including discussion of business proprietary information, refer to the accompanying successor-in-interest memorandum.[9] Commerce will issue its final results of the review in accordance with the time limits set forth in 19 CFR 351.216(e).

Public Comment

Pursuant to 19 CFR 351.310(c), any interested party may request a hearing within 30 days of publication of this notice. In accordance with 19 CFR 351.309(c)(1)(ii), interested parties may submit case briefs not later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than seven days after the case briefs, in accordance with 19 CFR 351.309(d). Parties who submit case or rebuttal briefs are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[10] All comments are to be filed electronically using Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS) available to registered users at *https://access.trade.gov.* An electronically filed document must be received successfully in its entirety by ACCESS by 5:00 p.m. Eastern Time on the day it is due.[11] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[12]

Consistent with 19 CFR 351.216(e), we will issue the final results of this changed circumstances review no later than 270 days after the date on which this review was initiated.

This notice is published in accordance with sections 751(b)(1) and 777(i) of the Act and 19 CFR 351.221(b)(4) and (c)(3).

Dated: December 10, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2020–27686 Filed 12–15–20; 8:45 am]

BILLING CODE 3510–DS–P

Antidumping Duty Changed Circumstances Review, 83 FR 37784 (August 2, 2018) (*Shrimp from India Preliminary Results*), unchanged in *Certain Frozen Warmwater Shrimp from India: Notice of Final Results of Antidumping Duty Changed Circumstances Review,* 83 FR 49909 (October 3, 2018) (*Shrimp from India Final Results*).

[6] *See, e.g., Shrimp from India Preliminary Results,* 83 FR at 37784, unchanged in *Shrimp from India Final Results,* 83 FR at 49909.

[7] *See Shrimp from India Preliminary Results,* 83 FR at 37784, unchanged in *Shrimp from India Final Results,* 83 FR at 49910; *see also Notice of Final Results of Changed Circumstances Antidumping Duty Administrative Review: Polychloroprene Rubber from Japan,* 67 FR 58, 59 (January 2, 2002); *Ball Bearings and Parts Thereof from France: Final Results of Changed-Circumstances Review,* 75 FR 34688, 34689 (June 18, 2010); *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea; Preliminary Results of Antidumping Duty Changed Circumstances Review,* 63 FR 14679 (March 26, 1998), unchanged in *Circular Welded Non-Alloy Steel Pipe from Korea; Final Results of Antidumping Duty Changed Circumstances Review,* 63 FR 20572 (April 27, 1998), in which Commerce found that a company which only changed its name and did not change its operations is a successor in interest to the company before it changed its name.

[8] *See* LNSK Greenhouse Agro CCR Request; and SQR.

[9] *See* Memorandum, ''Certain Frozen Warmwater Shrimp from India: Preliminary Results of Changed Circumstances Review,'' dated concurrently with this notice.

[10] *See* 19 CFR 351.309(c)(2).

[11] *See* 19 CFR 351.303(b).

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

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–842]

Large Residential Washers From Mexico: Final Results of Antidumping Duty Administrative Review; 2018–2019

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

SUMMARY: The Department of Commerce (Commerce) finds that sales of large residential washers (LRW) from Mexico were made at less than normal value (NV) during the period of review, February 1, 2018 through January 31, 2019.

DATES: Applicable December 16, 2020.

FOR FURTHER INFORMATION CONTACT: William Miller, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3906.

SUPPLEMENTARY INFORMATION:

Background

This review covers one producer/exporter of the subject merchandise, Electrolux Home Products Corp. N.V. and Electrolux Home Products de Mexico, S.A. de C.V. (collectively, Electrolux). On February 27, 2020, Commerce published the *Preliminary Results.*[1] On April 6, 2020, we received case briefs on behalf of Electrolux and Haier U.S. Appliance Solutions dba GE Appliances (GE).[2] On April 13, 2020, we received rebuttal briefs on behalf of Electrolux, Whirlpool Corporation (Whirlpool), and GE.[3]

Scope of the Order

The products covered by the order are all large residential washers and certain subassemblies thereof from Mexico. The products are currently classifiable under subheadings 8450.20.0040 and 8450.20.0080 of the Harmonized Tariff System of the United States (HTSUS). Products subject to this order may also enter under HTSUS subheadings 8450.11.0040, 8450.11.0080, 8450.90.2000, and 8450.90.6000. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to this scope is dispositive.[4]

[1] *See Large Residential Washers from Mexico: Preliminary Results of the Antidumping Duty Administrative Review; 2018–2019,* 85 FR 11338 (February 27, 2020) (*Preliminary Results),* and accompanying Preliminary Decision Memorandum (PDM).

[2] *See* Electrolux's Case Brief, ''Sixth Administrative Review of Large Residential Washers from Mexico: Case Brief of Electrolux,'' dated April 6, 2020; *see also* GE's Case Brief, ''Administrative Review of Large Residential Washers from Mexico Antidumping Order: Case Brief,'' dated April 6, 2020.

[3] *See* Electrolux's Rebuttal Brief, ''Sixth Administrative Review of Large Residential Washers from Mexico: Rebuttal Brief of Electrolux,'' dated April 13, 2020; Whirlpool's Rebuttal Brief, ''Large Residential Washers from Mexico: Rebuttal Brief of Whirlpool Corporation,'' dated April 13, 2020; and GE's Rebuttal Brief, ''Administrative Review of Large Residential Washers from Mexico Antidumping Order: GEA Rebuttal Brief,'' dated April 13, 2020.

[4] For a full description of the scope of the order, *see Preliminary Results* PDM.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs are listed in the Appendix to this notice and addressed in the IDM.[5] Interested parties can find a complete discussion of these issues and the corresponding recommendations in this public memorandum, which is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov*. In addition, a complete version of the IDM can be accessed directly at *https://enforcement.trade.gov/frn/index.html*. The signed IDM and the electronic version of the IDM are identical in content.

Changes Since the Preliminary Results

Based on a review of the record and comments received from interested parties regarding our *Preliminary Results,* we made no changes to the preliminary weighted-average margin for Electrolux.

Final Results of the Review

As a result of this review, Commerce determines that a weighted-average dumping margin of 3.53 percent exists for Electrolux for the period February 1, 2018 through January 31, 2019.

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act, and 19 CFR 351.212(b)(1), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review.

Pursuant to 19 CFR 351.212(b)(1), Electrolux reported the entered value of its U.S. sales such that we calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for the examined sales to the total entered value of the sales for which entered value was reported. Where the respondent's weighted-average dumping margin is zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), or an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

We intend to issue liquidation instructions to CBP 41 days after publication of the final results of this review.

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for Electrolux will be equal to the weighted-average dumping margin that is established in the final results of this review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for previously investigated companies not participating in this review, the cash deposit will continue to be the company-specific rate published for the most recently completed segment of this proceeding in which the company participated; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the cash deposit rate established for the most recently completed segment for the producer of the subject merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 36.52 percent, the all-others rate established in the LTFV investigation.[6] These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

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

Administrative Protective Order

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

Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 10, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the IDM

I. Summary
II. Background
III. Margin Calculations
IV. Discussion of Issues
Comment 1: Differential Pricing—the Ratio Test
Comment 2: Differential Pricing—Calculating the Denominator of the Cohen's *d* Test
Comment 3: CEP Offset for Electrolux's Canadian Sales
Comment 4: Capping Freight Revenue in the Comparison Market
V. Recommendation

[FR Doc. 2020–27638 Filed 12–15–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

North American Free Trade Agreement (NAFTA), Article 1904; Binational Panel Review: Notice of NAFTA Panel Decision

AGENCY: United States Section, NAFTA Secretariat, International Trade Administration, Department of Commerce.

ACTION: Notice of NAFTA Panel Decision in the matter of Ammonium Sulphate from the United States of America. (Secretariat File Number: MEX–USA–2015–1904–01.)

SUMMARY: On December 7, 2020, a NAFTA Binational Panel issued its Final Decision in the matter of Ammonium Sulphate from the United States of America (Determination on Remand). The Binational Panel remanded the Secretaria de Economia's (Economia) Determination on Remand

[5] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the 2018–2019 Administrative Review of the Antidumping Duty Order on Large Residential Washers from Mexico,'' (IDM), dated concurrently with, and hereby adopted by, this notice.

[6] *See Large Residential Washers from Mexico and the Republic of Korea: Antidumping Duty Orders,* 78 FR 11148 (February 15, 2013).

and ordered Economia to issue a redetermination within 90 days.

FOR FURTHER INFORMATION CONTACT: Vidya Desai, Acting United States Secretary, NAFTA Secretariat, Room 2061, 1401 Constitution Avenue NW, Washington, DC 20230, (202) 482–5438.

SUPPLEMENTARY INFORMATION: Article 1904 of Chapter 19 of NAFTA provides a dispute settlement mechanism involving trade remedy determinations issued by the Government of the United States, the Government of Canada, and the Government of Mexico. Following a Request for Panel Review, a Binational Panel is composed to provide judicial review of the trade remedy determination being challenged and then issue a binding Panel Decision. The NAFTA Binational Panel Decision is available publicly at *https://can-mex-usa-sec.org/secretariat/report-rapport-reporte.aspx?lang=eng.* There are established *NAFTA Rules of Procedure for Article 1904 Binational Panel Reviews* and the NAFTA Panel Decision has been notified in accordance with Rule 70. For the complete Rules, please see *https://can-mex-usa-sec.org/secretariat/agreement-accord-acuerdo/nafta-alena-tlcan/rules-regles-reglas/article-article-articulo_1904.aspx?lang=eng.*

Dated: December 10, 2020.

Vidya Desai,

Acting U.S. Secretary, NAFTA Secretariat.

[FR Doc. 2020–27612 Filed 12–15–20; 8:45 am]

BILLING CODE 3510–GT–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA698]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Long Beach Cruise Terminal Improvement Project in the Port of Long Beach, California

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

ACTION: Notice; issuance of incidental harassment authorization.

SUMMARY: NMFS has received a request from the Carnival Corporation & PLC (Carnival) for the re-issuance of a previously issued incidental harassment authorization (IHA) with the only change being effective dates. The initial IHA authorized take of five species of marine mammals, by Level A and Level B harassment, incidental to construction associated with the Port of Long Beach Cruise Terminal Improvement Project in Port of Long Beach, California. The project has been delayed and none of the work covered in the initial IHA has been conducted. The initial IHA was effective from November 19, 2019, through November 18, 2020. Carnival has requested re-issuance with new effective dates of December 10, 2020 through December 9, 2021. The scope of the activities and anticipated effects remain the same, authorized take numbers are not changed, and the required mitigation, monitoring, and reporting remains the same as included in the initial IHA. NMFS is, therefore, issuing a second identical IHA to cover the incidental take analyzed and authorized in the initial IHA.

DATES: This authorization is effective from December 10, 2020, through December 9, 2021.

ADDRESSES: An electronic copy of the final 2019 IHA previously issued to Carnival, Carnival's application, and the **Federal Register** notices proposing and issuing the initial IHA may be obtained by visiting *https://www.fisheries.noaa.gov/action/incidental-take-authorization-cruise-terminal-improvement-project-port-long-beach-ca.* In case of problems accessing these documents, please call the contact listed below (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Jaclyn Daly, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the Marine Mammal Protection Act (MMPA; 16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The MMPA states that the term ''take'' means to harass, hunt, capture, kill or attempt to harass, hunt, capture, or kill any marine mammal.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Summary of Request

On November 25, 2019, NMFS published final notice of our issuance of an IHA authorizing take of marine mammals incidental to the Port of Long Beach Cruise Terminal Improvement Project (84 FR 64833). The effective dates of that IHA were November 19, 2019 through November 18, 2020. On November 24, 2020, Carnival informed NMFS that the project was delayed. None of the pile driving considered in the initial IHA has occurred. Carnival submitted a request that we reissue an identical IHA that would be effective from December 10, 2020 through December 9, 2021, in order to conduct the construction work that was analyzed and for which take was authorized in the previously issued IHA. Therefore, re-issuance of the IHA is appropriate.

Summary of Specified Activity and Anticipated Impacts

The planned activities (including mitigation, monitoring, and reporting), authorized incidental take, and anticipated impacts on the affected stocks are the same as those analyzed and authorized through the previously issued IHA.

The purpose of Carnival's project is to make improvements to its existing berthing facilities at the Long Beach Cruise Terminal in order to accommodate a new, larger class of cruise ships. Implementation of the project requires pile driving to install two high-capacity mooring dolphins, fenders, and a new passenger bridge system, and dredging at the existing

berth and the immediate surrounding area. The location, timing, and nature of the activities, including the types of equipment planned for use, are identical to those described in the initial IHA. The mitigation, monitoring, and reporting measures are also identical to those prescribed in the initial IHA.

Species that are expected to be taken by the specified activity include short-beaked common dolphin (*Delphinus delphis*), long-beaked common dolphin (*Delphinus capensis*), bottlenose dolphin (*Tursiops truncates),* California sea lion (*Zalophus californianus)* and harbor seal (*Phoca vitulina*). A description of the methods and inputs used to estimate take anticipated to occur and, ultimately, the take that was authorized is found in the previous documents referenced above. The data inputs and methods of estimating take are identical to those used in the initial IHA. NMFS has reviewed recent Stock Assessment Reports, information on relevant Unusual Mortality Events, and recent scientific literature, and determined that no new information affects our original analysis of impacts or take estimate under the initial IHA.

Determinations

Carnival will conduct activities as analyzed in the initial 2019 IHA. As described above, the number of authorized takes of the same species and stocks of marine mammals are identical to the numbers that were found to meet the negligible impact and small numbers standards and authorized under the initial IHA and no new information has emerged that would change those findings. The re-issued 2020 IHA includes identical required mitigation, monitoring, and reporting measures as the initial IHA, and there is no new information suggesting that our analysis or findings should change.

Based on the information contained here and in the referenced documents, NMFS has determined the following: (1) The required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; and (4) Carnival's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action with respect to environmental consequences on the human environment.

Accordingly, NMFS has determined that the issuance of the IHA qualifies to be categorically excluded from further NEPA review. This action is consistent with categories of activities identified in CE B4 of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Because the only change to the IHA are effective dates, the CE on record for issuance of the initial IHA applies to this action.

Endangered Species Act (ESA)

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

However, no incidental take of ESA-listed species is authorized or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Authorization

NMFS has issued an IHA to Carnival for in-water construction activities associated with the specified activity from December 10, 2020 through December 9, 2021. All previously described mitigation, monitoring, and reporting requirements from the initial 2019 IHA are incorporated.

Dated: December 11, 2020.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2020–27675 Filed 12–15–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA689]

Interagency Working Group on Illegal, Unreported, and Unregulated Fishing; Request for Comments

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

ACTION: Notice; request for comments.

SUMMARY: NMFS is seeking public comments on the Work Plan of the Interagency Working Group on Illegal, Unreported, and Unregulated Fishing. This Interagency Working Group was established under the Maritime Security and Fisheries Enforcement Act.

DATES: Information should be received on or before January 15, 2021.

ADDRESSES: Information may be submitted electronically to *iuu.fishing@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Mi Ae Kim, phone 301–427–8365 or email *mi.ae.kim@noaa.gov.*

SUPPLEMENTARY INFORMATION: The Maritime Security and Fisheries Enforcement Act (Maritime SAFE Act) became law on December 20, 2019. The overarching purpose of the Maritime SAFE Act is to support a whole-of-government approach across the Federal government to counter illegal, unreported, and unregulated (IUU) fishing and related threats to maritime security. It seeks to achieve this through a number of means, including: Improve data sharing that enhances surveillance, enforcement, and prosecution against IUU fishing and related activities; support coordination and collaboration to counter IUU fishing within priority regions; and increase and improve global transparency and traceability across the seafood supply chain to deter IUU fishing and strengthen fisheries management and food security; improve global enforcement operations against IUU fishing; and prevent the use of IUU fishing as a financing source for transnational organized crime groups.

Part II of the Maritime SAFE Act calls for the establishment of the Interagency Working Group on IUU Fishing (Working Group), specifying the chair and agency membership in the Working Group, as well as the Working Group's responsibilities. This Working Group met for the first time in June 2020. NOAA is chair of this Working Group for its first three years, joined by the

U.S. Department of State and U.S. Coast Guard as deputy chairs.

The Working Group has developed its Work Plan, a living document that will serve as the basis for a 5-year strategic plan that is due to Congress by the end of calendar year 2021. In this Work Plan, the Working Group identified ongoing existing activities, as well as new lines of effort, that comprise the initial focus of Federal government actions under the purview of the Working Group. Many of the new activities proposed in the Work Plan emphasize the use of maritime intelligence and the involvement of military departments to support efforts to combat IUU fishing. The Work Plan can be found here: *https://www.fisheries.noaa.gov/national/maritime-safe-act-interagency-working-group-iuu-fishing.*

The Working Group is exploring potential ways in which the government and private sector stakeholders can work together to combat IUU fishing and enhance maritime security. We are interested to hear from the seafood industry, non-governmental organizations, and other stakeholders that are engaged in efforts to combat IUU fishing. We welcome comments in relation to the Work Plan, particularly any responses to the following questions:

- Which activities in the Work Plan are connected to the expertise or interests of your organization related to combating IUU fishing?
- What kinds of distinctive capabilities or capacities could your organization bring to the activities in the Work Plan?
- Which specific activities could serve as the basis for a partnership between your organization and particular Federal agencies?
- Are there specific geographic regions or seafood industry sectors (*e.g.,* harvesting, processing, or trade) where your organization focuses efforts to build capacity in combating IUU fishing that could be tied to activities in the Work Plan?
- Which elements in the Work Plan do you see as priorities to include in the 5-year Strategic Plan of the Working Group?

Dated: December 11, 2020.

Alexa Cole,

Director, Office of International Affairs and Seafood Inspection, National Marine Fisheries Service.

[FR Doc. 2020–27695 Filed 12–15–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Final Management Plan for the North Carolina National Estuarine Research Reserve

AGENCY: Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

ACTION: Notice of approval of the revised management plan for the North Carolina National Estuarine Research Reserve.

SUMMARY: Notice is hereby given that the Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce approves the revised management plan for the North Carolina National Estuarine Research Reserve. In accordance with applicable Federal regulations, the North Carolina Department of Environmental Quality's Division of Coastal Management revised the reserve's management plan, which replaces the plan previously approved in 2009.

ADDRESSES: The approved management plan can be downloaded or viewed at *https://coast.noaa.gov/data/docs/nerrs/Reserves_NOC_MgmtPlan.pdf.* The document is also available by sending a written request to the point of contact identified below (see **FOR FURTHER INFORMATION**).

FOR FURTHER INFORMATION CONTACT: Stephanie Robinson of NOAA's Office for Coastal Management, by email at *steph.robinson@noaa.gov,* phone at 843–740–1174, or mail at 2234 South Hobson Ave., Charleston, SC 29405.

SUPPLEMENTARY INFORMATION: Pursuant to 15 CFR 921.33(c), a state must revise the management plan for a research reserve at least every five years. Changes to a reserve's management plan may be made only after receiving written approval from NOAA. NOAA approves changes to management plans via notice in the **Federal Register**. On October 28, 2019, NOAA issued a notice in the **Federal Register** announcing a 30-day public comment period for the proposed revision of the management plan for the North Carolina National Estuarine Research Reserve (**Federal Register**, Volume 84, No. 208, pg. 57701). No comments were received; however, a summary of the public input process is available in Appendix U of the plan.

The management plan outlines the reserve's strategic goals and objectives; administrative structure; programs for conducting research and monitoring, education, and training; resource protection, restoration, and manipulation plans; public access and visitor use plans; consideration for future land acquisition; and facility development to support reserve operations. Since 2009, the reserve has completed its habitat map and added marsh vegetation and surface elevation monitoring; conducted a habitat vulnerability assessment to understand marsh vulnerability; led a number of research and training initiatives related to living shorelines; increased education programming at the Masonboro Island component of the reserve; begun implementing Teachers on the Estuary (TOTE) training; expanded use of volunteers to conduct citizen science regarding sensitive species and site conditions; and implemented training focused on informing real estate professionals about coastal issues. The revised management plan will serve as the guiding document for the 10,568-acre research reserve for the next five years.

NOAA reviewed the environmental impacts of the revised management plan and determined that this action is categorically excluded from further analysis under the National Environmental Policy Act, consistent with NOAA Administrative Order 216–6.]

Authority: 16 U.S.C. 1451 *et seq.;* 15 CFR 921.33.

Keelin S. Kuipers,

Deputy Director, Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2020–27603 Filed 12–15–20; 8:45 am]

BILLING CODE 3510–NK–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

The National Strategy To Secure 5G Industry Listening

AGENCY: National Telecommunications and Information Administration, U.S. Department of Commerce.

ACTION: Notice of open meeting.

SUMMARY: The National Telecommunications and Information Administration (NTIA) will convene two virtual industry roundtable listening sessions on aspects of the implementation plan of the Secure 5G Strategy.

DATES: The meetings will be held on January 28 and February 25, 2021, from

10:00 a.m. to 12:00 p.m., Eastern Standard Time.

ADDRESSES: The meetings will be held virtually, with online slide share and dial-in information to be posted at *https://www.ntia.gov/.*

FOR FURTHER INFORMATION CONTACT: Travis Hall, National Telecommunications and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Room 4725, Washington, DC 20230; telephone: (202) 482–3522; email: *thall@ntia.gov.* Please direct media inquiries to NTIA's Office of Public Affairs: (202) 482–7002; email: *press@ntia.gov.*

SUPPLEMENTARY INFORMATION:

Background and Authority: On March 25, 2020, the President signed into law the Secure 5G and Beyond Act of 2020, Public Law 116–129 (Act), which required the development of a strategy to ensure the security of next generation wireless communications systems and infrastructure.[1]

On the same day, and in fulfilment of the requirement established by the Act, the Administration published the National Strategy to Secure 5G of the United States of America (Strategy).[2] In so doing, the Administration recognizes both the importance of fifth generation wireless technologies (also known as 5G) to the future prosperity and security of the United States, as well as the risks and vulnerabilities posed by malicious actors that will seek to exploit these technologies. The Strategy is focused on four areas: (1) Facilitating domestic 5G rollout; (2) assessing the cybersecurity risks to and identifying core security principles of 5G capabilities and infrastructure; (3) addressing risks to United States economic and national security during development and deployment of 5G infrastructure worldwide; and (4) promoting responsible global development and deployment of secure and reliable 5G infrastructure. In accordance with both the Act and the Strategy, the National Security and National Economic Councils are developing an Implementation Plan, in consultation with relevant Departments and Agencies, to execute the actions identified to secure 5G infrastructure and development.

In accordance with the Act, NTIA published a Request for Comment on March 28th, 2020,[3] and posted the responses on June 29th, 2020.[4] To assist in the implementation of the strategy NTIA will conduct industry engagement and listening sessions with 5G industry groups and manufacturers to formulate policy approaches for market incentives to do the following: Leverage trusted domestic and international partner suppliers; close 5G security gaps; and ensure domestic industrial base viability. To this end, NTIA will convene two virtual roundtables. The January 28 roundtable will focus on market incentives for 5G security. The February 25 roundtable will focus on principles for fostering global 5G vendor diversity and open, interoperable architectures. The discussions held at these roundtables will be analyzed and turned into a report to help the Administration further develop its policy approach to the secure development and deployment of 5G.

Time and Date: NTIA will convene the roundtable listening session on January 28 and February 25, from 10:00 a.m. to 12:00 p.m. Eastern Standard Time. The exact time of the meeting is subject to change. Please refer to NTIA's website, *https://www.ntia.gov,* for the most current information.

Place: The meeting will be held virtually, with online slide share and dial-in information to be posted at *https://www.ntia.gov.* Please refer to NTIA's website, *https://www.ntia.gov,* for the most current information.

Other Information: The meeting is open to the public and the press on a first-come, first-served basis. The virtual meeting is accessible to people with disabilities. Individuals requiring accommodations such as real-time captioning, sign language interpretation or other ancillary aids should notify Travis Hall at (202) 482–3522 or *thall@ntia.gov* at least seven (7) business days prior to the meeting. Access details for the meeting are subject to change. Please refer to NTIA's website, *https://www.ntia.gov/,* for the most current information.

Dated: December 10, 2020.

Kathy D. Smith,

Chief Counsel, National Telecommunications and Information Administration.

[FR Doc. 2020–27609 Filed 12–15–20; 8:45 am]

BILLING CODE 3510–60–P

[1] Secure 5G and Beyond Act of 2020, Public Law 116–129, 134 Stat. 223–227 (2020) (Act).

[2] *See,* The National Strategy to Secure 5G of the United States of America, March 2020, *available at https://www.whitehouse.gov/wp-content/uploads/2020/03/National-Strategy-5G-Final.pdf.*

[3] *See,* 85 FR 32016, 103 (May 28, 2020) *available at https://www.ntia.doc.gov/files/ntia/publications/fr-secure-5g-implementation-plan-05282020.pdf.*

[4] *See https://www.ntia.doc.gov/federal-register-notice/2020/comments-national-strategy-secure-5g-implementation-plan.*

DEPARTMENT OF DEFENSE

Department of the Air Force

Notice of Intent To Grant an Exclusive Patent License

AGENCY: Department of the Air Force, Department of Defense.

ACTION: Notice of intent.

SUMMARY: Pursuant to the Bayh-Dole Act, and implementing regulations, the Department of the Air Force hereby gives notice of its intent to grant an exclusive patent license agreement to Integrated Icing Solutions, LLC, a corporation of the State of Oklahoma, having a place of business at 4301 SW 29th Street, Oklahoma City, OK 73119.

DATES: Written objections must be filed no later than fifteen (15) calendar days after the date of publication of this Notice.

ADDRESSES: Submit written objections to the Jeffrey Bamber, Air Force Materiel Command Law Office, AFMCLO/JAZ, 2240 B Street, Room 260, Wright-Patterson AFB, OH 45433–7109; Facsimile: (937) 255–3733; or Email: *afmclo.jaz.tech@us.af.mil.* Include Docket No. AFS–201113A–PL in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Jeffrey Bamber, Air Force Materiel Command Law Office, AFMCLO/JAZ, 2240 B Street, Rm 260, Wright-Patterson AFB, OH 45433–7109; Telephone: (937) 904–5787; Facsimile: (937) 255–3733; Email: *afmclo.jaz.tech@us.af.mil.*

SUPPLEMENTARY INFORMATION: The Department of the Air Force intends to grant the exclusive patent license agreement for the invention described in: U.S. Patent Application Serial No. 63/109,883, entitled ''Ice Detection and Precautionary System Shut-Down Event Reduction Systems and Related Methods'', filed November 5, 2020.

Abstract of patent application: An ice detection and precautionary system shut-down event reduction system and related methods are provided. Embodiments include an ice detection sensor array positioned in proximity to a jet engine test cell inlet. The sensor array can include a plurality of ice detection sensor array sensors including ice, static pressure, total pressure, and temperature as well as a second set of sensors position in proximity with a jet engine air inlet, where the second set of sensors include another temperature, static pressure, and total pressure sensor. The embodiment further includes a control section that receives inputs from the sensor array sensors and second set of sensors and performs

comparisons of inputs from these sensors against each other and stored values to determine actual icing conditions then generate warnings on a display to an operator. The exemplary control section has multiple modes including manual, semi-manual and automatic.

The Department of the Air Force may grant the prospective license unless a timely objection is received that sufficiently shows the grant of the license would be inconsistent with the Bayh-Dole Act or implementing regulations. A competing application for a patent license agreement, completed in compliance with 37 CFR 404.8 and received by the Air Force within the period for timely objections, will be treated as an objection and may be considered as an alternative to the proposed license.

Adriane Paris,

Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2020–27697 Filed 12–15–20; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID: USA–2020–HQ–0017]

Proposed Collection; Comment Request

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

ACTION: Information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Department of the Army 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 16, 2021.

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: DoD cannot receive written comments at this time due to the COVID–19 pandemic. Comments should be sent electronically to the docket listed above.

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

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to 1530 Concordia West, Irvine, CA 92612, ATTN: Dr. Nathan Meier, 949–214–3322.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Future Soldier Study (At-Risk Shippers); OMB Control Number 0702–XXXX.

Needs and Uses: This collection will help study the impact that regular exercise has on Future Soldiers (FS) accessions rates and shape the development of policy that will reduce the number of shipper delays and FS losses due to height, weight, and OPAT standards not being met, ultimately saving the Army time and money. FS will receive an at-home exercise program that they can execute with minimal equipment and experience, and conclude with an exercise adherence structured interview from the Company Commanders during their FS Asset Inventory (FSAI), a regular part of the FS program already. Body composition and OPAT data that the recruiters currently collect on the FS populations will then be cross-referenced with the exercise adherence data. This will allow us to identify to what degree exercise adherence leads to the improved shipping rates for FS as well as potential weight loss guidance for MEPS and Recruiting Command to use to more accurately predict the duration of time required from initial MEPS clearance to ship date based on a FS height, weight, and OPAT status. This data must be collected in order to accurately determine the impact that regular exercise has on FS accessions rates and provide MEPS and USAREC with demographic-specific projections for their at-risk populations to ship for basic training. The end result will be a study that will be presented to USAREC and MEPS Command with findings and recommendations for ways to reduce FS delays to the shipping process.

Affected Public: Individuals or Households.

Annual Burden Hours: 9,450.

Number of Respondents: 450.

Responses per Respondent: 1.

Annual Responses: 450.

Average Burden per Response: 21 hours.

Frequency: One-time.

Dated: December 11, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–27664 Filed 12–15–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2020–OS–0075]

Submission for OMB Review; Comment Request

AGENCY: National Defense University, Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by January 15, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Angela James, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Master's Degree Application Form for International Students; OMB Control Number 0704–XXXX.

Type of Request: Existing Collection in Use without an OMB Control Number.

Number of Respondents: 120.

Responses per Respondent: 1.

Annual Responses: 120.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 30 hours.

Needs and Uses: This form is used to collect the information required to admit international students to an NDU master's degree program. The respondents are prospective international students who wish to be admitted to an NDU master's degree program. They respond to this information collection in partial fulfillment of NDU application and admissions requirements. The completed collection instrument is processed by the NDU registrars and a committee of NDU faculty who review the application in consideration of admission to a master's degree program. The successful effect of this information collection is to satisfy NDU master's degree application requirements for international students so that an admissions decision can be made.

Affected Public: Foreign nationals.

Frequency: Annually.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

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

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

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

DOD Clearance Officer: Ms. Angela James.

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

Dated: December 11, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–27668 Filed 12–15–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Renewal of Department of Defense Federal Advisory Committee

AGENCY: Department of Defense (DoD).

ACTION: Renewal of Federal Advisory Committee.

SUMMARY: The DoD is publishing this notice to announce that it is renewing the Defense Health Board (''the Board'').

FOR FURTHER INFORMATION CONTACT: Jim Freeman, Advisory Committee Management Officer for the Department of Defense, 703–692–5952.

SUPPLEMENTARY INFORMATION: Based on its decision to renew the Board, the DoD is filing a new Board charter in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C., App) and 41 CFR 102–3.50(d). The charter and contact information for the Board's Designated Federal Officer (DFO) are found at *https://www.facadatabase.gov/FACA/apex/FACAPublicAgencyNavigation.*

The Board provides independent advice and recommendations to maximize the safety and quality of, as well as access to, health care for DoD healthcare beneficiaries. The Board will focus on matters pertaining to: a. DoD healthcare policy and program management; b. health research programs, c. requirements for the treatment and prevention of disease and injury by the DoD; d. promotion of health and wellness within DoD and the effective delivery of high-quality health care services to DoD beneficiaries; and e. Other health-related matters of special interest to the DoD, as determined by the Secretary of Defense, the Deputy Secretary of Defense, or the Under Secretary of Defense for Personnel and Readiness. The Board shall be composed of no more than 19 members. The members shall be eminent authorities in one or more of the following disciplines: Health care research/academia, infectious disease, occupational/environmental health, health care policy, trauma medicine/systems, clinical health care, strategic decision making, bioethics or ethics, beneficiary representative, neuroscience, and behavioral health. Board members who are not full-time or permanent part-time Federal civilian officers or employees, or active duty members of the Uniformed Services will be appointed as an expert or consultant, pursuant to 5 U.S.C. 3109, to serve as special government employee members. Board members who are full-time or permanent part-time Federal civilian officers or employees, or active duty members of the Uniformed Services will be appointed pursuant to 41 CFR 102–3.130(a), to serve as regular government employee members.

All members of the Board are appointed to provide advice on the basis of their best judgment without representing any particular point of view and in a manner that is free from conflict of interest. Except for reimbursement of official Board-related travel and per diem, members serve without compensation.

The public or interested organizations may submit written statements to the Board membership about the Board's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meeting of the Board. All written statements shall be submitted to the DFO for the Board, and this individual will ensure that the written statements are provided to the membership for their consideration.

Dated: December 10, 2020.

Kayyonne T. Marston,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–27594 Filed 12–15–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2020–OS–0104]

Proposed Collection; Comment Request

AGENCY: National Defense University, Department of Defense (DoD).

ACTION: Information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the National Defense University 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 16, 2021.

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: DoD cannot receive written comments at this time due to the COVID–19 pandemic. Comments should be sent electronically to the docket listed above.

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

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to National Defense University, 300 5th Avenue SW, Building 62, Washington, DC 20319, ATTN: LTC Ann Summers, or call (202) 685–3323.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: National Defense University Security Office Forms; OMB Control Number 0704–XXXX.

Needs and Uses: The National Defense University (NDU) Security Office is responsible for ensuring personnel and facility security in all situations involving NDU employees. This includes ensuring that an appropriate background investigation is completed and favorably adjudicated in accordance with 32 CFR 156.6—Common access card (CAC) investigation and adjudication. It is also necessary for the NDU Security Office to process visit clearance certification for NDU employees that are visiting outside agencies/components facilities involving access to, or disclosure of, classified information. In accordance with DoDM 5200.01, volume 3 and DoDD 5230.20 at a minimum, data is required to identify an individual, personnel security clearance, access (if appropriate), and need to know for all visitors. NDU Security Office is also responsible for in-processing all permanent personnel (military, civilians, contractors, and foreign partners assigned to the colleges and centers within NDU's area of responsibility). In accordance with HSPD–12 and FIPS 201, the data provided is necessary to process Personal Identity Verification (PIV) credentials to personnel seeking physical access to federally-controlled government facilities. The three forms included in this collection package—the NDU eQIP Nomination Form, NDU Visit Request Form, and NDU Security In-Process Form—facilitate each of these processes, respectively. Respondents to this collection are National Defense University employees who must provide information to the NDU Security Office to facilitate essential personnel, facility, and information security functions. This includes information necessary to complete a background investigation for CAC card issuance (NDU eQIP Nomination Form), information for in-processing and PIV credentialing (NDU Security In-Process Form), and information for visit clearance certification (NDU Visit Request Form).

Affected Public: Individuals and Households, Foreign Nationals.

Annual Burden Hours: 77.

Number of Respondents: 385.

Responses per Respondent: 1.

Annual Responses: 385.

Average Burden per Response: 12 minutes.

Frequency: On occasion.

Dated: December 11, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–27663 Filed 12–15–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

[Docket ID: DoD–2020–OS–0070]

Submission for OMB Review; Comment Request

AGENCY: National Defense University, Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by January 15, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Angela James, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: NDU Foreign Delegation Visit Request; OMB Control Number 0704–XXXX.

Type of Request: Existing Collection in Use without an OMB Control Number.

Number of Respondents: 45.

Responses per Respondent: 1.

Annual Responses: 45.

Average Burden per Response: 1 hour.

Annual Burden Hours: 45.

Needs and Uses: Foreign delegation visits help to conduct analysis for regional and DoD academic accreditations, create reports for University leadership to aid in the development of effective curricula, and facilitate academic completion requirements. The foreign visit request form is primarily used to collect information on visiting delegations for protocol purposes and to ensure proper logistic support for the visiting delegation. The respondents in our collection are generally Foreign Nationals visiting the National Defense University to meet with NDU leadership. The collection instrument is a PDF document sent over email. Respondents access the PDF directly and return via email. Once the document is returned, the information is used to create a customized visit for the delegation and informs a read ahead document for NDU leadership. Information and electronic records are maintained in the NDU Enterprise Information System (NEIS), the NDU network. The NDU NEIS encompasses all hardware and software utilized to support the academic and business information hosted in university-owned systems.

Affected Public: Foreign Nationals, Individuals or Households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

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

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

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

DOD Clearance Officer: Ms. Angela James.

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

Dated: December 11, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–27665 Filed 12–15–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket ID: USN–2020–HQ–0008]

Submission for OMB Review; Comment Request

AGENCY: Marine Junior Reserve Officer's Training Corps (MCJROTC), Department of the Navy, Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by January 15, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Angela James, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Individual MCJROTC Instructor Evaluation Summary; NAVMC 10942; OMB Control Number 0703–0016.

Type of Request: Revision.

Number of Respondents: 509.

Responses per Respondent: 1.

Annual Responses: 509.

Average Burden per Response: 30 minutes.

Annual Burden Hours: 254.5.

Needs and Uses: The information collection requirement is necessary to provide a written record of the overall performance of duty of MCJROTC instructors who are responsible for implementing the MCJROTC curriculum. The individual MCJROTC Instructor Evaluation Summary is completed by principles to evaluate the effectiveness of individual MCJROTC instructors. The form is further used as a performance related counseling tool and as a record of service performance to document performance and growth of individual MCJROTC instructors. Evaluating the performance of instructors is essential in ensuring that they provide quality training.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

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

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

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

DOD Clearance Officer: Ms. Angela James.

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

Dated: December 11, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–27670 Filed 12–15–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2020–SCC–0193]

Agency Information Collection Activities; Comment Request; Teacher Cancellation Low Income Directory

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension without change of a currently approved collection.

DATES: Interested persons are invited to submit comments on or before February 16, 2021.

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–2020–SCC–0193. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted 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 PRA Coordinator of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W208D, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

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: Teacher Cancellation Low Income Directory.

OMB Control Number: 1845–0077.

Type of Review: An extension without change of a currently approved collection.

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

Total Estimated Number of Annual Responses: 67.

Total Estimated Number of Annual Burden Hours: 6,840.

Abstract: The Higher Education Act of 1965, as amended, (HEA) allows for up to a one hundred percent cancellation of a Federal Perkins Loan and loan forgiveness of a Federal Family Education Loan and Direct Loan program loan if the graduate teaches full-time in an elementary or secondary school serving low-income students.

The data collected for the development of the Teacher Cancellation Low Income Directory provides web-based access to a list of all elementary and secondary schools, and educational service agencies that serve a total enrollment of more than 30 percent low income students (as defined under Title I, Part A of the Elementary and Secondary Education Act of 1965, as amended). The Directory allows post-secondary institutions to determine whether or not a teacher, who received a Federal Perkins Loan, Direct Loan, or Federal Family Education Loan at their school, is eligible to receive loan cancellation or forgiveness or that a teacher who received a TEACH Grant is meeting the service obligation.

Dated: December 11, 2020.

Kate Mullan,

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

[FR Doc. 2020–27646 Filed 12–15–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

National Nuclear Security Administration

Proposed Subsequent Arrangement

AGENCY: National Nuclear Security Administration, Department of Energy.

ACTION: Proposed subsequent arrangement.

SUMMARY: This document is being issued under the authority of the Atomic Energy Act of 1954, as amended. The Department is providing notice of a proposed subsequent arrangement under the Agreement for Cooperation Concerning Civil Uses of Atomic Energy Between the Government of the United States of America and the Government of Canada, as amended (the Agreement).

DATES: This subsequent arrangement will take effect no sooner than December 31, 2020.

FOR FURTHER INFORMATION CONTACT: Mr. Sean Oehlbert, Office of Nonproliferation and Arms Control, National Nuclear Security Administration, Department of Energy. Telephone: 202–586–3806 or email: *sean.oehlbert@nnsa.doe.gov.*

SUPPLEMENTARY INFORMATION: This proposed subsequent arrangement concerns the granting of advance consent to Canada, pursuant to paragraph D of Article XII of the Agreement, to retransfer unirradiated source material, unirradiated uranium enriched to less than 20% in the isotope U–235, and moderator material to member states of the European Atomic Energy Community (EURATOM), and to the United Kingdom of Great Britain and Northern Ireland (UK). Any such material transferred from Canada to EURATOM would be made subject to the Agreement for Cooperation in the Peaceful Uses of Nuclear Energy between the United States of America and the European Atomic Energy Community (the U.S.-EURATOM 123 Agreement). Any such material transferred from Canada to the UK prior to the entry into force of the Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for Cooperation in Peaceful Uses of Nuclear Energy (the U.S.-UK 123 Agreement) would be made subject to the U.S.-EURATOM 123 Agreement, and any such material transferred from Canada to the UK following the entry into force of the U.S.-UK 123 Agreement would be made subject to the U.S.-UK 123 Agreement.

Pursuant to the authority in section 131 a. of the Atomic Energy Act of 1954, as delegated, I have determined that this proposed subsequent arrangement will not be inimical to the common defense and security of the United States of America.

Signing Authority

This document of the Department of Energy was signed on December 11, 2020, by Brent K. Park, Deputy Administrator for Defense Nuclear Nonproliferation, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on December 11, 2020.

Treena V. Garrett,

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

[FR Doc. 2020–27682 Filed 12–15–20; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

National Nuclear Security Administration

Notice of Intent To Prepare an Environmental Impact Statement for the Surplus Plutonium Disposition Program

AGENCY: National Nuclear Security Administration, Department of Energy.

ACTION: Notice of intent.

SUMMARY: The National Nuclear Security Administration (NNSA), a semi-autonomous agency within the United States (U.S.) Department of Energy (DOE), announces its intent, consistent with the National Environmental Policy Act of 1969 (NEPA), to prepare a Surplus Plutonium Disposition Program (SPDP) Environmental Impact Statement (EIS) to evaluate alternatives for the safe and timely disposition of plutonium surplus to the defense needs of the United States. NNSA will prepare a SPDP EIS to evaluate the dilute and dispose alternative, also known as ''plutonium downblending,'' and any other identified reasonable alternatives for the disposition of surplus plutonium. The dilute and dispose approach would require new, modified, or existing capabilities at the Savannah River Site (SRS), Los Alamos National Laboratory (LANL), Pantex Plant (Pantex), and the Waste Isolation Pilot Plant (WIPP). The purpose of this Notice is to invite public participation in the process and to encourage public involvement on the scope and alternatives that should be considered.

DATES: The public scoping period begins with the publication of this Notice in the **Federal Register** and continues until February 1, 2021. Comments received after this date will be considered to the extent practicable.

In light of recent public health concerns, NNSA will be hosting an internet- and telephone-based, virtual public scoping meeting in place of an in-person meeting. The date of the meeting will be provided in a future notice posted on the following website: *https://www.energy.gov/nnsa/nnsa-nepa-reading-room.* NNSA will hold the meeting no earlier than 15 days from the posting of the notice. Public scoping meeting details will also be announced in local media outlets.

ADDRESSES: Written comments on the scope of the SPDP EIS, requests to be placed on the SPDP EIS mailing list, and requests for information related to the SPDP EIS should be sent to: Mr. Jeffrey Galan, NNSA NEPA Document Manager, by regular mail at: Mr. Jeffrey Galan, NEPA Document Manager, NNSA Office of Material Management and Minimization, Savannah River Site, P.O. Box A, Bldg. 730–2B, Rm. 328, Aiken, SC 29802; or sent by email to *SPDP-EIS@NNSA.DOE.GOV* or phone to 803–952–7434.

NNSA invites other Federal and state agencies, state and local governments, Native American tribes, industry, other organizations, and members of the public to submit comments to assist in identifying environmental issues and in determining the appropriate scope of the SPDP EIS. Written and oral comments will be given equal weight and NNSA will consider all comments received or postmarked by the end of the comment period in preparing the Draft SPDP EIS. Comments received or postmarked after the comment period will be considered to the extent practicable. Before including your address, phone number, email address, or other personally identifiable information in your comment, please be advised that your entire comment—including your personally identifiable information—may be made publicly available. If you wish for NNSA to withhold your name and/or other personally identifiable information, please state this prominently at the beginning of your comment. You may also submit comments anonymously.

This Notice of Intent, information related to the online scoping meeting (including internet and telephone access details), and instructions on how to participate will be available at the following website: *https://www.energy.gov/nnsa/nnsa-nepa-reading-room* and announced in local media outlets.

FOR FURTHER INFORMATION CONTACT: For further information about this Notice, please contact Mr. Jeffrey Galan, NNSA NEPA Document Manager, by regular mail at: Mr. Jeffrey Galan, NEPA Document Manager, NNSA Office of Material Management and Minimization, Savannah River Site, P.O. Box A, Bldg. 730–2B, Rm. 328, Aiken, SC 29802; phone: 803–952–7434; or email to: *SPDP-EIS@NNSA.DOE.GOV.*

Requests for general information concerning the NNSA NEPA process should be directed to Mrs. Amy Miller, NEPA Compliance Officer, NNSA Office of General Counsel, P.O. Box 5400, Albuquerque, NM 87185–5400; or sent by email to *SPDP-EIS@NNSA.DOE.GOV.*

SUPPLEMENTARY INFORMATION: NNSA will prepare the SPDP EIS in accordance with the previous version of the Council on Environmental Quality regulations (40 CFR parts 1500–1508, 1978 as amended in 1986 and 2005), as this version was controlling at the time the NEPA process for the SPDP was initiated.

Background

The following is a summary of NNSA's previous NEPA reviews and decisions regarding the disposition of surplus plutonium.

Following the end of the Cold War, the United States in 1994 declared 52.5 metric tons of plutonium surplus to the defense needs of the Nation. In 2007, an additional 9 metric tons of plutonium was declared surplus. Since the mid-1990s, NNSA has prepared several NEPA reviews to evaluate alternative means of assuring that the surplus plutonium would no longer be suitable for use in nuclear weapons. In 1996, DOE completed the *Storage and Disposition of Weapons-Usable Fissile Materials Programmatic Environmental Impact Statement* (DOE/EIS–0229). DOE evaluated deep borehole, immobilization, and reactor alternatives, each with sub-alternatives, for dispositioning surplus plutonium. In a subsequent Record of Decision (ROD) (62 FR 304, January 21, 1997), NNSA documented its decision to (1) immobilize some or all surplus plutonium for disposal in a geologic repository, (2) fabricate some surplus plutonium into mixed oxide (MOX) fuel for irradiation in commercial reactors, (3) consolidate storage of pit plutonium at Pantex, and (4) consolidate storage of non-pit plutonium at the SRS.

In 1999, DOE completed the *Surplus Plutonium Disposition Environmental Impact Statement* (SPD EIS, DOE/EIS–0283). In the SPD EIS, DOE evaluated immobilization (ceramic and glass) alternatives and MOX fuel fabrication alternatives, as well as siting alternatives for a Mixed-Oxide Fuel Fabrication Facility (MFFF), a pit disassembly and conversion facility (PDCF), and an immobilization facility. In a subsequent ROD (65 FR 1608, January 11, 2000), NNSA documented its decision to pursue a dual track approach for plutonium disposition by (1) immobilizing about 17 metric tons of surplus weapons-usable plutonium, (2) using 33 metric tons of surplus weapons-usable plutonium to fabricate MOX fuel for irradiation in commercial nuclear reactors, and (3) constructing and operating an immobilization facility, a PDCF, and an MFFF at SRS.

On April 19, 2002 (67 FR 19432) and April 24, 2003 (68 FR 20134), NNSA decided to (1) cancel the immobilization program, (2) immediately consolidate storage of plutonium then stored at the Rocky Flats Environmental Technology Site at SRS, and (3) designate 34 metric tons rather than 33 metric tons of surplus plutonium for fabrication into MOX fuel for irradiation in commercial nuclear reactors. In 2008, NNSA decided to construct and operate a Waste Solidification Building (WSB) at SRS to prepare waste from the MFFF and the PDCF for disposal.

In 2015, NNSA completed the Surplus Plutonium Disposition Supplemental Environmental Impact Statement (SPD Supplemental EIS) (DOE/EIS–0283–S2). In the SPD Supplemental EIS, NNSA evaluated the MOX Fuel Alternative, the WIPP Alternative (also referred to as ''plutonium downblending'' or ''dilute and dispose''), and two variations on immobilization for disposition of 6 metric tons of non-pit plutonium and 7.1 metric tons of pit plutonium. This 13.1 metric tons of surplus plutonium, for which a disposition path had not previously been assigned, was in addition to the 34 metric tons NNSA decided to disposition using the MOX approach. In addition, NNSA evaluated options for pit disassembly and conversion. In 2015 (80 FR 80348, December 24, 2015), DOE announced its preferred alternative for the 6 metric tons of non-pit plutonium evaluated in the SPD Supplemental EIS. In 2016, NNSA issued a ROD to dispose of the 6 metric tons of non-pit plutonium using the WIPP Alternative (dilute and dispose) (81 FR 19588, April 5, 2016). Using that approach, NNSA is currently diluting the 6 metric tons of non-pit plutonium with an adulterant using modified or existing facilities, packaging the material as contact-handled TRU

waste, and shipping it to WIPP for emplacement.

In addition, in August 2020 NNSA prepared a Supplement Analysis (SA) based on the analysis presented in the 2015 SPD SEIS to evaluate using dilute and dispose for disposition of 7.1 MT of non-pit plutonium that comprises a part of the 34 MT (DOE/EIS–0283–SA–4, August 2020). NNSA subsequently issued an Amended ROD (AROD) to use dilute and dispose to disposition that 7.1 MT of the 34 MT mission (85 FR 53350, August 28, 2020). The SA and AROD are available online at *https://www.energy.gov/nnsa/nnsa-nepa-reading-room.*

This same dilute and dispose process is being proposed to disposition the full 34 MT of surplus plutonium that is the responsibility of the Surplus Plutonium Disposition Program.

Purpose and Need for Agency Action

NNSA's purpose in taking action is to reduce the threat of nuclear weapons proliferation worldwide by dispositioning surplus plutonium in the United States in a safe and secure manner, ensuring that it can never again be readily used in nuclear weapons.

Since the end of the Cold War in the early 1990s and the Presidential declarations of surplus fissile materials, NNSA has been charged with dispositioning surplus plutonium. Over the last two and a half decades, NNSA has studied many alternative technologies and locations for surplus plutonium disposition. There is a need for NNSA to implement a disposition process and strategy that can be safely executed in a reasonable time at a cost consistent with fiscal realities.

Proposed Action and Alternatives

Preferred Alternative. NNSA proposes implementing the dilute and dispose approach to disposition surplus weapons-usable plutonium. The effort would require new, modified, or existing capabilities at SRS, LANL, Pantex, and WIPP. Under the dilute and dispose approach, NNSA would convert pit and non-pit metal plutonium to oxide, blend surplus plutonium in oxide form with an adulterant, and emplace the resulting CH–TRU waste underground in WIPP. NNSA believes that implementing a proven method is the most efficient way to move forward with the Surplus Plutonium Disposition Program. NNSA evaluated this process in the SPD Supplemental EIS (DOE/EIS–0283–S–2, April 2015) and decided to use it to dispose of 6 MT of non-pit plutonium (81 FR 19588, April 5, 2016). The process was also evaluated in the Supplement Analysis for Disposition of Additional Non-Pit Surplus Plutonium (DOE/EIS–0283–SA–4, August 2020) and NNSA decided to use it to disposition 7.1 MT of non-pit plutonium (85 FR 53350, August 28, 2020). Dilute and dispose is NNSA's preferred alternative for the disposition of the full 34 MT of surplus plutonium that is the responsibility of the Surplus Plutonium Disposition Program.

No Action Alternative. NNSA will evaluate a No Action Alternative in the SPDP EIS. The No Action Alternative will be continued safe storage of surplus pit plutonium at Pantex and disposition of 7.1 MT of non-pit plutonium using the dilute and dispose approach.

If any other reasonable alternatives are identified during the scoping period, NNSA will also evaluate those alternatives in the EIS. Following completion of the SPDP EIS, NNSA will select an alternative for disposition of surplus weapons-usable plutonium, including locations and options for processing capabilities, and the specific quantity of material to be dispositioned.

Potential Environmental Issues for Analysis

NNSA tentatively identified the following environmental issues that will be analyzed in the SPDP EIS. This list is not intended to be comprehensive.

- Impacts to the general population and onsite workers from radiological and non-radiological releases resulting from construction and operation of facilities required to implement the proposed action and alternatives.
- Impacts of transporting plutonium materials from current storage and management locations to facilities required to disassemble pits and dilute plutonium oxide. Analysis of transportation to WIPP may be summarized from existing NEPA analyses, as appropriate.
- Impacts to the general public and onsite workers from postulated accidents.
- Socioeconomic impacts to local communities.
- Disproportionately high and adverse impacts on low-income and minority populations (environmental justice).
- Impacts on air quality, surface water quality, and groundwater quality.
- Impacts to land use, biota, and threatened and endangered species.
- Impacts to cultural resources.
- Impacts to geology and soils, including seismic risks.

EIS Preparation and Schedule

Following the scoping period, and after consideration of comments received during scoping, NNSA will prepare a draft EIS for disposition of surplus plutonium. The U.S. Environmental Protection Agency (EPA) will announce the availability of the draft EIS in the **Federal Register**. NNSA will also publish a Notice of availability in the **Federal Register** and announce the draft EIS in local media outlets. NNSA expects to issue the draft SPDP EIS in calendar year 2021.

Signing Authority

This document of the Department of Energy was signed on December 10, 2020, by William A. Bookless, Acting Under Secretary for Nuclear Security and Administrator, NNSA, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register.**

Signed in Washington, DC, on December 11, 2020.

Treena V. Garrett,

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

[FR Doc. 2020–27674 Filed 12–15–20; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC21–3–000]

Commission Information Collection Activities; Request for Emergency Extension for FERC–725D

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of request for an emergency extension.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995 (PRA), the Federal Energy Regulatory Commission (Commission or FERC) has solicited public comments on FERC–725D (Mandatory Reliability Standard: Facilities Design, Connections and Maintenance Reliability Standards). FERC submitted a request to the Office of Management and Budget (OMB) for a three-month emergency extension (to March 31, 2021) to ensure this

information collection will remain active while FERC completes the pending PRA renewal process. No changes are being made to the reporting and recordkeeping requirements.

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by email at *DataClearance@FERC.gov* and telephone at (202) 502–8663.

SUPPLEMENTARY INFORMATION: The PRA renewal process for the information collection is ongoing. To ensure that OMB approval of the current information collection remains active during the PRA renewal process, FERC has submitted a request to OMB for a three-month emergency extension.

Title: FERC–725D, Mandatory Reliability Standard: Facilities Design, Connections and Maintenance Reliability Standards.

OMB Control No.: 1902–0247.

Docket No. for Ongoing PRA Renewal: IC21–3.

FERC submitted a formal request [1] to OMB on December 10, 2020, for an emergency three-month extension to March 31, 2021.

Dated: December 10, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–27657 Filed 12–15–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG21–51–000.

Applicants: Flat Ridge 2 Wind Energy LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Flat Ridge 2 Wind Energy LLC.

Filed Date: 12/10/20.

Accession Number: 20201210–5051.

Comments Due: 5 p.m. ET 12/31/20.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1907–019; ER10–1918–020; ER10–1930–013; ER10–1931–014; ER10–1932–015; ER10–1935–015; ER10–1950–020; ER10–1951–027; ER10–1962–015; ER10–1964–017; ER10–1966–014; ER10–1970–019; ER10–1972–019; ER10–1973–014; ER10–1974–025; ER10–1975–027; ER10–1976–013; ER10–2641–037; ER10–2720–023; ER11–2642–017; ER11–3635–014; ER11–4428–023; ER11–4462–048; ER11–4677–016; ER12–1228–023; ER12–1880–022; ER12–2225–013; ER12–2226–013; ER12–2444–015; ER12–895–021; ER13–2112–011; ER13–2147–002; ER14–1630–011; ER14–21–008; ER14–2138–010; ER14–2707–018; ER14–2710–018; ER15–1375–009; ER15–2101–009; ER15–2477–009; ER15–2601–007; ER15–2602–006; ER15–58–016; ER16–1354–009; ER16–1872–010; ER16–2241–011; ER16–2275–011; ER16–2276–011; ER16–2297–011; ER16–2443–006; ER16–2506–011; ER16–90–009; ER17–1774–005; ER17–2340–006; ER17–822–006; ER17–823–006; ER17–838–023; ER18–1535–006; ER18–1771–009; ER18–1952–009; ER18–2003–007; ER18–2182–007; ER18–2246–008; ER18–241–005; ER18–772–005; ER19–11–005; ER19–1392–005; ER19–2389–004; ER19–2398–004; ER20–1220–001; ER20–1879–001; ER20–1988–001; ER20–2012–002; ER20–2019–001; ER20–2064–001; ER20–2648–001; ER20–2690–001; ER20–2695–001; ER20–792–002.

Applicants: FPL Energy North Dakota Wind, LLC, FPL Energy North Dakota Wind II, LLC, FPL Energy South Dakota Wind, LLC, FPL Energy Stateline II, Inc., FPL Energy Vansycle, L.L.C., FPL Energy Wyman, LLC, FPL Energy Wyman IV, LLC, Frontier Utilities Northeast LLC, Garden Wind, LLC, Genesis Solar, LLC, Golden Hills Interconnection, LLC, Golden Hills North Wind, LLC, Golden Hills Wind, LLC, Golden West Power Partners, LLC, Gray County Wind, LLC, Grazing Yak Solar, LLC, Green Mountain Storage, LLC, Gulf Power Company, Hancock County Wind, LLC, Hatch Solar Energy Center I, LLC, Heartland Divide Wind Project, LLC, High Lonesome Mesa Wind, LLC, High Majestic Wind I, LLC, High Majestic Wind II, LLC, High Winds, LLC, Jordan Creek Wind Farm LLC, Kingman Wind Energy I, LLC, Kingman Wind Energy II, LLC, Lake Benton Power Partners II, LLC, Langdon Renewables, LLC, Limon Wind, LLC, Limon Wind II, LLC, Limon Wind III, LLC, Live Oak Solar, LLC, Logan Wind Energy LLC, Lorenzo Wind, LLC, Luz Solar Partners Ltd., III, Luz Solar Partners Ltd., IV, Luz Solar Partners Ltd., V, Mammoth Plains Wind Project, LLC, Mantua Creek Solar, LLC, Marshall Solar, LLC, McCoy Solar, LLC, Meyersdale Storage, LLC, Minco Wind, LLC, Minco Wind II, LLC, Minco Wind III, LLC, Minco IV & V Interconnection, LLC, Minco Wind Interconnection Services, LLC, Mohave County Wind Farm LLC, Montauk Energy Storage Center, LLC, Montauk Energy Storage Center, LLC, Mountain View Solar, LLC, NEPM II, LLC, New Mexico Wind, LLC, NextEra Blythe Solar Energy Center, LLC, NextEra Energy Bluff Point, LLC, NextEra Energy Duane Arnold, LLC, NextEra Energy Montezuma II Wind, LLC, NextEra Energy Point Beach, LLC, NextEra Energy Marketing, LLC, NextEra Energy Seabrook, LLC, NextEra Energy Services Massachusetts, LLC, Northeast Energy Associates, A Limited Partnership, Ninnescah Wind Energy, LLC, North Jersey Energy Associates, A Limited Partnership, North Sky River Energy, LLC, Northern Colorado Wind Energy, LLC, Northern Colorado Wind Energy Center II, LLC, Northern Divide Wind, LLC, Oleander Power Project, Limited Partnership, Oliver Wind I, LLC, Oliver Wind Energy Center II, LLC, Oliver Wind III, LLC, Oklahoma Wind, LLC, Orbit Bloom Energy, LLC, Osborn Wind Energy, LLC, Palo Duro Wind Energy, LLC, Palo Duro Wind Interconnection Services, LLC, Peetz Logan Interconnect, LLC.

Description: Notice of Change in Status of the NextEra MBR Sellers (Part 2), et al.

Filed Date: 12/7/20.

Accession Number: 20201207–5238.

Comments Due: 5 p.m. ET 12/28/20.

Docket Numbers: ER21–615–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2020–12–10_SA 3588 NSP-Walleye Wind FSA (J569) to be effective 2/9/2021.

Filed Date: 12/10/20.

Accession Number: 20201210–5018.

Comments Due: 5 p.m. ET 12/31/20.

Docket Numbers: ER21–616–000.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Cancellation: Notice of Cancellation of Interconnection Coordination Agreement No. 4531 to be effective 5/23/2020.

Filed Date: 12/10/20.

Accession Number: 20201210–5073.

Comments Due: 5 p.m. ET 12/31/20.

Docket Numbers: ER21–617–000.

Applicants: San Diego Gas & Electric Company.

Description: § 205(d) Rate Filing: 2021 TACBAA Update to be effective 1/1/2021.

Filed Date: 12/10/20.

Accession Number: 20201210–5079.

Comments Due: 5 p.m. ET 12/31/20.

Docket Numbers: ER21–618–000.

Applicants: Southern California Edison Company.

[1] The letter (addressed to the Administrator of OIRA at OMB) requests a three-month emergency extension and was signed by the Acting General Counsel on 12/10/2020.

Description: § 205(d) Rate Filing: DSA ENA BESS 1, LLC Inglewood Energy Storage SA No. 1125 WDT1602 to be effective 2/9/2021.

Filed Date: 12/10/20.

Accession Number: 20201210–5080.

Comments Due: 5 p.m. ET 12/31/20.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 10, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–27655 Filed 12–15–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1989–016; ER10–2078–020; ER11–2192–016; ER11–4678–016; ER12–1660–019; ER12–631–017; ER12–676–013; ER13–2458–014; ER13–2461–014; ER13–2474–017; ER14–2708–019; ER14–2709–018; ER15–1016–009; ER15–2243–007; ER15–30–016; ER16–1277–010; ER16–1293–009; ER16–1293–010; ER16–1440–012; ER16–1913–007; ER16–2240–012; ER17–196–005; ER17–2270–011; ER17–582–007; ER17–583–007; ER18–1981–007; ER18–2032–007; ER18–2091–006; ER18–2224–009; ER18–807–005; ER19–2266–003; ER19–2382–003; ER19–2495–003; ER19–2513–003; ER19–774–006; ER20–1219–002; ER20–1417–002; ER20–1991–001; ER20–2069–001; ER20–2070–001; ER20–2153–002; ER20–2237–001; ER20–2380–001; ER20–2597–001; ER20–2603–001; ER20–2622–002; ER20–637–001; ER20–780–002.

Applicants: Peetz Table Wind, LLC, Pegasus Wind, LLC, Perrin Ranch Wind, LLC, Pheasant Run Wind, LLC, Pima Energy Storage System, LLC, Pinal Central Energy Center, LLC, Ponderosa Wind, LLC, Pratt Wind, LLC, Quitman Solar, LLC, Red Mesa Wind, LLC, River Bend Solar, LLC, Roswell Solar, LLC, Roundhouse Renewable Energy, LLC, Rush Springs Wind Energy, LLC, Saint Solar, LLC, Sanford Airport Solar, LLC, Seiling Wind, LLC, Seiling Wind II, LLC, Seiling Wind Interconnection Services, LLC, Skeleton Creek Wind, LLC, Silver State Solar Power South, LLC, Shafter Solar, LLC, Sky River LLC, Soldier Creek Wind, LLC, Sooner Wind, LLC, Stanton Clean Energy, LLC, Steele Flats Wind Project, LLC, Story County Wind, LLC, Stuttgart Solar, LLC, Titan Solar, LLC, Tuscola Bay Wind, LLC, Tuscola Wind II, LLC, Vasco Winds, LLC, Weatherford Wind, LLC, Wheatridge Wind II, LLC, Wheatridge Wind Energy, LLC, Wessington Springs Wind, LLC, Westside Solar, LLC, White Oak Energy LLC, White Oak Solar, LLC, White Pine Solar, LLC, Whitney Point Solar, LLC, Wildcat Ranch Wind Project, LLC, Wilmot Energy Center, LLC, Wilton Wind Energy I, LLC, Wilton Wind Energy II, LLC, Windpower Partners 1993, LLC.

Description: Notice of Change in Status of the NextEra MBR Sellers (Part 3), et al..

Filed Date: 12/8/20.

Accession Number: 20201208–5213.

Comments Due: 5 p.m. ET 12/29/20.

Docket Numbers: ER21–202–000.

Applicants: Centrica Business Solutions Optimize, LLC.

Description: Supplement to October 26, 2020 Centrica Business Solutions Optimize, LLC tariff filing.

Filed Date: 12/9/20.

Accession Number: 20201209–5179.

Comments Due: 5 p.m. ET 12/21/20.

Docket Numbers: ER21–245–001.

Applicants: Michigan Electric Transmission Company, LLC.

Description: Tariff Amendment: Amendment to IFA Filing to be effective 12/29/2020.

Filed Date: 12/10/20.

Accession Number: 20201210–5146.

Comments Due: 5 p.m. ET 12/31/20.

Docket Numbers: ER21–619–000.

Applicants: Alabama Power Company.

Description: § 205(d) Rate Filing: PowerSouth Transmission Interconnection Contract Filing to be effective 11/10/2020.

Filed Date: 12/10/20.

Accession Number: 20201210–5115.

Comments Due: 5 p.m. ET 12/31/20.

Docket Numbers: ER21–620–000.

Applicants: Georgia Power Company.

Description: § 205(d) Rate Filing: PowerSouth Interconnection Contract Filing to be effective 11/10/2020.

Filed Date: 12/10/20.

Accession Number: 20201210–5116.

Comments Due: 5 p.m. ET 12/31/20.

Docket Numbers: ER21–621–000.

Applicants: Mississippi Power Company.

Description: § 205(d) Rate Filing: PowerSouth Transmission Interconnection Contract Filing to be effective 11/10/2020.

Filed Date: 12/10/20.

Accession Number: 20201210–5117.

Comments Due: 5 p.m. ET 12/31/20.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 10, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–27654 Filed 12–15–20; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–R01–OW–2020–0216; FRL–10018–55–Region 1]

Availability of Final Modifications to NPDES General Permits for Stormwater Discharges From Small Municipal Separate Storm Sewer Systems in Massachusetts and New Hampshire

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability of final permit modifications.

SUMMARY: The Environmental Protection Agency (EPA) is providing a notice of

availability (NOA) of final limited modifications to the National Pollutant Discharge Elimination System (NPDES) general permits for discharges of stormwater from small Municipal Separate Storm Sewer Systems (MS4s) in Massachusetts and New Hampshire under the Clean Water Act (CWA). The final modifications represent the results of mediation supervised by the U.S. Court of Appeals for the District of Columbia Circuit Mediation Program between EPA and petitioners the National Association of Homebuilders (NAHB), the Home Builders and Remodelers Association of Massachusetts, Inc. (HBRAMA), the New Hampshire Home Builders Association (NHHBA), the Center for Regulatory Reasonableness (CRR), the Massachusetts Coalition for Water Resources Stewardship (MCWRS), the Town of Franklin, Massachusetts, (Franklin), the City of Lowell, Massachusetts (Lowell), the Conservation Law Foundation (CLF), and the Charles River Watershed Association (CRWA). In April 2020, EPA and the petitioners entered into settlement agreements that included commitments for EPA to propose certain modifications to the 2016 Massachusetts Small MS4 General Permit and the 2017 New Hampshire Small MS4 General Permit, and then to take final action on each proposal.

DATES: These final permit modifications are effective 30 days after signature. In accordance with 40 CFR part 23, this permit shall be considered issued for the purpose of judicial review at 1:00 p.m. Eastern daylight time on December 30, 2020. Under section 509(b) of the Clean Water Act, judicial review of these general permit modifications can be requested by filing a petition for review in the United States Court of Appeals within 120 days after the permit modifications are considered issued. Under section 509(b)(2) of the Clean Water Act, these permit modifications may not be challenged later in civil or criminal proceedings to enforce these requirements. In addition, these permit modifications may not be challenged in other agency proceedings.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R01–OW–2020–0216. All documents in the docket are listed on the *http://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Newton Tedder, Water Division, U.S. Environmental Protection Agency, Region 1, 5 Post Office Square, MC 06–4, Boston, MA 02109; telephone number: 617–918–1038; email address: *tedder.newton@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Final Permit Modifications

A. Background on Litigation and Settlement Agreements

On April 4, 2016, EPA issued a final NPDES general permit for discharges of stormwater from small MS4s in Massachusetts (the MA MS4 Permit) under CWA section 402(p). 33 U.S.C. 1342(p). On July 18, 2016, CRR filed a petition for review of the permit in the U.S. Court of Appeals for the D.C. Circuit. CLF, CRWA, MCWRS, Franklin, NAHB, HBRAMA, and the City of Lowell also filed petitions for review of the permit, all of which were consolidated with CRR's petition in the D.C. Circuit. *Center for Regulatory Reasonableness, et al.* v. *EPA,* No. 16–1246 (D.C. Cir.) (2016 Massachusetts Small MS4 General Permit consolidated cases). On January 18, 2017, EPA issued a final NPDES general permit for discharges of stormwater from small MS4s in New Hampshire (the NH MS4 Permit). On February 1, 2017, CLF filed a petition for review of the permit in the U.S. Court of Appeals for the First Circuit. CRR, NAHB, and NHHBA later filed petitions for review in the D.C. Circuit. The First Circuit then transferred the CLF petition to the D.C. Circuit, where the D.C. Circuit consolidated it with the CRR, NAHB, and NHHBA petitions. *Center for Regulatory Reasonableness et al.* v. *EPA, Conservation Law Foundation, Intervenor* No. 17–1060 (D.C. Cir.) (2017 New Hampshire Small MS4 General Permit consolidated cases). The parties to both cases entered mediation in 2017, and the D.C. Circuit held the cases in abeyance. On December 27, 2019, EPA published three proposed settlement agreements in the **Federal Register** for a 30-day public comment period. *See* ''Proposed Settlement Agreements, Clean Water Act Claims,'' 84 FR 71407 (Dec. 27, 2019). EPA's planned proposed permit modifications to the Massachusetts and New Hampshire permits and statements of basis describing those proposed modifications were attached as Exhibits A and B to the Massachusetts and New Hampshire proposed settlement agreements. EPA and the petitioners executed the Massachusetts and New Hampshire settlement agreements on April 15, 2020. The first two settlement agreements describe the modifications that EPA proposed to the MA MS4 Permit and NH MS4 Permit.

Pursuant to the settlement agreements, the proposed permit modifications reflected the substantive agreements that parties reached during mediation. In the settlement agreements, the petitioners agreed not to submit adverse public comments on the Draft Permit Modifications, except that the Petitioners reserved their rights to submit any form of comment on EPA's proposed modification to Part 2.3.6.a of the NH MS4 permit and on the definitions of ''new development'' and ''redevelopment'' in NH MS4 permit Appendix A. The agreements specified that EPA would take final action on each proposed modification within nine months of posting the NOA of the Draft Permit Modifications on its website and in the **Federal Register** (that is, by January 23, 2021); that petitioners would then dismiss their current petitions for review with prejudice; and that petitioners agreed not to challenge EPA's respective final actions if they modify the permits in a manner substantially similar to the proposed modifications (with one exception, discussed in the New Hampshire settlement agreement). The third settlement agreement commits Lowell, Massachusetts, to voluntarily dismiss its petition without prejudice and commits EPA to process Lowell's individual permit application and then to take final action on Lowell's individual permit application. Today's notice includes the final MA MS4 and NH MS4 permit modifications. Lowell filed a joint stipulation to voluntarily dismiss its petition on July 15, 2020. EPA will propose an individual permit for Lowell in a separate action.

B. Final Permit Modifications

EPA published the proposed permit modifications on April 23, 2020. *See* 85 FR 22735 (Apr. 23, 2020). The public comment period for these proposals closed on June 8, 2020. EPA received 21 public comments. EPA reopened, reexamined, and accepted comments on only the parts of the MA MS4 and NH MS4 permits that the proposed modifications specified. In the MA MS4 permit, the following permit parts were the only parts open for modification and comment: Parts 2.0; 2.1; 2.1.1; 2.1.2.a; 2.2.; 2.2.2; 2.3.3; 2.3.5; 2.3.6; 2.3.7.a; 2.3.7.b; 4.1; 4.4; Appendix F part A.I; Appendix F part A.II; Appendix F

Attachments 2 and 3; and Appendix H. In the NH MS4 permit, the following permit parts were the only parts open for modification and comment: 2.0; 2.1; 2.1.1; 2.1.2.a; 2.2.; 2.2.2 (paragraphs 2 and 3); 2.3.3.1; 2.3.5; 2.3.5.3; 2.3.6.a; 2.3.7.2.b.iii; 3.1.3; 4.1.4; 4.4.2.3; Appendix A; Appendix F part III and Attachment 3; and Appendix H. The modifications provide either enhanced clarity regarding permit terms or greater flexibility in permit implementation. EPA prepared Statements of Basis that fully explained the proposed modifications. *See www.regulations.gov* Docket document EPA–R01–OW–2020–0216–0002, ''Statement of Basis for Massachusetts Small MS4 General Permit 2020 Modifications,'' and document EPA–R01–OW–2020–0216–0005, ''Statement of Basis for New Hampshire Small MS4 General Permit 2020 Modifications.'' EPA has considered all significant public comments on the permit sections that were open for proposed modification. The docket also contains a Memorandum to the Record discussing the potential impacts of the permit modifications and the Response to Comments documents for the Massachusetts and New Hampshire permits. Based on public comments, EPA plans to finalize the permits as proposed, except for the following changes:

Massachusetts Small MS4 General Permit

- EPA updated the typographical error in Appendix F, Table F–6. Grafton and Shrewsbury have the same required percent reduction of 49% for phosphorus from urban stormwater sources for Flint Pond and Lake Quinsigamond.
- EPA updated the permit language to clarify that Part 6.5 is not applicable to the MA Department of Conservation and Recreation, which has its own phosphorus reduction requirements, as indicated in Appendix F Part A.I of the permit.

New Hampshire Small MS4 General Permit

- The proposed modifications to Part 2.3.6 (post-construction stormwater minimum control measures) attempted to rely on the Southeast Watershed Alliance (SWA) model ordinances, a successful local program as described in the Statement of Basis, but erred in requiring some pieces of the SWA Model Ordinance to be adopted by SWA communities and others to be adopted by non-SWA communities. In response to comments noting confusion as to which requirements applied to which communities, EPA has updated the language in Part 2.3.6 to remove the different requirements for those communities in and out of the SWA. Consistent with the option in the 2017 NH MS4 Permit, the final permit modification requires that all New Hampshire permittees—those in the SWA and those outside the SWA—adopt a regulatory mechanism that is at least as stringent as SWA Model Standards Section 4 Element C and Element D in their entirety.

EPA has emailed notifications of the Final Permit Modifications to regulated parties, parties to this mediation, and other interested parties on EPA Region 1's NPDES permit mailing list. The official public docket for this action, EPA–R01–OW–2020–0216, contains copies of the final permits, response to comments documents, a memorandum describing economic impacts of the modifications, and other supporting material. An electronic version of the public docket is available through *www.regulations.gov*. These documents are also posted on EPA Region 1's website at *https://www.epa.gov/npdes-permits/npdes-stormwater-permit-program-new-england#smallms4program*. The official public docket is available for public viewing at U.S. EPA Region 1, John W. McCormack Building, 5 Post Office Square, Boston, MA 02109. Please contact the persons listed in **FOR FURTHER INFORMATION CONTACT.**

Administrative Requirements

Executive Order 12866: Regulatory Planning and Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket.

Consideration of Other Federal or State Laws

EPA's docket provides information on compliance with applicable laws and anticipated impacts on small entities in a memorandum to the record, in the proposed permits' statements of basis/fact sheets, and the final permits' response to comments documents. Massachusetts and New Hampshire provided water quality certifications to EPA for this action pursuant to Section 401 of the Clean Water Act, 33 U.S.C. 1341. In accordance with the Endangered Species Act (ESA), EPA has also obtained concurrence from the New England regional offices of the National Marine Fisheries Service and U.S. Fish and Wildlife Service that this action is not likely to adversely affect any listed threatened or endangered species. The Massachusetts and New Hampshire Coastal Zone Management offices have also provided EPA with Coastal Zone Management Act (CZMA) consistency determinations for this action.

Authority: This action is being taken under the Clean Water Act, 33 U.S.C. 1251 *et seq.*

Dated: December 10, 2020.

Dennis Deziel,

Regional Administrator, EPA Region 1.

[FR Doc. 2020–27637 Filed 12–15–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2020–0621; FRL–10017–86]

Draft Compliance Guide for Imported Articles Containing Surface Coatings Subject to the Long-Chain Perfluoroalkyl Carboxylate and Perfluoroalkyl Sulfonate Chemical Substances Significant New Use Rule; Notice of Availability and Request for Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is announcing the availability of and soliciting public comment on the draft compliance guide for the significant new uses EPA identified under the Toxic Substances Control Act (TSCA) for the import of articles with certain long-chain perfluoroalkyl carboxylate (LCPFAC) chemicals as part of the surface coating, as established by EPA's final rule ''Long-Chain Perfluoroalkyl Carboxylate and Perfluoroalkyl Sulfonate Chemical Substances; Significant New Use Rule.'' Specifically, the guide provides additional clarity on what is meant by a ''surface coating,'' identifies which entities are regulated, describes the activities that are required or prohibited, and summarizes the notification requirements of the final significant new use rule (SNUR).

DATES: Comments must be received on or before January 15, 2021.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2013–0225, using the Federal eRulemaking Portal at *http://www.regulations.gov*. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI)

or other information whose disclosure is restricted by statute.

Due to the public health concerns related to COVID–19, the EPA Docket Center (EPA/DC) and Reading Room is closed to visitors with limited exceptions. The staff continues to provide remote customer service via email, phone, and webform. For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets*.

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Tyler Lloyd, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–4016; email address: *lloyd.tyler@epa.gov*.

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

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. What action is the Agency taking?

EPA is announcing the availability of and soliciting public comment on the draft compliance guide for the significant new uses EPA identified under section 5(a) the Toxic Substances Control Act (TSCA), 15 U.S.C. 2604(a), for the import of articles with certain long-chain perfluoroalkyl carboxylate (LCPFAC) chemicals as part of the surface coating, as established by EPA's final rule ''Long-Chain Perfluoroalkyl Carboxylate and Perfluoroalkyl Sulfonate Chemical Substances; Significant New Use Rule'' (85 FR 45109, July 27, 2020) (FRL–10010–44) (Ref. 1). Specifically, the draft compliance guide provides additional clarity on what is meant by a ''surface coating,'' identifies which entities are regulated, describes the activities that are required or prohibited, and summarizes the notification requirements of the final significant new use rule (SNUR).

During the public comment period for the 2020 supplemental proposal (Ref. 2), several commenters asked EPA to define ''surface coating'' and to include a definition in the regulatory text. In the final rule (Ref. 1), EPA did not finalize a regulatory definition of ''surface coating.'' Rather, EPA stated that the Agency would issue guidance for imported articles that may contain LCPFAC chemical substances as part of a surface coating. This draft compliance guide was prepared consistent with Executive Order 13891 (84 FR 55235, October 9, 2019) and EPA's procedural rule for guidance, ''EPA Guidance; Administrative Procedures for Issuance and Public Petitions'' (85 FR 66230, October 19, 2020).

B. Do guidance documents contain binding requirements?

While the requirements in the statutes and Agency regulations are binding on EPA and the regulated entities, the contents of this compliance guide do not have the force and effect of law and are not meant to bind the public in any way. This compliance guide is intended only to provide clarity to the public regarding existing requirements under the law or agency policies. The statements in the compliance guide are intended solely as guidance to aid in complying with the EPA regulations in 40 CFR part 721.

C. Does this action apply to me?

You may be potentially affected by this action if you import articles containing certain LCPFAC chemical substances. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Manufacturers (including importers) of one or more of subject chemical substances (NAICS codes 325 and 324110) (*e.g.,* chemical manufacturing and petroleum refineries).
- Fiber, yarn, and thread mills (NAICS code 31311).
- Carpet and rug mills (NAICS code 314110).
- Home furnishing merchant wholesalers (NAICS code 423220).
- Carpet and upholstery cleaning services (NAICS code 561740).
- Manufacturers of computer and other electronic products, appliances, and components (NAICS codes 324 and 335).
- Manufacturers of surgical and medical instruments (NAICS 339112).
- Merchant wholesalers (NAICS codes 423 and 424).
- Stores and retailers (NAICS codes 442, 442, 444, 448, 451, and 454).
- Providers of other support services (NAICS code 561990).

Other types of entities not listed in this unit could also be affected. The NAICS codes have 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 the technical information contact listed under **FOR FURTHER INFORMATION CONTACT**.

D. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *http://www.epa.gov/dockets/comments.html*.

II. Request for Public Comment

EPA welcomes comments on any aspect of the draft compliance guide. EPA specifically solicits comments to enable it to enhance the clarity of the compliance guide.

III. References

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

1. EPA. Long-Chain Perfluoroalkyl Carboxylate and Perfluoroalkyl Sulfonate Chemical Substances; Significant New Use Rule. Final Rule. **Federal Register**. 85 FR 45109, July 27, 2020 (FRL–10010–44).

2. EPA. Long-Chain Perfluoroalkyl Carboxylate and Perfluoroalkyl Sulfonate Chemical Substances; Significant New Use Rule. Supplemental Proposal. **Federal Register**. 85 FR 12479, March 3, 2020 (FRL–10003–21).

IV. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *http://www2.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review, Executive Order 13563: Improving Regulation and Regulatory Review, and Executive Order 13891: Promoting the Rule of Law Through Improved Agency Guidance Documents

This draft compliance guide was submitted to the Office of Management and Budget (OMB) for review under Executive Orders 12866 (58 FR 51735, October 4, 1993), 13563 (76 FR 3821, January 21, 2011), and 13891 (84 FR 55235, October 9, 2019). Any changes made in response to OMB recommendations have been documented in the docket for this action as required by section 6(a)(3)(E) of Executive Order 12866.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA, 44 U.S.C. 3501 *et seq.* Burden is defined in 5 CFR 1320.3(b). The information collection activities associated with existing chemical SNURs are already approved under OMB control number 2070–0038 (EPA ICR No. 1188); and the information collection activities associated with export notifications are already approved under OMB control number 2070–0030 (EPA ICR No. 0795).

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information that requires OMB approval under the PRA, unless it has been approved by OMB and displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in Title 40 of the CFR, after appearing in the **Federal Register**, are listed in 40 CFR, part 9, and included on the related collection instrument, or form, as applicable.

Authority: 15 U.S.C. 2601 *et seq.*

Dated: December 10, 2020.

Alexandra Dapolito Dunn,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2020–27600 Filed 12–15–20; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0004, FRS 17299]

Information Collection Being Submitted for Review and Approval to Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Pursuant to the Small Business Paperwork Relief Act of 2002, the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.'' The Commission may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written comments and recommendations for the proposed information collection should be submitted on or before January 15, 2021.

ADDRESSES: Comments should be sent to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Your comment must be submitted into *www.reginfo.gov* per the above instructions for it to be considered. In addition to submitting in *www.reginfo.gov* also send a copy of your comment on the proposed information collection to Nicole Ongele, FCC, via email to *PRA@fcc.gov* and to *Nicole.Ongele@fcc.gov.* Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection, contact Nicole Ongele at (202) 418–2991. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the Title of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION: As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the FCC invited the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

OMB Control Number: 3060–0004.

Title: Sections 1.1307 and 1.1311, Guidelines for Evaluating the Environmental Effects of Radiofrequency Exposure.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Individuals or households, Business or other for-profit, Not-for-profit institutions, and State, Local or Tribal government.

Number of Respondents and Responses: 335,441 Respondents; 335,441 Responses.

Estimated Time per Response: 0.0833 hours (5 minutes)–20 hours.

Frequency of Response: On occasion reporting requirement and third-party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory

authority for this Information collection is contained in 47 U.S.C. 154(i), 302, 303, 303(r), and 307.

Total Annual Burden: 41,997 hours.

Total Annual Costs: $2,933,431.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is a minimal exemption from the Freedom of Information Act (FOIA), *5 U.S.C. 552(b)(4),* and *47 CFR 0.459* of the Commission's rules, that is granted for trade secrets and privileged or confidential commercial or financial information, which may be submitted to the Commission as part of the documentation of test results. No other assurances of confidentiality are provided to respondents.

Needs and Uses: The Commission will submit this revised information collection to the Office of Management and Budget (OMB) after this 60-day comment period in order to obtain the full three-year clearance.

This information collection is a result of responsibility placed on the FCC by the National Environmental Policy Act (NEPA) of 1969. NEPA requires that each federal agency evaluate the impact of ''major actions significantly affecting the quality of the human environment.'' It is the FCC's opinion that this is the most efficient and reasonable method of complying with NEPA with regard to the environmental issue of radiofrequency radiation from FCC-regulated transmitters.

The December 2019 RF Exposure Second Report and Order, ET Docket Nos. 03–137 and 13–184, FCC 19–126, included amendments to rule sections 1.1307, 2.1091 and 2.1093 requiring approval by OMB under the Paperwork Reduction Act. Revision to information collection effected by amendments to rule section 1.1307 is reported herein. Revision to information collection effected by amendments to rule sections 2.1091 and 2.1093 is reported separately under OMB Information Collection 3060–0057.

In amendments to rule section 1.1307, the Commission revised its implementing rules to reflect modern technology and today's uses. The Commission streamlined the criteria for determining when an applicant or licensee is exempt from our radio frequency (RF) exposure evaluation criteria by replacing service-based exemptions with a formula-based approach. For those applicants and licensees who do not qualify for an exemption, the Commission provided more flexibility to establish compliance with our RF exposure limits. The Commission also specified methods that RF equipment operators can use to mitigate the risk of excess exposure, both to members of the public and trained workers (such as training, supervision, and signage). The amended rules provide more efficient, practical, and consistent RF exposure evaluation procedures and mitigation measures to help ensure compliance with the existing RF exposure limits.

Most of the changes to rule section 1.1307 represent clarification or simplification of existing requirements and are not expected to significantly increase or decrease the estimated burden to respondents or to the Federal government. To address components of the amended requirements that were not included in previous burden estimates, isolated revisions were made to the burden estimates as summarized in the supporting statement of the Information Collection. To update burden estimates based on most recently available data, the Commission also adjusted the total number of respondents/responses, the total annual hourly burden, and the total annual costs from the previous estimates, based on licensing data for calendar year 2019.

The latest RF exposure Second Report and Order, ET Docket Nos. 03–137 and 13–184, FCC 19–126, amended rule section 1.1307 by revising paragraph (b) to read as follows:

§ 1.1307 Actions that may have a significant environmental effect, for which Environmental Assessments (EA) must be prepared.

* * * * *

(b)(1) *Requirements.* (i) With respect to the limits on human exposure to RF provided in Section 1.1310 of this chapter, applicants to the Commission for the grant or modification of construction permits, licenses or renewals thereof, temporary authorities, equipment authorizations, or any other authorizations for radiofrequency sources must either:

(A) Determine that they qualify for an exemption pursuant to Section 1.1307(b)(3);

(B) Prepare an evaluation of the human exposure to RF radiation pursuant to Section 1.1310 and include in the application a statement confirming compliance with the limits in Section 1.1310; or

(C) Prepare an Environmental Assessment if those RF sources would cause human exposure to levels of RF radiation in excess of the limits in Section 1.1310.

(ii) Compliance with these limits for fixed RF source(s) may be accomplished by use of mitigation actions, as provided in Section 1.1307(b)(4). Upon request by the Commission, the party seeking or holding such authorization must submit technical information showing the basis for such compliance, either by exemption or evaluation. Notwithstanding the preceding requirements, in the event that RF sources cause human exposure to levels of RF radiation in excess of the limits in Section 1.1310 of this chapter, such RF exposure exemptions and evaluations are not deemed sufficient to show that there is no significant effect on the quality of the human environment or that the RF sources are categorically excluded from environmental processing.

(2) *Definitions.* For the purposes of this section, the following definitions shall apply.

Available maximum time-averaged power for an RF source is the maximum available RF power (into a matched load) as averaged over a *time-averaging period*;

Category One is any spatial region that is compliant with the general population exposure limit with *continuous exposure* or *source-based time-averaged exposure*;

Category Two is any spatial region where the general population exposure limit is exceeded but that is compliant with the occupational exposure limit with *continuous exposure*;

Category Three is any spatial region where the occupational exposure limit is exceeded but by no more than ten times the limit;

Category Four is any spatial region where the exposure is more than ten times the occupational exposure limit or where there is a possibility for serious injury on contact.

Continuous exposure refers to the maximum time-averaged exposure at a given location for an *RF source* and assumes that exposure may take place indefinitely. The exposure limits in Section 1.1310 of this chapter are used to establish the spatial regions where mitigation measures are necessary assuming continuous exposure as prescribed in Section 1.1307(b)(4) of this chapter.

Effective Radiated Power (ERP) is the product of the *maximum antenna gain* which is the largest far-field power gain relative to a dipole in any direction for each transverse polarization component, and the *maximum delivered time-averaged power* which is the largest net power delivered or supplied to an antenna as averaged over a *time-averaging period; ERP* is summed over two polarizations when present;

Exemption for (an) *RF source(s)* is solely from the obligation to perform a routine environmental evaluation to demonstrate compliance with the RF

exposure limits in Section 1.1310 of this chapter; it is not exemption from the equipment authorization procedures described in Part 2 of this chapter, not exemption from general obligations of compliance with the RF exposure limits in Section 1.1310 of this chapter, and not exemption from determination of whether there is no significant effect on the quality of the human environment under Section 1.1306 of this chapter.

Fixed RF source is one that is physically secured at one location, even temporarily, and is not able to be easily moved to another location while radiating;

Mobile device is as defined in Section 2.1091(b) of this chapter;

Plane-wave equivalent power density is the square of the root-mean-square (rms) electric field strength divided by the impedance of free space (377 ohms).

Portable device is as defined in Section 2.1093(b) of this chapter;

Positive access control is mitigation by proactive preclusion of unauthorized access to the region surrounding an RF source where the continuous exposure limit for the general population is exceeded. Examples of such controls include locked doors, ladder cages, or effective fences, as well as enforced prohibition of public access to external surfaces of buildings. However, it does not include natural barriers or other access restrictions that did not require any action on the part of the licensee or property management.

Radiating structure is an unshielded RF current-carrying conductor that generates an RF reactive near electric or magnetic field and/or radiates an RF electromagnetic wave. It is the component of an *RF source* that transmits, generates, or reradiates an RF fields, such as an antenna, aperture, coil, or plate.

RF source is Commission-regulated equipment that transmits or generates RF fields or waves, whether intentionally or unintentionally, via one or more *radiating structure*(*s*). Multiple *RF sources* may exist in a single *device.*

Separation distance (variable R in Table 1) is the minimum distance in any direction from any part of a *radiating structure* and any part of the body of a nearby person;

Source-based time averaging is an average of instantaneous exposure over a *time-averaging period* that is based on an inherent property or duty-cycle of a device to ensure compliance with the *continuous exposure* limits;

Time-averaging period is a time period not to exceed 30 minutes for fixed RF sources or a time period inherent from device transmission characteristics not to exceed 30 minutes for mobile and portable RF sources;

Transient individual is an untrained person in a location where occupational/controlled limits apply, and he or she must be made aware of the potential for exposure and be supervised by trained personnel pursuant to Section 1.1307(b)(4) of this chapter where use of time averaging is required to ensure compliance with the general population exposure limits in Section 1.1310 of this chapter.

(3) Determination of exemption.

(i) For single RF sources (*i.e.,* any single fixed RF source, mobile device, or portable device, as defined in paragraph (b)(2) of this section): A single RF source is exempt if:

(A) The available maximum time-averaged power is no more than 1 mW, regardless of separation distance. This exemption may not be used in conjunction with other exemption criteria other than those in paragraph (b)(3)(ii)(A) of this section. Medical implant devices may only use this exemption and that in paragraph (b)(3)(ii)(A);

(B) Tr the available maximum time-averaged power or effective radiated power (ERP), whichever is greater, is less than or equal to the threshold P_{th} (mW) described in the following formula. This method shall only be used at separation distances (cm) from 0.5 centimeters to 40 centimeters and at frequencies from 0.3 GHz to 6 GHz (inclusive). P_{th} is given by:

$$P_{th}\ (\text{mW}) = \begin{cases} ERP_{20\ cm}(d/20\ \text{cm})^{x} & d \le 20\ \text{cm} \\ ERP_{20\ cm} & 20\ \text{cm} < d \le 40\ \text{cm} \end{cases}$$

Where

$$x = -\log_{10}\left(\frac{60}{ERP_{20\ cm}\sqrt{f}}\right) \text{ and f is in GHz;}$$

and

$$ERP_{20\ cm}\ (\text{mW}) = \begin{cases} 2040f & 0.3\ \text{GHz} \le f < 1.5\ \text{GHz} \\ 3060 & 1.5\ \text{GHz} \le f \le 6\ \text{GHz} \end{cases}$$

d = the separation distance (cm);

(C) Or using Table 1 and the minimum separation distance (R in meters) from the body of a nearby person for the frequency (f in MHz) at which the source operates, the ERP (watts) is no more than the calculated value prescribed for that frequency. For the exemption in Table 1 to apply, R must be at least $\lambda/2\pi$, where λ is the free-space operating wavelength in meters. If the ERP of a single RF source is not easily obtained, then the available maximum time-averaged power may be used in lieu of ERP if the physical dimensions of the radiating structure(s) do not exceed the electrical length of $\lambda/4$ or if the antenna gain is less than that of a half-wave dipole (1.64 linear value).

TABLE 1 TO § 1.1307(b)(3)(i)(C)—SINGLE RF SOURCES SUBJECT TO ROUTINE ENVIRONMENTAL EVALUATION

RF source frequency (MHz)	Threshold ERP (watts)
0.3–1.34	1,920 R^2.
1.34–30	3,450 R^2/f^2.
30–300	3.83 R^2.

TABLE 1 TO § 1.1307(b)(3)(i)(C)—SINGLE RF SOURCES SUBJECT TO ROUTINE ENVIRONMENTAL EVALUATION—Continued

RF source frequency (MHz)	Threshold ERP (watts)
300–1,500	0.0128 R^2f.
1,500–100,000	19.2R^2.

(ii) For multiple RF sources. Multiple RF sources are exempt if:

(A) The available maximum time-averaged power of each source is no more than 1 mW and there is a separation distance of two centimeters between any portion of a radiating structure operating and the nearest portion of any other radiating structure in the same device, except if the sum of multiple sources is less than 1 mW during the time-averaging period, in which case they may be treated as a single source (separation is not required). This exemption may not be used in conjunction with other exemption criteria other than those is paragraph 1.1307(b)(3)(i)(A) of this section. Medical implant devices may only use this exemption and that in paragraph 1.1307(b)(3)(i)(A).

(B) In the case of fixed RF sources operating in the same time-averaging period, or of multiple mobile or portable RF sources within a device operating in the same time averaging period, if the sum of the fractional contributions to the applicable thresholds is less than or equal to 1 as indicated in the following equation.

$$\sum_{i=1}^{a} \frac{P_i}{P_{th,i}} + \sum_{j=1}^{b} \frac{ERP_j}{ERP_{th,j}} + \sum_{k=1}^{c} \frac{Evaluated_k}{Exposure\ Limit_k} \leq 1$$

Where

a = number of fixed, mobile, or portable RF sources claiming exemption using paragraph (b)(3)(i)(B) of this section for P_{th}, including existing exempt transmitters and those being added.

b = number of fixed, mobile, or portable RF sources claiming exemption using paragraph (b)(3)(i)(C) of this section for Threshold ERP, including existing exempt transmitters and those being added.

c = number of existing fixed, mobile, or portable RF sources with known evaluation for the specified minimum distance including existing evaluated transmitters.

P_i = the available maximum time-averaged power or the ERP, whichever is greater, for fixed, mobile, or portable RF source i at a distance between 0.5 cm and 40 cm (inclusive).

$P_{th,i}$ = the exemption threshold power (P_{th}) according to paragraph (b)(3)(i)(B) of this section for fixed, mobile, or portable RF source i.

ERP_j = the ERP of fixed, mobile, or portable RF source j.

$ERP_{th,j}$ = exemption threshold ERP for fixed, mobile, or portable RF source j, at a distance of at least $\lambda/2\pi$ according to the applicable formula of paragraph (b)(3)(i)(C) of this section.

$Evaluated_k$ = the maximum reported SAR or MPE of fixed, mobile, or portable RF source k either in the device or at the transmitter site from an existing evaluation at the location of exposure.

$Exposure\ Limit_k$ = either the general population/uncontrolled maximum permissible exposure (MPE) or specific absorption rate (SAR) limit for each fixed, mobile, or portable RF source k, as applicable from Section 1.1310 of this chapter.

(4) Mitigation. (i) As provided in paragraphs (b)(4)(ii) through (vi) of this section, specific mitigation actions are required for fixed RF sources to the extent necessary to ensure compliance with our exposure limits, including the implementation of an RF safety plan, restriction of access to those RF sources, and disclosure of spatial regions where exposure limits are exceeded.

(ii) Category One—INFORMATION: No mitigation actions are required when the RF source does not cause continuous or source-based time-averaged exposure in excess of the general population limit in Section 1.1310 of this part. Optionally a green ''INFORMATION'' sign may offer information to those persons who might be approaching RF sources. This optional sign, when used, must include at least the following information: Appropriate signal word ''INFORMATION'' and associated color (green), an explanation of the safety precautions to be observed when closer to the antenna than the information sign, a reminder to obey all postings and boundaries (if higher categories are nearby), up-to-date licensee (or operator) contact information (if higher categories are nearby), and a place to get additional information (such as a website, if no higher categories are nearby).

(iii) Category Two—NOTICE: Mitigation actions are required in the form of signs and positive access control surrounding the boundary where the continuous exposure limit is exceeded for the general population, with the appropriate signal word ''NOTICE'' and associated color (blue) on the signs. Signs must contain the components discussed in paragraph (b)(4)(vi) of this section. Under certain controlled conditions, such as on a rooftop with limited access, a sign attached directly to the surface of an antenna will be considered sufficient if the sign specifies a minimum approach distance and is readable at this separation distance and at locations required for compliance with the general population exposure limit in Section 1.1310 of this part. Appropriate training is required for any occupational personnel with access to controlled areas within restrictive barriers where the general population exposure limit is exceeded, and transient individuals must be supervised by trained occupational personnel upon entering any of these areas. Use of time averaging is required for transient individuals to ensure compliance with the general population exposure limit.

(iv) Category Three—CAUTION: Signs (with the appropriate signal word ''CAUTION'' and associated color (yellow) on the signs), controls, or indicators (*e.g.,* chains, railings, contrasting paint, diagrams) are required (in addition to the positive access control established for Category Two) surrounding the area in which the exposure limit for occupational personnel in a controlled environment is exceeded by no more than a factor of ten. Signs must contain the components discussed in paragraph (b)(4)(vi) of this section. If the boundaries between Category Two and Three are such that placement of both Category Two and Three signs would be in the same location, then the Category Two sign is optional. Under certain controlled conditions, such as on a rooftop with limited access, a sign may be attached directly to the surface of an antenna within a controlled environment if it specifies the minimum approach distance and is readable at this distance and at locations required for compliance

with the occupational exposure limit in Section 1.1310 of this part. If signs are not used at the occupational exposure limit boundary, controls or indicators (*e.g.,* chains, railings, contrasting paint, diagrams, *etc.*) must designate the boundary where the occupational exposure limit is exceeded. Additionally, appropriate training is required for any occupational personnel with access to the controlled area where the general population exposure limit is exceeded, and transient individuals must be supervised by trained personnel upon entering any of these areas. Use of time averaging is required for transient individuals to ensure compliance with the general population exposure limit. Further mitigation by reducing exposure time in accord with six-minute time averaging is required for occupational personnel in the area in which the occupational exposure limit is exceeded. However, proper use of RF personal protective equipment may be considered sufficient in lieu of time averaging for occupational personnel in the areas in which the occupational exposure limit is exceeded. If such procedures or power reduction, and therefore Category reduction, are not feasible, then lockout/tagout procedures in 29 CFR Section 1910.147 must be followed.

(v) Category Four—WARNING/DANGER: Where the occupational limit could be exceeded by a factor of more than ten, ''WARNING'' signs with the associated color (orange), controls, or indicators (*e.g.,* chains, railings, contrasting paint, diagrams) are required (in addition to the positive access control established for Category Two) surrounding the area in which the occupational exposure limit in a controlled environment is exceeded by more than a factor of ten Signs must contain the components discussed in paragraph (b)(4)(vi) of this section. ''DANGER'' signs with the associated color (red) are required where immediate and serious injury will occur on contact, in addition to positive access control, regardless of mitigation actions taken in Categories Two or Three. If the boundaries between Category Three and Four are such that placement of both Category Three and Four signs would be in the same location, then the Category Three sign is optional. No access is permitted without Category reduction. If power reduction, and therefore Category reduction, is not feasible, then lockout/tagout procedures in 29 CFR Section 1910.147 must be followed.

(vi) RF exposure advisory signs must be viewable and readable from the boundary where the applicable exposure limits are exceeded, pursuant to 29 CFR Section 1910.145, and include at least the following five components:

(A) Appropriate signal word, associated color {*i.e.,* ''DANGER'' (red), ''WARNING'' (orange), ''CAUTION,'' (yellow) ''NOTICE'' (blue)};

(B) RF energy advisory symbol;

(C) An explanation of the RF source;

(D) Behavior necessary to comply with the exposure limits; and

(E) Up-to-date contact information.

(5) *Responsibility for compliance.* (i) In general, when the exposure limits specified in Section 1.1310 of this part are exceeded in an accessible area due to the emissions from multiple fixed RF sources, actions necessary to bring the area into compliance or preparation of an Environmental Assessment (EA) as specified in Section 1.1311 of this part are the shared responsibility of all licensees whose RF sources produce, at the area in question, levels that exceed 5% of the applicable exposure limit proportional to power. However, a licensee demonstrating that its facility was not the most recently modified or newly-constructed facility at the site establishes a rebuttable presumption that such licensee should not be liable in an enforcement proceeding relating to the period of non-compliance. Field strengths must be squared to be proportional to SAR or power density. Specifically, these compliance requirements apply if the square of the electric or magnetic field strength exposure level applicable to a particular RF source exceeds 5% of the square of the electric or magnetic field strength limit at the area in question where the levels due to multiple fixed RF sources exceed the exposure limit. Site owners and managers are expected to allow applicants and licensees to take reasonable steps to comply with the requirements contained in paragraph 1.1307(b)(1) of this section and, where feasible, should encourage co-location of RF sources and common solutions for controlling access to areas where the RF exposure limits contained in Section 1.1310 of this part might be exceeded. Applicants and licensees are required to share technical information necessary to ensure joint compliance with the exposure limits, including informing other licensees at a site in question of evaluations indicating possible non-compliance with the exposure limits.

(ii) Applicants for proposed RF sources that would cause non-compliance with the limits specified in Section 1.1310 at an accessible area previously in compliance must submit an EA if emissions from the applicant's RF source would produce, at the area in question, levels that exceed 5% of the applicable exposure limit. Field strengths must be squared if necessary to be proportional to SAR or power density.

(iii) Renewal applicants whose RF sources would cause non-compliance with the limits specified in Section 1.1310 at an accessible area previously in compliance must submit an EA if emissions from the applicant's RF source would produce, at the area in question, levels that exceed 5% of the applicable exposure limit. Field strengths must be squared if necessary to be proportional to SAR or power density.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2020–27641 Filed 12–15–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0910; FRS 17300]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control

number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before February 16, 2021. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *Nicole.Ongele@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele at (202) 418–2991.

SUPPLEMENTARY INFORMATION: *OMB Control Number:* 3060–0910.

Title: Third Report and Order in CC Docket No. 94–102 to Ensure Compatibility with Enhanced 911 Emergency Calling Systems.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents and Responses: 967 respondents; 967 responses.

Estimated Time per Response: 1 hour.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Mandatory. Statutory authority for this collection of information is contained in 47 U.S.C. 1, 4(i), 201, 303, 309 and 332 of the Communications Act of 1934, as amended.

Total Annual Burden: 967 hours.

Total Annual Cost: No Cost.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: The information submitted to the Commission will provide public service answering points (PSAPs), providers of location technology, investors, manufacturers, local exchange carriers, and the Commission with valuable information necessary for full Phase II E911 service implementation. These reports will provide helpful, if not essential information for coordinating carrier plans with those of manufacturers and PSAPs. The reports will also assist the Commission's efforts to monitor Phase II developments and to take action, if necessary, to maintain the Phase II implementation schedule.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2020–27651 Filed 12–15–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1147; FRS 17298]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before February 16, 2021. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *Nicole.Ongele@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele, (202) 418–2991.

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–1147.

Title: Wireless E911 Location Accuracy Requirements (Third Report and Order in PS Docket No. 07–114).

Form Nos.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit, State, Local or Tribal government, and Federal Government.

Number of Respondents and Responses: 4,477 respondents; 4,793 responses.

Estimated Time per Response: 1 hour–8 hours.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this collection is contained in 47 U.S.C. Sections 151, 154(i), 301, 303(r), and 332 of the Communications Act, as amended.

Total Annual Burden: 32,492 hours.

Total Annual Cost: No cost.

Privacy Act Impact Assessment: No Impact(s).

Nature and Extent of Confidentiality: No confidentiality is required for this collection.

Needs and Uses: The Commission is seeking Office of Management and Budget (OMB) approval for an extension of this information collection and will submit this information collection after this 60-day comment period.

The Commission's *Third Report and Order* in PS Docket No. 07–114 adopted a rule providing that new CMRS network providers meeting the definition of covered CMRS providers in Section 9.10 and deploying new stand-alone networks must meet the handset-based location accuracy standard in delivering emergency calls for Enhanced 911 service. The rule requires that new stand-alone CMRS providers must satisfy the handset-based location accuracy standard at either a county-based or Public Safety Answering Point (PSAP)-based geographic level. Additionally, in accordance with the pre-existing requirements for CMRS providers using handset-based location technologies, new stand-alone CMRS providers are permitted to exclude up to 15 percent of the counties or PSAP areas they serve due to heavy forestation that limits handset-based technology accuracy in those counties or areas but are required to file a an initial list of the specific counties or portions of counties where they are utilizing their respective exclusions.

A. *Updated Exclusion Reports.* Under this information collection and pursuant to current rule section 9.10(h) new stand-alone CMRS providers and existing CMRS providers that have filed initial exclusion reports are required to file reports informing the Commission of any changes to their exclusion lists within thirty days of discovering such changes. The permitted exclusions properly but narrowly account for the known technical limitations of either the handset-based or network-based location accuracy technologies chosen by a CMRS provider, while ensuring that the public safety community and the public at large are sufficiently informed of these limitations.

B. *Confidence and Uncertainty Data.* Under this information collection and pursuant to current rule section 9.10(h), all CMRS providers and other entities responsible for transporting confidence and uncertainty data between the wireless carriers and PSAPs, including LECs, CLECs, owners of E911 networks, and emergency service providers (collectively, System Service Providers (SSPs)) must continue to provide confidence and uncertainty data of wireless 911 calls to Public Safety Answering Points (PSAP) on a per call basis upon a PSAP's request. New stand-alone wireless carriers also incur this obligation. The transport of the confidence and uncertainty data is needed to ensure the delivery of accurate location information with E911 service.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2020–27640 Filed 12–15–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreement under the Shipping Act of 1984. Interested parties may submit comments, relevant information, or documents regarding the agreements to the Secretary by email at *Secretary@fmc.gov,* or by mail, Federal Maritime Commission, Washington, DC 20573. Comments will be most helpful to the Commission if received within 12 days of the date this notice appears in the **Federal Register**. Copies of agreements are available through the Commission's website (*www.fmc.gov*) or by contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 201344–001.

Agreement Name: The Global Shipping Business Network Agreement.

Parties: CMA CGM S.A.; COSCO SHIPPING Lines Co., Ltd.; Hapag-Lloyd AG; and Orient Overseas Container Line Limited.

Filing Party: Eric Jeffrey; Nixon Peabody.

Synopsis: The Amendment deletes CMA CGM S.A. as a party to the Agreement.

Proposed Effective Date: 12/10/2020.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/29502.

Dated: December 11, 2020.

Rachel E. Dickon,

Secretary.

[FR Doc. 2020–27669 Filed 12–15–20; 8:45 am]

BILLING CODE 6730–02–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Savings and Loan Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Home Owners' Loan Act (12 U.S.C. 1461 *et seq.*) (HOLA), Regulation LL (12 CFR part 238), and Regulation MM (12 CFR part 239), and all other applicable statutes and regulations to become a savings and loan holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a savings association.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on whether the proposed transaction complies with the standards enumerated in the HOLA (12 U.S.C. 1467a(e)).

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than January 15, 2021.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *The Martha E. Records 2020 Family Trust, Oklahoma City, Oklahoma;* to become a savings and loan holding company by acquiring voting shares of Midland Financial Co., and thereby indirectly acquire voting shares of MidFirst Bank, both of Oklahoma City, Oklahoma.

2. *The Kathryn R. Ryan 2020 Family Trust, Oklahoma City, Oklahoma;* to become a savings and loan holding company by acquiring voting shares of Midland Financial Co., and thereby indirectly acquire voting shares of MidFirst Bank, both of Oklahoma City, Oklahoma.

Board of Governors of the Federal Reserve System, December 11, 2020.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2020–27684 Filed 12–15–20; 8:45 am]

BILLING CODE 6210–01–P

GULF COAST ECOSYSTEM RESTORATION COUNCIL

[Docket No: 112102020–1111–01]

Senior Executive Service Performance Review Board Membership

AGENCY: Gulf Coast Ecosystem Restoration Council (GCERC).

ACTION: Notice of Performance Review Board (PRB) appointments.

SUMMARY: This notice announces the members of the Senior Executive Service (SES) Performance Review Board. The PRB is comprised of a Chairperson and a mix of state representatives and career senior executives that meet annually to review and evaluate performance appraisal documents and provide a written recommendation to the Chairperson of the Council for final approval of each executive's performance rating, performance-based pay adjustment, and performance award.

DATES: The board membership is applicable beginning on 12/01/2020 and ending on 12/31/21.

FOR FURTHER INFORMATION CONTACT: Mary C. Pleffner, Chief Financial Officer and Director of Assistance, Gulf Coast Ecosystem Restoration Council, telephone 813–394–2185.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 4314(c)(4), the persons named below have been selected to serve on the PRB:

Department of Interior

Blanchard, Mary Josie, Deputy Director, Environmental Protection

Compliance, MaryJosie_*Blanchard@ios.doi.gov*, 202–208–3406.

State of Alabama

Blankenship, Christopher, Commissioner of Conservation and Natural Resources, *Chris.blankenship@dcnr.alabama.gov*, 334–242–3486.

Environmental Protection Agency

Wyatt, Marc, Director, Gulf of Mexico Division, *Wyatt.marc@epa.gov*, 228–679–5915.

State of Texas

Baker, Toby, Texas Commission of Environmental Quality, *Toby.Baker@tceq.texas.gov*, 512–239–5515.

Keala Hughes,

Director of External Affairs & Tribal Relations, Gulf Coast Ecosystem Restoration Council.

[FR Doc. 2020–27617 Filed 12–15–20; 8:45 am]

BILLING CODE 6560–58–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Supplemental Evidence and Data Request on Maternal and Childhood Outcomes Associated With the Special Supplemental Nutrition Program for Women, Infants and Children (WIC)

AGENCY: Agency for Healthcare Research and Quality (AHRQ), HHS.

ACTION: Request for supplemental evidence and data submissions.

SUMMARY: The Agency for Healthcare Research and Quality (AHRQ) is seeking scientific information submissions from the public. Scientific information is being solicited to inform our review on *Maternal and Childhood Outcomes Associated with the Special Supplemental Nutrition Program for Women, Infants and Children (WIC),* which is currently being conducted by the AHRQ's Evidence-based Practice Centers (EPC) Program. Access to published and unpublished pertinent scientific information will improve the quality of this review.

DATES: *Submission Deadline* on or before January 15, 2021.

ADDRESSES: *Email submissions: epc@ahrq.hhs.gov.*

Print submissions:

Mailing Address: Center for Evidence and Practice Improvement, Agency for Healthcare Research and Quality, ATTN: EPC SEADs Coordinator, 5600 Fishers Lane, Mail Stop 06E53A, Rockville, MD 20857.

Shipping Address (FedEx, UPS, etc.): Center for Evidence and Practice Improvement, Agency for Healthcare Research and Quality, ATTN: EPC SEADs Coordinator, 5600 Fishers Lane, Mail Stop 06E77D, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Jenae Benns, Telephone: 301–427–1496 or Email: *epc@ahrq.hhs.gov.*

SUPPLEMENTARY INFORMATION: The Agency for Healthcare Research and Quality has commissioned the Evidence-based Practice Centers (EPC) Program to complete a review of the evidence for *Maternal and Childhood Outcomes Associated with the Special Supplemental Nutrition Program for Women, Infants and Children (WIC).* AHRQ is conducting this systematic review pursuant to Section 902 of the Public Health Service Act, 42 U.S.C. 299a.

The EPC Program is dedicated to identifying as many studies as possible that are relevant to the questions for each of its reviews. In order to do so, we are supplementing the usual manual and electronic database searches of the literature by requesting information from the public (*e.g.,* details of studies conducted). We are looking for studies that report on *Maternal and Childhood Outcomes Associated with the Special Supplemental Nutrition Program for Women, Infants and Children (WIC),* including those that describe adverse events. The entire research protocol is available online at: *https://effectivehealthcare.ahrq.gov/products/outcomes-nutrition/protocol.*

This is to notify the public that the EPC Program would find the following information on *Maternal and Childhood Outcomes Associated with the Special Supplemental Nutrition Program for Women, Infants and Children (WIC)* helpful:

- A list of completed studies that your organization has sponsored for this indication. In the list, please *indicate whether results are available on ClinicalTrials.gov along with the ClinicalTrials.gov trial number.*
- *For completed studies that do not have results on ClinicalTrials.gov,* a summary, including the following elements: Study number, study period, design, methodology, indication and diagnosis, proper use instructions, inclusion and exclusion criteria, primary and secondary outcomes, baseline characteristics, number of patients screened/eligible/enrolled/lost to follow-up/withdrawn/analyzed, effectiveness/efficacy, and safety results.
- *A list of ongoing studies that your organization has sponsored for this indication.* In the list, please provide the *ClinicalTrials.gov* trial number or, if the trial is not registered, the protocol for the study including a study number, the study period, design, methodology, indication and diagnosis, proper use instructions, inclusion and exclusion criteria, and primary and secondary outcomes.
- Description of whether the above studies constitute *ALL Phase II and above clinical trials* sponsored by your organization for this indication and an index outlining the relevant information in each submitted file.

Your contribution is very beneficial to the Program. Materials submitted must be publicly available or able to be made public. Materials that are considered confidential; marketing materials; study types not included in the review; or information on indications not included in the review cannot be used by the EPC Program. This is a voluntary request for information, and all costs for complying with this request must be borne by the submitter.

The draft of this review will be posted on AHRQ's EPC Program website and available for public comment for a period of 4 weeks. If you would like to be notified when the draft is posted, please sign up for the email list at: *https://www.effectivehealthcare.ahrq.gov/email-updates.*

The systematic review will answer the following questions. This information is provided as background. AHRQ is not requesting that the public provide answers to these questions.

Key Questions (KQs)

KQ 1: Among women who are eligible to participate in WIC, how is WIC participation during pregnancy associated with maternal and infant birth outcomes?

a. Does the association vary by gestational age at WIC enrollment or duration of mother's WIC participation?

b. Does the association vary by participant factors such as:

i. Age of the mother at delivery
ii. Race/ethnicity of mother
iii. Geographic location (*e.g.* region, urban vs. rural)
iv. Education of the mother
v. Employment status of the mother
vi. Marital status
vii. Housing (*e.g.* public), homelessness

KQ 2: Among infants and children eligible to participate in WIC, how is WIC participation associated with dietary and health outcomes in childhood?

a. Does the association vary by age or duration of WIC participation?

b. Does the association vary by participant factors such as:
i. Age of the mother at delivery
ii. Race/ethnicity of child
iii. Geographic location (*e.g.* region, urban vs. rural)
iv. Education of the mother
v. Employment status of the mother
vi. Marital status of the mother
vii. Housing (*e.g.* public, private), homelessness

PICOTS (Populations, Interventions, Comparators, Outcomes, Timing, Settings)

PICOTS elements	KQ 1	KQ 2
Population	Women who participated in WIC during pregnancy and their infants at birth up to 28 days. Participant factors include; age of mother at delivery, race/ethnicity of mother, geographic location, education of mother, employment status of mother, marital status of mother, housing, parity, and maternal nutritional status at enrollment.	Infants/children who participated in WIC (age from 29 days up to age 5). Participant factors include; age of mother at delivery, race/ethnicity of child (or mother), geographic location, education of mother, employment status of mother, marital status of mother, housing, parity of mother, and maternal and/or child nutritional status at enrollment.
Intervention	Participation in WIC with service provisions from 2009 onwards (year and location), defined at a minimum as enrolling in WIC for one month or more.	Participation in WIC with service provisions from 2009 onwards (year and location), defined at a minimum as enrolling in WIC for one month or more.
Comparison	Women who were eligible for WIC, but did not participate during pregnancy, and their infants at birth up to 28 days; duration of WIC participation.	Infants/children who were eligible for WIC, but did not participate at the age studied (ages from 29 days up to 5 years); duration of WIC participation.
Outcomes *	Dietary practices of infants and mothers, diet quality, household food security, food purchasing. *Anthropometric status:* Weight status (*e.g.* BMI, underweight, obesity). *Maternal: E.g.* anemia, weight gain, health care utilization (prenatal, postpartum), mode of delivery, intra- and post-partum complications, morbidity and mortality. *Infant birth outcomes: E.g.* gestational age, birth weight, small/large for gestational age, birth complications such as preterm delivery, hospitalization.	Dietary practices of infants and children, diet quality, household and child food security, food purchasing. *Anthropometric status: E.g.* weight-for-age, length- or height-for-age, weight-for-length, or weight-for-height percentile or Z-score, BMI-for-age percentile or Z-score, underweight, and obesity), growth velocity. *Infant and child outcomes:* Anemia, iron deficiency anemia, iron deficiency, primary health care utilization, immunization status, morbidity and mortality. Child development/school performance (*e.g.,* cognitive development, behavioral development, educational performance, school-related factors (*e.g.* attendance, behavior)).
Timing **	Studies published 2009 onwards	Studies published 2009 onwards.
Setting	Any jurisdiction served by a WIC State or Local Agency	Any jurisdiction served by a WIC State or Local Agency.
Study Design	Intervention trials (randomized and non-randomized), observational studies, quasi-experimental, before-after, interrupted time series.	Intervention trials (randomized and non-randomized), observational studies, quasi-experimental, before-after, interrupted time series.

* Please see appendix A for the detailed list of outcomes.
** Only for specific key outcomes (maternal mortality, infant mortality, child development/school performance) will studies prior to 2009 be included.

Appendix A: Detailed List of Outcomes by Key Question

Key Question 1: Among women who are eligible to participate in WIC, how is WIC participation during pregnancy associated with *maternal and infant birth outcomes*?

Outcomes	Measures
Maternal health outcomes [health risk] in: ➢ Pregnancy. ➢ Postpartum.	
Anemia, Iron deficiency, Iron-deficiency anemia, Nutritional anemias.	
Gestational weight gain	Total gestational weight gain; IOM rec by BMI: under, within, over.
Weight status (*e.g.,* BMI, underweight, overweight, obesity).	Pregnancy, Postpartum obesity, Postpartum weight retention.
Health care utilization	Utilization of recommended prenatal care, postpartum care and other health maintenance recommendations Inter-pregnancy interval.
Morbidity	GDM, Pre-eclampsia, Gestational hypertension, Mental Health (symptoms), Smoking, alcohol, risk behaviors.
Mode of delivery	Cesarean/Vaginal.
Intra- and post-partum complications	Prolonged labor, PROM, Postpartum hemorrhage, transfusion.
Mortality	Fetal death (stillbirth), pregnancy-related death (while pregnant or within a year of the pregnancy ending).
Dietary outcomes	Breastfeeding (intention, initiation, and duration of any breastfeeding), Dietary intake (nutrient intake); diet quality measures (HEI, AHEI, DASH/Medical); glycemic load; servings of food groups, variety, adequacy and moderation components, SSB, sodium/salt, EFA); nutrient density (% fat, and by type; %CHO).
Diet intake, practices and quality (infant and mother) (Diet quality measure, Dietary intake (method), Diet quality score).	
Food purchasing behavior at the participant level	Benefit redemption, purchasing surveys.
Household food security	*E.g.,* 18-item USDA Household Food Security Scale.

Outcomes	Measures
Infant birth outcomes:	
Gestational age	Preterm, late preterm, early term, term and late term.
Birth weight	Very low birth weight, Low birth weight, Normal birth weight, High birth weight.
Small for gestational age.	
Large for gestational age.	
Birth complications	Preterm delivery, hospitalization, NICU stay, congenital malformations, neonatal (live birth and death within 28 days) or infant (within first year of life after live birth) death.

BMI = Body mass index; GDM = Gestational diabetes mellitus; PIH = pregnancy-induced hypertension; PROM = Prelabor rupture of the membranes; USDA = United States Department of Agriculture; AHEI = Alternative Healthy Eating Index; DASH = Dietary, Approaches to Stop Hypertension; HEI = Healthy Eating Index; SSB = sugar-sweetened beverage; EFA = Essential Fatty Acids; CHO = Carbohydrates; NICU= Neonatal Intensive Care Unit; WIC = Special Supplemental Nutrition Program for Women, Infants and Children.

Key Question 2: Among *infants and children eligible* to participate in WIC, how is WIC participation associated with dietary and health outcomes in childhood (to age 17 years)?

Outcomes	Measures
Health outcomes:	
Anemia, Iron deficiency anemia, nutritional anemias, iron deficiency.	
Child growth, anthropometric status	Weight-for-age, length- or height-for-age, weight-for-length, or weight-for-height percentile or Z-score, BMI-for-age percentile or Z-score, underweight, overweight, obese; growth velocity (change in size/status or z-score over time).
Healthcare Utilization	Well child visits, Immunization status.
Morbidity	Otitis media, allergies, gastrointestinal respiratory infections, asthma, immunization status,
	Pre-diabetes, Diabetes mellitus, elevated blood pressure/hypertension, hyperlipidemia.
Mortality	Infant mortality.
	Child mortality.
Dietary outcomes:	
Dietary practices of infants and children	*Infants:* Maternal intention to breastfeed; Ever breastfed or any breastfeeding; Exclusive breastfeeding (initiation and duration); Duration of any breastfeeding; introduction of formula (timing); timing of solids introduction (<4 months, <6 months); cereal in the bottle; timing of cow's milk introduction (<12 months); food group servings; nutrient intakes.
	Children (1–2): Food group servings, groups for variety, adequacy and moderation; added sugars, SSB, type of milk; fruit juice; dietary diversity; nutrient intakes, nutrient density measures (iron, zinc, calcium, %fat (total and by type)) energy density.
Diet quality	*Children 2–5:* [HEI, AHEI, food group servings (adequacy and moderation, added sugars, SSB), type of milk; fruit juice].
	Nutrient intakes and nutrient density measures (iron, zinc, calcium, %fat (total and by type)) energy density.
Food purchasing behavior at the participant level	Benefit redemption, purchasing surveys.
Household and child food security	18-item USDA Household Food Security Scale.
Child development/school performance:	
Academic development	Pre-school or Head Start (*e.g.,* attendance, behavior).
	K–12 educational performance, school-related factors (*e.g.* attendance, behavior).
	ADHD, conduct disorders, mental health.
Child development (behavioral development, cognitive development; cognitive performance).	BSID II/III; WPPSI, WISC, other standardized measures or specific constructs.

ADHD = Attention deficit hyperactivity disorder; AHEI = Alternative Healthy Eating Index; HEI = Healthy Eating Index; SSB = sugar-sweetened beverage; WISC = Wechsler Intelligence Scale for Children; BSID = Bayley Scales of Infant Development; WPPSI = Wechsler Preschool and Primary Scale of Intelligence.

Dated: December 10, 2020.

Marquita Cullom,

Associate Director.

[FR Doc. 2020–27645 Filed 12–15–20; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Notice of Opportunity To Comment on Strategies To Improve Patient Safety: Draft Report to Congress for Public Comment and Review by the National Academy of Medicine

AGENCY: Agency for Healthcare Research and Quality (AHRQ), Department of Health and Human Services (HHS).

ACTION: Notice of opportunity to comment.

SUMMARY: As required by the Patient Safety and Quality Improvement Act of 2005 (Patient Safety Act), the Secretary of HHS (the Secretary) is making this draft report on effective strategies for reducing medical errors and increasing patient safety available to the public for review and comment. The draft report includes measures determined appropriate by the Secretary to encourage the appropriate use of such strategies.

DATES: Send comments on or before February 16, 2021.

ADDRESSES: The draft report, Strategies to Improve Patient Safety: Draft Report to Congress for Public Comment and Review by the National Academy of Medicine, can be accessed electronically at the following HHS website: *https://pso.ahrq.gov/legislation/act.* Comments on the draft report must be submitted by email to *PSQIA.RC@ahrq.hhs.gov*.

FOR FURTHER INFORMATION CONTACT: Paula DiStabile, Patient Safety Organization Division, Center for Quality Improvement and Patient Safety, AHRQ, 5600 Fishers Lane, Mailstop 06N100B, Rockville, MD 20857; telephone (toll free): (866) 403–3697; telephone (local): (301) 427–1111; TTY (toll free): (866) 438–7231; TTY (local): (301) 427–1130; email: *PSQIA.RC@ahrq.hhs.gov*.

SUPPLEMENTARY INFORMATION:

Background

The Secretary, in consultation with the Director of AHRQ, has prepared a draft report on effective strategies for reducing medical errors and increasing patient safety as required by the Patient Safety Act. The report includes measures determined appropriate by the Secretary to encourage the appropriate use of such strategies, including use in any federally funded programs. The draft report is now available for public comment and will be (or has been) submitted to the National Academy of Medicine for review. The final report is required to be submitted to Congress no later than December 21, 2021. The specific provision describing these requirements can be found at 42 U.S.C. 299b–22(j).

The Patient Safety Act created a framework for the development of a voluntary patient safety event reporting system to advance patient safety and quality of care across the Nation. Without limiting patients' rights to their medical information, the law created Federal legal privilege and confidentiality protections for patient safety work product; that is, information exchanged between healthcare providers and organizations listed by the Secretary that specialize in patient safety and quality improvement, called patient safety organizations (PSOs). The law charged PSOs with analyzing and using this information to provide feedback and assistance to help providers minimize patient risk and improve the safety and quality of their care. More information about the Patient Safety Act, its implementing regulation, and PSOs can be found at *https://pso.ahrq.gov/*.

In addition to creating a protected legal environment where healthcare providers can share information and learning for improvement purposes beyond organizational and State boundaries, Congress also envisioned and created the potential for aggregating and analyzing patient safety data on a national scale. This part of the Patient Safety Act, the network of patient safety databases (NPSD), is a mechanism that can leverage data contributed by individual healthcare providers and PSOs across the United States into a valuable national resource for improving patient safety. Congress required the draft report that is the subject of this Notice to be made available for public comment and submitted to the Institute of Medicine (now the National Academy of Medicine) no later than 18 months after the NPSD became operational. The NPSD became operational on June 21, 2019. More information about the NPSD can be found at *https://www.ahrq.gov/npsd/index.html*.

Overview of the Draft Report

The draft report contains three chapters. It begins with an overview of the impetus for and objectives of the Patient Safety Act, its key provisions, and some milestones in its implementation. Chapter 2 reviews some of the principles and concepts underlying effective patient safety improvement, provides an overview of research and measurement in patient safety, and presents the strategies and practices for reducing medical errors and increasing patient safety reviewed in AHRQ's Making Healthcare Safer reports, published in 2001, 2013, and 2020. Together, these reports reviewed the existing evidence for the effectiveness of more than 100 patient safety strategies and practices used in hospitals, primary care practices, long-term care facilities, and other healthcare settings. They include cross-cutting strategies and topics such as patient and family engagement and teamwork training; safety topics specific to particular clinical interventions, such as medications and surgery; a variety of tools and processes, such as rapid response teams and antimicrobial stewardship; and practices that target prevention of specific harms, such as healthcare-associated infections and pressure injuries. Hyperlinks in the draft report lead to the full text of the evidence review and to later updates regarding the assessment of evidence for the effectiveness for each strategy and practice. The final chapter in the draft report begins with an overview of learning health systems and concepts underlying effective implementation of patient safety strategies. It provides examples of resources Federal agencies make available to encourage healthcare providers to use effective patient safety strategies and describes ''Safer Together: A National Action Plan to Advance Patient Safety,'' recently released by the National Steering Committee for Patient Safety that was convened by the Institute for Healthcare Improvement. The draft report concludes by describing an approach that has a track record of success in encouraging providers to use effective practices to improve patient safety and outlines measures that could accelerate progress in improving patient safety and encouraging the use of effective patient safety improvement strategies.

Where To View the Draft Report and How To Submit Comments

The draft report is posted on the AHRQ PSO Program website at *https://pso.ahrq.gov/legislation/act.* The website contains a link to the email address for submitting comments on the draft report, which is *PSQIA.RC@ahrq.hhs.gov*.

Dated: December 10, 2020.

Marquita Cullom,

Associate Director.

[FR Doc. 2020–27589 Filed 12–15–20; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Delegation of Authority

Notice is hereby given that I have delegated to the National Coordinator for Health Information Technology, Office of the National Coordinator for Health Information Technology (ONC), or his or her successor, the authorities that are vested in the Secretary of Health and Human Services under title III, Section 307, ''International Cooperation,'' of the Public Health Service (PHS) Act, [42 U.S.C. 242 l], as amended, with regard to participating with other countries in cooperative endeavors.

Limitation

This delegation of authority may be re-delegated within ONC. Previous delegations and re-delegations made to officials within the Department of Health and Human Services for authorities under Section 307 of the PHS Act continue in effect. Exercise of this authority shall be in accordance with established policies, procedures, guidelines, and regulations as prescribed by the Secretary. The Secretary retains the authority to submit reports to Congress, promulgate regulations, and to establish advisory committees and councils and appoint their members. I hereby affirm and ratify any actions taken by the National Coordinator, ONC, or other ONC officials, which involve the exercise of this authority prior to the effective date of this delegation.

Effective Date

This delegation of authority is effective immediately.

Authority

Section 6 of the Reorganization Plan No. 1 of 1953 and Section 2 of the Reorganization Plan No. 3 of 1966.

Dated: December 9, 2020.

Eric D. Hargan,

Deputy Secretary.

[FR Doc. 2020–27606 Filed 12–15–20; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; K22 Transition Career Development Award.

Date: January 19, 2021.

Time: 10:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W234, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Adriana Stoica, Ph.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W234, Rockville, Maryland 20850, 240–276–6368, *Stoicaa2@mail.nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; Assay Validation of High-Quality Markers for Clinical Studies in Cancer.

Date: January 21, 2021.

Time: 1:30 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W124, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Eun Ah Cho, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W124, Rockville, Maryland 20850, 240–276–6342 *choe@mail.nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; Applications related to Pediatrics.

Date: January 26, 2021.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W530, Rockville, Maryland 20850, (Telephone Conference Call).

Contact Person: Shamala K. Srinivas, Ph.D., Associate Director, Office of Referral, Review, and Program Coordination, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W530, Rockville, Maryland 20850, 240–276–6442 *ss537t@nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; TEP–3: SBIR Contract Review.

Date: January 29, 2021.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W254, Rockville, Maryland 20850, (Telephone Conference Call).

Contact Person: Eduardo Emilio Chufan, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W254, Rockville, Maryland 20850, 240–276–7975 *chufanee@mail.nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–5: NCI Clinical and Translational R21 and Omnibus R03 Review.

Date: February 4–5, 2021.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W248, Rockville, Maryland 20850, (Telephone Conference Call).

Contact Person: Shree Ram Singh, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W248, Rockville, Maryland 20817, 240–672–6175 *singhshr@mail.nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–2: NCI Clinical and Translational R21 and Omnibus R03 Review.

Date: February 4–5, 2021.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W264, Rockville, Maryland 20850 (Telephone Conference Call)

Contact Person: Ombretta Salvucci, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W264, Rockville, Maryland 20854, 240–276–7286 *salvucco@mail.nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI SPORE (P50) Review IV.

Date: February 9–10, 2021.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room

7W108, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Wlodek Lopaczynski, M.D., Ph.D., Assistant Director, Office of the Director, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W514, Rockville, Maryland 20850, 240–276–6458 *lopacw@mail.nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; Feasibility to Build Collaborative Partnerships in Cancer research.

Date: February 10, 2021.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W108, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Clifford W. Schweinfest, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W108, Rockville, Maryland 20850, 240–276–6343, *schweinfestcw@mail.nih.gov*.

Name of Committee: National Cancer Institute Initial Review Group; Subcommittee F—Institutional Training and Education.

Date: February 24–25, 2021.

Time: 9:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W234, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Adriana Stoica, Ph.D., Scientific Review Officer, Resources and Training Review, Branch Division of Extramural Activities, National Cancer Institute, NIH 9609 Medical Center Drive, Room 7W234 Rockville, Maryland 20850, 240–276–6368, *Stoicaa2@mail.nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; Feasibility and Planning Studies for SPOREs in Cancer Health Disparities.

Date: February 25–26, 2021.

Time: 9:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W126, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Caron A. Lyman, Ph.D., Chief, Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W126, Rockville, Maryland 20850, 240–276–6348, *lymanc@mail.nih.gov*.

Name of Committee: National Cancer Institute Initial Review Group Subcommittee; J-Career Development.

Date: February 25–26, 2021.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W624, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Tushar Deb, Ph.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W624, Rockville, Maryland 20850, 240–276–6132, *tushar.deb@nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; Cancer Biomarkers and Biospecimens.

Date: February 26, 2021.

Time: 12:00 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W106, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Reed A. Graves, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W106, Rockville, Maryland 20850, 240–276–6384, *gravesr@mail.nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; TEP–8A: SBIR Contract Review Meeting.

Date: March 16, 2021.

Time: 11:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W246, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Jun Fang, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W246, Rockville, Maryland 20850, 240–276–5460, *jfang@mail.nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP Training Grants

Date: March 16, 2021.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove. 9609 Medical Center Drive, Room 7W234. Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Adriana Stoica, Ph.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W234, Rockville, Maryland 20850, 240–276–6368, *stoicaa2@mail.nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; TEP–8B: SBIR Contract Review Meeting.

Date: March 18, 2021.

Time: 11:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W246, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Jun Fang, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W246, Rockville, Maryland 20850, 240–276–5460, *jfang@mail.nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; Information Technology in Cancer Research.

Date: March 30–31, 2021.

Time: 10:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W234, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Adriana Stoica, Ph.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W234, Rockville, Maryland 20850, 240–276–6368, *Stoicaa2@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: December 12, 2020.

Patricia B. Hansberger,

Supervisory Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–27625 Filed 12–15–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Aging and Balance.

Date: February 18, 2021.

Time: 10:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Video Meeting).

Contact Person: Greg Bissonette, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Gateway Building, Suite 2W200, Bethesda, MD 20892, (301) 402–1622, *bissonettegb@mail.nih.gov*.

Name of Committee: National Institute on Aging Special Emphasis Panel, Drug Repositioning and Combination Therapy for AD.

Date: February 23, 2021.

Time: 12:00 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Video Meeting).

Contact Person: Alexander Parsadanian, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, Gateway Building 2C/212, 7201 Wisconsin Avenue, Bethesda, MD 20892, (301) 496–9666, *parsadaniana@nia.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 10, 2020.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–27623 Filed 12–15–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel; NIAAA Individual Fellowships (F30, F31, F32) Review Panel.

Date: February 24, 2021.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Health, National Institute on Alcohol Abuse and Alcoholism, 6700 B Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Luis Espinoza, Ph.D., Scientific Review Officer, Extramural Project Review, Branch Office of Extramural Activities, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Room 2109, Bethesda, MD 20892, (301) 443–8599, *espinozala@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards., National Institutes of Health, HHS)

Dated: December 10, 2020.

Patricia B. Hansberger,

Supervisory Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–27624 Filed 12–15–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2020–0039; OMB No. 1660–0006]

Agency Information Collection Activities: Proposed Collection; Comment Request; National Flood Insurance Program Policy Forms

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: 60-Day notice and request for comments.

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a revision of a currently approved information collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning information collected for the selling and servicing of National Flood Insurance Program (NFIP) policies by FEMA's direct servicing agent, NFIP Direct.

DATES: Comments must be submitted on or before February 16, 2021.

ADDRESSES: Submit comments at *www.regulations.gov* under Docket ID FEMA–2020–0039. Follow the instructions for submitting comments.

All submissions received must include the agency name and Docket ID, and will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy and Security Act Notice that is available via a link on the homepage of *www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Joycelyn Collins, Underwriting Branch Program Analyst, Federal Insurance Directorate, 202–701–3383. You may contact the Records Management Division for copies of the proposed collection of information at email address: *FEMA-Information-Collections-Management@fema.dhs.gov*.

SUPPLEMENTARY INFORMATION: The NFIP is authorized by Public Law 90–448 (1968) and expanded by Public Law 93–234 (1973). The National Flood Insurance Act of 1968 requires that the Federal Emergency Management Agency (FEMA) provide flood insurance at full actuarial rates reflecting the complete flood risk to structures built or substantially improved on or after the effective date for the initial Flood Insurance Rate Map for the community, or after December 31, 1974, whichever is later, so that the risks associated with buildings in flood-prone areas are borne by those located in such areas and not by the taxpayers at large. In accordance with Public Law 93–234, the purchase of flood insurance is mandatory when Federal or federally-related financial assistance is being provided for acquisition or construction of buildings located, or to be located, within FEMA-identified special flood hazard areas of communities that participate in the NFIP.

Collection of Information

Title: National Flood Insurance Program Policy Forms.

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: 1660–0006.

FEMA Forms: FEMA Forms 086–0–1 and 086–0–1T, Flood Insurance Application; FEMA Forms 086–0–2 and 086–0–2T, Flood Insurance Cancellation/Nullification Request Form; FEMA Forms 086–0–3 and 086–3T, Flood Insurance General Change Endorsement; FEMA Form 086–0–4, V-Zone Risk Factor Rating Form and Instructions (discontinued October 16, 2019, due to insufficient use); and FEMA Form 086–0–5T, Flood Insurance Preferred Risk Policy and Newly Mapped Application.

Abstract: To provide for the availability of policies for flood insurance, policies are marketed and administered through the facilities of licensed insurance agents or brokers in the various States. Applications, general change requests, and cancellations from agents or brokers are forwarded to a direct servicing agent designated as fiscal agent by the Federal Insurance and Mitigation Administration (FIMA), referred to as NFIP Direct. Upon receipt and examination of the application, general change request, cancellation, and required premium, the servicing company issues or updates the appropriate Federal flood insurance policy.

Affected Public: Individuals or households; State, local or Tribal Government; Business or other for profit; Not-for-profit institutions; and Farms.

Number of Respondents: 409,781.

Number of Responses: 409,781.

Estimated Total Annual Burden Hours: 62,196.

Estimated Total Annual Respondent Cost: $2,335,459.

Estimated Total Annual Cost to the Federal Government: $9,356,398.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to: (a) Evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Maile Arthur,

Acting Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2020–27599 Filed 12–15–20; 8:45 am]

BILLING CODE 9110–11–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2020–0030; OMB No. 1660–0002]

Agency Information Collection Activities: Proposed Collection; Comment Request; Disaster Assistance Registration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: 30-Day notice and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission will describe the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before January 15, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Information Management Division, 500 C Street SW, Washington, DC 20472, email address *FEMA-Information-Collections-Management@fema.dhs.gov* or Brian Thompson, Supervisory Program Specialist, FEMA, Recovery Directorate, *Brian.Thompson6@fema.dhs.gov,* 540–686–3602.

SUPPLEMENTARY INFORMATION: This proposed information collection previously published in the **Federal Register** on September 14, 2020 at 85 FR 56625 with a 60 day public comment period. No comments were received. The purpose of this notice is to notify the public that FEMA will submit the information collection abstracted below to the Office of Management and Budget for review and clearance.

Collection of Information

Title: Disaster Assistance Registration.

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: 1660–0002.

Form Titles and Numbers: FEMA Form 009–0–1T (English) Tele-Registration, Disaster Assistance Registration; FEMA Form 009–0–1Int (English) internet, Disaster Assistance Registration; FEMA Form 009–0–2Int (Spanish) internet, Registro Para Asistencia De Desastre; FEMA Form 009–0–1 (English) Paper Application, Disaster Assistance Registration; FEMA Form 009–0–2 (Spanish), Solicitud en Papel, Registro Para Asistencia De Desastre; FEMA Form 009–0–3 (English), Declaration and Release; FEMA Form 009–0–4 (Spanish), Declaración Y Autorización; FEMA Form 009–0–5 (English), Manufactured Housing Unit Revocable License and Receipt for Government Property; FEMA Form 009–0–6 (Spanish), Las Casas Manufacturadas Unidad Licencia Revocable y Recibo de la Propiedad del Gobierno; Request for Information.

Abstract: The forms in this collection are used to obtain pertinent information to provide financial assistance, and if necessary, direct assistance to eligible individuals and households who, as a direct result of a disaster or emergency, have uninsured or under-insured, necessary or serious expenses they are unable to meet. To provide meaningful access to individuals with disabilities throughout FEMA programs, the revision to the collection will obtain pertinent disability-related information.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 1,004,488.

Estimated Number of Responses: 1,004,488.

Estimated Total Annual Burden Hours: 356,007.

Estimated Total Annual Respondent Cost: $13,368,063.

Estimated Respondents' Operation and Maintenance Costs: $0.

Estimated Respondents' Capital and Start-Up Costs: $0.

Estimated Total Annual Cost to the Federal Government: $32,192,627.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the

accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Maile Arthur,

Acting Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2020–27677 Filed 12–15–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2020–0028; OMB No. 1660–0029]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; Approval and Coordination of Requirements To Use the NETC for Extracurricular and Training Activities

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: 30-Day notice and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public to take this opportunity to comment on a reinstatement, without change, of a previously approved information collection for which approval has expired. FEMA will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission will describe the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before January 15, 2021.

ADDRESSES: Submit comments at *www.regulations.gov* under Docket ID FEMA–2020–0028. Follow the instructions for submitting comments.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy and Security Notice that is available via a link on the homepage of *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Merril Sollenberger, Administrative Specialist, FEMA, U.S. Fire Administration, (301) 447–1179, *merril.sollenberger@fema.dhs.gov.* You may contact the Information Management Division for copies of the proposed collection of information at email address: *FEMA-Information-Collections-Management@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. 5121–5207, authorizes the President to establish a program of disaster preparedness that utilizes services of all appropriate agencies and includes training and exercises. Section 611 of the Stafford Act (42 U.S.C. 5196) directs that the Federal Emergency Management Agency (FEMA) may conduct training for the purpose of emergency preparedness. In response, FEMA established the National Emergency Training Center (NETC), located in Emmitsburg, Maryland. The NETC site has facilities and housing available for those participating in emergency preparedness training. For planning purposes, a request for use of these areas must be made in advance.

This proposed information collection previously published in the **Federal Register** on August 28, 2020, at FR 85 53392 with a 60 day public comment period. No relevant comments were received. This information collection expired on November 30, 2020. FEMA is requesting a reinstatement, without change, of a previously approved information collection for which approval has expired. The purpose of this notice is to notify the public that FEMA will submit the information collection abstracted below to the Office of Management and Budget for review and clearance.

Collection of Information

Title: Approval and Coordination of Requirements to Use the NETC for Extracurricular Training Activities.

Type of Information Collection: Reinstatement, without change, of a previously approved information collection for which approval has expired.

OMB Number: 1660–0029.

Form Titles and Numbers: FEMA Form 119–17–1 Request for Housing Accommodations, FEMA Form 119–17–2 Request for Use of NETC Facilities.

Abstract: In accordance with FEMA Directive 119–3: Facility Use and Expenses at the National Emergency Training Center, 21 May 2018, FEMA Form 119–17–1, Request For Housing Accommodations, and FEMA Form 119–17–2, Request for Use of NETC Facilities are applied for functions at NETC.

Affected Public: Individuals or households, Not-for-profit institutions, Federal Government, State, local or Tribal Governments.

Estimated Number of Respondents: 120.

Estimated Number of Responses: 120.

Estimated Total Annual Burden Hours: 12.

Estimated Total Annual Respondent Cost: $354.

Estimated Respondents' Operation and Maintenance Costs: $0.

Estimated Respondents' Capital and Start-Up Costs: There are no annual start-up or capital costs for Respondents.

Estimated Total Annual Cost to the Federal Government: $1,148.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology,

e.g., permitting electronic submission of responses.

Maile Arthur,

Acting Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2020–27678 Filed 12–15–20; 8:45 am]

BILLING CODE 9111–45–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R3–ES–2020–0045; FXES11140300000–212]

Draft Environmental Assessment and Proposed Habitat Conservation Plan; Receipt of an Application for an Incidental Take Permit, Bluff Point Wind Energy Center, Jay and Randolph Counties, Indiana

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability of documents; request for comment and information.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), have received an application from NextEra Energy Bluff Point LLC (applicant), for an incidental take permit (ITP) under the Endangered Species Act of 1973, as amended (ESA), for its Bluff Point Wind Energy Center (project). If approved, the ITP would be for a 30-year period and would authorize the incidental take of an endangered species, the Indiana bat, and a threatened species, the northern long-eared bat. The applicant has prepared a habitat conservation plan (HCP) that describes the actions and measures that the applicant would implement to avoid, minimize, and mitigate incidental take of the Indiana bat and northern long-eared bat. We also announce the availability of a draft Environmental Assessment (DEA), which has been prepared in response to the permit application in accordance with the requirements of the National Environmental Policy Act (NEPA). We request public comment on the application, the DEA, and associated documents.

DATES: We will accept comments received or postmarked on or before January 15, 2021.

ADDRESSES: *Document availability:*

Internet: Electronic copies of the documents this notice announces will be available online in Docket No. FWS–R3–ES–2020–0045 at *http://www.regulations.gov.* Public comments will also be available online at *http://www.regulations.gov.*

Comment submission: In your comment, please specify whether your comment addresses the proposed HCP, draft EA, or any combination of the aforementioned documents, or other supporting documents. You may submit written comments by one of the following methods:

- *Online: http://www.regulations.gov.* Search for and submit comments on Docket No. FWS–R3–ES–2020–0045.
- *By hard copy:* Submit comments by U.S. mail to Public Comments Processing, Attn: Docket No. FWS–R3–ES–2020–0045; U.S. Fish and Wildlife Service; 5275 Leesburg Pike, MS: PRB/3W; Falls Church, VA 22041–3803.

FOR FURTHER INFORMATION CONTACT: Scott Pruitt, Field Supervisor, Bloomington, Indiana, Ecological Services Field Office, U.S. Fish and Wildlife Service, 620 South Walker Street, Bloomington, IN 47403; telephone: 812–334–4261, extension 214; or Andrew Horton, Regional HCP Coordinator, U.S. Fish and Wildlife Service—Interior Region 3, 5600 American Blvd., West, Suite 990, Bloomington, MN 55437–1458; telephone: 612–713–5337.

Individuals who are hearing or speech impaired may call the Federal Relay Service at 1–800–877–8339 for TTY assistance.

SUPPLEMENTARY INFORMATION:

Background

Section 9 of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and its implementing regulations prohibit the ''take'' of animal species listed as endangered or threatened. Take is defined under the ESA as to ''harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect ''listed animal species,'' or to attempt to engage in such conduct'' (16 U.S.C. 1532). However, under section 10(a) of the ESA, we may issue permits to authorize incidental take of listed species. ''Incidental take'' is defined by the ESA as take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity (16 U.S.C. 1539). Regulations governing incidental take permits for endangered and threatened species, respectively, are found in the Code of Federal Regulations at 50 CFR 17.22 and 50 CFR 17.32.

Applicant's Proposed Project

The applicant requests a 30-year ITP to take the federally endangered Indiana bat (*Myotis sodalis*) and threatened northern long-eared bat (*Myotis septentrionalis*) at the Bluff Point Wind Resource Area (BPWRA) in Jay and Randolph Counties, consisting of approximately 23,613 acres of private land. The applicant determined that unavoidable take is reasonably certain to occur incidental to operation of 57 previously constructed wind turbines. The proposed conservation strategy in the applicant's proposed HCP is designed to avoid, minimize, and mitigate the impacts of the covered activity on the covered species. The biological goals and objectives are to minimize potential take of Indiana bats and northern long-eared bats through on-site minimization measures and to provide habitat conservation measures for Indiana bats and northern long-eared bats to offset any unavoidable impacts from operations of the project. The BPWRA includes confirmed Indiana bat summer roost habitat and northern long-eared bat summer maternity habitat. The HCP provides on-site avoidance and minimization measures, which include seasonal turbine operational curtailment and adaptive management measures that allow for modifications to the minimization and mitigation measures based on monitoring results and other triggers, and a 1,000 foot minimization buffer during the summer season to protect potential summer habitat for both covered species. Based on the available data, the predicted level of take is anticipated to be 63 Indiana bats and 32 northern long-eared bats over the 30-year permit term. However, the applicant requests a permit to take 165 Indiana bats and 84 northern long-eared bats over the 30-year permit term due to the uncertainty associated with estimating take and the exact (or specific) reduction in fatalities from the minimization without facility specific data. To fully offset the impacts of the taking of 122 Indiana bats and 42 northern long-eared bats, the applicant proposes to protect in perpetuity 77.2 acres of known maternity colony habitat and staging/swarming habitat through a conservation easement held by a 501(c)3 non-profit at a Land of Indiana site in Greene County, Indiana through a third-party mitigation provider, First Indiana Resources, LLC. The HCP includes adaptive management measures if mitigation is insufficient to fully offset the impact of the actual take determined through mortality monitoring.

National Environmental Policy Act

The issuance of an ITP is a Federal action that triggers the need for compliance with NEPA (42 U.S.C. 4321 *et seq.*). We prepared a draft EA that analyzes the environmental impacts on the human environment resulting from

three alternatives: A no-action alternative, the applicant's proposed action, and a more restrictive alternative consisting of feathering turbines at a rate of wind speed that results in less impacts to bats.

Next Steps

The Service will evaluate the application and the comments received to determine whether the permit application meets the requirements of section 10(a) of the ESA (16 U.S.C. 1531 *et seq.*). We will also conduct an intra-Service consultation pursuant to section 7 of the ESA to evaluate the effects of the proposed take. After considering the above findings, we will determine whether the permit issuance criteria of section 10(a)(l)(B) of the ESA have been met. If met, the Service will issue the requested ITP to the applicant.

Public Comments

The Service invites the public to comment and suggestions from all interested parties on the proposed HCP and draft EA and supporting documents during a 30-day public comment period (see **DATES**). In particular, information and comments regarding the following topics are requested:

1. Whether adaptive management, monitoring and mitigation provisions in the Proposed Action alternative are sufficient;
2. Any threats to the Indiana bat and the northern long-eared bat that may influence their populations over the life of the ITP that are not addressed in the proposed HCP or draft EA;
3. Any new information on white-nose syndrome effects on the Indiana bat and the northern long-eared bat;
4. Whether or not the significance of the impact on various aspects of the human environment has been adequately analyzed;
5. Any other information pertinent to evaluating the effects of the proposed action on the Indiana bat, the northern long-eared bat and the human environment; and
6. The direct, indirect, or cumulative effects that implementation of any alternative could have on the human environment.

You may submit comments by one of the methods shown under **ADDRESSES**. We will post on *http://regulations.gov* all public comments and information received electronically or via hardcopy. All comments received, including names and addresses, will become part of the administrative record associated with this action. 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 request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Authority

We provide this notice under section 10(c) of the ESA (16 U.S.C. 1531 *et seq.*) and its implementing regulations (50 CFR 17.22) and the NEPA (42 U.S.C. 4321 *et seq.*) and its implementing regulations (40 CFR 1506.6; 43 CFR part 46).

Lori Nordstrom,

Assistant Regional Director, Ecological Services.

[FR Doc. 2020–27667 Filed 12–15–20; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[212A2100DD/AAKC001030/A0A501010.999900253G]

Land Acquisitions; Kiowa Indian Tribe of Oklahoma

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: The Assistant Secretary—Indian Affairs made a final agency determination to acquire in trust 11.33 acres, more or less, of land in the City of Hobart, Kiowa County, Oklahoma, (Site) for the Kiowa Indian Tribe of Oklahoma (Tribe) for gaming and other purposes.

DATES: This final determination was made on December 11, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Paula L. Hart, Director, Office of Indian Gaming, Bureau of Indian Affairs, MS–3543 MIB, 1849 C Street NW, Washington, DC 20240, telephone (202) 219–4066, *paula.hart@bia.gov.*

SUPPLEMENTARY INFORMATION: This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 Departmental Manual 8.1, and is published to comply with the requirements of 25 CFR 151.12(c)(2)(ii) that notice of the decision to acquire land in trust be promptly provided in the **Federal Register**.

On the date listed in the **DATES** section of this notice, the Assistant Secretary—Indian Affairs issued a decision to acquire the Site, consisting of 11.33 acres, more or less, of land in trust for the Tribe under the authority of the Indian Reorganization Act, 25 U.S.C. 5108. The Assistant Secretary—Indian Affairs determined that Tribe's request also meets the requirements of the Indian Gaming Regulatory Act's ''Oklahoma exception,'' 25 U.S.C. 2719(a)(2)(A)(i), to the general prohibition contained in 25 U.S.C. 2719(a) for gaming on lands acquired in trust after October 17, 1988.

The Assistant Secretary—Indian Affairs, on behalf of the Secretary of the Interior, will immediately acquire title to the Site in the name of the United States of America in trust for the Tribe upon fulfillment of Departmental requirements.

The 11.33 acres, more or less, are located in the City of Hobart, Kiowa County, Oklahoma, and are described as follows:

The surface and surface rights only in a tract of land located in the SE/4 of Section 02, Township 06 North, Range 18 West of the Indian Base and Meridian, Kiowa County, Oklahoma and more particularly described as follows: Commencing at the SE Corner of the said SE/4; thence N 00°06′58″ E along the East Line of the said SE/4 a distance of 1414.12 feet; thence N 89°53′02″ W perpendicular to the said East Line a distance of 66.30 feet to the East Right-of-Way Line of U.S. Highway No. 183, and the point of beginning; thence N 89°52′41″ W a distance of 1304.40 feet; thence N 00°06′58″ E a distance of 373.30 feet; thence S 89°52′41″ E a distance of 1320.00 feet to the said East Right-of-Way Line; thence S 01°06′35″ E along the said East Right-of-Way Line a distance of 307.98 feet; thence S 18°51′28″ W a distance of 69.05 feet to the point of beginning, consisting of 11.33 acres, more or less; surface and surface rights only. Basis of bearings: True Meridian.

Tara Sweeney,

Assistant Secretary—Indian Affairs.

[FR Doc. 2020–27699 Filed 12–15–20; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[21X.LLAKR00000.L13100000.DB0000]

Notice of Availability of the Coastal Plain Marsh Creek East Seismic Exploration Environmental Assessment

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended, and the Tax Cuts and Jobs Act of 2017, which requires the Secretary of the Interior, acting through the Bureau of Land Management (BLM), to establish and administer a competitive oil and gas program for the leasing, development, production, and transportation of oil and gas in and from the Coastal Plain area within the Arctic National Wildlife Refuge (ANWR), the BLM, Arctic District Office, has prepared an Environmental Assessment (EA) and Draft Finding of No New Significant Impact (FONNSI) for proposed 3-dimensional seismic exploration in the Coastal Plain of the ANWR.

DATES: The BLM will accept comments concerning the adequacy of the analysis of the EA and the preliminary conclusions made in the Draft FONNSI. All comments must be received by December 30, 2020. Reviewers are encouraged to provide their comments in such a manner that they are useful to the agency's analysis. Therefore, comments should clearly articulate the reviewer's concerns and contentions.

ADDRESSES: Submit comments at the BLM ePlanning website (*https://eplanning.blm.gov/eplanning-ui/project/2003258/510*), or by mail or in person at the BLM Arctic District Office, Attn: Coastal Plain Seismic EA, 222 University Avenue, Fairbanks, Alaska 99709. Comments not transmitted in accordance with these instructions may not be considered.

FOR FURTHER INFORMATION CONTACT: Sarah LaMarr, Project Lead; by telephone, 907–474–2334; by email, *slamarr@blm.gov;* or by mail, at the address in the **ADDRESSES** section.

Individuals who use telecommunication devices 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, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION:

The Tax Cuts and Jobs Act of 2017, Section 20001 of Public Law 115–97 (Dec. 22, 2017), requires the Secretary of the Interior, acting through the BLM, to establish and administer a competitive oil and gas program for the leasing, development, production, and transportation of oil and gas in and out of the Coastal Plain area within the ANWR. Kaktovik Iñupiat Corporation (KIC) has requested authorization to conduct 3-dimensional seismic exploration on the eastern side of the Coastal Plain during the 2020/2021 winter season starting in January 2021, to acquire high-quality, high-resolution seismic data.

Seismic exploration would occur on approximately 352,400 acres around the community of Kaktovik, to include 92,000 acres of Kaktovik Iñupiat Corporation lands and approximately 260,400 acres of federally managed lands. Seismic exploration generates acoustic waves that are picked up by sensors as the waves travel through and bounce off subsurface formations. From this information, images can be created that show subsurface structure and formations including those areas of potential hydrocarbons.

Comments received in response to this notice, including names and addresses of those who comment, will be part of the public record for this proposed action.

Authority: 40 CFR 1506.6.

Chad B. Padgett,

State Director.

[FR Doc. 2020–27683 Filed 12–15–20; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

Vineyard Wind LLC's Proposed Wind Energy Facility Offshore Massachusetts

AGENCY: Bureau of Ocean Energy Management, Department of the Interior.

ACTION: Notice.

SUMMARY: The preparation of an Environment Impact Statement (EIS) for the Construction and Operations Plan (COP) submitted by Vineyard Wind LLC (Vineyard Wind) concerning the construction and operation of an 800 megawatt wind energy facility offshore Massachusetts (Vineyard Wind 1 Project) is no longer necessary and the process is hereby terminated.

DATES: This termination takes effect immediately.

FOR FURTHER INFORMATION CONTACT: For further information, please contact: Michelle Morin, BOEM Office of Renewable Energy Programs, 45600 Woodland Road, Sterling, Virginia 20166, (703) 787–1722 or *michelle.morin@boem.gov.*

SUPPLEMENTARY INFORMATION: In December 2017, Vineyard Wind submitted to BOEM a COP for the Vineyard Wind 1 Project. On December 7, 2018, BOEM published a Draft EIS for the proposed Project. On June 12, 2020, BOEM published a Supplement to the Draft EIS in response to comments from the public and stakeholders requesting an expanded cumulative analysis and an analysis of fishing data previously unavailable to BOEM. A Final EIS was scheduled to be published in the **Federal Register** on December 11, 2020. However, by way of a letter dated December 1, 2020, Vineyard Wind withdrew the COP ''from further review and decision-making by BOEM pursuant to 30 CFR 585.628'' to conduct additional technical and logistical reviews associated with the inclusion of the General Electric Haliade-X wind turbine generator into the final project design. Vineyard Wind's December 1, 2020, letter for withdrawal of its COP was made ''effectively immediately.'' Since the COP has been withdrawn from review and decision-making, there is no longer a proposal for a major federal action awaiting technical and environmental review, nor is there a decision pending before BOEM. See 42 U.S.C. 4332; 40 CFR 1500.1; 1508.1(q), (x). Thus, in light of Vineyard Wind's letter dated December 1, 2020, this notice advises the public that the preparation and completion of an EIS is no longer necessary, and the process is hereby terminated.

Authority: This Notice was prepared under National Environmental Policy Act, as amended (42 U.S.C. 4321 *et seq.*), and published in accordance with Council on Environmental Quality regulations (40 CFR parts 1500–1508), including sections 1503.1 and 1506.6.

William Yancey Brown,

Chief Environmental Officer, Bureau of Ocean Energy Management.

[FR Doc. 2020–27701 Filed 12–15–20; 8:45 am]

BILLING CODE 4310–MR–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–506 and 508 and 731–TA–1238–1243 (Review)]

Non-Oriented Electrical Steel From China, Germany, Japan, Korea, Sweden, and Taiwan

Determination

On the basis of the record [1] developed in the subject five-year reviews, the United States International Trade Commission (''Commission'')

[1] The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

determines, pursuant to the Tariff Act of 1930 (''the Act''), that revocation of the countervailing duty orders on non-oriented electrical steel from China and Taiwan and the antidumping duty orders on non-oriented electrical steel from China, Germany, Japan, Korea, Sweden, and Taiwan would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission instituted these reviews on November 1, 2019 (84 FR 58743) and determined on February 4, 2020 that it would conduct full reviews (85 FR 8325, February 13, 2020). Notice of the scheduling of the Commission's reviews and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on June 2, 2020 (85 FR 33711). In light of the restrictions on access to the Commission building due to the COVID–19 pandemic, the Commission conducted its hearing through written testimony and video conference on October 8, 2020. All persons who requested the opportunity were permitted to participate.

The Commission made these determinations pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)). It completed and filed its determinations in these reviews on December 10, 2020. The views of the Commission are contained in USITC Publication 5140 (December 2020), entitled *Non-Oriented Electrical Steel from China, Germany, Japan, Korea, Sweden, and Taiwan: Investigation Nos. 701–TA–506 and 508 and 731–TA–1238–1243 (Review).*

By order of the Commission.

Issued: December 10, 2020.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2020–27592 Filed 12–15–20; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–653 and 731–TA–1527 (Final)]

Standard Steel Welded Wire Mesh From Mexico; Scheduling of the Final Phase of Countervailing Duty and Anti-Dumping Duty Investigations

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of the final phase of antidumping and countervailing duty investigation Nos. 701–TA–653 and 731–TA–1527 (Final) pursuant to the Tariff Act of 1930 (''the Act'') to determine whether an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of standard steel welded wire mesh from Mexico, provided for in subheadings 7314.20.00 and 7314.39.00 of the Harmonized Tariff Schedule of the United States, preliminarily determined by the Department of Commerce (''Commerce'') to be subsidized. A determination from Commerce with respect to sales at less-than-fair-value is pending.

DATES: December 3, 2020.

FOR FURTHER INFORMATION CONTACT: Julie Duffy ((202) 708–2579), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Scope.—For purposes of these investigations, Commerce has defined the subject merchandise as covering uncoated standard welded steel reinforcement wire mesh (wire mesh) produced from smooth or deformed wire. Subject wire mesh is produced in square and rectangular grids of uniformly spaced steel wires that are welded at all intersections. Sizes are specified by combining the spacing of the wires in inches or millimeters and the wire cross-sectional area in hundredths of square inch or millimeters squared. Subject wire mesh may be packaged and sold in rolls or in sheets.

Subject wire mesh is currently produced to ASTM specification A1064/A1064M, which covers carbon-steel wire and welded wire reinforcement, smooth and deformed, for concrete in the following seven styles:

1. 6x6 W1.4/W1.4 or D1.4/D1.4
2. 6x6 W2.1/W2.1 or D2.1/D2.1
3. 6x6 W2.9/W2.9 or D2.9/D2.9
4. 6x6 W4/W4 or D4/D4
5. 6x12 W4/W4 or D4/D4
6. 4x4 W2.9/W2.9 or D2.9/D2.9
7. 4x4 W4/W4 or D4/D4

Commerce's written description of the scope is dispositive and appears in full in Appendix I of *Standard Steel Welded Wire Mesh From Mexico: Preliminary Affirmative Countervailing Duty Determination* (85 FR 78124, December 3, 2020).

Background.—The final phase of these investigations is being scheduled pursuant to sections 705(b) and 731(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b) and 1673d(b)), as a result of affirmative preliminary determinations by Commerce that certain benefits which constitute subsidies within the meaning of § 703 of the Act (19 U.S.C. 1671b) are being provided to manufacturers, producers, or exporters in Mexico of standard steel welded wire mesh, and that such products are being sold in the United States at less than fair value within the meaning of § 733 of the Act (19 U.S.C. 1673b). The investigations were requested in a petition filed on June 30, 2020, by Insteel Industries Inc., Mount Airy, North Carolina; Mid South Wire Company, Nashville, Tennessee; National Wire LLC, Conroe, Texas; Oklahoma Steel & Wire Co., Madill, Oklahoma; and Wire Mesh Corp., Houston, Texas.

For further information concerning the conduct of this phase of the investigations, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

Participation in the investigations and public service list.—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the final phase of these investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11 of the Commission's rules, no later than 21 days prior to the hearing date specified in this notice. A party that filed a notice of appearance during the preliminary phase of the investigations need not file an additional notice of appearance during this final phase. The Secretary will maintain a public service list containing

the names and addresses of all persons, or their representatives, who are parties to the investigations.

Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*.) No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in the final phase of these investigations available to authorized applicants under the APO issued in the investigations, provided that the application is made no later than 21 days prior to the hearing date specified in this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the investigations. A party granted access to BPI in the preliminary phase of the investigations need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report.—The prehearing staff report in the final phase of these investigations will be placed in the nonpublic record on January 29, 2021, and a public version will be issued thereafter, pursuant to § 207.22 of the Commission's rules.

Hearing.—The Commission will hold a hearing in connection with the final phase of these investigations beginning at 9:30 a.m. on February 12, 2021. Information about the place and form of the hearing, including about how to participate in and/or view the hearing, will be posted on the Commission's website at *https://www.usitc.gov/calendarpad/calendar.html.* Interested parties should check the Commission's website periodically for updates. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before February 5, 2021. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should participate in a prehearing conference to be held at 9:30 a.m. on February 9, 2021. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), and 207.24 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 business days prior to the date of the hearing.

Written submissions.—Each party who is an interested party shall submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of § 207.23 of the Commission's rules; the deadline for filing is February 5, 2021. Parties may also file written testimony in connection with their presentation at the hearing, as provided in § 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of § 207.25 of the Commission's rules. The deadline for filing posthearing briefs is February 19, 2021. In addition, any person who has not entered an appearance as a party to the investigations may submit a written statement of information pertinent to the subject of the investigations, including statements of support or opposition to the petition, on or before February 19, 2021. On March 10, 2021, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before March 12, 2021, but such final comments must not contain new factual information and must otherwise comply with § 207.30 of the Commission's rules. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings.

Additional written submissions to the Commission, including requests pursuant to § 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with §§ 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.21 of the Commission's rules.

By order of the Commission.

Issued: December 11, 2020.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2020–27653 Filed 12–15–20; 8:45 am]

BILLING CODE 7020–02–P

JOINT BOARD FOR THE ENROLLMENT OF ACTUARIES

Meeting of the Advisory Committee; Meeting

AGENCY: Joint Board for the Enrollment of Actuaries

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The Joint Board for the Enrollment of Actuaries gives notice of a teleconference meeting of the Advisory Committee on Actuarial Examinations (a portion of which will be open to the public) on January 4–5, 2021.

DATES: Monday, January 4, 2021, from 9:00 a.m. to 5:00 p.m. (EST), and Tuesday, January 5, 2021, from 8:30 a.m. to 5:00 p.m. (EST).

ADDRESSES: The meeting will be held by teleconference.

FOR FURTHER INFORMATION CONTACT: Elizabeth Van Osten, Designated Federal Officer, Advisory Committee on Actuarial Examinations, at 202–317–3648 or *Elizabeth.j.vanosten@irs.gov.*

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Advisory Committee on Actuarial Examinations will meet by teleconference on Monday, January 4, 2021, from 9:00 a.m. to 5:00 p.m. (EST), and Tuesday, January 5, 2021, from 8:30 a.m. to 5:00 p.m. (EST).

The purpose of the meeting is to discuss topics and questions that may be recommended for inclusion on future Joint Board examinations in actuarial mathematics and methodology referred to in 29 U.S.C. 1242(a)(1)(B) and to review the November 2020 Pension (EA–2F) Examination in order to make recommendations relative thereto, including the minimum acceptable pass score. Topics for inclusion on the syllabus for the Joint Board's examination program for the May 2021 Basic (EA–1) Examination and the May 2021 Pension (EA–2L) Examination also will be discussed.

A determination has been made as required by section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. App.

2, that the portions of the meeting dealing with the discussion of questions that may appear on the Joint Board's examinations and the review of the November 2020 Pension (EA–2F) Examination fall within the exceptions to the open meeting requirement set forth in 5 U.S.C. 552b(c)(9)(B), and that the public interest requires that such portions be closed to public participation.

The portion of the meeting dealing with the discussion of the other topics will commence at 1:00 p.m. (EST) on January 4, 2021 and will continue for as long as necessary to complete the discussion, but not beyond 3:00 p.m. (EST). Time permitting, after the close of this discussion by Advisory Committee members, interested persons may make statements germane to this subject. Persons wishing to make oral statements should contact the Designated Federal Officer at *NHQJBEA@IRS.GOV* and include the written text or outline of comments they propose to make orally. Such comments will be limited to 10 minutes in length. Persons who wish to attend the public session should contact the Designated Federal Officer at *NHQJBEA@IRS.GOV* to obtain teleconference access instructions. Notifications of intent to make an oral statement or to attend the meeting must be sent electronically to the Designated Federal Officer by no later than December 31, 2020. In addition, any interested person may file a written statement for consideration by the Joint Board and the Advisory Committee by sending it to *NHQJBEA@IRS.GOV*.

Dated: December 11, 2020.

Thomas V. Curtin,

Executive Director, Joint Board for the Enrollment of Actuaries.

[FR Doc. 2020–27692 Filed 12–15–20; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. *National Association of REALTORS®* Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America* v. *National Association of REALTORS®,* Civil Action No. 1:20–cv–03356. On November 19, 2020, the United States filed a Complaint alleging that the certain of Defendant's, the National Association of REALTORS® (''NAR''), rules, policies, and practices promulgated by NAR resulted in a lessening of competition among real estate brokers and agents to the detriment of American home buyers in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The proposed Final Judgment, filed at the same time as the Complaint, is designed to remedy the anticompetitive effects alleged in the Complaint. Under the proposed Final Judgment, NAR is required to repeal, eliminate, or modify its rules, practices, and policies that the Division alleges in the Complaint violate the Sherman Act.

Specifically, NAR and NAR-affiliated multi-listing services (''MLSs'') must not (1) adopt, maintain, or enforce any rule, practice, or policy or (2) enter into any agreement or practice that directly or indirectly:

a. Prohibits, discourages, or recommends against an MLS or real estate broker or agent working with a NAR-affiliated MLS (''MLS Participant [1] or REALTOR®'') publishing or displaying to consumers any MLS data specifying the compensation offered to other MLS Participants, such as buyer brokers;

b. permits or requires MLS Participants, including buyer brokers, to represent or suggest that their services are free or available to a home buyer at no cost to the home buyer;

c. permits or enables MLS Participants to filter, suppress, hide, or not display or distribute MLS listings based on the level of compensation offered to the buyer broker or the name of the brokerage or brokers or agents; or

d. prohibits, discourages, or recommends against allowing any licensed real estate broker or agent to access, with approval from the home seller, the lockboxes of properties listed on an MLS.

As discussed in further detail in the Competitive Impact Statement, the proposed Final Judgement also requires NAR to take affirmative steps to remedy the competitive harm alleged in the Complaint by requiring adopting new rules, the content of which must be approved by the United States that effectuates the foregoing prohibitions.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection on the Antitrust Division's website at *http://www.justice.gov/atr* and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the Antitrust Division's website, filed with the Court, and, under certain circumstances, published in the **Federal Register**. Comments should be directed to Chief, Media, Entertainment and Professional Services Section, Antitrust Division, Department of Justice, 450 Fifth Street NW, Suite 4000, Washington, DC 20530 (telephone: 202–616–5935).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

United States District Court for the District of Columbia

United States of America, Department of Justice, Antitrust Division, 450 Fifth Street NW, Suite 4000, Washington, DC 20530, Plaintiff, v. *National Association of Realtors®, 430 North Michigan Ave., Chicago, IL 60611*, Defendant.
Case No. 1:20–cv–3356–TJK

Complaint

The United States of America brings this civil antitrust action to obtain equitable relief against Defendant National Association of REALTORS®. The United States alleges as follows:

I. Nature of the Action

1. Defendant National Association of REALTORS® (''NAR'') has adopted a series of rules, policies, and practices governing, among other things, the publication and marketing of real estate, real estate broker commissions, as well as real estate broker access to lockboxes, that have been widely adopted by NAR's members resulting in a lessening of competition among real estate brokers to the detriment of American home buyers. These NAR rules, policies, and practices include:

(a) Prohibiting NAR-affiliated multiple-listing services (''MLSs'') from disclosing to prospective buyers the amount of commission that the buyer broker will earn if the buyer purchases a home listed on the MLS;

(b) allowing buyer brokers to misrepresent to buyers that a buyer broker's services are free;

(c) enabling buyer brokers to filter MLS listings based on the level of buyer broker commissions offered and to exclude homes with lower commissions

[1] Under the proposed Final Judgment, an ''MLS Participant'' is defined as ''a member or user of, a participant in, or a subscriber to an MLS.'' (*See* Proposed Final Judgment, Section II—Definitions.)

from consideration by potential home buyers; and

(d) limiting access to the lockboxes that provide licensed brokers with physical access to a home that is for sale to only brokers who are members of a NAR-affiliated MLS.

2. These NAR rules, policies, and practices have been widely adopted and enforced by NAR-affiliated MLSs, and are, therefore, agreements among competing real estate brokers each of which reduce price competition among brokers and lead to lower quality service for American home buyers and sellers. Together, the agreements also have a cumulative anticompetitive effect. The agreements individually and collectively unreasonably restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and should be enjoined.

3. Accordingly, the United States seeks an order requiring NAR to cease its activities with respect to these rules, policies, and practices and providing additional relief.

II. Jurisdiction and Venue

4. NAR is engaged in interstate commerce and in activities substantially affecting interstate commerce. NAR transacts business throughout the United States. NAR's membership includes brokers and agents that conduct business across the United States in the local areas in which each member operates. NAR's rules, policies, and practices govern the conduct of its members in all 50 states, including the conduct of all of NAR's individual member brokers and their affiliated agents and sales associates (''REALTORS®''). The anticompetitive rules, policies, and practices alleged in this Complaint violate the Sherman Act and affect home buyers and sellers located throughout the United States. The Court has subject matter jurisdiction under Section 4 of the Sherman Act, 15 U.S.C. 4, to prevent and restrain NAR from violating Section 1 of the Sherman Act, 15 U.S.C. 1.

5. NAR has consented to venue and personal jurisdiction in this District. Venue is also proper in this judicial district under 28 U.S.C. 1391(b)(1).

III. The Defendant

6. NAR is a trade association organized under the laws of Illinois with its principal place of business in Chicago. It is the leading national trade association of real estate brokers and agents. Among its members are licensed residential real estate brokers, including brokers who provide real estate brokerage services to home sellers (''listing brokers''), home buyers (''buyer brokers''), or both (collectively ''residential brokers'').

IV. Industry Background

7. Among other activities, NAR establishes and enforces rules, policies, and practices, that are adopted by NAR's 1,400+ local associations (also called ''Member Boards'') and their affiliated MLSs that govern the conduct of NAR's approximately 1.4 million-member REALTORS® who are engaged in residential real estate brokerages across the United States.

8. The real estate brokerage business by its nature tends to be local. Most buyers and sellers prefer to work with a broker who is familiar with local market conditions. As a result, NAR's member brokers and agents compete with one another in local listing broker and buyer broker service markets to provide real estate brokerage services to home sellers and home buyers.

9. MLSs are joint ventures among competing brokers to facilitate the publishing and sharing of information about homes for sale in a geographic area. The membership of an MLS is generally comprised of nearly all residential real estate brokers and their affiliated agents in an MLS's service area. The geographic coverage of the MLS serving an area normally establishes the geographic market in which competition among brokers occurs, although meaningful competition among brokers may also occur in smaller areas, like a particular area of a city, in which case that smaller area may also be a relevant geographic market.

10. In each area an MLS serves, the MLS will include or ''list'' the vast majority of homes that are for sale through a residential real estate broker in that area. In most areas, the local MLS provides the most up-to-date, accurate, and comprehensive compilation of the area's home listings. Listing brokers will use the MLS to market sellers' properties to other broker and agent participants in the MLS and, through those other brokers and agents, to potential home buyers. By virtue of nearly industry-wide participation and control over important data, brokers offering MLSs possess and exercise market power in the markets for the provision of real estate brokerage services to home buyers and sellers in local markets throughout the country.

11. NAR, through its Member Boards, controls a substantial number of the MLSs in the United States. NAR promulgates rules, policies, and practices governing the conduct of NAR-affiliated MLSs that are set forth annually in the *Handbook on Multiple Listing Policy* (''Handbook''). Under the terms of the Handbook, affiliated REALTOR® associations and MLSs ''must conform their governing documents to the mandatory MLS policies established by [NAR's] Board of Directors to ensure continued status as member boards and to ensure coverage under the master professional liability insurance program.'' National Association of REALTORS®, Handbook on Multiple Listing Policy 2020 (32nd ed. 2020), at iii.

12. NAR and its affiliated REALTOR® associations and MLSs enforce the Handbook's rules, policies, and practices as well as the rules, policies, and practices codified in NAR's Code of Ethics. NAR's Code of Ethics states that ''[a]ny Member Board which shall neglect or refuse to maintain and enforce the Code of Ethics with respect to the business activities of its members may, after due notice and opportunity for hearing, be expelled by the Board of Directors from membership in the National Association.'' National Association of REALTORS®, Procedures for Consideration of Alleged Violations of Article IV, Section 2, Bylaws.

V. The Unlawful Agreements

13. NAR's Handbook and NAR's Code of Ethics impose certain rules, policies, and practices on NAR-affiliated MLSs that affect competition for the provision of buyer broker services among those participating in a given MLS. In addition, some MLSs employ certain practices that are not directly required by a NAR rule or policy, but that similarly affect competition for the provision of buyer broker services among those participating in an MLS.

14. These rules, policies, and practices include: Prohibiting an MLS from disclosing to prospective buyers the amount of commission that the buyer broker will earn if the buyer purchases a home listed on the MLS (''NAR's Commission Concealment Rules''); allowing buyer brokers to mislead buyers into thinking that buyer broker services are free (''NAR's Free-Service Rule''); enabling buyer brokers to filter MLS listings based on the level of buyer broker commissions offered and to exclude homes with lower commissions from consideration by potential home buyers (''NAR's Commission-Filter Rules and Practices''); and limiting access to lockboxes that provide licensed brokers physical access to a home that is for sale to only those real estate brokers who are members of a NAR-affiliated MLS (''NAR's Lockbox Policy'').

15. NAR's and its affiliated MLSs' adoption and enforcement of these

rules, policies, and practices which are described in more detail below, reflect concerted action between horizontal competitors and constitute agreements among competing real estate brokers that reduce price competition among brokers and lead to higher prices and lower quality service for American home buyers and sellers.

A. NAR's Commission-Concealment Rules

16. NAR's Commission-Concealment Rules recommend that MLSs prohibit disclosing to prospective buyers the total commissions offered to buyer brokers. Such concealment likely leads to higher prices and lower quality for buyer broker services. All or nearly all of NAR-affiliated MLSs have adopted a prohibition on disclosing commissions offered to buyer brokers. This means that while buyer brokers can see the commission that is being offered to them if their home buyer purchases a specific property—a commission that will ultimately be paid through the home purchase price that the home buyer, represented by the buyer broker, pays—MLSs conceal this fee from home buyers.

17. The Commission-Concealment Rules are laid out in several places in NAR's *Handbook,* including Policy Statement 7.58, Policy Statement 7.23, Policy Statement 7.3; Section IV.1.a of the Virtual Office websites Policy; and Sections 18.3.1 and 19.15 of the Model MLS Rules.

18. NAR's Commission-Concealment Rules relieve buyer brokers from the necessity of competing against each other by offering rebates or offering to accept lower commissions. NAR's Commission-Concealment Rules also make home buyers both less likely and less able to negotiate a discount or rebate off the offered commission. Finally, NAR's Commission-Concealment Rules encourage and perpetuate the setting of persistently high commission offers by sellers and their listing agents. The result is higher prices for buyer broker services.

19. Buyer brokers may, in fact, steer potential home buyers away from properties with low commission offers by filtering out, failing to show, or denigrating homes listed for sale that offer lower commissions than other properties in the area. When buyers cannot see commission offers, they cannot detect or resist this type of steering. Steering not only results in higher prices for buyer broker services, it also reduces the quality of the services that are rendered to the potential home buyer, making it less likely that the buyer will ultimately be matched with the optimal home choice. Fear of having buyers steered away from a property is also a strong deterrent to sellers who would otherwise offer lower buyer broker commissions, which further contributes to higher prices for buyer broker services.

B. NAR's Free-Service Rule

20. Because commissions are offered by home sellers, and buyers do not pay their buyer brokers directly, it can be difficult for buyers to appreciate that they are nevertheless sharing with the seller the cost of the buyer broker's services. NAR's Free-Services Rule, which has been widely adopted by NAR-affiliated MLSs, compounds this problem by allowing buyer brokers to mislead buyers into thinking that the buyer broker's services are free when they are not. Under the NAR Code of Ethics, ''Unless they are receiving no compensation from any source for their time and service, REALTORS® may use the term 'free' and similar terms in their advertising and in other representations only if they clearly and conspicuously disclose: (1) By whom they are being, or expect to be, paid; (2) the amount of the payment or anticipated payment; (3) any condition associated with the payment, offered product or service, and; (4) any other terms relating to their compensation.'' (See NAR Code of Ethics, Standard of Practice 12–1).

21. NAR's Free-Services Rule allows brokers to mislead buyers by obscuring the fact that buyers have a stake in what their buyer brokers are being paid for their services. Buyer broker fees, though nominally paid by the home's seller, are ultimately paid out of the funds from the purchase price of the house. If buyers are told that buyer broker services are ''free,'' buyers are less likely to think to negotiate a lower buyer broker commission or to view buyer broker rebate offers as attractive. In these ways, NAR's Free-Services Rule likely leads to higher prices for services provided by buyer brokers.

C. NAR'S Commission-Filter Rules and Practices

22. NAR's Commission-Filter Rules and Practices allow buyer brokers to filter MLS listings that will be shown to buyers based on the level of buyer broker commissions offered. Once this filtering is performed, some MLSs further permit buyer brokers to affirmatively choose not to show certain homes to potential home buyers if the buyer broker will make less money because of lower commissions. Homes may be filtered out in this manner even if they otherwise meet the buyer's home search criteria. For example, buyer brokers or agents may use an MLS's software to filter out any listing where a buyer broker will receive less than 2.5% commission on the home sale. The buyer broker would then provide to its home buyer customer only those listings where the buyer broker would be paid a 2.5% commission or more if the home sale is completed.

23. According to Policy Statement 7.58 of NAR's Handbook, for example, ''Participants may select the IDX listings they choose to display based only on objective criteria including . . . cooperative compensation offered by listing brokers.'' Handbook, at 24 (Policy Statement 7.58); see also id. at 43 (VOW Policy) (''A VOW may exclude listings from display based only on objective criteria, including . . . cooperative compensation offered by listing broker, or whether the listing broker is a Realtor®.'').

24. NAR's Commission-Filter Rules and Practices, which have been widely adopted by NAR-affiliated MLSs, facilitates steering by helping buyer brokers conceal from potential home buyers any property listings offering lower buyer broker commissions. As alleged above, the practice of steering buyers away from homes with lower buyer broker commissions likely reduces the quality of buyer broker services and raises prices for buyer broker services, both at the expense of home buyers.

D. NAR's Lockbox Policy

25. NAR and its members have also adopted a policy and practice that limits access to lockboxes to only those real estate brokers who are members of a NAR-affiliated MLS. Lockboxes hold the keys to a house to allow brokers and potential buyers to access homes for sale, with permission from the selling home owner, while continuing to keep the homes secure. Such lockboxes are accessed by a real estate broker using a numerical code or digital Bluetooth® 'key' enabling the real estate broker to show buyers homes that are listed for sale.

26. NAR and its affiliated MLSs have adopted a series of rules (set forth in the NAR Handbook, Policy Statement 7.31) that limit access to lockboxes only to those real estate brokers that are members of NAR and subscribe to the NAR-affiliated MLS. Licensed, but non-NAR-affiliated brokers are not allowed to access the lockboxes, thereby depriving those brokers the ability to show homes listed for sale. This policy and practice effectively deprives licensed real estate brokers that are not members of NAR from accessing properties for sale to show potential

home buyers, thereby lessening competition for buyer broker services.

VI. Violation of Section 1 of the Sherman Act

27. NAR's real estate broker members are direct competitors for the provision of listing-broker and buyer broker services. Through the rules, policies, and practices alleged above and challenged in this action, NAR has coordinated and enforced anticompetitive agreements, which have likely contributed to reduced price competition among buyer brokers and a lower quality of buyer broker services for home buyers.

28. When adopted by NAR Member Boards, the NAR rules, policies, and practices alleged above and challenged in this action are horizontal agreements that govern and enforce the conduct of competing MLS brokers and agents that deny prospective home buyers access to relevant information resulting in higher prices and lower quality for buyer broker services.

29. The NAR rules, policies, and practices alleged above and challenged in this action have an anticompetitive effect in the relevant markets and unreasonably restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

VII. Requested Relief

30. The United States requests that this Court:

(a) Adjudge that the NAR rules, policies, and practices challenged in this action are unreasonable restraints of trade and interstate commerce, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1;

(b) enjoin and restrain NAR from promulgating, enforcing, or adhering to any rules, policies, or practices that unreasonably restrict competition;

(c) permanently enjoin and restrain NAR from establishing the same or similar rules, policies, or practices as those challenged in this action in the future, except as prescribed by the Court;

(d) award the United States such other relief as the Court may deem just and proper to redress and prevent recurrence of the alleged violations and to dissipate the anticompetitive effects of the illegal agreements entered into by NAR; and

(e) award the United States the costs of this action.

Respectfully submitted,

COUNSEL FOR PLAINTIFF UNITED STATES

Dated: November 19, 2020

/s/

Makan Delrahim (D.C. Bar #457795)

Assistant Attorney General, Antitrust Division.

/s/

Michael F. Murray (D.C. Bar #1001680)

Deputy Assistant Attorney General.

/s/

Owen M. Kendler

Chief.

/s/

Lisa A. Scanlon

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/s/

Samer M. Musallam* (DC Bar # 986077)

U.S. Department of Justice, Antitrust Division, 950 Pennsylvania Ave. NW, Suite 3110, Washington, DC 20530, Tel. 202.598.2990, Fax: 202.514.9033, samer.musallam@usdoj.gov.

Attorneys for the United States

* Lead Attorney to be Noticed

United States District Court for the District of Columbia

United States of America, Plaintiff, v. *National Association of Realtors®*, Defendant.

Case No. 1:20–cv–3356–TJK

[Proposed] Final Judgment

Whereas, Plaintiff, United States of America, filed its Complaint on November 19, 2020, alleging that Defendant, National Association of REALTORS®, violated Section 1 of the Sherman Act, 15 U.S.C. 1,

And whereas, the United States and Defendant have consented to the entry of this Final Judgment without the taking of testimony, without trial or adjudication of any issue of fact or law, without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law, and without Defendant admitting liability, wrongdoing, or the truth of any allegations in the Complaint;

And whereas, Defendant agrees to undertake certain actions and refrain from certain conduct for the purpose of remedying the anticompetitive effects alleged in the Complaint;

Now therefore, it is ordered, adjudged, and decreed:

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendant under Section 1 of the Sherman Act, as amended, 15 U.S.C. 1.

II. Definitions

As used in this Final Judgment:

A. ''NAR'' and ''Defendant'' mean the National Association of REALTORS®, a non-profit trade association with its headquarters in Chicago, Illinois, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

B. ''Agreement'' means any agreement, understanding, pact, contract, or arrangement, formal or informal, oral or written, between two or more Persons.

C. ''Broker'' means a Person licensed by a state to provide services to a buyer (''buyer Broker'') or seller (''listing Broker'') in connection with a real estate transaction. The term includes any Person who possesses a Broker's license and any agent or sales associate who is affiliated with such a Broker.

D. ''Client'' means the person(s) with whom a REALTOR® is contracted with or otherwise has an agency or legally recognized non-agency relationship with respect to the purchase or sale of real property.

E. ''Management'' means NAR's President, President Elect, First Vice President, Treasurer, VP of Advocacy, VP of Association Affairs, Chief Executive Officer, and Executive Committee.

F. ''Member Board'' means any state or local Board of REALTORS® or Association of REALTORS®, including any city, county, inter-county, or inter-state Board or Association, and any multiple listing service owned by, or affiliated with, any such Board of REALTORS® or Association of REALTORS®.

G. ''MLS Participant'' means a member or user of, a participant in, or a subscriber to an MLS.

H. ''MLS'' means a multiple-listing service owned or controlled by a Member Board.

I. ''Person'' means any natural person, trade association, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental.

J. ''Rule'' means any final rule, model rule, ethical rule, bylaw, policy, definition, standard, or guideline, and any interpretation of any Rule issued or approved by NAR.

III. Applicability

A. This Final Judgment applies to NAR, as defined above, and all other Persons, including all Member Boards and MLS Participants, in active concert or participation with NAR who receive actual notice of this Final Judgment. A

Member Board or MLS Participant shall not be deemed to be in active concert with NAR solely as a consequence of its receipt of actual notice of this Final Judgment or its affiliation with or membership in NAR.

IV. Prohibited Conduct

NAR and its Member Boards must not adopt, maintain, or enforce any Rule, or enter into or enforce any Agreement or practice, that directly or indirectly:

1. Prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS database field specifying the compensation offered to other MLS Participants;

2. permits or requires MLS Participants, including buyer Brokers, to represent or suggest that their services are free or available to a Client at no cost to the Client;

3. permits or enables MLS Participants to filter, suppress, hide, or not display or distribute MLS listings based on the level of compensation offered to the buyer Broker or the name of the brokerage or agent; or

4. prohibits, discourages, or recommends against the eligibility of any licensed real estate agent or agent of a Broker, from accessing, with seller approval, the lockboxes of those properties listed on an MLS.

V. Required Conduct

A. By not later than 45 calendar days after entry of the Stipulation and Order in this matter, NAR must submit to the United States, for the United States' approval in its sole discretion, any Rule changes that NAR proposes to adopt to comply with Paragraphs V.C–I of this Final Judgment.

B. By not later than thirty calendar days after entry of the Stipulation and Order in this matter, NAR must furnish notice of this action to all its Member Boards and MLS Participants in a form to be approved by the United States in its sole discretion.

C. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion, that repeal any Rule that prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS database field specifying compensation offered to other MLS Participants.

D. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion that require all Member Boards and MLSs to repeal any Rule that prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS database field specifying compensation offered to other MLS Participants.

E. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion, that require all MLS Participants to provide to Clients information about the amount of compensation offered to other MLS Participants.

F. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion, that:

1. Repeal any Rule that permits all MLSs and MLS Participants, including buyer Brokers, to represent that their services are free or available at no cost to their Clients;

2. require all Member Boards and MLSs to repeal any Rule that permits MLSs and MLS Participants, including buyer Brokers, to represent that their services are free or available at no cost to their Clients; and

3. prohibit all MLSs and MLS Participants, including buyer Brokers, from representing that their services are free or available at no cost to their Clients.

G. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion, that require all Member Boards and MLSs to:

1. Prohibit MLS Participants from filtering or restricting MLS listings that are searchable by or displayed to consumers based on the level of compensation offered to the buyer Broker or the name of the brokerage or agent; and

2. repeal any Rule that permits or enables MLS Participants to filter or restrict MLS listings that are searchable by or displayed to consumers based on the level of compensation offered to the buyer Broker, or by the name of the brokerage or agent.

H. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion, that require all Member Boards and MLSs to allow any licensed real estate agent or agent of a Broker, to access, with seller approval, the lockboxes of those properties listed on an MLS.

I. By not later than 10 business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this Final Judgment, NAR must furnish notice of this action to all its Member Boards and MLS Participants through (i) a direct communication, in a form to be approved by the United States in its sole discretion, that must contain this Final Judgment; the new Rule or Rules NAR devises in compliance with Paragraphs V.E., V.H., and V.I; and the Competitive Impact Statement; and (ii) the creation and maintenance of a page on NAR's website, that must be posted for no less than one year after the date of entry of this Final Judgment, and must contain links to this Final Judgment; the new Rule or Rules NAR devises in compliance with Section V; the Competitive Impact Statement; and the Complaint in this matter.

J. By not later than 30 calendar days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this Final Judgment, NAR must publish to all Member Boards, in a manner subject to approval by the United States in its sole discretion, this Final Judgment and the NAR Rules adopted in compliance with Section V.

K. By not later than 60 calendar days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this Final Judgment, NAR must require all Member Boards to publish, in a manner subject to approval by the United States in its sole discretion, to all MLS Participants this Final Judgment and the NAR Rules adopted in compliance with Section V.

L. The United States, in its sole discretion, may agree to one or more

extensions of each of the time periods set forth in this Section V.

VI. Antitrust Compliance

A. By not later than 30 calendar days after entry of the Stipulation and Order in this matter, Defendant must (i) appoint an Antitrust Compliance Officer and (ii) identify to the United States the Antitrust Compliance Officer's name, business address, telephone number, and email address. Within thirty days after the Antitrust Compliance Officer position becomes vacant, the Defendant must (i) appoint a replacement Antitrust Compliance Officer and (ii) must identify to the United States the replacement Antitrust Compliance Officer's name, business address, telephone number, and email address. The Defendant's initial appointment and replacement of an Antitrust Compliance Officer is subject to the approval of the United States in its sole discretion.

B. The Antitrust Compliance Officer must:

1. By not later than 30 calendar days after entry of this Final Judgment, furnish to all of Management a copy of this Final Judgment, the Competitive Impact Statement filed by the United States in connection with this matter, and a cover letter in a form attached as Exhibit 1;

2. by not later than 30 calendar days after entry of this Final Judgment, in a form and manner to be approved by the United States in its sole discretion, provide Management and employees with reasonable notice of the meaning and requirements of this Final Judgment;

3. annually brief Management on the meaning and requirements of this Final Judgment and the antitrust laws;

4. brief any person who succeeds a Person in any Management position on the meaning and requirements of this Final Judgment by not later than 30 calendar days after such succession;

5. obtain from all members of Management, by not later than 30 calendar days after that Person's receipt of this Final Judgment, a certification that the Person (i) has read and, to the best of his or her ability, understands and agrees to abide by the terms of this Final Judgment; (ii) has reported any violation of this Final Judgment to Defendant or is not aware of any violation of this Final Judgment that has not been reported to the Defendant; and (iii) understands that his or her failure to comply with this Final Judgment may result in an enforcement action for civil or criminal contempt of court against the Defendant and any other Person bound by the Final Judgment who violates this Final Judgment;

6. maintain a record of certifications received pursuant to this Section and a copy of each certification;

7. annually communicate to Management and employees that they must disclose to the Antitrust Compliance Officer information concerning any potential violation of this Final Judgment or the antitrust laws and that any such disclosure will be without reprisal by Defendant; and

8. by not later than 90 calendar days after entry of this Final Judgment and annually thereafter, the Antitrust Compliance Officer must file reports with the United States describing that Defendant has met its obligations under this Paragraph.

C. Immediately upon Management's or the Antitrust Compliance Officer's learning of any violation or potential violation of any of the terms of this Final Judgment, NAR must take appropriate action to investigate and, in the event of a potential violation, must cease or modify the activity so as to comply with this Final Judgment. NAR must maintain all documents related to any potential violation of this Final Judgment for the term of this Final Judgment.

D. Within 30 calendar days of Management's or the Antitrust Compliance Officer's learning of any potential violation of any of the terms of this Final Judgment, Defendant must file with the United States a statement describing the potential violation, including a description of (1) any communications constituting the potential violation, the date and place of the communication, the persons involved in the communication, and the subject matter of the communication, and (2) all steps taken by the Antitrust Compliance Officer or Management to remedy the potential violation.

E. Defendant must have its CEO or CFO, and its General Counsel certify in writing to the United States, no later than 60 calendar days after the Final Judgement is entered and then annually on the anniversary of the date of the entry of this Final Judgment, that the Defendant has complied with the provisions of this Final Judgment.

F. The United States, in its sole discretion, may agree to one or more extensions of each of the time periods set forth in this Section VI.

VII. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment or of related orders such as the Stipulation and Order or of determining whether this Final Judgment should be modified or vacated, upon written request of an authorized representative of the Assistant Attorney General for the Antitrust Division, and reasonable notice to Defendant, Defendant must permit, from time to time and subject to legally recognized privileges, authorized representatives, including agents retained by the United States:

1. To have access during Defendant's office hours to inspect and copy, or at the option of the United States, to require Defendant to provide electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendant, relating to any matters contained in this Final Judgment; and

2. to interview, either informally or on the record, Defendant's officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews must be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendant.

B. Upon the written request of an authorized representative of the Assistant Attorney General for the Antitrust Division, Defendant must submit written reports or respond to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment.

C. No information or documents obtained pursuant to this Section VII may be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party, including grand jury proceedings, for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If a third party requests disclosure of information under the Freedom of Information Act, 5 U.S.C. 552, the Antitrust Division will act in accordance with that statute, and the Department of Justice regulations at 28 CFR part 16, including the provision on confidential commercial information, at 28 CFR 16.7. Defendant submitting information to the Antitrust Division should designate the confidential commercial information portions of all applicable documents and information under 28 CFR 16.7. Designations of confidentiality expire ten years after submission, ''unless the submitter requests and provides justification for a longer designation period.'' *See* 28 CFR 16.7(b).

E. If at the time that Defendant furnishes information or documents to the United States pursuant to this

Section VII, Defendant represents and identifies in writing information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendant marks each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure,'' the United States must give Defendant ten calendar days' notice before divulging such material in any legal proceeding, other than a grand jury proceeding.

VIII. Retention of Jurisdiction

The Court retains jurisdiction to enable any party to this Final Judgment to apply to the Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

IX. Enforcement of Final Judgment

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from the Court. Defendant agrees that in a civil contempt action, a motion to show cause, or a similar action brought by the United States regarding an alleged violation of this Final Judgment, the United States may establish a violation of this Final Judgment and the appropriateness of a remedy therefor by a preponderance of the evidence, and Defendant waives any argument that a different standard of proof should apply.

B. This Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws and to restore the competition the United States alleged was harmed by the challenged conduct. Defendant agrees that it may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that, as interpreted by the Court in light of these procompetitive principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of this Final Judgment should not be construed against either party as the drafter.

C. In an enforcement proceeding in which the Court finds that Defendant has violated this Final Judgment, the United States may apply to the Court for a one-time extension of this Final Judgment, together with other relief that may be appropriate. In connection with any successful effort by the United States to enforce this Final Judgment against Defendant, whether litigated or resolved before litigation, Defendant agrees to reimburse the United States for the fees and expenses of its attorneys, as well as any other costs, including experts' fees, incurred in connection with that enforcement effort, including in the investigation of the potential violation.

D. For a period of four years following the expiration or termination of this Final Judgment, if the United States has evidence that Defendant violated this Final Judgment before it expired, the United States may file an action against Defendant in this Court requesting that the Court order: (1) Defendant to comply with the terms of this Final Judgment for an additional term of at least four years following the filing of the enforcement action, (2) all appropriate contempt remedies, (3) any additional relief needed to ensure the Defendant complies with the terms of this Final Judgment, and (4) fees or expenses as called for in this Section IX.

X. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire 7 years from the date of its entry, except that after 5 years from the date of its entry, this Final Judgment may be terminated upon notice by the United States to the Court and Defendant that the continuation of this Final Judgment no longer is necessary or in the public interest.

XI. United States' Reservation of Rights

Nothing in this Final Judgment shall limit the right of the United States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any Rule or practice adopted or enforced by NAR or any of its Member Boards.

XII. Notice

For purposes of this Final Judgment, any notice or other communication required to be provided to the United States must be sent to the person at the address set forth below (or such other address as the United States may specify in writing to Defendant): Chief, Office of Decree Enforcement and Compliance, Antitrust Division, U.S. Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530.

XIII. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including by making available to the public copies of this Final Judgment and the Competitive Impact Statement, any public comments thereon, and any response to comments by the United States. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

[Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. 16]

United States District Judge

United States District Court for the District of Columbia

United States of America, Plaintiff, v. *National Association of Realtors®*, Defendant.

Case No. 1:20–cv–03356–TJK

Competitive Impact Statement

Plaintiff United States of America (''United States''), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. §1A16(b)–(h) (''APPA'' or ''Tunney Act''), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

On November 19, 2020, the United States filed a civil antitrust Complaint against Defendant National Association of REALTORS® (''NAR'') alleging that a series of rules, policies, and practices promulgated by NAR resulted in a lessening of competition among real estate brokers and agents to the detriment of American home buyers in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. [Dkt. No. 1.]

The Complaint alleges that certain NAR rules, policies, and practices have been widely adopted by NAR's members, including the multiple listing services (''MLSs'') affiliated with NAR that facilitate the publishing and sharing of information about local homes for sale, resulting in a lessening of competition among real estate brokers and agents to the detriment of American home buyers. These NAR rules, policies, and practices include those that:

a. Prohibit MLSs affiliated with NAR from disclosing to potential home buyers the amount of commission that the buyer's real estate broker or agent will earn if the buyer purchases a home listed on the MLS;

b. allow brokers for home sellers (''buyer brokers'') to misrepresent to potential home buyers that a buyer broker's services are free;

c. enable buyer brokers to filter the listings of homes for sale via an MLS based on the level of buyer broker commissions offered and exclude homes with lower commissions from consideration by potential home buyers; and

d. limit access to lockboxes, which provide physical access to homes for sale, only to real estate brokers or agents working with a NAR-affiliated MLS.

At the same time the Complaint was filed, the United States filed a Stipulation and Order and proposed Final Judgment, which are designed to remedy the anticompetitive effects alleged in the Complaint. [Dkt. No. 4.] On November 20, 2020, the Court entered the Stipulation and Order. [Dkt. No. 5.]

Under the proposed Final Judgment, NAR is required to repeal, eliminate, or modify its rules, practices, and policies that the Division alleges in the Complaint violate the Sherman Act. Specifically, NAR and NAR-affiliated MLSs must not (1) adopt, maintain, or enforce any rule, practice, or policy or (2) enter into any agreement or practice that directly or indirectly:

e. Prohibits, discourages, or recommends against an MLS or real estate broker or agent working with a NAR-affiliated MLS (''MLS Participant [2] or REALTOR®'') publishing or displaying to consumers any MLS data specifying the compensation offered to other MLS Participants, such as buyer brokers;

f. permits or requires MLS Participants, including buyer brokers, to represent or suggest that their services are free or available to a home buyer at no cost to the home buyer;

g. permits or enables MLS Participants to filter, suppress, hide, or not display or distribute MLS listings based on the level of compensation offered to the buyer broker or the name of the brokerage or brokers or agents; or

h. prohibits, discourages, or recommends against allowing any licensed real estate broker or agent to access, with approval from the home seller, the lockboxes of properties listed on an MLS.

As discussed in further detail below, the proposed Final Judgment requires NAR to take affirmative steps to remedy the competitive harm alleged in the Complaint. The Stipulation and Order requires NAR to abide by and comply with the provisions of the proposed Final Judgment until the proposed Final Judgment is entered by the Court or until expiration of time for all appeals of any Court ruling declining entry of the proposed Final Judgment. [Dkt. No. 5.]

The United States and NAR have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof. [Dkt. No. 4–2.]

II. Description of Events Giving Rise to the Alleged Violation

A. The Defendant and Its Members

Defendant NAR is a trade association organized under the laws of Illinois with its principal place of business in Chicago. NAR is the leading national trade association of real estate brokers and agents. Among NAR's members are licensed residential real estate brokers, including brokers who provide real estate brokerage services to home sellers, home buyers, or both.

Among other activities, NAR establishes and enforces rules, policies, and practices that are then adopted by NAR's more than 1,400 local associations (also known as the ''Member Boards'') and their affiliated MLSs. These rules, policies, and practices govern the conduct of the approximately 1.4 million MLS Participants or REALTORS® affiliated with NAR who are engaged in residential real estate brokerages across the United States.

An MLS is a joint venture among competing brokers to facilitate the publishing and sharing of information about homes for sale in a geographic area. The membership of an MLS is generally comprised of nearly all residential real estate brokers and their affiliated agents in an MLS's service area. In each area an MLS serves, the MLS will include or ''list'' the vast majority of homes that are for sale through a residential real estate broker in that area. In most areas, the local MLS provides the most up-to-date, accurate, and comprehensive compilation of the area's home listings. Listing brokers use the MLS to market sellers' properties to other broker and agent participants in the MLS and, through those other brokers and agents, to potential home buyers. By virtue of nearly industry-wide participation and control over important data, MLSs possess and exercise market power in the markets for the provision of real estate brokerage services to home buyers and sellers in local markets throughout the country.

As alleged in the Complaint, NAR's member brokers and agents compete with one another in local listing broker and buyer service markets to provide real estate brokerage services to home sellers and home buyers. The geographic coverage of the MLS serving an area normally establishes the geographic market in which competition among brokers occurs, although meaningful competition among brokers may also occur in smaller areas, like a particular area of a city, in which case that smaller area may also be a relevant geographic market.

NAR, through its Member Boards, controls a substantial number of the MLSs in the United States. NAR promulgates rules, policies, and practices governing the conduct of NAR-affiliated MLSs that are set forth annually in the *Handbook on Multiple Listing Policy* (''Handbook''). Under the terms of the Handbook, affiliated REALTOR® associations and MLSs ''must conform their governing documents to the mandatory MLS policies established by [NAR's] Board of Directors to ensure continued status as member boards and to ensure coverage under the master professional liability insurance program.'' (National Association of REALTORS®, Handbook on Multiple Listing Policy 2020 (32nd ed. 2020), at iii).[3]

NAR and its affiliated REALTOR® associations and MLSs enforce the Handbook's rules, policies, and practices as well as the rules, policies, and practices set forth in NAR's Code of Ethics. NAR's Code of Ethics states that ''[a]ny Member Board which shall neglect or refuse to maintain and enforce the Code of Ethics with respect to the business activities of its members may, after due notice and opportunity for hearing, be expelled by the Board of Directors from membership'' in NAR. (National Association of REALTORS®, Procedures for Consideration of Alleged Violations of Article IV, Section 2, Bylaws).[4]

B. Description of the Challenged Rules, Policies, and Practices and Their Anticompetitive Effects

NAR's Handbook and NAR's Code of Ethics impose certain rules, policies,

[2] Under the proposed Final Judgment, an ''MLS Participant'' is defined as ''a member or user of, a participant in, or a subscriber to an MLS.'' (*See* Proposed Final Judgment, Section II—Definitions.)

[3] Available at *cdnr.nar.realtor/sites/default/files/document/NAR-HMLP-2020-v2.pdf.* (Last visited on 12/2/2020).

[4] Available at *https://www.nar.realtor/about-nar/governing-documents/code-of-ethics/duty-to-adopt-and-enforce-the-code-of-ethics#:~:text=Any%20Member%20Board%20which%20shall,membership%20in%20the%20National%20Association.* (Last visited on 12/2/2020).

and practices on NAR-affiliated MLSs that affect competition for the provision of buyer broker services among those participating in a given MLS. In addition, some MLSs employ certain practices that are not directly required by a NAR rule or policy, but that similarly affect competition for the provision of buyer broker services among those participating in an MLS.

These rules, policies, and practices, discussed in more detail below, include: prohibiting an MLS from disclosing to potential home buyers the amount of commission that the buyer broker will earn if the buyer purchases a home listed on the MLS (''NAR's Commission Concealment Rules''); allowing buyer brokers to mislead potential home buyers into thinking that buyer broker services are free (''NAR's Free-Service Rule''); enabling buyer brokers to filter MLS listings based on the level of buyer broker commissions offered and to exclude homes with lower commissions from consideration by potential home buyers (''NAR's Commission-Filter Rules and Practices''); and limiting accesses to lockboxes that provide licensed brokers physical access to a home that is for sale to only those real estate brokers who are members of a NAR-affiliated MLS (''NAR's Lockbox Policy'').

These rules, policies, and practices constitute agreements that reduce price competition among brokers and lead to lower quality service for American home buyers and sellers.

1. NAR's Commission-Concealment Rules

NAR's Commission-Concealment Rules recommend that MLSs prohibit disclosing to potential home buyers the total commission offered to buyer brokers. All or nearly all of NAR-affiliated MLSs have adopted a prohibition on disclosing commissions offered to buyer brokers. This means that while buyer brokers can see the commission that is being offered to them if their home buyer purchases a specific property—a commission that will ultimately be paid through the home purchase price that the home buyer, represented by the buyer broker, pays—MLSs conceal this fee from potential home buyers.

NAR's Commission-Concealment Rules lessen competition among buyer brokers by reducing their incentives to compete against each other by offering rebates. These rules also make potential home buyers both less likely and less able to negotiate a rebate off the offered commission. NAR's Commission-Concealment Rules encourage and perpetuate the setting of persistently high commission offers by sellers and their listing agents. This contributes to higher prices for buyer broker services.

As alleged in the Complaint, NAR's Commission-Concealment Rules can also lead to other anticompetitive effects. Because of the Commission-Concealment Rules, buyer brokers may steer potential home buyers away from properties with low commission offers by filtering out, failing to show, or denigrating homes listed for sale that offer lower commissions than other properties in the area. When potential home buyers can't see commission offers, they can't detect or resist this type of steering. Steering not only results in higher prices for buyer broker services, it also reduces the quality of the services that are rendered to the potential home buyer, making it less likely that the buyer will ultimately be matched with the optimal home choice. Fear of having potential home buyers steered away from a property is a strong deterrent to sellers who would otherwise offer lower buyer broker commissions, which further contributes to higher prices for buyer broker services.

2. NAR's Free-Service Rule

Because commissions are offered by home sellers—and home buyers do not pay their buyer brokers directly—it can be difficult for buyers to appreciate that they are nevertheless sharing with the seller the cost of the buyer broker's services. NAR's Free-Service Rule, which has been widely adopted by NAR-affiliated MLSs, compounds this problem by allowing buyer brokers to mislead buyers into thinking the buyer broker's services are free and hide the fact that buyers have a stake in what their buyer brokers are being paid. Under NAR's Code of Ethics, ''Unless they are receiving no compensation from any source for their time and service, REALTORS® may use the term 'free' and similar terms in their advertising and in other representations only if they clearly and conspicuously disclose: (1) By whom they are being, or expect to be, paid; (2) the amount of the payment or anticipated payment; (3) any condition associated with the payment, offered product or service, and; (4) any other terms relating to their compensation.'' (NAR Code of Ethics, Standard of Practice 12–1.)[5]

Buyer broker fees, though nominally paid by the home's seller, are ultimately paid out of the funds from the purchase price of the house. If potential home buyers are told that buyer broker services are ''free,'' buyers are less likely to think to negotiate a lower buyer-broker commission or to view the buyer broker rebate offers as attractive. In these ways, NAR's Fee-Service Rule likely leads to higher prices for services provided by buyer brokers.

3. NAR's Commission-Filter Rules and Practices

NAR's Commission-Filter Rules and Practices allow buyer brokers to filter MLS listings that will be shown to potential home buyers based on the level of buyer broker commissions offered. Once this filtering is performed, some MLSs further permit buyer brokers to affirmatively choose not to show certain homes to potential home buyers if the buyer broker will make less money because of lower commissions. Homes may be filtered out in this manner even if they otherwise meet the buyer's home search criteria. For example, buyer brokers or agents may use an MLS's software to filter out any listing where buyer brokers will receive less than 2.5% commission on the home sale. The buyer broker would then provide to his home buyer customer only those listings where the buyer broker would be paid a 2.5% commission or more if the home sale is completed.

According to Policy Statement 7.58 of NAR's Handbook, for example, ''[p]articipants may select the IDX listings they choose to display based only on objective criteria including . . . cooperative compensation offered by listing brokers.'' (Handbook, at 24, Policy Statement 7.58; *see* NAR's VOW Policy, *id.* at 43 (''A VOW may exclude listings from display based only on objective criteria, including . . . cooperative compensation offered by the listing broker, or whether the listing broker is a Realtor®.'')) [6]

NAR's Commission-Filter Rules and Practices, which have been widely adopted by NAR-affiliated MLSs, are anticompetitive because they facilitate steering by helping buyer brokers conceal from potential home buyers any property listings offering lower buyer broker commissions. The practice of steering buyers away from homes with lower buyer broker commissions likely reduces the quality of buyer broker services and raises prices for buyer broker services, both at the expense of buyers.

[5] Available at *https://www.nar.realtor/about-nar/governing-documents/code-of-ethics/2021-code-of-ethics-standards-of-practice.* (Last visited on 12/2/2020).

[6] Available at *cdnr.nar.realtor/sites/default/files/document/NAR-HMLP-2020-v2.pdf.* (Last visited on 12/2/2020).

4. NAR's Lockbox Policy

Lockboxes hold the keys to a house to allow brokers and potential home buyers to access homes for sale, with permission from the selling home owner, while continuing to keep the homes secure. Such lockboxes are typically accessed by a real estate broker using a numerical code or digital Bluetooth® ''key'' enabling the real estate broker to show buyer homes that are listed for sale.

NAR and its affiliated MLSs have adopted a policy and practice that limits access to lockboxes to only those real estate brokers who are members of NAR and subscribe to the NAR-affiliated MLS. (*See* Handbook, Policy Statement 7.31).[7] Licensed, but non-NAR-affiliated brokers are not allowed to access the lockboxes. Because only real estate brokers that are members of NAR and subscribe to the NAR-affiliated MLS are permitted access to lockboxes, this policy and practice effectively deprives licensed real estate brokers that are not members of NAR from accessing properties for sale to show potential home buyers. This lessens competition for buyer broker services as real estate brokers that are not members of NAR cannot access lockboxes and show properties to their clients.

C. The Challenged Rules, Policies, and Practices Violate the Antitrust Laws

NAR's challenged rules, policies and practices violate Section 1 of the Sherman Act, 15 U.S.C. 1, which prohibits unreasonable restraints on competition. NAR's real estate broker members are direct competitors for the provision of listing broker and buyer broker services. NAR and its affiliated MLSs have widely adopted the challenged rules, policies, and practices. Adoption by NAR and its affiliated MLSs of these rules, policies, and practices reflects concerted action between horizontal competitors and constitutes agreements among competing real estate brokers that reduce price competition among brokers and lead to higher prices and a lower quality of service for American home buyers. *See, e.g., Realcomp II, Ltd.* v. *FTC,* 635 F.3d 815, 828–29 (6th Cir. 2011) (holding that association of real-estate brokers was a contract, combination, or conspiracy with respect to allegedly anticompetitive policies).

When adopted by NAR Member Boards, the NAR rules, policies, and practices alleged above and challenged in this action are horizontal agreements that govern and enforce the conduct of competing MLS brokers and agents that deny potential home buyers access to relevant information resulting in higher prices and lower quality for buyer broker services.

The NAR rules, policies, and practices challenged in this action have anticompetitive effects in the relevant market for local listing broker and buyer broker services in the United States that outweigh any purported pro-competitive benefits. Accordingly, they unreasonably restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

III. Explanation of the Proposed Final Judgment

The proposed Final Judgment prohibits NAR and its Member Boards from undertaking certain conduct and affirmatively requires NAR to take certain actions to remedy the antitrust violations alleged in the Complaint.

A. Prohibited and Required Conduct

1. Commission-Concealment Rules

Paragraph IV.1 of the proposed Final Judgment prohibits NAR and its Member Boards from adopting, maintaining, or enforcing any rule, or from entering into or enforcing any agreement or practice, that directly or indirectly ''prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS data specifying the compensation offered to other MLS Participants.''

Paragraphs V.C.–E. of the proposed Final Judgment further require NAR to adopt new rules, the content of which must be approved by the United States, that:

a. Repeal any rule that prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS data specifying compensation offered to other MLS Participants;

b. repeal any rule that prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS data specifying compensation offered to other MLS Participants; or

c. require all MLS Participants to provide to their clients with information about the amount of compensation offered to other MLS Participants.

These provisions, as set forth in the proposed Final Judgment, are designed to resolve the competitive concerns related to NAR's Commission-Concealment rules as alleged in the Complaint.

2. Free-Service Rule

Paragraph IV.2 of the proposed Final Judgment prohibits NAR and its Member Boards from adopting, maintaining, or enforcing any rule, or from entering into or enforcing any agreement, that directly or indirectly ''permits or requires MLS Participants, including buyer Brokers, to represent or suggest that their services are free or available to a Client at no cost to the Client.''

Paragraph V.F. of the proposed Final Judgment further requires NAR to adopt new rules, the content of which must be approved by the United States, that:

a. Repeals any rule that permits all MLSs and MLS Participants, including buyer Brokers, to represent that their services are free or available at no cost to their clients;

b. requires all Member Boards and MLSs to repeal any rule that permits MLSs and MLS Participants, including buyer Brokers, to represent that their services are free or available at no cost to their clients; and

c. prohibits all MLSs and MLS Participants, including buyer Brokers, from representing that their services are free or available at no cost to their clients.

These provisions, as set forth in the proposed Final Judgment, are designed to resolve the competitive concerns with NAR's Free-Service Rule as alleged in the Complaint.

3. Commission-Filter Rules and Practices

Paragraph IV.3 of the proposed Final Judgment prohibits NAR and its Member Boards from adopting, maintaining, or enforcing any rule, or from entering into or enforcing any agreement that directly or indirectly ''permits or enables MLS Participants to filter, suppress, hide, or not display or distribute MLS listings based on the level of compensation offered to the buyer Broker or the name of the brokerage or agent.''

Paragraph V.G. of the proposed Final Judgment further requires NAR to adopt new rules, the content of which must be approved by the United States that:

a. Prohibits MLS Participants from filtering or restricting MLS listings that are searchable by or displayed to consumers based on the level of compensation offered to the buyer Broker or the name of the brokerage or agent; and

b. repeals any rule that permits or enables MLS Participants to filter or restrict MLS listings that are searchable by or displayed to consumers based on the level of compensation offered to the

[7] Available at *cdnr.nar.realtor/sites/default/files/document/NAR-HMLP-2020-v2.pdf.* (Last visited on 12/2/2020).

buyer Broker, or by the name of the brokerage or agent.

These provisions, as set forth in the proposed Final Judgment, are designed to resolve the competitive concerns with NAR's Commission-Filter Rules and Practices as alleged in the Complaint.

4. Lockbox Policy

Paragraph IV.4 of the proposed Final Judgment prohibits NAR and its Member Boards from adopting, maintaining, or enforcing any rule, or from entering into or enforcing any agreement or practice, that directly or indirectly ''prohibits, discourages, or recommends against the eligibility of any licensed real estate agent or agent of a Broker, from accessing, with seller approval, he lockboxes of those properties listed on an MLS.''

Paragraph V.H. of the proposed Final Judgment further requires NAR to adopt one or more rules, the content of which must be approved by the United States, that ''requires all Member Boards and MLSs to allow any licensed real estate agent or agent of a Broker, to access, with seller approval, the lockboxes of those properties listed on an MLS.''

These provisions, as set forth in the proposed Final Judgment, are designed to resolve the competitive concerns with NAR's Lockbox Policy as alleged in the Complaint.

B. Other Provisions

Notice to Member Boards, MLS Participants and Public. Paragraph V.I. of the proposed Final Judgment requires NAR to furnish notice of this action to all of its Member Boards and MLS Participants through (1) a communication, in a form to be approved by the United States, that must contain the Final Judgment, the new rules NAR proposes to issue to comply with the proposed Final Judgment, and this Competitive Impact Statement; and (2) the creation and maintenance of a page on NAR's website, to be posted for no less than one year, that contains links to the Final Judgment, the new rules NAR proposes to issue to comply with the proposed Final Judgment, this Competitive Impact Statement; and the Complaint. Notification to NAR's Member Boards and MLS Participants is required to ensure compliance with the Final Judgment by NAR and its Member Boards and MLS Participants, while publication of this action on NAR's website will provide notice to the public of all prohibited and required conduct.

Antitrust Compliance Officer. The proposed Final Judgment also contains provisions designed to promote compliance and make enforcement of the Final Judgment as effective as possible. Paragraph VI requires NAR to appoint an Antitrust Compliance Officer who is responsible for, among other things, annually briefing NAR's management on the meaning and requirements of the Final Judgment and the antitrust laws, providing NAR's management and employees with reasonable notice of the meaning and requirements of the Final Judgment, and obtaining and maintaining certification from all members of NAR's management that they understand and agree to abide by the terms of the Final Judgment. The Antitrust Compliance Officer is also required to (1) annually communicate to NAR's management and employees that they must disclose to the Antitrust Compliance Officer any information concerning any potential violation of the Final Judgment of which they are aware and (2) file a report with the United States describing that NAR has met its obligations under the Final Judgment.

Enforcement of Final Judgment. Paragraph IX.A. provides that the United States retains and reserves all rights to enforce the Final Judgment, including the right to seek an order of contempt from the Court. Under the terms of this paragraph, NAR has agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that NAR has waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance with the Final Judgment with the standard of proof that applies to the underlying offense that the Final Judgment addresses.

Paragraph IX.B. provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment is intended to remedy the competition the United States alleges was harmed by the challenged conduct. NAR agrees that it will abide by the proposed Final Judgment and that it may be held in contempt of the Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Paragraph IX.C. of the proposed Final Judgment provides that if the Court finds in an enforcement proceeding that NAR has violated the Final Judgment, the United States may apply to the Court for a one-time extension of the Final Judgment, together with such other relief as may be appropriate. In addition, to compensate American taxpayers for any costs associated with investigating and enforcing violations of the Final Judgment, Paragraph IX.C. provides that, in any successful effort by the United States to enforce the Final Judgment against NAR, whether litigated or resolved before litigation, NAR will reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with any effort to enforce the Final Judgment, including the investigation of the potential violation.

Paragraph IX.D. states that the United States may file an action against NAR for violating the Final Judgment for up to four years after the Final Judgment has expired or been terminated. This provision is meant to address circumstances such as when evidence that a violation of the Final Judgment occurred during the term of the Final Judgment is not discovered until after the Final Judgment has expired or been terminated or when there is not sufficient time for the United States to complete an investigation of an alleged violation until after the Final Judgment has expired or been terminated. This provision, therefore, makes clear that, for four years after the Final Judgment has expired or been terminated, the United States may still challenge a violation that occurred during the term of the Final Judgment.

Expiration of Final Judgment. Paragraph X of the proposed Final Judgment provides that the Final Judgment will expire seven years from the date of its entry, except that after five years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and NAR that the continuation of the Final Judgment is no longer necessary or in the public interest.

Reservation of Rights. Paragraph XI of the proposed Final Judgment reserves the rights of the United States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any rule, policy, or practice adopted or enforced by NAR or any of its Member Boards and that nothing in the Final Judgment shall limit those rights.

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable

attorneys' fees. Entry of the proposed Final Judgment neither impairs nor assists the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against NAR.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the U.S. Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of the Final Judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the **Federal Register**.

Written comments should be submitted to: Chief, Media, Entertainment and Professional Services Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street NW, Suite 4000, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against NAR. The United States could have continued the litigation and sought preliminary and permanent injunctions against NAR for the challenged conduct. The United States is satisfied, however, that the prohibited and required conduct described in the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, increasing competition for buyer broker services in the United States. Thus, the proposed Final Judgment is designed to achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. Standard of Review Under the APPA for the Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

(A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995); *United States* v. *Associated Milk Producers, Inc.,* 534 F.2d 113, 117 (8th Cir. 1976) (''It is axiomatic that the Attorney General must retain considerable discretion in controlling government litigation and in determining what is in the public interest.''); *United States* v. *U.S. Airways Grp., Inc.,* 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the ''court's inquiry is limited'' in Tunney Act settlements); *United States* v. *InBev N.V./S.A.,* No. 08–1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that a court's review of a consent judgment is limited and only inquires ''into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable'').

As the U.S. Court of Appeals for the District of Columbia Circuit has held, under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not '''make *de novo* determination of facts and issues.''' *United States* v. *W. Elec. Co.,* 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quoting *United States* v. *Mid-Am. Dairymen, Inc.,* No. 73 CV 681–W–1, 1977 WL 4352, at *9 (W.D. Mo. May 17, 1977)); *see also Microsoft,* 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Instead, ''[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General.'' *W. Elec. Co.,* 993 F.2d at 1577 (quotation marks omitted). ''The court should bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest.'' *Microsoft,* 56 F.3d at 1460 (quotation marks omitted); *see also United States* v. *Deutsche Telekom AG,* No. 19–2232 (TJK), 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020). More demanding requirements would ''have enormous practical consequences for the government's ability to negotiate future settlements,'' contrary to congressional intent. *Id.* at 1456. ''The Tunney Act was not intended to create a disincentive to the use of the consent

decree.'' *Id.; see also United States* v. *Mid-Am. Dairymen, Inc.,* No. 73 CV 681–W–1, 1977 WL 4352, at *9 (W.D. Mo. May 17, 1977) (''It was the intention of Congress in enacting [the] APPA to preserve consent decrees as a viable enforcement option in antitrust cases.'').

The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g., Microsoft,* 56 F.3d at 1461 (recognizing courts should give ''due respect to the Justice Department's . . . view of the nature of its case''); *United States* v. *Iron Mountain, Inc.,* 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) (''In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'') (internal citations omitted); *United States* v. *Republic Servs., Inc.,* 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting ''the deferential review to which the government's proposed remedy is accorded''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (''A district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case''); *see also Mid-Am. Dairymen,* 1977 WL 4352, at *9 (''The APPA codifies the case law which established that the Department of Justice has a range of discretion in deciding the terms upon which an antitrust case will be settled''). The ultimate question is whether ''the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.' '' *Microsoft,* 56 F.3d at 1461 (*quoting W. Elec. Co.,* 900 F.2d at 309).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the Court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft,* 56 F.3d at 1459; *see also U.S. Airways,* 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 (''[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged''). Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using consent judgments proposed by the United States in antitrust enforcement, Public Law 108–237 § 221, and added the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2); *see also U.S. Airways,* 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: ''[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). ''A court can make its public interest determination based on the competitive impact statement and response to public comments alone.'' *U.S. Airways,* 38 F. Supp. 3d at 76 (citing *Enova Corp.,* 107 F. Supp. 2d at 17).

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: December 10, 2020.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA

/s/

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DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Intuit Inc., et al.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia, in *United States of America* v. *Intuit Inc. and Credit Karma, Inc.,* Civil Action No. 1:20–cv–03441–ABJ. On November 25, 2020 the United States filed a Complaint alleging that the proposed acquisition by Intuit Inc. of Credit Karma, Inc. would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed at the same time as the Complaint, requires Intuit and Credit Karma to divest Credit Karma's digital do-it-yourself (''DDIY'') tax preparation business, Credit Karma Tax, along with the products, intellectual property, and other related assets and rights that Credit Karma uses to provide DDIY tax preparation products to consumers.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection on the Antitrust Division's website at *http://www.justice.gov/atr* and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the Antitrust Division's website, filed with the Court, and, under certain circumstances, published in the **Federal Register**. Comments should be directed to Robert A. Lepore, Chief, Transportation, Energy, and Agriculture Section, Antitrust Division, Department of Justice, 450 Fifth Street NW, Suite 8000, Washington, DC 20530 (telephone: 202–476–0375).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

United States District Court for the District of Columbia

United States of America, *Plaintiff,* v. Intuit Inc. and Credit Karma, Inc., *Defendants.*

Civil Action No.: 1:20–cv–03441–ABJ
Judge Amy Berman Jackson

Complaint

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil antitrust action to prevent Intuit Inc. from acquiring Credit Karma, Inc. The United States alleges as follows:

I. Introduction

1. Each year, nearly 140 million individuals, families, and households around the country file U.S. federal and state income taxes. The tens of millions of filers who choose a digital do-it-yourself (''DDIY'') tax preparation product have some choice, but one product dominates this market: TurboTax. Intuit, the maker of TurboTax, is by far the largest provider of DDIY tax preparation products, with a 66% market share. For more than a decade, Intuit's dominance has been nearly as certain as taxes themselves.

2. Since 2008, Credit Karma has operated a popular personal finance platform that offers consumers a variety of free services, including credit monitoring and financial management. When Credit Karma launched its own DDIY tax preparation product in 2017, it was the first meaningful DDIY tax preparation product entry in at least a decade. Credit Karma's goal was clear: ''Just like it did with credit scores in 2008, Credit Karma plans to change the tax preparation industry so people won't ever have to pay to do their taxes again.'' [1] Credit Karma quickly became a significant competitor to Intuit, despite its recent entry and relatively small market share, because Credit Karma has always offered its DDIY tax preparation product to consumers entirely for free. This business model remains unique among DDIY tax preparation product providers.

3. Through Credit Karma's personal finance platform, Credit Karma offers its more than 100 million members free personal finance tools, such as free credit scores and monitoring, and tailored, third-party financial offers, including credit card, personal loan, and refinancing opportunities. Credit Karma is paid only by the third parties, and only when consumers take advantage of these customized offers. Credit Karma can take the data gathered from tax filings, with the filers' consent, to improve Credit Karma's offerings to its members. This, in turn, improves the likelihood that a consumer will take advantage of the offer. This process enables Credit Karma to provide a DDIY tax preparation product for free regardless of the U.S. federal or state tax forms used and complexity of the tax return.

4. Thanks to its always-free strategy and enormous member base, Credit Karma became the fifth-largest DDIY tax provider after its first tax season and has grown significantly each year since, with over two million filers in 2020. Credit Karma has projected additional growth in the future as its product continues to get traction, and as it continues to add features and expand the scope of its DDIY tax preparation product.

5. Although as the new player in the market Credit Karma serves only 3% of customers, Intuit has recognized that Credit Karma represents its most disruptive competitor for DDIY tax preparation. Credit Karma's always-free model poses a unique threat to Intuit because Intuit (and all other DDIY tax preparation providers) charges consumers for DDIY tax preparation products for anything beyond the most basic filings as well as often for state filings. Intuit relies on these fees for revenue. For example, Intuit charges individual filers substantial fees to use TurboTax to claim itemized deductions, report investment income, or claim self-employed business expenses, among other complex tax filings. The majority of TurboTax customers pay Intuit to use one of its DDIY tax preparation products. By contrast, Credit Karma offers these same services for federal and state tax returns to individuals for free, and there is no up-charging for additional complexity.

6. Over the last four tax seasons, Credit Karma has begun to erode Intuit's dominance in the market for the development, provision, operation, and support for DDIY tax preparation products. Credit Karma has constrained Intuit's pricing, and has also limited Intuit's ability to degrade the quality and reduce the scope of the free version of TurboTax in order to drive customers to the paid versions. Customer losses to Credit Karma have also represented lost revenue to Intuit because many switchers were purchasing TurboTax paid products, not using TurboTax free offerings. Faced with stiff competition from Credit Karma and mounting losses of paying customers to Credit Karma's always-free product, Intuit responded aggressively. Intuit lowered the prices and increased the quality of some of its products. This head-to-head competition with Credit Karma has benefitted many of the millions of Americans who use TurboTax each year, constraining Intuit's ability to charge higher prices and leading Intuit to increase the quality of its products.

7. Intuit's proposed acquisition of Credit Karma will eliminate the growing threat posed by Credit Karma and further cement TurboTax's dominance. If the proposed transaction proceeds in its current form, consumers are likely to pay higher prices, receive lower quality products and services, and have less choice for DDIY tax preparation products. To prevent those harms, the Court should enjoin this unlawful transaction.

II. Jurisdiction and Venue

8. The United States brings this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. 25, to prevent and restrain Defendants from violating Section 7 of the Clayton Act, 15 U.S.C. 18.

9. Defendants are engaged in, and their activities substantially affect, interstate commerce. Intuit and Credit Karma both provide DDIY tax preparation products that serve federal and state tax filers throughout the United States. The Court has subject matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. 25, and 28 U.S.C. 1331, 1337(a), and 1345.

10. Venue is proper under Section 12 of the Clayton Act, 15 U.S.C. 22, and under 28 U.S.C. 1391(b) and (c).

11. This Court has personal jurisdiction over each Defendant. Intuit and Credit Karma both transact business and are found within the District of Columbia.

12. Intuit and Credit Karma have each consented to personal jurisdiction and venue in this jurisdiction for purposes of this action.

III. Defendants and the Proposed Transaction

13. This case arises from Intuit's proposed acquisition of Credit Karma for approximately $7.1 billion, pursuant to an Agreement and Plan of Merger entered on February 24, 2020.

14. Intuit is a large, public software company based in Mountain View, California that offers tax preparation, accounting, payroll, and personal finance solutions to individuals and small businesses. Intuit offers DDIY tax preparation products under the TurboTax brand. Approximately 41 million individuals filed individual federal tax returns in 2020 using TurboTax. Intuit, through its TurboTax business, is the largest provider of DDIY tax preparation products for U.S. federal and state tax returns. In 2019, Intuit earned over $6.5 billion in revenue, including over $2.5 billion from sales of TurboTax products.

[1] *https://www.creditkarma.com/ourstory.*

15. Credit Karma is a privately-held technology company based in San Francisco, California that offers an online and mobile personal finance platform. Credit Karma's platform provides individuals with access to free credit scores, credit monitoring, and DDIY tax preparation, among other products and services. Credit Karma is home to more than one hundred million customers, and in any given month, over thirty-five million customers are actively engaged on the Credit Karma platform. Credit Karma's DDIY tax preparation business, known as Credit Karma Tax, is the fifth-largest provider of DDIY tax preparation products for U.S. federal and state tax returns. Approximately two million individuals filed U.S. federal tax returns with Credit Karma Tax in 2020.

IV. The Relevant Market

A. Relevant Product Market

16. Intuit and Credit Karma compete to develop, provide, operate, and support DDIY tax preparation products that help individuals file U.S. federal and state tax returns (''DDIY tax preparation products'') to millions of Americans. DDIY tax preparation products enable individuals to prepare their own U.S. federal and state tax returns on the provider's website or mobile application or using the provider's software installed on a personal computer. The development, provision, operation, and support of DDIY tax preparation products is a relevant product market and line of commerce under Section 7 of the Clayton Act, 15 U.S.C. 18.

17. A hypothetical monopolist would impose at least a small but significant and non-transitory increase in the price of DDIY tax preparation products. Such a price increase for these products would not be defeated by substitution to alternative products. Other methods of preparing individual U.S. federal or state income tax returns are not close substitutes for DDIY tax preparation products because those methods of tax preparation do not offer comparable functionality or are less convenient, more cumbersome, or more expensive. For example, hiring an accountant—*i.e.,* ''assisted tax preparation''—is substantially more expensive and less convenient than using DDIY tax preparation products. Similarly, completing U.S. federal and state tax returns manually using the ''pen-and-paper'' method is a substantially more tedious and error-prone process and thus less efficient than using DDIY tax preparation products.

B. Relevant Geographic Market

18. The DDIY tax preparation products that Intuit and Credit Karma offer assist individuals with filing their U.S. federal and state income tax returns. Customers that are required to file tax returns in jurisdictions outside of the United States cannot use the DDIY tax preparation products at issue for those purposes. Similarly, DDIY tax preparation products that have been designed to assist individuals with filing tax returns in jurisdictions outside of the United States cannot be used by customers to prepare U.S. federal and state tax returns. Both customers and suppliers of DDIY tax preparation products predominantly are located within the United States. However, because many DDIY tax preparation products are provided over the internet, there do not appear to be any physical restrictions on the location of suppliers or customers—that is, any consumer who is required to file U.S. taxes can generally choose between the same DDIY tax preparation products, regardless of whether the customer or DDIY product supplier is physically located inside the United States. Therefore, a worldwide market is a relevant geographic market within the meaning of Section 7 of the Clayton Act, 15 U.S.C. 18 for the purposes of analyzing this transaction.

V. Intuit's Acquisition of Credit Karma Is Likely To Result in Anticompetive Effects

A. The Transaction Is Presumed Likely To Enhance Intuit's Market Power and Substantially Less Competition

19. The relevant market is highly concentrated and would become significantly more concentrated as a result of the proposed transaction. The more concentrated a market and the more a transaction increases concentration in that market, the more likely it is that the transaction will reduce competition. Concentration is typically measured by market shares and by the well-recognized Herfindahl–Hirschman Index (HHI). If the post-transaction HHI would be more than 2,500 and the change in HHI more than 200, the transaction is presumed likely to enhance market power and substantially lessen competition. *See, e.g., United States* v. *Anthem, Inc.,* 855 F.3d 345, 349 (D.C. Cir. 2017).

20. In 2020, approximately 41 million individuals filed a federal tax return using Intuit's TurboTax, accounting for about 66% of the total market for DDIY tax preparation products. During the same time period, approximately two million individuals filed a federal tax return using Credit Karma's DDIY tax preparation product, accounting for about 3% of the total market. H&R Block, the second-largest provider of DDIY tax preparation products, has about a 15% market share. The post-transaction HHI would be over 5,000, with an increase in excess of 400. Given the high concentration level and increases in concentration in the market for DDIY tax preparation products, the proposed acquisition presumptively violates Section 7 of the Clayton Act.

21. These concentration measures understate the likely anticompetitive effects of the transaction. Because Credit Karma is the only competitor that provides DDIY tax preparation products for free to consumers regardless of the complexity of the federal tax return or state tax return required, it plays a uniquely disruptive role in the market. Further, Credit Karma is poised to continue with substantial growth in the near- and long-term.

B. The Transaction Would Eliminate Head-to-Head Competition Between Intuit and Credit Karma and an Important Competitive Constraint

22. Intuit's acquisition of Credit Karma would remove a significant competitor that has been an important competitive constraint on Intuit. Intuit's TurboTax offers consumers a limited free option for simple individual federal tax filings, but it charges consumers fees for more complicated federal tax filings, including filings with itemized deductions, investment income, and self-employed income and expenses. Intuit also charges consumers fees for their state tax filings. Unlike Intuit, Credit Karma does not charge consumers for any of the products and services that it offers. Instead, Credit Karma uses the data that it collects from users to create targeted offers on financial products and services and collects a commission from financial institutions when users accept these offers. In addition, Credit Karma has an existing customer base of over a hundred million users that it can cost-effectively target for DDIY tax preparation products.

23. Intuit and Credit Karma compete head-to-head to provide DDIY tax preparation products to tens of millions of Americans. This head-to-head competition has led to lower prices and increased quality for DDIY tax preparation products. In response to competition from Credit Karma, Intuit has strategically lowered prices on some of its DDIY tax preparation products, such as by extending promotions for free state tax filing with TurboTax (up to a $50 value). In addition, to compete

with Credit Karma, Intuit has expanded the scope and quality of services it offers to TurboTax users at no additional cost to consumers, including by granting customers free access to their prior year's tax returns.

24. Moreover, without this merger, competition between Intuit and Credit Karma would intensify as Credit Karma continues to grow and erode Intuit's substantial base of TurboTax customers. Credit Karma has consistently and significantly grown its market share year over year and is forecasting continued significant growth over the next few years.

25. By eliminating head-to-head competition between Intuit and Credit Karma, the proposed acquisition in its current form would result in higher prices, lower quality, and reduced choice. Thus, the merger would substantially lessen competition and harm millions of consumers in the development, provision, operation, and support of DDIY tax preparation products.

VI. Absence of Countervailing Factors

26. New entry and expansion by competitors likely will not be timely and sufficient in scope to prevent the acquisition's likely anticompetitive effects. Apart from Credit Karma, no other companies have successfully entered the market for the development, provision, operation, and support of DDIY tax preparation products in over a decade. As Intuit's and Credit Karma's executives have recognized, barriers to entry are high. Barriers to entry and expansion include (i) large sunk costs and significant other expenditures to develop easy-to-use, robust DDIY tax preparation products; (ii) significant time and expense to build a trusted brand; and (iii) substantial marketing dollars and effort to promote the DDIY tax preparation products and attract customers.

27. The proposed acquisition is unlikely to generate verifiable, merger-specific efficiencies sufficient to reverse or outweigh the anticompetitive effects that are likely to occur.

VII. Violation Alleged

28. The United States hereby incorporates the allegations of paragraphs 1 through 27 above as if set forth fully herein.

29. Intuit's proposed acquisition of Credit Karma is likely to substantially lessen competition in the relevant market, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

30. Unless enjoined, the proposed acquisition would likely have the following anticompetitive effects, among others:

(a) Eliminate present and future competition between Intuit and Credit Karma in the market for the development, provision, operation, and support of DDIY tax preparation products;

(b) cause prices for DDIY tax preparation products to be higher than they would be otherwise;

(c) lessen innovation; and

(d) reduce quality, service, and choice for Americans that file U.S. federal and state tax returns.

VIII. Request for Relief

31. The United States requests that the Court:

(a) Adjudge Intuit's acquisition of Credit Karma to violate Section 7 of the Clayton Act, 15 U.S.C. 18;

(b) permanently enjoin Defendants from consummating Intuit's proposed acquisition of Credit Karma or from entering into or carrying out any other agreement, understanding, or plan by which the assets or businesses of Intuit and Credit Karma would be combined;

(c) award the United States its costs of this action; and

(d) grant the United States such other relief the Court deems just and proper.

Dated: November 25, 2020.

Respectfully submitted,

For Plaintiff United States:

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United States District Court for the District of Columbia

United States of America, Plaintiff, v. *Intuit Inc.,* and *Credit Karma, Inc.,* Defendants.

Civil Action No.: 1:20–cv–03441–ABJ
Judge Amy Berman Jackson

Proposed Final Judgment

Whereas, Plaintiff, United States of America, filed its Complaint on [Month, Day], 2020;

And whereas, the United States and Defendants, Intuit Inc. (''Intuit'') and Credit Karma, Inc. (''Credit Karma''), have consented to entry of this Final Judgment without the taking of testimony, without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

And whereas, Defendants agree to make a divestiture to remedy the loss of competition alleged in the Complaint;

And whereas, Defendants represent that the divestiture and other relief required by this Final Judgment can and will be made and that Defendants will not later raise a claim of hardship or difficulty as grounds for asking the Court to modify any provision of this Final Judgment;

Now therefore, it is *ordered, adjudged, and decreed:*

I. Jurisdiction

The Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

II. Definitions

As used in this Final Judgment:

A. ''Acquirer'' means Square or any other entity to which Defendants divest the Divestiture Assets.

B. ''Intuit'' means Defendant Intuit Inc., a Delaware corporation with its headquarters in Mountain View, California, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. ''Credit Karma'' means Defendant Credit Karma, Inc., a Delaware corporation with its headquarters in San Francisco, California, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint

ventures, and their directors, officers, managers, agents, and employees.

D. ''Square'' means Square, Inc., a Delaware corporation with its headquarters in San Francisco, California, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

E. ''CKT'' means Credit Karma Tax, Inc., a wholly owned subsidiary of Credit Karma, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

F. ''Divestiture Assets'' means all of Defendants' rights, titles, and interests in and to all property and assets, tangible and intangible, wherever located, related to or used or held for use in connection with CKT, including, but not limited to:

1. The CKT Products;

2. the CKT IP;

3. the Credit Karma IP License;

4. the Credit Karma Trademarks License;

5. all tangible personal property, including, but not limited to, servers and other computer hardware; research and development activities; all fixed assets, personal property, inventory, office furniture, materials, and supplies;

6. all contracts, contractual rights, and customer relationships; and all other agreements, commitments, and understandings;

7. all licenses, permits, certifications, approvals, consents, registrations, waivers, and authorizations issued or granted by any governmental organization, and all pending applications or renewals;

8. all records and data, including (a) customer lists, accounts, sales, and credit records, (b) manuals and technical information Credit Karma provides to its own employees, customers, suppliers, agents, or licensees, (c) records and research data concerning historic and current research and development activities, and (d) drawings, blueprints, and designs; and

9. all other intangible property, including (a) commercial names and d/b/a names, (b) technical information, (c) computer software and related documentation, know-how, trade secrets, design protocols, quality assurance and control procedures, (d) design tools and simulation capabilities, and (e) rights in internet websites and internet domain names.

G. ''Divestiture Date'' means the date on which the Divestiture Assets are divested to Acquirer.

H. ''Acquirer's Tax Landing Page'' means the website on which Acquirer will provide the CKT Products and any applicable internet pages under such domain or sub-domain.

I. ''CKT Actual Filers'' means customers who, at any time on or before October 16, 2021, have successfully electronically filed federal or state income tax returns using the CKT Products.

J. ''CKT E-File Product website'' means *http://tax.creditkarma.com,* including any applicable internet pages under such domain or sub-domain.

K. ''CKT IP'' means all intellectual property owned by CKT.

L. ''CKT Landing Page'' means *www.creditkarma.com/tax,* including any applicable internet pages under such domain or sub-domain.

M. ''CKT New Member'' means any customer who either (a) creates a Credit Karma account via the CKT Landing Page or (b) creates a Credit Karma account via any internet page other than the CKT Landing Page and, within 24 hours of creating that Credit Karma account, provides Credit Karma with the additional authentication required for filing a U.S. federal tax return.

N. ''CKT Product Link'' means any link, advertisement, reference to tax or tax filing (including ''file now'' or similar links) with respect to CKT Products, or the CKT Tax Button, on the applicable internet website menu banners and pages.

O. ''CKT Products'' means all products and services, including all digital do-it-yourself personal United States federal or state income tax return preparation and e-filing products and services developed, manufactured, delivered, made commercially available, marketed, distributed, supported, sold, offered for sale, imported or exported for resale, or licensed out by, for, or on behalf of CKT.

P. ''CKT Tax Button'' means (a) with respect to the Credit Karma website, the link that is labeled ''Tax,'' and (b) with respect to any CKT mobile application, the navigation element that is labeled ''Tax.''

Q. ''Credit Karma IP'' means all intellectual property, except for the Credit Karma Trademarks, owned by Credit Karma that is used or held for use in connection with Credit Karma Products and which is embodied in or related to the development, provision, operation, or support of digital do-it-yourself personal United States federal or state income tax return preparation and e-filing products and services.

R. ''Credit Karma IP License'' means a non-exclusive, worldwide, fully paid-up, perpetual, irrevocable, non-transferable license to the Credit Karma IP for Acquirer's use in the development, provision, operation, and support of all existing and future digital do-it-yourself personal United States federal or state income tax return preparation and e-filing products and services.

S. ''Credit Karma New Member'' means any customer who creates a Credit Karma account for the first time following the Divestiture Date and prior to the later of (a) April 16, 2021, or (b) the date of any federal filing deadline required by the Internal Revenue Service for federal income tax returns and tax payments for the tax year ending December 31, 2020, if such federal filing deadline is expressly extended beyond April 15, 2021, excluding persons who were referred to Credit Karma by Intuit.

T. ''Credit Karma Products'' means all products and services, excluding CKT Products, provided by Defendants using the ''Credit Karma'' brand name.

U. ''Credit Karma Trademarks'' means all trademarks, service marks, internet domain names, trade dress, trade names, other names, or source identifiers, including all such registrations, applications for registrations, and associated goodwill, owned by Credit Karma that is used or held for use in connection with Credit Karma Products and which is embodied in or related to the development, provision, operation, or support of digital do-it-yourself personal United States federal or state income tax return preparation and e-filing products and services.

V. ''Credit Karma Trademarks License'' means a limited, non-exclusive, non-transferrable, non-assignable, non-sublicensable license to the Credit Karma Trademarks for Acquirer's use in the development, provision, operation, and support of all existing and future digital do-it-yourself personal United States federal or state income tax return preparation and e-filing products and services during the Year 1 Period.

W. ''Credit Karma website'' means *www.creditkarma.com* and any applicable internet pages under such domain or sub-domain.

X. ''Other Tax Product'' means, except for the Divestiture Assets, any digital do-it-yourself personal United States federal or state income tax return preparation and e-filing product or service, including, but not limited to, Intuit's TurboTax.

Y. ''Protected User'' means any person who is a CKT Actual Filer, a Tax Intent User, or a Credit Karma New Member.

Z. ''Relevant Personnel'' means:

1. All full-time, part-time, or contract employees of CKT at any time between February 24, 2020, and the Divestiture Date; and

2. all full-time, part-time, or contract employees of Credit Karma, wherever located, who dedicated at least 50% of such person's time to the development, provision, operation, or support of the digital do-it-yourself personal United States federal or state income tax return preparation and e-filing products and services at any time between October 1, 2019, and September 30, 2020.

The United States, in its sole discretion, will resolve any disagreement regarding which employees are Relevant Personnel.

AA. ''Tax Intent User'' means any customer (a) in the case of a user of the Credit Karma website, (i) who clicks on a CKT Product Link, (ii) who accesses the CKT Tax Landing Page or the CKT E-File Product website, or (iii) who accesses the Credit Karma website, CKT Tax Landing Page, or CKT E-File Product website through a link provided through electronic mail or other notifications sent by Defendants on behalf of Acquirer or otherwise pursuant to Paragraph IV.M.1. or through other promotional or marketing materials distributed or made available by Acquirer, and (b) in the case of a user of the Credit Karma mobile application, (i) who clicks on a CKT Product Link or (ii) who accesses the application through a link provided through electronic mail or other notifications sent by Defendants on behalf of Acquirer or otherwise pursuant to Paragraph IV.M.1. or through other promotional or marketing materials distributed or made available by Acquirer.

BB. ''Year 1 Period'' means the period beginning on the Divestiture Date and ending on October 16, 2021.

CC. ''Year 2 Period'' means the period beginning on October 17, 2021, and ending on the later of (a) June 14, 2022, or (b) 60 calendar days following any extension of the federal filing deadline required by the Internal Revenue Service for federal income tax returns and tax payments for the tax year ending December 31, 2021, if such federal filing deadline is expressly extended beyond April 15, 2022.

III. Applicability

A. This Final Judgment applies to Intuit and Credit Karma, as defined above, and all other persons in active concert or participation with any Defendant who receive actual notice of this Final Judgment.

B. If, prior to complying with Section IV and Section V of this Final Judgment, Defendants sell or otherwise dispose of all or substantially all of their assets or of business units that include the Divestiture Assets, Defendants must require any purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from Acquirer.

IV. Divestiture

A. Defendants are ordered and directed, within 30 calendar days after the Court's entry of the Asset Preservation Stipulation and Order in this matter, to divest the Divestiture Assets in a manner consistent with this Final Judgment to Square or to another Acquirer acceptable to the United States, in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed 60 calendar days in total and will notify the Court of any extensions.

B. Defendants must use their best efforts to divest the Divestiture Assets as expeditiously as possible and may not take any action to impede the certification, operation, or divestiture of the Divestiture Assets.

C. Unless the United States otherwise consents in writing, divestiture pursuant to this Final Judgment must include the entire Divestiture Assets and must be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by Acquirer as part of a viable, ongoing business of the development, provision, operation, and support of digital do-it-yourself personal United States federal or state income tax return preparation and e-filing products and services, and that the divestiture to Acquirer will remedy the competitive harm alleged in the Complaint.

D. The divestiture must be made to an Acquirer that, in the United States' sole judgment, has the intent and capability (including the necessary managerial, operational, technical, and financial capability) to compete effectively in the development, provision, operation, and support of digital do-it-yourself personal United States federal or state income tax return preparation and e-filing products and services.

E. The divestiture must be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between Acquirer and Defendants gives Defendants the ability unreasonably to raise Acquirer's costs, to lower Acquirer's efficiency, or otherwise to interfere in the ability of Acquirer to compete effectively.

F. In the event Defendants are attempting to divest the Divestiture Assets to an Acquirer other than Square, Defendants promptly must make known, by usual and customary means, the availability of the Divestiture Assets. Defendants must inform any person making an inquiry regarding a possible purchase of the Divestiture Assets that the Divestiture Assets are being divested in accordance with this Final Judgment and must provide that person with a copy of this Final Judgment. Defendants must offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets that are customarily provided in a due-diligence process; *provided, however,* that Defendants need not provide information or documents subject to the attorney-client privilege or work-product doctrine. Defendants must make all information and documents available to the United States at the same time that the information and documents are made available to any other person.

G. Defendants must provide prospective Acquirers with (1) access to make inspections of the Divestiture Assets; (2) access to all environmental, zoning, and other permitting documents and information; and (3) access to all financial, operational, or other documents and information customarily provided as part of a due diligence process. Defendants also must disclose all encumbrances on any part of the Divestiture Assets, including on intangible property.

H. Defendants must cooperate with and assist Acquirer to identify and hire all Relevant Personnel.

1. Within 10 business days following the filing of the Complaint in this matter, Defendants must identify all Relevant Personnel to Acquirer and the United States, including by providing organization charts covering all Relevant Personnel.

2. Within 10 business days following receipt of a request by Acquirer, the United States, or the monitoring trustee, Defendants must provide to Acquirer, the United States, and the monitoring trustee additional information related to Relevant Personnel, name, job title, reporting relationships, past experience, responsibilities, training and educational history, relevant certifications, and job performance evaluations. Defendants must also provide to Acquirer current, recent, and accrued compensation and benefits, including most recent bonus paid, aggregate annual compensation, current target or guaranteed bonus, if any, any

retention agreement or incentives, and any other payments due, compensation or benefits accrued, or promises made to the Relevant Personnel. If Defendants are barred by any applicable law from providing any of this information, Defendants must provide, within 10 business days following receipt of the request, the requested information to the full extent permitted by law and also must provide a written explanation of Defendants' inability to provide the remaining information.

3. At the request of Acquirer, Defendants must promptly make Relevant Personnel available for private interviews with Acquirer during normal business hours at a mutually agreeable location.

4. Defendants must not interfere with any effort by Acquirer to employ any Relevant Personnel. Interference includes, offering to increase the compensation or benefits of Relevant Personnel unless the offer is part of a company-wide increase in compensation or benefits granted that was announced prior to February 24, 2020, or has been approved by the United States, in its sole discretion. Defendants' obligations under this Paragraph IV.H.4. will expire 12 months after the divestiture of the Divestiture Assets pursuant to this Final Judgment.

5. For Relevant Personnel who elect employment with Acquirer within 12 months of the Divestiture Date, Defendants must waive all non-compete and non-disclosure agreements, vest and pay on a prorated basis any bonuses, incentives, other salary, benefits, or other compensation fully or partially accrued at the time of transfer to Acquirer; vest all unvested pension and other equity rights; and provide all other benefits that those Relevant Personnel otherwise would have been provided had the Relevant Personnel continued employment with Defendants, including, any retention bonuses or payments. Defendants may maintain reasonable restrictions on disclosure by Relevant Personnel of Defendants' proprietary non-public information that is unrelated to the Divestiture Assets and not otherwise required to be disclosed by this Final Judgment.

6. For a period of 12 months from the date on which any Relevant Personnel is hired by Acquirer, Defendants may not solicit to rehire Relevant Personnel who were hired by Acquirer within 12 months of the Divestiture Date unless (a) an individual is terminated or laid off by Acquirer or (b) Acquirer agrees in writing that Defendants may solicit to rehire that individual. Nothing in this Paragraph IV.H.6. prohibits Defendants from advertising employment openings using general solicitations or advertisements and rehiring Relevant Personnel who apply for an employment opening through a general solicitation or advertisement.

I. Defendants must warrant to Acquirer that (1) the Divestiture Assets will be operational and without material defect on the date of their transfer to Acquirer; (2) there are no material defects in the environmental, zoning, or other permits pertaining to the operation of the Divestiture Assets; and (3) Defendants have disclosed all encumbrances on any part of the Divestiture Assets, including on intangible property. Following the sale of the Divestiture Assets, Defendants must not undertake, directly or indirectly, challenges to the environmental, zoning, or other permits pertaining to the operation of the Divestiture Assets.

J. Defendants must assign, subcontract, or otherwise transfer all contracts, agreements, and customer relationships (or portions of such contracts, agreements, and customer relationships) included in the Divestiture Assets, including all supply and sales contracts, to Acquirer; *provided, however,* that for any contract or agreement that requires the consent of another party to assign, subcontract, or otherwise transfer, Defendants must use best efforts to accomplish the assignment, subcontracting, or transfer. Defendants must not interfere with any negotiations between Acquirer and a contracting party.

K. Defendants must make best efforts to assist Acquirer to obtain all necessary licenses, registrations, certifications, and permits to operate the Divestiture Assets. Until Acquirer obtains the necessary licenses, registrations, certifications, and permits, Defendants must provide Acquirer with the benefit of Defendants' licenses, registrations, certifications, and permits to the full extent permissible by law.

L. At the option of Acquirer, and subject to approval by the United States in its sole discretion, on or before the Divestiture Date, Defendants must enter into a transition services agreement for engineering, product support, data migration, information security, information technology, technology infrastructure, customer support, marketing, finance, accounting, and knowledge-transfer related to the tax industry, for a period of up to 24 months on terms and conditions reasonably related to market conditions for the provision of the transition services. Any amendments to or modifications of any provision of a transition services agreement are subject to approval by the United States, in its sole discretion. Acquirer may terminate a transition services agreement, or any portion of a transition services agreement, without penalty at any time upon commercially reasonable notice. The employee(s) of Defendants tasked with providing transition services must not share any competitively sensitive information of Acquirer with any other employee of Defendants.

M. For the duration of the Year 1 Period Defendants:

1. Must distribute Acquirer-created marketing content to CKT Actual Filers via electronic mail and mobile application notifications, with the same frequency of distribution as CKT-created marketing content for the 12 months prior to the Divestiture Date;

2. must continue to make the CKT mobile application available through the same mobile application distribution channels as for the 12 months prior to the Divestiture Date;

3. must use reasonable best efforts to support Acquirer's efforts to obtain consents of customers under Section 7216 of the Internal Revenue Code and Treasury Regulations thereunder;

4. must continue to make the CKT Products available to customers at all times with at least the same level of quality, functionality, availability, access, and customer support as was provided by Defendants during the 12 months prior to the Divestiture Date;

5. (a) must cause any person who clicks on a CKT Product Link or accesses the CKT Landing Page or CKT E-File Product website to be directed to the CKT Products, and (b) must not (i) direct or cause to be directed any person who clicks on a CKT Product Link or accesses the CKT Landing Page or CKT E-File Product website to any Other Tax Product, or (ii) show any person who clicks on a CKT Product Link or accesses the CKT Landing Page or CKT E-File Product website any links to or advertisements for any Other Tax Product;

6. must not market, provide any links to, or otherwise make available Other Tax Products on the Credit Karma website or mobile application, including the CKT Landing Page, to any user of the Credit Karma website or mobile application who (a) is not logged in to the Credit Karma website or mobile application or (b) is a Protected User; and

7. to the extent Defendants market, provide any links to, or otherwise make available Other Tax Products on the Credit Karma website or mobile application, including the CKT Landing Page, to any user of the Credit Karma website or mobile application who is

both (a) logged in to the Credit Karma website or mobile application and (b) not a Protected User, Defendants must also market the CKT Products on equal and non-discriminatory terms and in a manner that does not reduce the efficacy or prominence of the CKT Tax Button and is not otherwise inconsistent with the terms of Section IV.

N. For the duration of the Year 2 Period, Defendants:

1. Must distribute Acquirer-created marketing content to CKT Actual Filers via up to 6 electronic mail and mobile application notifications; and

2. (a) must cause any CKT Actual Filers who click on a CKT Product Link or access the CKT Landing Page or CKT E-File Product website to be directed to the Acquirer's Tax Landing Page, and (b) without first verifying that a person is not a CKT Actual Filer or Credit Karma New Member, must not (i) direct or cause to be directed any person who clicks on a CKT Product Link or accesses the CKT Landing Page or CKT E-File Product website to any Other Tax Product, or (ii) show any person who clicks on a CKT Product Link or accesses the CKT Landing Page or CKT E-File Product website any links to or advertisements for any Other Tax Product.

O. For the duration of both the Year 1 Period and the Year 2 Period, Defendants:

1. Must maintain the CKT Tax Button; and

2. must not market or promote to any CKT Actual Filers any products or services that compete, either directly or indirectly, with the CKT Products, via electronic mail marketing that is (a) deliberately directed at such CKT Actual Filers based on their statuses as CKT Actual Filers or (b) delivered to CKT Actual Filers at the email addresses associated with such CKT Actual Filers' accounts with Credit Karma.

P. Unless Acquirer directs Defendants to retain such data for a longer period, and except as required in Paragraph IV.Q., within 30 calendar days after the Divestiture Date, Defendants must delete any data collected from or provided by CKT Actual Filers during the tax preparation or filing process that Credit Karma has in its possession, including, but not limited to, (a) any such data CKT has provided to Credit Karma pursuant to the consent of customers under Section 7216 of the Internal Revenue Code and Treasury Regulations thereunder and (b) any such data indicating whether a CKT Actual Filer is a CKT New Member. If Acquirer directs Defendants to retain such data for a longer period, Defendants must delete such data within 30 calendar days after Acquirer directs Defendants to delete such data. Within 5 calendar days of Defendants' deletion of this data, Defendants must (i) provide to the United States and to the monitoring trustee a written certification, signed by Defendants' respective General Counsels, that all data covered by this Paragraph IV.P. has been deleted and is no longer in the possession or control of Defendants and (ii) provide a copy of such certification to Acquirer.

Q. Defendants may maintain information to indicate whether a customer is a CKT Actual Filer solely for the purpose of complying with Paragraphs IV.L., IV.M., IV.N., IV.O., and IV.P. Within 10 calendar days following the end of the Year 2 Period, Defendants must delete (a) the data that Defendants maintain for purposes of complying with Paragraphs IV.L., IV.M., IV.N., IV.O., and IV.P. and which identify a customer as a CKT Actual Filer and (b) any remaining data that Defendants possess that could be used to identify a customer as a CKT Actual Filer or as a CKT New Member, including any data described in Paragraph IV.P. Within 5 calendar days of Defendants' deletion of this data, Defendants must (i) provide to the United States and to the monitoring trustee a written certification, signed by Defendants' respective General Counsels, that all data covered by this Paragraph IV.Q. has been deleted and is no longer in the possession or control of Defendants, and (ii) provide a copy of such certification to Acquirer.

R. If any term of an agreement between Defendants and Acquirer, including, but not limited to, an agreement to effectuate the divestiture required by this Final Judgment, varies from a term of this Final Judgment, to the extent that Defendants cannot fully comply with both, this Final Judgment determines Defendants' obligations.

V. Appointment of Divestiture Trustee

A. If Defendants have not divested the Divestiture Assets within the period specified in Paragraph IV.A., Defendants must immediately notify the United States of that fact in writing. Upon application of the United States, which Defendants may not oppose, the Court will appoint a divestiture trustee selected by the United States and approved by the Court to effect the divestiture of the Divestiture Assets.

B. After the appointment of a divestiture trustee by the Court, only the divestiture trustee will have the right to sell the Divestiture Assets. The divestiture trustee will have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States, in its sole discretion, at a price and on terms as are then obtainable upon reasonable effort by the divestiture trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and will have other powers as the Court deems appropriate. The divestiture trustee must sell the Divestiture Assets as quickly as possible.

C. Defendants may not object to a sale by the divestiture trustee on any ground other than malfeasance by the divestiture trustee. Objections by Defendants must be conveyed in writing to the United States and the divestiture trustee within 10 calendar days after the divestiture trustee has provided the notice of proposed divestiture required under Section VI.

D. The divestiture trustee will serve at the cost and expense of Defendants pursuant to a written agreement, on terms and conditions, including confidentiality requirements and conflict of interest certifications, that are approved by the United States.

E. The divestiture trustee may hire at the cost and expense of Defendants any agents or consultants, including, but not limited to, investment bankers, attorneys, and accountants, that are reasonably necessary in the divestiture trustee's judgment to assist with the divestiture trustee's duties. These agents or consultants will be accountable solely to the divestiture trustee and will serve on terms and conditions, including terms and conditions governing confidentiality requirements and conflict-of-interest certifications, that are approved by the United States in its sole discretion.

F. The compensation of the divestiture trustee and agents or consultants hired by the divestiture trustee must be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement that provides the divestiture trustee with incentives based on the price and terms of the divestiture and the speed with which it is accomplished. If the divestiture trustee and Defendants are unable to reach agreement on the divestiture trustee's compensation or other terms and conditions of engagement within 14 calendar days of the appointment of the divestiture trustee by the Court, the United States may, in its sole discretion, take appropriate action, including by making a recommendation to the Court. Within three business days of hiring an agent or consultant, the divestiture trustee must provide written notice of the hiring and rate of compensation to Defendants and the United States.

G. The divestiture trustee must account for all monies derived from the sale of the Divestiture Assets sold by the divestiture trustee and all costs and expenses incurred. Within 30 calendar days of the date of the sale of the Divestiture Assets, the divestiture trustee must submit that accounting to the Court for approval. After approval by the Court of the divestiture trustee's accounting, including fees for unpaid services and those of agents or consultants hired by the divestiture trustee, all remaining money must be paid to Defendants and the trust will then be terminated.

H. Defendants must use their best efforts to assist the divestiture trustee to accomplish the required divestiture. Subject to reasonable protection for trade secrets, other confidential research, development, or commercial information, or any applicable privileges, Defendants must provide the divestiture trustee and agents or consultants retained by the divestiture trustee with full and complete access to all personnel, books, records, and facilities of the Divestiture Assets. Defendants also must provide or develop financial and other information relevant to the Divestiture Assets that the divestiture trustee may reasonably request. Defendants may not take any action to interfere with or to impede the divestiture trustee's accomplishment of the divestiture.

I. The divestiture trustee must maintain complete records of all efforts made to sell the Divestiture Assets, including by filing monthly reports with the United States setting forth the divestiture trustee's efforts to accomplish the divestiture ordered by this Final Judgment. The reports must include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring any interest in the Divestiture Assets and must describe in detail each contact with any such person.

J. If the divestiture trustee has not accomplished the divestiture ordered by this Final Judgment within six months of appointment, the divestiture trustee must promptly provide the United States with a report setting forth: (1) The divestiture trustee's efforts to accomplish the required divestiture; (2) the reasons, in the divestiture trustee's judgment, why the required divestiture has not been accomplished; and (3) the divestiture trustee's recommendations for completing the divestiture. Following receipt of that report, the United States may make additional recommendations consistent with the purpose of the trust to the Court. The Court thereafter may enter such orders as it deems appropriate to carry out the purpose of this Final Judgment, which may include extending the trust and the term of the divestiture trustee's appointment by a period requested by the United States.

K. The divestiture trustee will serve until divestiture of all Divestiture Assets is completed or for a term otherwise ordered by the Court.

L. If the United States determines that the divestiture trustee is not acting diligently or in a reasonably cost-effective manner, the United States may recommend that the Court appoint a substitute divestiture trustee.

VI. Notice of Proposed Divestiture

A. Within two business days following execution of a definitive divestiture agreement, Defendants or the divestiture trustee, whichever is then responsible for effecting the divestiture, must notify the United States of a proposed divestiture required by this Final Judgment. If the divestiture trustee is responsible for completing the divestiture, the divestiture trustee also must notify Defendants. The notice must set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets.

B. Within 15 calendar days of receipt by the United States of this notice, the United States may request from Defendants, the proposed Acquirer, other third parties, or the divestiture trustee additional information concerning the proposed divestiture, the proposed Acquirer, and other prospective Acquirers. Defendants and the divestiture trustee must furnish the additional information requested within 15 calendar days of the receipt of the request unless the United States provides written agreement to a different period.

C. Within 45 calendar days after receipt of the notice required by Paragraph VI.A. or within 20 calendar days after the United States has been provided the additional information requested pursuant to Paragraph VI.B., whichever is later, the United States will provide written notice to Defendants and any divestiture trustee that states whether or not the United States, in its sole discretion, objects to Acquirer or any other aspect of the proposed divestiture. Without written notice that the United States does not object, a divestiture may not be consummated. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to Defendants' limited right to object to the sale under Paragraph V.C. of this Final Judgment. Upon objection by Defendants pursuant to Paragraph V.C., a divestiture by the divestiture trustee may not be consummated unless approved by the Court.

D. No information or documents obtained pursuant to this Section VI may be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party, including grand-jury proceedings, for the purpose of evaluating a proposed Acquirer or securing compliance with this Final Judgment, or as otherwise required by law.

E. In the event of a request by a third party for disclosure of information under the Freedom of Information Act, 5 U.S.C. 552, the Antitrust Division will act in accordance with that statute, and the Department of Justice regulations at 28 CFR part 16, including the provision on confidential commercial information, at 28 CFR 16.7. Persons submitting information to the Antitrust Division should designate the confidential commercial information portions of all applicable documents and information under 28 CFR 16.7. Designations of confidentiality expire ten years after submission, ''unless the submitter requests and provides justification for a longer designation period.'' *See* 28 CFR 16.7(b).

F. If at the time that a person furnishes information or documents to the United States pursuant to this Section VI, that person represents and identifies in writing information or documents for which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and marks each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure,'' the United States must give that person ten calendar days' notice before divulging the material in any legal proceeding (other than a grand-jury proceeding).

VII. Financing

Defendants may not finance all or any part of Acquirer's purchase of all or part of the Divestiture Assets made pursuant to this Final Judgment.

VIII. Asset Preservation Obligations

Until the divestiture required by this Final Judgment has been accomplished, Defendants must take all steps necessary to comply with the Asset Preservation Stipulation and Order entered by the Court. Defendants must take no action that would jeopardize the divestiture ordered by the Court.

IX. Affidavits

A. Within 20 calendar days of the filing of the Complaint in this matter, and every 30 calendar days thereafter until the divestiture required by this Final Judgment has been completed, Defendants each must deliver to the United States an affidavit, signed by each Defendant's Chief Financial Officer and General Counsel, describing the fact and manner of Defendants' compliance with this Final Judgment. The United States, in its sole discretion, may approve different signatories for the affidavits.

B. Each affidavit must include: (1) The name, address, and telephone number of each person who, during the preceding 30 calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, an interest in the Divestiture Assets and describe in detail each contact with such persons during that period; (2) a description of the efforts Defendants have taken to solicit buyers for and complete the sale of the Divestiture Assets and to provide required information to prospective Acquirers; and (3) a description of any limitations placed by Defendants on information provided to prospective Acquirers. Objection by the United States to information provided by Defendants to prospective Acquirers must be made within 14 calendar days of receipt of the affidavit, except that the United States may object at any time if the information set forth in the affidavit is not true or complete.

C. Defendants must keep all records of any efforts made to divest the Divestiture Assets until one year after the divestiture has been completed.

D. Within 20 calendar days of the filing of the Complaint in this matter, Defendants also must each deliver to the United States an affidavit signed by each Defendant's Chief Financial Officer and General Counsel, that describes in reasonable detail all actions Defendants have taken and all steps Defendants have implemented on an ongoing basis to comply with Section VIII of this Final Judgment. The United States, in its sole discretion, may approve different signatories for the affidavits.

E. If Defendants make any changes to the efforts and actions outlined in any earlier affidavits provided pursuant to Paragraph IX.D., Defendants must, within 15 calendar days after any change is implemented, deliver to the United States an affidavit describing those changes.

F. Defendants must keep all records of any efforts made to preserve the Divestiture Assets until one year after the divestiture has been completed.

X. Appointment of Monitoring Trustee

A. Upon motion of the United States, which Defendants cannot oppose, the Court will appoint a monitoring trustee selected by the United States and approved by the Court.

B. The monitoring trustee will have the power and authority to monitor Defendants' compliance with the terms of this Final Judgment and the Asset Preservation Stipulation and Order entered by the Court and will have other powers as the Court deems appropriate. The monitoring trustee will have no responsibility or obligation for operation of the Divestiture Assets.

C. Defendants may not object to actions taken by the monitoring trustee in fulfillment of the monitoring trustee's responsibilities under any Order of the Court on any ground other than malfeasance by the monitoring trustee. Objections by Defendants must be conveyed in writing to the United States and the monitoring trustee within 10 calendar days of the monitoring trustee's action that gives rise to Defendants' objection.

D. The monitoring trustee will serve at the cost and expense of Defendants pursuant to a written agreement with Defendants and on terms and conditions, including terms and conditions governing confidentiality requirements and conflict of interest certifications, that are approved by the United States.

E. The monitoring trustee may hire, at the cost and expense of Defendants, any agents and consultants, including, but not limited to, investment bankers, attorneys, and accountants, that are reasonably necessary in the monitoring trustee's judgment to assist with the monitoring trustee's duties. These agents or consultants will be solely accountable to the monitoring trustee and will serve on terms and conditions, including terms and conditions governing confidentiality requirements and conflict-of-interest certifications, that are approved by the United States.

F. The compensation of the monitoring trustee and agents or consultants retained by the monitoring trustee must be on reasonable and customary terms commensurate with the individuals' experience and responsibilities. If the monitoring trustee and Defendants are unable to reach agreement on the monitoring trustee's compensation or other terms and conditions of engagement within 14 calendar days of the appointment of the monitoring trustee, the United States, in its sole discretion, may take appropriate action, including by making a recommendation to the Court. Within three business days of hiring any agents or consultants, the monitoring trustee must provide written notice of the hiring and the rate of compensation to Defendants and the United States.

G. The monitoring trustee must account for all costs and expenses incurred.

H. Defendants must use their best efforts to assist the monitoring trustee to monitor Defendants' compliance with their obligations under this Final Judgment and the Asset Preservation Stipulation and Order. Subject to reasonable protection for trade secrets, other confidential research, development, or commercial information, or any applicable privileges, Defendants must provide the monitoring trustee and agents or consultants retained by the monitoring trustee with full and complete access to all personnel, books, records, and facilities of the Divestiture Assets. Defendants may not take any action to interfere with or to impede accomplishment of the monitoring trustee's responsibilities.

I. The monitoring trustee must investigate and report on Defendants' compliance with this Final Judgment and the Asset Preservation Stipulation and Order, including ensuring Defendants' compliance with any transition services agreement. The monitoring trustee must provide periodic reports to the United States setting forth Defendants' efforts to comply with their obligations under this Final Judgment and under the Asset Preservation Stipulation and Order. The United States, in its sole discretion, will set the frequency of the monitoring trustee's reports.

J. The monitoring trustee will serve until the divestiture of all Divestiture Assets pursuant to this Final Judgment or until expiration of any transition services agreement pursuant to Paragraph IV.L., whichever is later, unless the United States, in its sole discretion, determines a shorter period is appropriate.

K. If the United States determines that the monitoring trustee is not acting diligently or in a reasonably cost-effective manner, the United States may

recommend that the Court appoint a substitute.

XI. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment or of related orders such as the Asset Preservation Stipulation and Order or of determining whether this Final Judgment should be modified or vacated, upon written request of an authorized representative of the Assistant Attorney General for the Antitrust Division, and reasonable notice to Defendants, Defendants must permit, from time to time and subject to legally recognized privileges, authorized representatives, including agents retained by the United States:

1. to have access during Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide electronic copies of all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants relating to any matters contained in this Final Judgment; and
2. to interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews must be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General for the Antitrust Division, Defendants must submit written reports or respond to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment.

C. No information or documents obtained pursuant to this Section XI may be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party, including grand jury proceedings, for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. In the event of a request by a third party for disclosure of information under the Freedom of Information Act, 5 U.S.C. 552, the Antitrust Division will act in accordance with that statute, and the Department of Justice regulations at 28 CFR part 16, including the provision on confidential commercial information, at 28 CFR 16.7. Defendants submitting information to the Antitrust Division should designate the confidential commercial information portions of all applicable documents and information under 28 CFR 16.7. Designations of confidentiality expire 10 years after submission, ''unless the submitter requests and provides justification for a longer designation period.'' *See* 28 CFR 16.7(b).

E. If at the time that Defendants furnish information or documents to the United States pursuant to this Section XI, Defendants represent and identify in writing information or documents for which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure,'' the United States must give Defendants 10 calendar days' notice before divulging the material in any legal proceeding (other than a grand jury proceeding).

XII. No Reacquisition; Limitations on Joint Ventures, Partnerships, or Collaborations

Defendants may not reacquire any part of or any interest in the Divestiture Assets during the term of this Final Judgment. In addition, Defendants may not, without the prior written consent of the United States, enter into a new joint venture, partnership, or collaboration, including any marketing or sales agreement, or expand the scope of an existing joint venture, partnership, or collaboration with Acquirer involving any digital do-it-yourself tax return preparation and e-filing products and services during the term of this Final Judgment. The decision whether to consent to any joint venture, partnership, or collaboration is within the sole discretion of the United States.

XIII. Retention of Jurisdiction

The Court retains jurisdiction to enable any party to this Final Judgment to apply to the Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XIV. Enforcement of Final Judgment

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from the Court. Defendants agree that in a civil contempt action, a motion to show cause, or a similar action brought by the United States regarding an alleged violation of this Final Judgment, the United States may establish a violation of this Final Judgment and the appropriateness of a remedy therefor by a preponderance of the evidence, and Defendants waive any argument that a different standard of proof should apply.

B. This Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws and to restore the competition the United States alleged was harmed by the challenged conduct. Defendants agree that they may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that, as interpreted by the Court in light of these procompetitive principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of this Final Judgment should not be construed against either party as the drafter.

C. In an enforcement proceeding in which the Court finds that Defendants have violated this Final Judgment, the United States may apply to the Court for a one-time extension of this Final Judgment, together with other relief that may be appropriate. In connection with a successful effort by the United States to enforce this Final Judgment against a Defendant, whether litigated or resolved before litigation, that Defendant agrees to reimburse the United States for the fees and expenses of its attorneys, as well as all other costs including experts' fees, incurred in connection with that enforcement effort, including in the investigation of the potential violation.

D. For a period of four years following the expiration of this Final Judgment, if the United States has evidence that a Defendant violated this Final Judgment before it expired, the United States may file an action against that Defendant in this Court requesting that the Court order: (1) Defendant to comply with the terms of this Final Judgment for an additional term of at least four years following the filing of the enforcement action; (2) all appropriate contempt remedies; (3) additional relief needed to ensure the Defendant complies with the terms of this Final Judgment; and (4) fees or expenses as called for by this Section XIV.

XV. Expiration of Final Judgment

Unless the Court grants an extension, this Final Judgment will expire 10 years from the date of its entry, except that after five years from the date of its entry, this Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the divestiture has been completed and the continuation of this Final Judgment is no longer necessary or in the public interest.

XVI. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including by making available to the public copies of this Final Judgment and the Competitive Impact Statement, public comments thereon, and any response to comments by the United States. Based upon the record before the Court, which includes the Competitive Impact Statement and, if applicable, any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date:

[Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. 16]

United States District Judge

United States District Court for the District of Columbia

United States of America, Plaintiff, v. *Intuit Inc.* and *Credit Karma, Inc.,*. Defendants

Civil Action No.: 1:20–cv–03441–ABJ

Judge Amy Jackson Berman

Competitive Impact Statement

The United States of America, under Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) (''APPA'' or ''Tunney Act''), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

On February 24, 2020, Defendant Intuit Inc. (''Intuit'') agreed to acquire Defendant Credit Karma, Inc. (''Credit Karma'') for approximately $7.1 billion. The United States filed a civil antitrust Complaint against Intuit and Credit Karma on November 25, 2020, seeking to enjoin the proposed transaction (Docket No. 1). The Complaint alleges that the likely effect of the proposed transaction would be to substantially lessen competition for digital do-it-yourself (''DDIY'') tax preparation products used to help individuals file U.S. federal and state tax returns, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

At the same time the Complaint was filed, the United States filed an Asset Preservation and Hold Separate Stipulation and Order (''Stipulation and Order'') (Docket No. 2–1) and a proposed Final Judgment (Docket No. 2–2), which are designed to address the anticompetitive effects alleged in the Complaint. Under the proposed Final Judgment, which is explained more fully below, Credit Karma is required to divest its DDIY tax preparation business, known as Credit Karma Tax, including the assets needed to run that business.

Under the terms of the Stipulation and Order, Defendants are required to take certain steps to ensure Credit Karma Tax is operated as a competitively independent, economically viable, and ongoing business concern, which will remain independent and uninfluenced by Defendants, and that competition is maintained during the pendency of the required divestiture.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violation

A. The Defendants and the Proposed Transaction

Intuit is a software company based in Mountain View, California that offers tax preparation, accounting, payroll, and personal finance solutions to individuals and businesses. Intuit offers DDIY tax preparation products under the TurboTax brand. Intuit, through its TurboTax business, is the largest provider of DDIY tax preparation products for U.S. federal and state returns.

Credit Karma is a privately held technology company based in San Francisco, California that offers an online and mobile personal finance platform. Credit Karma's platform provides individuals with access to free credit scores, credit monitoring, and DDIY tax preparation, among other products and services. Credit Karma's tax business, known as Credit Karma Tax, is the fifth-largest provider of DDIY tax preparation products for U.S. federal and state returns.

On February 24, 2020, Intuit agreed to acquire Credit Karma in a transaction valued at approximately $7.1 billion.

B. Anticompetitive Effects of the Proposed Transaction in the Market for DDIY Tax Preparation Products

The Complaint alleges that the loss of competition in DDIY tax preparation products due to the proposed transaction would result in substantial harm to millions of U.S. taxpayers. The acquisition of a disruptive upstart by the dominant firm in DDIY tax preparation products would lead to a presumptively anticompetitive increase in market concentration. The Complaint further alleges that the proposed transaction would eliminate important head-to-head competition between Intuit and Credit Karma and an important constraint on Intuit in the market for the development, provision, operation, and support of DDIY tax preparation products.

1. The Relevant Market for Analyzing the Transaction's Anticompetitive Effects

The Complaint alleges that the relevant market for analyzing the effects of the proposed acquisition is the development, provision, operation, and support of DDIY tax preparation products (''the market for DDIY tax preparation products''). DDIY tax preparation products enable individuals to prepare their own U.S. federal and state personal income taxes on the provider's website or mobile application or using the provider's software installed on a personal computer.

The Complaint alleges that other methods of tax preparation, including hiring an accountant (*i.e.,* ''assisted tax preparation'') and completing a tax return manually on paper (the ''pen-and-paper'' method), are not close substitutes for DDIY tax preparation products. Alternate methods of tax preparation do not offer comparable functionality or are less convenient, more cumbersome, or more expensive than DDIY tax preparation products. Thus, the Complaint alleges that a hypothetical monopolist likely would impose at least a small but significant and non-transitory increase in the price of DDIY tax preparation products. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 4.1.1 (revised Aug. 19, 2010) (''Merger Guidelines''), *https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.* Other forms of tax preparation are not sufficiently substitutable to prevent such a price increase.

The Complaint alleges that the relevant geographic market for analyzing the effects of the proposed acquisition is worldwide. All major providers of DDIY tax preparation products for U.S. federal and state tax returns and most customers of such products are located in the United States. DDIY tax preparation products designed for filings in other parts of the world are not substitutes for DDIY tax preparation products designed for U.S.

federal and state filings. Nonetheless, because many DDIY tax preparation products are provided over the internet, there appear to be no physical restrictions on the location of providers or customers of DDIY tax preparation products. Accordingly, the relevant geographic market for analyzing the proposed transaction is a worldwide market.

2. The Transaction is Presumed to Enhance Intuit's Market Power

The proposed transaction would significantly increase market concentration in the market for DDIY tax preparation products. The Complaint alleges that Intuit has a 66% market share and Credit Karma has a 3% market share. Market concentration is often a useful indicator of the level of competitive vigor in a market and the likely competitive effects of an acquisition. The more concentrated a market, and the more a transaction would increase concentration in a market, the more likely it is that the transaction would result in harm to consumers by meaningfully reducing competition.

Market concentration is typically measured by the Herfindahl-Hirschman Index (''HHI''). Markets in which the HHI is above 2,500 are considered highly concentrated. Transactions that increase the HHI by more than 200 points and result in a highly concentrated market are presumed to be likely to enhance market power. *See* Merger Guidelines § 5.3.

Intuit's proposed acquisition of Credit Karma would further increase concentration in a market that is already highly concentrated, resulting in a post-acquisition HHI of over 5,000 points. As a result of the transaction, the HHI in the relevant market would increase by more than 400 points. These HHI measures indicate that the transaction is presumptively likely to enhance market power. *See* Merger Guidelines § 5.3.

As the Complaint alleges, these concentration measures understate the likely anticompetitive effects of the proposed transaction. As explained more fully in Section II.B.3 below, Credit Karma Tax has been a disruptive competitor in the market by offering its DDIY tax preparation product for free to consumers regardless of the complexity of their individual tax returns. Further, Credit Karma Tax is expected to continue to grow rapidly in the near future. Thus, current concentration measures in the market for DDIY tax preparation products understate Credit Karma Tax's competitive importance in the market.

3. The Transaction Would Eliminate Head-to-Head Competition Between Intuit and Credit Karma

The Complaint alleges that Intuit and Credit Karma compete directly against each other to provide DDIY tax preparation products to millions of U.S. taxpayers. For over a decade, Intuit has been the dominant DDIY tax preparation products provider. In 2017, Credit Karma entered the market with a completely free DDIY tax preparation product for U.S. taxpayers. Over the last four years, Credit Karma's free tax product has disrupted TurboTax's dominance in the market by winning over customers from TurboTax. In response to the competitive threat posed by Credit Karma, Intuit has lowered the price of certain DDIY tax preparation products and expanded the scope and quality of services it offers to TurboTax users for free.

Since entering the market, Credit Karma has been a disruptive competitor to Intuit in DDIY tax preparation. Indeed, as the Complaint alleges, Intuit itself has recognized that Credit Karma has been its most disruptive competitor within DDIY tax preparation. Unlike any other provider, Credit Karma offers a completely free DDIY tax preparation product for a broad range of simple and complex U.S. and state tax returns. Credit Karma is able to offer its DDIY tax preparation product for free because it is paid by third parties when it successfully markets their offers for financial products, like credit cards or personal loans, to its customer base of over 100 million users. The data Credit Karma obtains from its users' tax filings helps Credit Karma better tailor offers for other products to its users. Credit Karma's users are more likely to accept tailored offers, which in turn, increases Credit Karma's commissions from the third parties.

Absent the proposed transaction, competition between Intuit and Credit Karma is expected to continue to increase in the future. As the Complaint alleges, Credit Karma Tax has grown significantly since its 2017 launch, serving over 2 million filers in 2020. In the coming tax seasons, Credit Karma Tax is expected to continue to grow and increase its market share, at the expense of TurboTax, as its product gains further traction in the market and as Credit Karma continues to improve and expand its tax product's functionality.

The Complaint, therefore, alleges that by eliminating the head-to-head competition between Intuit and Credit Karma, Intuit's proposed acquisition of Credit Karma would likely substantially lessen competition in the market for DDIY tax preparation products in violation of Section 7 of the Clayton Act.

4. Entry and Efficiencies Are Unlikely To Counteract the Proposed Transaction's Anticompetitive Effects

As the Complaint alleges, new entry or expansion in DDIY tax preparation products is unlikely to prevent the acquisition's anticompetitive effects. Apart from Credit Karma, no other companies have successfully entered the market for DDIY tax preparation products in over a decade. There are significant barriers to entry or expansion in DDIY tax preparation products, including the cost of developing and maintaining a robust, easy-to-use product, marketing costs to acquire and retain customers, and the time and expense needed to build a strong, trusted brand.

The Complaint also alleges that the anticompetitive effects of the proposed acquisition are not likely to be eliminated by any efficiencies the proposed acquisition may achieve.

III. Explanation of the Proposed Final Judgment

The divestiture required by the proposed Final Judgment will remedy the loss of competition alleged in the Complaint by establishing an independent and economically viable competitor in the market for DDIY tax preparation products. The proposed Final Judgment requires Defendants, within 30 calendar days after the entry of the Stipulation and Order by the Court, to divest the products, intellectual property, and other related assets and rights that Credit Karma Tax uses to provide DDIY tax preparation products (collectively, the ''Divestiture Assets''). The Divestiture Assets must be divested to Square, Inc., or to another acquirer approved by the United States, in such a way as to satisfy the United States in its sole discretion that the Divestiture Assets can and will be operated as a viable, ongoing business that can compete effectively in the market for DDIY tax preparation products. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly.

The proposed Final Judgment includes certain provisions to protect the viability of the Divestiture Assets during the transition of those assets to the Acquirer. As explained in more detail below, the proposed Final Judgment requires Defendants to provide certain transition services during the 2021 tax filing season and restricts Defendants from taking certain actions that could threaten the viability

of the Divestiture Assets while the acquirer prepares to independently operate the divested business.

A. Divestiture Assets and Employees

The proposed Final Judgment requires Defendants to divest the Divestiture Assets, which are defined in Paragraph II.F of the proposed Final Judgment. The Divestiture Assets will provide the acquirer with all of the assets and rights owned by or licensed to Credit Karma Tax, and all material assets and rights that are needed to run the Credit Karma Tax business in substantially the same manner as it had been run prior to the transfer. The Divestiture Assets include, among other things: All Credit Karma Tax products, including their underlying software and data; all intellectual property owned by Credit Karma Tax; all certifications and material contracts; copies of all books and records related to Credit Karma Tax; and copies of all marketing materials related to Credit Karma Tax.

The Divestiture Assets also include a worldwide, non-exclusive, irrevocable, perpetual license to all other intellectual property, except for Credit Karma trademarks, owned by Credit Karma or its subsidiaries that is used by the Credit Karma Tax business. Finally, the Divestiture Assets include a limited, non-exclusive license to use the Credit Karma trademarks for the Credit Karma Tax business during the 2021 tax filing season.

Further, under Paragraph IV.H of the proposed Final Judgment, the acquirer will, for up to 12 months after the date of the divestiture, have the right to hire any employees currently employed by Credit Karma Tax, or currently employed by Credit Karma who dedicated at least 50% of their total time to Credit Karma Tax at any point from October 1, 2019 to September 30, 2020. Defendants must provide the acquirer with information on these employees and are prohibited from interfering with the acquirer's efforts to hire them.

B. Transition Services

The proposed Final Judgment requires Defendants to provide certain transition services to maintain the viability and competitiveness of the Credit Karma Tax business during its transition to the acquirer.

Paragraph IV.L of the proposed Final Judgment requires Defendants, at the acquirer's election, to enter into a transition services agreement, for a period of up to 24 months, for engineering, product support, data migration, information security, information technology, technology infrastructure, customer support, marketing, finance, accounting, and knowledge transfer related to the tax industry. Because the Divestiture Assets may be transferred to the acquirer during the 2021 tax filing season, the proposed Final Judgment allows certain transition services to extend beyond 12 months to give the acquirer sufficient time to integrate the Divested Assets into its existing business and to ensure customers can smoothly transition from Credit Karma Tax to the acquirer.

Under Paragraphs IV.M.2 and IV.M.4, for the 2021 tax filing season, Defendants must make the Credit Karma Tax website and mobile application available to consumers with the same level of functionality, availability, access, and customer support as Credit Karma provided during the year preceding the divestiture. This will ensure that Credit Karma Tax customers can continue to fully use these services when filing their 2020 tax returns, while providing the acquirer with the time necessary to integrate Credit Karma Tax into its own business and platform. For the 2021 tax filing season, Paragraph IV.M.1 of the proposed Final Judgment further requires Defendants to distribute acquirer-created marketing content to Credit Karma Tax filers at least as frequently as Credit Karma sent such communications between October 2019 and the date of the divestiture.

C. Marketing and Steering Prohibitions

The proposed Final Judgment contains provisions that limit Defendants' ability to steer customers away from the acquirer's tax business to TurboTax while Defendants fulfill their transition services obligations to the acquirer. These provisions will help ensure that Defendants do not degrade the competitiveness of the divested business while they are providing the transitional services.

For example, during the 2021 tax filing season, the proposed Final Judgment limits Defendants' ability to market TurboTax on the Credit Karma website and mobile application to certain Credit Karma users. During this period, Defendants may market TurboTax only to Credit Karma users that have not previously filed with Credit Karma Tax or shown an intent to use Credit Karma Tax, and only if Defendants also market Credit Karma Tax with equal prominence. Defendants cannot market TurboTax on the Credit Karma platform to any other users during this period. Further, during the 2021 and 2022 tax filing seasons, under Paragraph IV.O.2, Defendants may not directly target previous Credit Karma Tax filers with email marketing related to TurboTax.

Similarly, Paragraphs IV.M.5 and IV.N.2 of the proposed Final Judgment limit Defendants' ability to redirect certain individuals to TurboTax from the Credit Karma website or mobile application. During the 2021 tax season, Defendants must redirect any person from the Credit Karma website or mobile application to the Credit Karma Tax website if the person has indicated an intent to use Credit Karma Tax. Defendants may not direct any such person to the TurboTax website. During the 2022 tax season, the same restrictions on redirection apply but only with respect to previous Credit Karma Tax filers.

Finally, Paragraphs IV.P–Q require Defendants to delete any user data collected from Credit Karma Tax filers that could be used by Defendants to identify any users as Credit Karma Tax filers, except as necessary to provide transitional services to the acquirer.

D. Other Provisions

Section XII of the proposed Final Judgment prevents Defendants from reacquiring any part of or interest in the Divestiture Assets during the term of the Final Judgment. This section further prohibits Defendants from entering into or expanding any new joint venture, partnership, or collaboration with the acquirer related to DDIY tax preparation products during the term of the Final Judgment without prior written consent from the United States.

The proposed Final Judgment also contains provisions designed to promote compliance and make enforcement of the Final Judgment as effective as possible. Paragraph XIV.A provides that the United States retains and reserves all rights to enforce the proposed Final Judgment, including the right to seek an order of contempt from the Court. Under the terms of this paragraph, Defendants have agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that Defendants have waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance with the Final Judgment with the standard of proof that applies to the underlying offense that the Final Judgment addresses.

Paragraph XIV.B provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment is intended to restore competition that the United States alleges would

otherwise be harmed by the transaction. Defendants agree that they will abide by the proposed Final Judgment, and that they may be held in contempt of this Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Paragraph XIV.C of the proposed Final Judgment provides that if the Court finds in an enforcement proceeding that Defendants have violated the Final Judgment, the United States may apply to the Court for a one-time extension of the Final Judgment, together with such other relief as may be appropriate. In addition, to compensate American taxpayers for any costs associated with investigating and enforcing violations of the Final Judgment, Paragraph XIV.C provides that in any successful effort by the United States to enforce the Final Judgment against a Defendant, whether litigated or resolved before litigation, that Defendants will reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with any effort to enforce the Final Judgment, including the investigation of the potential violation.

Paragraph XIV.D states that the United States may file an action against a Defendant for violating the Final Judgment for up to four years after the Final Judgment has expired or been terminated. This provision is meant to address circumstances such as when evidence that a violation of the Final Judgment occurred during the term of the Final Judgment is not discovered until after the Final Judgment has expired or been terminated or when there is not sufficient time for the United States to complete an investigation of an alleged violation until after the Final Judgment has expired or been terminated. This provision, therefore, makes clear that, for four years after the Final Judgment has expired or been terminated, the United States may still challenge a violation that occurred during the term of the Final Judgment.

Finally, Section XV of the proposed Final Judgment provides that the Final Judgment will expire ten years from the date of its entry, except that after five years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the divestiture has been completed and that continuation of the Final Judgment is no longer necessary or in the public interest.

E. Monitoring Trustee

Section X of the proposed Final Judgment provides that the United States may appoint a monitoring trustee with the power and authority to investigate and report on the Defendants' compliance with the terms of the Final Judgment and the Stipulation and Order. The monitoring trustee will not have any responsibility or obligation for the operation of the Defendants' businesses. The monitoring trustee will serve at Defendants' expense, on such terms and conditions as the United States approves, and Defendants must assist the trustee in fulfilling its obligations. The monitoring trustee will provide periodic reports to the United States and will serve until the later of the completion of the divestiture or the expiration of any transition services contract, unless the United States determines a shorter monitoring period is appropriate.

F. Divestiture Trustee

If Defendants do not accomplish the divestiture within the period prescribed in Paragraph IV.A of the proposed Final Judgment, Section V of the proposed Final Judgment provides that the Court will appoint a divestiture trustee selected by the United States to effect the divestiture. If a divestiture trustee is appointed, the proposed Final Judgment provides that Defendants will pay all costs and expenses of the trustee. The divestiture trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After the divestiture trustee's appointment becomes effective, the trustee will provide monthly reports to the United States setting forth his or her efforts to accomplish the divestiture. If the divestiture has not been accomplished within six months of the divestiture trustee's appointment, the divestiture trustee and the United States may make recommendations to the Court, which will enter such orders as appropriate, in order to carry out the purpose of the Final Judgment, including by extending the trust or the term of the divestiture trustee's appointment.

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment neither impairs nor assists the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the U.S. Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of the Final Judgment. The comments and the response of the United States will be filed with the Court and in the **Federal Register**, unless the Court agrees that the United States instead may publish them on the U.S. Department of Justice, Antitrust Division's internet website.

Written comments should be submitted to: Robert A. Lepore, Chief, Transportation, Energy, and Agriculture Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street NW, Suite 8000, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against Defendants. The United States could have continued the litigation and

sought preliminary and permanent injunctions against Intuit's acquisition of Credit Karma. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, preserving competition for the provision of DDIY tax preparation products in the United States. Thus, the proposed Final Judgment achieves all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. Standard of Review Under the APPA for the Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995); *United States* v. *U.S. Airways Grp., Inc.,* 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the ''court's inquiry is limited'' in Tunney Act settlements); *United States* v. *InBev N.V./S.A.,* No. 08–1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that a court's review of a consent judgment is limited and only inquires ''into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable'').

As the U.S. Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not ''make de novo determination of facts and issues.'' *United States* v. *W. Elec. Co.,* 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); *see also Microsoft,* 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Instead, ''[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General.'' *W. Elec. Co.,* 993 F.2d at 1577 (quotation marks omitted). ''The court should bear in mind the *flexibility* of the public interest inquiry: The court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest.'' *Microsoft,* 56 F.3d at 1460 (quotation marks omitted); *see also United States* v. *Deutsche Telekom AG,* No. 19–2232 (TJK), 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020). More demanding requirements would ''have enormous practical consequences for the government's ability to negotiate future settlements,'' contrary to congressional intent. *Id.* at 1456. ''The Tunney Act was not intended to create a disincentive to the use of the consent decree.'' *Id.*

The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g., Microsoft,* 56 F.3d at 1461 (recognizing courts should give ''due respect to the Justice Department's . . . view of the nature of its case''); *United States* v. *Iron Mountain, Inc.,* 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) (''In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'') (internal citations omitted); *United States* v. *Republic Servs., Inc.,* 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting ''the deferential review to which the government's proposed remedy is accorded''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (''A district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case''). The ultimate question is whether ''the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.' '' *Microsoft,* 56 F.3d at 1461 (*quoting W. Elec. Co.,* 900 F.2d at 309).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the Court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft,* 56 F.3d at 1459; *see also U.S. Airways,* 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 (''[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged''). Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using consent judgments proposed by the United States in antitrust enforcement, Public Law 108–237 § 221, and added the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2); *see also U.S. Airways,* 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to

permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: ''[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). ''A court can make its public interest determination based on the competitive impact statement and response to public comments alone.'' *U.S. Airways,* 38 F. Supp. 3d at 76 (citing *Enova Corp.,* 107 F. Supp. 2d at 17).

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: December 10, 2020.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA

Brian Hanna,
Attorney for the United States.
U.S. Department of Justice, Antitrust Division, 450 Fifth Street NW, Suite 8000, Washington, DC 20530, Tel: (202) 598–8360, Email: *brian.hanna2@usdoj.gov.*

[FR Doc. 2020–27604 Filed 12–15–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

[CPCLO Order No. 006–2020]

Privacy Act of 1974; Systems of Records

AGENCY: Office of Justice Programs, United States Department of Justice.

ACTION: Notice of a new system of records.

SUMMARY: Pursuant to the Privacy Act of 1974, Office of Management and Budget (OMB) Circular No. A–108, and 34 U.S.C. 10109(e), notice is hereby given that the Office of Justice Programs (OJP) proposes to develop a new system of records titled Justice Grants System (JustGrants) (JUSTICE/OJP–016) on behalf of itself, the Office of Community Oriented Policing Services (COPS), and the Office on Violence Against Women (OVW). OJP, COPS, and OVW are the three grant-making components of the United States Department of Justice (DOJ or Department). OJP, COPS, and OVW will use JustGrants to manage the planning, reviewing, awarding, modifying, monitoring, and closing out of DOJ grant awards and payment programs (such as the State Criminal Alien Assistance Program (SCAAP) and the Bullet Proof Vest Program (BVP)). JustGrants provides authorized internal users with the capability to effectively run queries on various data elements, review and score applications, generate award documents for successful applicants, approve awards, obligate award funds, and monitor the performance of award recipients. JustGrants also allows authorized internal users to maintain files on unsuccessful applicants and to update, modify, and maintain files for past and current award recipients. Finally, applicants for, and recipients of, federal grant funding from OJP, COPS, and OVW will be able to use JustGrants to manage the full lifecycle of the DOJ grants or payment programs with which they are involved, including applying for, accepting, modifying, monitoring, reporting on, and closing out of the grants or programs.

DATES: In accordance with 5 U.S.C. 552a(e)(4) and (11), this notice is effective upon publication, subject to a 30-day period in which to comment on the routine uses described below. Please submit any comments by January 15, 2021.

ADDRESSES: The public, OMB, and Congress are invited to submit any comments by mail to the United States Department of Justice, Office of Privacy and Civil Liberties, ATTN: Privacy Analyst, 145 N Street NE, Suite 8W.300, Washington, DC 20002; by facsimile at 202–307–0693; or by email at *privacy.compliance@usdoj.gov.* To ensure proper handling, please reference the above CPCLO Order No. on your correspondence.

FOR FURTHER INFORMATION CONTACT: Maria Swineford, Business Manager, Office of the Assistant Attorney General, Office of Justice Programs, 810 7th Street NW, Washington, DC 20531, *Maria.Swineford@usdoj.gov,* (202) 616–0109.

SUPPLEMENTARY INFORMATION:

JustGrants will replace and consolidate two systems of records, Grants Management Information System (GMS) [JUSTICE/OJP–004] and COPS's NexGen [JUSTICE/COPS–003], which are currently used by OJP, OVW, and COPS. JustGrants is designed to provide a uniform and flexible information platform that is simple to use, in order to promote continuous improvement in DOJ's grant and payment programs processes.

Pursuant to 5 U.S.C. 552a(b)(12), records maintained in this system of records may be disclosed to a consumer reporting agency without the prior written consent of the individual to whom the record pertains. Such disclosures will only be made in accordance with 31 U.S.C. 3711(e).

In accordance with 5 U.S.C. 552a(r), the DOJ has provided a report to OMB and Congress on this new system of records.

Dated: December 9, 2020.

Peter Winn,

Acting Chief Privacy and Civil Liberties Officer, United States Department of Justice.

JUSTICE/OJP–016

SYSTEM NAME AND NUMBER:

Justice Grants System (JustGrants), JUSTICE/OJP–016.

SECURITY CLASSIFICATION:

The system is unclassified.

SYSTEM LOCATION:

Records in this system are maintained at the following locations: Office of Justice Programs (OJP); 810 7th Street NW, Washington, DC 20531; and with the following cloud service providers: Pega Cloud for Government, Pegasystems, Inc., 1 Rogers Street, Cambridge, MA 02142; Socrata Data Platform, 255 South King Street, Suite 1100, Seattle, WA 98104; Amazon Web Services (AWS) GovCloud, 13200 Woodland Park Road, Herndon, VA 20171; and AWS US East/West, 12900 Worldgate Drive, Herndon, VA 20170. The cloud computing service providers and their location may change from time to time, and this document may not reflect the most current information available. To confirm information about the current cloud computing service provider, please contact OJP through the OJP service desk at email address *OJP.ITservicedesk@ojp.usdoj.gov.*

SYSTEM MANAGER(S):

Bryce Mitchell, Division Director, Enterprise Application Development Division, Office of the Chief Information Officer, Office of Justice Programs, 810 7th Street NW, Washington, DC 20531, *Bryce.Mitchell@usdoj.gov,* (202) 514–2412.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

28 U.S.C. 530C; 44 U.S.C. 3101; 31 U.S.C. 3512(b)–(c); 34 U.S.C. 10109(e); 34 U.S.C. 10442 and 34 U.S.C. 10444.

PURPOSE(S) OF THE SYSTEM:

JustGrants supports the grant making, grant management, performance reporting, and payment program processing of DOJ's three grant-making components, whose mission is to improve the nation's capacity to prevent

and reduce crime, strengthen the criminal and juvenile justice systems, advance public safety through community policing, improve responses to violence against women, reduce crime and juvenile delinquency, support law enforcement officer safety and wellness, and serve the needs of crime victims. Authorized DOJ internal users will use the system to effectively run queries on various data elements, review and score applications, generate award documents for successful applicants, approve awards, obligate award funds, and monitor the performance of awards. DOJ users will also use the system to maintain files on unsuccessful applicants and update, modify, and maintain files on past and current award recipients. Applicants for, and recipients of, federal funding from DOJ's three grant-making components will use this system to manage the full grants or payment programs lifecycle, including applying for, accepting, modifying, monitoring, reporting on, and closing out of DOJ grant awards or programs.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current and former applicants; recipients and sub-recipients of DOJ grants and payment programs; peer reviewers; DOJ personnel and contractors; DOJ consultants or fellows; and other individuals will be granted access to the system as permitted by the Privacy Act and pursuant to the routine uses in this notice.

CATEGORIES OF RECORDS IN THE SYSTEM:

The system will maintain business contact information (*e.g.,* email address, phone number, address of business) for applicants, recipients (including any sub-recipients at any tier), and DOJ personnel; performance information for grant recipients (including consultants or fellows); other personal information of applicants and recipients (*e.g.,* date of birth or age, education or employment information, military service information); government assigned identifiers of applicants and recipients (*e.g.,* Originating Agency Indentifier (ORI) numbers, Data Universal Number System (DUNS) numbers, System for Award Management (SAM) numbers, award or application numbers, tax identification numbers, vendor identification numbers, driver's license numbers, alien registration numbers, and passport numbers); applicant and financial information of applicants and recipients (*e.g.,* salary data, financial accounts, credit card information, income, debts, taxpayer information); and system administrative/audit data relating to recipients and DOJ personnel (*e.g.,* user ID, passwords, IP address, date/time of access). The system will maintain information regarding the grant programs for which applicants have applied and the final disposition of their applications (funded or denied funding). The system will maintain information on sub-awards and procurement contracts under the awards and sub-awards. The system will also maintain statistical information on the number of applicants that applied for programs each fiscal year; the number of applicants funded and denied funding for each fiscal year; the total number of awards made by DOJ for each fiscal year; the number of years the same award recipients received funding from the DOJ; and the dollar amounts of the awards and the associated duration of award obligations.

RECORD SOURCE CATEGORIES:

The JustGrants System is comprised of two subsystems: The Dynamic Case Management (DCM) and Data Management, Reporting, and Analytics (DMRA) systems. Information maintained in the JustGrants system of records will originate from a number of sources including, but not limited to: Applicants, recipients, sub-recipients, COPS NexGen, OJP Grants Management System, the System for Award Management (*SAM.GOV*), *GRANTS.GOV,* DOJ's Unified Financial Management System (UFMS), DOJ's Identity, Credential, and Access Service Records System (DOJ DIAMD)(JUSTICE/DOJ–020), and U.S. Department of Treasury's Automated Standard Application for Payments (ASAP).

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b), all or a portion of the records or information contained in this system of records may be disclosed as a routine use pursuant to 5 U.S.C. 552a(b)(3) under the circumstances or for the purposes described below, to the extent such disclosures are compatible with the purposes for which the information was collected:

1. Where a record, either alone or in conjunction with other information, may be relevant to investigating a violation or potential violation of law—criminal, civil, or regulatory in nature—the relevant records may be referred to the appropriate federal, state, local, territorial, tribal, or foreign law enforcement authority or other appropriate entity charged with the responsibility for investigating or prosecuting such violation or charged with enforcing or implementing such law.

2. To complainants and/or victims to the extent necessary to provide such persons with information and explanations concerning the progress and/or results of the investigation or case arising from the matters of which they complained and/or of which they were a victim.

3. To any person or entity that the DOJ has reason to believe possesses information regarding a matter within the jurisdiction of the DOJ, to the extent deemed to be necessary by the DOJ in order to elicit such information or cooperation from the recipient for use in the performance of an authorized activity.

4. In an appropriate proceeding before a court, grand jury, or administrative or adjudicative body, when the DOJ determines that the records are arguably relevant to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant to the proceeding.

5. To the news media and the public, including but not limited to disclosures pursuant to 28 CFR 50.2, unless it is determined that release of the specific information in the context of a particular case or matter would constitute an unwarranted invasion of personal privacy. While disclosures under 28 CFR 50.2 are in connection with a civil or criminal proceeding, disclosures under this routine use may also pertain to administrative proceedings as well as investigations of federal employee misconduct prejudicial to the interests of members of the public.

6. To contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for the Federal Government, when necessary to accomplish an agency function related to this system of records.

7. To a former employee of the DOJ for official purposes where the DOJ requires information and/or consultation assistance from the former employee regarding a matter within that person's former area of responsibility.

8. To a Member of Congress or staff acting upon the Member's behalf when the Member or staff requests the information on behalf of, and at the request of, the individual who is the subject of the record.

9. To the National Archives and Records Administration for purposes of records management inspections

conducted under the authority of 44 U.S.C. 2904 and 2906.

10. To appropriate agencies, entities, and persons when (1) the DOJ suspects or has confirmed that there has been a breach of the system of records; (2) the DOJ has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the DOJ (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the DOJ's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

11. To another Federal agency or Federal entity, when the DOJ determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach, or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

12. To any agency, organization, or individual for the purpose of performing authorized audit or oversight operations of DOJ and meeting related reporting requirements.

13. To such recipients and under such circumstances and procedures as are mandated by Federal statute or treaty.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in JustGrants are stored in electronic format in the OJP cloud platforms. Records are stored securely in accordance with applicable federal laws, regulations, Department directives, and guidance.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records can be retrieved through the system portal or through a connecting system via a connector or application program interface (API). The records are retrievable by global search features such as recipient or applicant organizational name; recipient or applicant authorized representative name; application number; award number; ORI number; DOJ employee or contract name; email addresses; physical addresses; user identification numbers; unique identification numbers; SAM Registration numbers; Unique Entity Identifiers; and financial accounting identification.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records in this system are retained and disposed of in accordance with the National Archives and Records Administration, General Records Schedule 1.2: ''Grant and Cooperative Agreement Records'' for records created by Federal agency program offices responsible for managing grants and cooperative agreements such as program announcements, application files, case files and similar or related records, state plans, and final products or deliverables. Financial transaction records maintained in this system are retained and disposed of in accordance with General Records Schedule 1.1, Financial Management and Reporting Records.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

This system meets all DOJ requirements for authorization to operate per DOJ Order 0904, Cybersecurity Program. Specifically, information in this system is maintained in accordance with applicable laws, rules, and policies on protecting individual privacy.

The system leverages Cloud Service Providers that maintain an authority to operate in accordance with applicable laws, rules, and policies, including Federal Risk and Authorization Management Program (FedRAMP) requirements.

Backup information will be maintained in accordance with a government contract that requires adherence to applicable laws, rules, and policies. Internet connections are protected by multiple firewalls. Security personnel conduct periodic vulnerability scans using DOJ-approved software to ensure security compliance and security logs are enabled for all computers to assist in troubleshooting and forensics analysis during incident investigations. Users of individual computers can only gain access to the data by a valid users identification and authentication.

RECORD ACCESS PROCEDURES:

All requests for access to records must be in writing and should be addressed to the component that manages the relevant award:

For COPS Office Awards: COPS FOIA Officer, Office of Community Oriented Policing Services, 145 N Street NE, Washington, DC 20530.

For OJP Awards: OJP FOIA Officer; Office of Justice Programs, Office of the General Counsel, 810 7th Street NW, Rm. 5400, Washington, DC 20531.

For OVW Awards: OVW FOIA Officer, Office on Violence Against Women, 145 N Street NE, Suite 10W.121, Washington, DC 20530.

The envelope and letter should be clearly marked ''Privacy Act Access Request.'' The request must describe the records sought in sufficient detail to enable DOJ personnel to locate them with a reasonable amount of effort. The request must include a general description of the records sought and must include the requester's full name, current address, and date and place of birth. The request must be signed and either notarized or submitted under penalty of perjury.

Although no specific form is required, you may obtain forms for this purpose from the FOIA/Privacy Act Mail Referral Unit, United States Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530, or on the Department of Justice website at *https://www.justice.gov/oip/oip-request.html.*

More information regarding the DOJ's procedures for accessing records in accordance with the Privacy Act can be found at 28 CFR part 16 Subpart D, ''Protection of Privacy and Access to Individual Records Under the Privacy Act of 1974.''

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest or amend records maintained in this system of records must direct their requests to the address indicated in the ''RECORD ACCESS PROCEDURES'' paragraph, above. All requests to contest or amend records must be in writing and the envelope and letter should be clearly marked ''Privacy Act Amendment Request.'' All requests must state clearly and concisely what record is being contested, the reasons for contesting it, and the proposed amendment to the record.

More information regarding the DOJ's procedures for amending or contesting records in accordance with the Privacy Act can be found at 28 CFR 16.46, ''Requests for Amendment or Correction of Records.''

NOTIFICATION PROCEDURES:

Individuals may be notified if a record in this system of records pertains to them when the individuals request information utilizing the same procedures as those identified in the ''RECORD ACCESS PROCEDURES'' paragraph, above.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

None.

[FR Doc. 2020–27696 Filed 12–15–20; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

[OMB Number 1110–0060]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Revision of a Currently Approved Collection; Biographic Verification Form (1–791)

AGENCY: Criminal Justice Information Services Division, Federal Bureau of Investigation Department of Justice.

ACTION: 60-Day notice.

SUMMARY: Department of Justice (DOJ), Federal Bureau of Investigation (FBI), Criminal Justice Information Services (CJIS) Division, 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 16, 2021.

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 Gerry Lynn Brovey, Supervisory Information Liaison Specialist, FBI, CJIS, Resources Management Section, Administrative Unit, Module C–2, 1000 Custer Hollow Road, Clarksburg, West Virginia, 26306; phone: 304–625–4320 or email *glbrovey@fbi.gov*. Written comments and/or suggestions can also be sent to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted via email to *OIRA_submission@omb.eop.gov*.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *The Title of the Form/Collection:* Biographic Verification Form.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form number is 1–791. The applicable component within the Sponsoring component: Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Agencies authorized to submit applicant fingerprints into the Next Generation Identification (NGI) system for noncriminal justice purposes such as employment, benefits, and licensing. This form is completed to obtain a biographic verification (name check) for an applicant when the fingerprints have been rejected twice for quality to ensure eligible individuals are not denied employment, benefits, or licensing.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 50,000 respondents will complete each form within approximately 8 minutes.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 6,700 total annual burden hours associated with this collection.

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: December 11, 2020.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2020–27643 Filed 12–15–20; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF JUSTICE

Notice of Proposed Settlement Agreement Under the Oil Pollution Act of 1990

Notice is hereby given that the United States of America, on behalf of the Department of the Interior (''DOI''), acting through the Fish and Wildlife Service, and the State of Indiana, on behalf of the Indiana Department of Natural Resources and the Indiana Department of Environmental Management, (collectively ''Trustees''), are providing an opportunity for public comment on a proposed Settlement Agreement among the United States, Indiana, and Marathon Pipe Line, LLC (''Marathon'').

The Settlement Agreement resolves the United States' and Indiana's claims under the Oil Pollution Act of 1990 (''OPA''), 33 U.S.C. 2701 *et seq.,* for injury to natural resources resulting from two oil spills from Marathon pipelines in different parts of the state of Indiana. The first spill occurred on March 20, 2018, when approximately 1,400 barrels (58,800 gallons) of low sulfur diesel fuel was discharged from a Marathon pipeline into Big Creek, near Solitude, Posey County, Indiana (''Big Creek Spill''). The second spill, on April 2, 2019, involved the release of an estimated 300 barrels (12,600 gallons) of natural gasoline from an 8-inch product pipeline owned by Marathon near Knightsville, Clay County, Indiana, impacting soil and a tributary of Billy Creek (''Knightsville Spill'').

The Settlement Agreement requires Marathon to pay $412,780.15 to the DOI Natural Resource Damage Assessment and Restoration Fund. This amount will reimburse past assessment costs and fund the development and implementation of restoration plans to restore, replace, rehabilitate, or acquire the equivalent of those resources injured by the two spills and to compensate the public for any lost recreational opportunities. Marathon will receive from the Trustees a covenant not to sue under OPA or other statutes for natural resource damages caused by the Spills, including damage assessment costs.

The publication of this notice opens a period for public comment on the proposed Settlement Agreement. Comments should be addressed to

Daniel W. Sparks, and should refer to: Marathon Settlement Agreement. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	Send them to:
By email	daniel_sparks@fws.gov.
By mail	Daniel W. Sparks, Senior Fish and Wildlife Biologist, U.S. Fish and Wildlife Service, 620 S Walker St., Bloomington, IN 47403.

During the public comment period, the Settlement Agreement may be examined and downloaded at this website: *https://www.fws.gov/midwest/es/ec/nrda/BigCreekIndiana/Index.html#AdminRecord.* We will provide a paper copy of the Settlement Agreement upon written request and payment of reproduction costs. Please mail your request and payment to: Assistant Solicitor, Environmental Restoration Branch, Office of the Solicitor, U.S. Department of the Interior, 1849 C Street NW, MS 6318, Washington, DC 20240.

Please enclose a check or money order for $2.50 (25 cents per page reproduction cost) payable to the United States Treasury.

Patricia McKenna,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2020–27679 Filed 12–15–20; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Second Amendment to Consent Decree Under the Clean Water Act

On December 11, 2020, the Department of Justice lodged a proposed Second Amendment to Consent Decree (''Second Amendment'') with the United States District Court for the Northern District of Ohio in the lawsuit entitled *United States and the State of Ohio v. Northeast Ohio Regional Sewer District,* Civil Action No. 1:10–cv–02895.

The United States, on behalf of the U.S. Environmental Protection Agency, and the State of Ohio, on behalf of the Ohio Environmental Protection Agency (''Ohio EPA''), filed a complaint under the Clean Water Act asserting claims related to discharges from the Northeast Ohio Regional Sewer District's (''NEORSD'') municipal wastewater and sewer system. The United States sought civil penalties and injunctive relief.

On July 7, 2011, the Court entered a Consent Decree that required that NEORSD implement injunctive measures and required payment of civil penalties. The injunctive relief in the Consent Decree requires, *inter alia,* that the District undertake an extensive program of improvements in its combined sewer overflow control infrastructure and that it significantly expand the capacity of its three wastewater treatment plants in order to increase the ability of the plants to treat increased sewer flows during wet weather.

The proposed Second Amendment relates primarily to work that remains to be completed at the Southerly and Westerly wastewater treatment plants (Control Measures 5 and 3 specified in Appendix 1) and proposed changes to the structure of the improvements required by Control Measures 13, 14, 15, 16, 17, 20, 21, 22, and 24 of Appendix 1. The proposed modifications are reflected in changes to the language of the Consent Decree, Appendix 1, and Appendix 2.

With regard to Southerly, the Consent Decree required two significant upgrades to increase the Southerly plant's peak wet weather capacity: Construction of a 125 MGD CEHRT facility and expansion of secondary treatment capacity from 400 MGD to 615 MGD. To address the District's concerns about constructability and operability of the required expansion of secondary treatment capacity, the proposed modification instead requires the expansion of the secondary system to 480 MGD and an expansion of the capacity of the CEHRT to 255 MGD.

With regard to Westerly, the Consent Decree, in Control Measure 3 of Appendix 1, requires the District to modify and expand an existing wet weather storage and sedimentation facility (the ''CSOTF'') to provide CEHRT treatment for flows up to 411 MGD. The Parties recognized after entry of the Consent Decree that site space constraints, upstream hydraulic limitations, and the potential for CEHRT infrastructure flooding requires the occasional use of a center channel diversion in such a manner that limits the District's ability to treat 411 MGD at all times and therefore propose to address the limitations of the CEHRT treatment capacity by detailing the infrastructure to be constructed and circumstances under which the use of the center channel diversion is allowed to be used.

Appendix 2 of the Consent Decree presents the requirements for post-construction monitoring of the control measures that the District is required to implement. For both Southerly and Westerly CEHRT systems, the Parties decided to add to Appendix 2 detailed descriptions of the processes and methods for conducting post-construction monitoring of the CEHRT systems instead of those details being addressed through a separate deliverable submitted by the District and subject to Plaintiffs' review and approval.

The proposed modification also updates the Notice requirements of the Consent Decree and makes replacements to Paragraph 18 of the Consent Decree based on the Southerly and Westerly modifications described above.

The publication of this notice opens a period for public comment on the Second Amendment. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States and the State of Ohio* v. *Northeast Ohio Regional Sewer District,* D.J. Ref. No. 90–5–1–1–08177/1. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	Send them to:
By email	pubcomment-ees.enrd@usdoj.gov.
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the Second Amendment may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the Second Amendment upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $ 59.00 (25 cents per page reproduction cost) payable to the United States Treasury.

Patricia McKenna,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2020–27680 Filed 12–15–20; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

[OMB Number 1140–0026]

Agency Information Collection Activities; Proposed eCollection of eComments Requested; Report of Theft or Loss—Explosive Materials—ATF Form 5400.5

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 30-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 an additional 30 days until January 15, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

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:* Revision of a currently approved collection.

(2) *The Title of the Form/Collection:* Report of Theft or Loss—Explosive Materials.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number: ATF Form 5400.5.

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: Business or other for-profit.

Other: Individuals or households, Not-for-profit institutions, Farms, Federal Government, and State, Local, or Tribal Government.

Abstract: According to 27 CFR 555.30 (a) entitled *Reporting Theft or Loss of Explosive Materials,* ''Any licensee or permittee who has knowledge of the theft or loss of any explosive materials from his stock shall, within 24 hours of discovery, report the theft or loss by telephoning 1–800–461–8841 (nationwide toll free number) and on ATF F 5400.5 [*Report of Theft or Loss—Explosive Materials*], in accordance with the instructions on the form. Theft or loss of any explosive materials shall also be reported to appropriate local authorities.''

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 300 respondents will use the form annually, and it will take each respondent approximately 1 hour and 48 minutes to complete their responses.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with this collection is 540 hours, which is equal to 300 (# of respondents) * 1 (# of responses per respondent) * 1.8 (1 hour and 48 minutes).

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: December 11, 2020.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2020–27644 Filed 12–15–20; 8:45 am]

BILLING CODE 4410–14–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of a Change in Status of an Extended Benefit (EB) Program for Arizona, Maryland, Oklahoma, and West Virginia

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

This notice announces a change in benefit period eligibility under the EB program for Arizona, Maryland, Oklahoma, and West Virginia.

The following changes have occurred since the publication of the last notice regarding the State's EB status:

- Arizona's 13-week insured unemployment rate (IUR) for the week ending November 21, 2020, was 4.78 percent, falling below the 5.00 percent threshold necessary to remain ''on'' EB. Therefore, the EB period for Arizona ends on December 12, 2020. The state will remain in an ''off'' period for a minimum of 13 weeks.
- Maryland's 13-week IUR for the week ending November 21, 2020, was 4.96 percent, falling below the 5.00 percent threshold necessary to remain ''on'' EB. Therefore, the EB period for Maryland ends on December 12, 2020. The state will remain in an ''off'' period for a minimum of 13 weeks.
- Oklahoma's 13-week IUR for the week ending November 21, 2020, was 4.94 percent, falling below the 5.00 percent threshold necessary to remain ''on'' EB. Therefore, the EB period for Oklahoma ends on December 12, 2020. The state will remain in an ''off'' period for a minimum of 13 weeks.
- West Virginia's 13-week IUR for the week ending November 21, 2020, was 4.64 percent, falling below the 5.00 percent threshold necessary to remain ''on'' EB. Therefore, the EB period for West Virginia ends on December 12, 2020. The state will remain in an ''off'' period for a minimum of 13 weeks.

Information for Claimants

The duration of benefits payable in the EB Program, and the terms and conditions on which they are payable, are governed by the Federal-State Extended Unemployment Compensation Act of 1970, as amended, and the operating instructions issued to the state by the U.S. Department of Labor. In the case of a state ending an EB period, the State Workforce Agency will furnish a written notice to each individual who is currently filing claims for EB of the forthcoming termination of the EB

period and its effect on the individual's right to EB (20 CFR 615.13 (c)).

FOR FURTHER INFORMATION CONTACT: U.S. Department of Labor, Employment and Training Administration, Office of Unemployment Insurance Room S–4524, Attn: Thomas Stengle, 200 Constitution Avenue NW, Washington, DC 20210, telephone number (202)-693–2991 (this is not a toll-free number) or by email: *Stengle.Thomas@dol.gov*.

Signed in Washington, DC.

John Pallasch,

Assistant Secretary for Employment and Training.

[FR Doc. 2020–27633 Filed 12–15–20; 8:45 am]

BILLING CODE 4510–FW–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–20–0024; NARA–2021–010]

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 of certain Federal agency requests for records disposition authority (records schedules). We publish notice in the **Federal Register** and on *regulations.gov* for records schedules in which agencies propose to dispose of records they no longer need to conduct agency business. We invite public comments on such records schedules.

DATES: NARA must receive comments by February 1, 2021.

ADDRESSES: You may submit comments by either of the following methods. You must cite the control number, which appears on the records schedule in parentheses after the name of the agency that submitted the schedule.

- *Federal eRulemaking Portal: http://www.regulations.gov.*
- *Mail:* Records Appraisal and Agency Assistance (ACR); National Archives and Records Administration; 8601 Adelphi Road; College Park, MD 20740–6001.

FOR FURTHER INFORMATION CONTACT: Kimberly Keravuori, Regulatory and External Policy Program Manager, by email at *regulation_comments@nara.gov.* For information about records schedules, contact Records Management Operations by email at *request.schedule@nara.gov,* by mail at the address above, or by phone at 301–837–1799.

SUPPLEMENTARY INFORMATION:

Public Comment Procedures

We are publishing notice of records schedules in which agencies propose to dispose of records they no longer need to conduct agency business. We invite public comments on these records schedules, as required by 44 U.S.C. 3303a(a), and list the schedules at the end of this notice by agency and subdivision requesting disposition authority.

In addition, this notice lists the organizational unit(s) accumulating the records or states that the schedule has agency-wide applicability. It also provides the control number assigned to each schedule, which you will need if you submit comments on that schedule.

We have uploaded the records schedules and accompanying appraisal memoranda to the *regulations.gov* docket for this notice as ''other'' documents. Each records schedule contains a full description of the records at the file unit level as well as their proposed disposition. The appraisal memorandum for the schedule includes information about the records.

We will post comments, including any personal information and attachments, to the public docket unchanged. Because comments are public, you are responsible for ensuring that you do not include any confidential or other information that you or a third party may not wish to be publicly posted. If you want to submit a comment with confidential information or cannot otherwise use the *regulations.gov* portal, you may contact *request.schedule@nara.gov* for instructions on submitting your comment.

We will consider all comments submitted by the posted deadline and consult as needed with the Federal agency seeking the disposition authority. After considering comments, we will post on *regulations.gov* a ''Consolidated Reply'' summarizing the comments, responding to them, and noting any changes we have made to the proposed records schedule. We will then send the schedule for final approval by the Archivist of the United States. You may elect at *regulations.gov* to receive updates on the docket, including an alert when we post the Consolidated Reply, whether or not you submit a comment. If you have a question, you can submit it as a comment, and can also submit any concerns or comments you would have to a possible response to the question. We will address these items in consolidated replies along with any other comments submitted on that schedule.

We will post schedules on our website in the Records Control Schedule (RCS) Repository, at *https://www.archives.gov/records-mgmt/rcs,* after the Archivist approves them. The RCS contains all schedules approved since 1973.

Background

Each year, Federal agencies create billions of records. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval. Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. The records schedules authorize agencies to preserve records of continuing value in the National Archives or to destroy, after a specified period, records lacking continuing administrative, legal, research, or other value. 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.

Agencies may not destroy Federal records without the approval of the Archivist of the United States. The Archivist grants this approval only after thorough consideration of 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. Public review and comment on these records schedules is part of the Archivist's consideration process.

Schedules Pending

1. Western Hemisphere Drug Policy Commission, Agency-wide, Records for the Western Hemisphere Drug Policy Commission (DAA–0220–2020–0017).

Laurence Brewer,

Chief Records Officer for the U.S. Government.

[FR Doc. 2020–27610 Filed 12–15–20; 8:45 am]

BILLING CODE 7515–01–P

THE NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

Notice of Proposed Information Collection Requests: 2022–2024 IMLS Native American Library Services Basic Grant Program Notice of Funding Opportunity

AGENCY: Institute of Museum and Library Services, National Foundation for the Arts and the Humanities.

ACTION: Submission for OMB Review, comment request.

SUMMARY: The Institute of Museum and Library Services announces that the following information collection has been submitted to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The purpose of this Notice is to solicit comments about this assessment process, instructions, and data collections. A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the **FOR FURTHER INFORMATION CONTACT** section below on or before January 14, 2021.

OMB is particularly interested in comments that help the agency to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including 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).

ADDRESSES: Comments should be sent to Office of Information and Regulatory Affairs, *Attn.:* OMB Desk Officer for Education, Office of Management and Budget, Room 10235, Washington, DC 20503, 202–395–7316.

FOR FURTHER INFORMATION CONTACT: Connie Bodner, Ph.D., Director of Grants Policy and Management, Office of Grants Policy and Management, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Dr. Bodner can be reached by telephone at 202–653–4636 or by email at *cbodner@imls.gov*. Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

The Institute of Museum and Library Services is the primary source of federal support for the nation's libraries and museums. We advance, support, and empower America's museums, libraries, and related organizations through grant making, research, and policy development. Our vision is a nation where museums and libraries work together to work together to transform the lives of individuals and communities. To learn more, visit *www.imls.gov*.

Current Actions: The purpose of this collection is to assist Native American tribes in improving core library services for their communities, particularly as they relate to the following goals in the Museum and Library Services Act (20 U.S.C. 9141).

1. Expanding services for learning and access to information and educational resources in a variety of formats (including new and emerging technology), in all types of libraries, for individuals of all ages in order to support such individuals' need for education, lifelong learning, workforce development, economic and business development, health information, critical thinking skills, digital library skills, and financial literacy and other types of literacy skills.

2. Establishing or enhancing electronic and other linkages and improved coordination among and between libraries and entities, as described in 20 U.S.C. 9134(b)(6), for the purpose of improving the quality of and access to library and information services.

3. Providing training and professional development, including continuing education, to enhance the skills of the current library workforce and leadership, and advance the delivery of library and information services; and enhancing efforts to recruit future professionals, including those from diverse and underrepresented backgrounds, to the field of library and information services.

4. Developing public and private partnerships with other agencies, tribes, and community-based organizations.

5. Targeting library services to individuals of diverse geographic, cultural, and socioeconomic backgrounds, to individuals with disabilities, and to individuals with limited functional literacy or information skills.

6. Targeting library and information services to persons having difficulty using a library and to underserved urban and rural communities, including children (from birth through age 17) from families with incomes below the poverty line (as defined by the Office of Management and Budget and revised annually in accordance with 42 U.S.C. 9902(2)) applicable to a family of the size involved.

7. Developing library services that provide all users access to information through local, State, regional, national, and international collaborations and networks.

8. Carrying out other activities consistent with the purposes of the Library Services and Technology subchapter of the IMLS statute (20 U.S.C. 9121).

Nonprofit organizations that primarily serve and represent Native Hawaiians (as the term is defined in 20 U.S.C. 7517) are eligible to apply for funding under the Naïve Hawaiian Library Program.

This action is to renew the forms and instructions for the Notice of Funding Opportunities for the next three years. The 60-day notice for the 2022–2024 IMLS Native American Library Services Basic Grant Program Notice of Funding Opportunity was published in the **Federal Register** on October 9, 2020, (85 FR 64170–64171). No comments were received.

Agency: Institute of Museum and Library Services.

Title: 2022–2024 IMLS Native American Library Services Basic Grant Program Notice of Funding Opportunity.

OMB Number: 3137–0093.

Frequency: Once per year.

Affected Public: Federally recognized tribes.

Number of Respondents: 200.

Estimated Average Burden per Response: 10 hours.

Estimated Total Annual Burden: 2,000 hours.

Total Annualized capital/startup costs: n/a.

Total Annual costs: $59,540.00.

Total Federal costs: $9,558.40.

Public Comments Invited: Comments submitted in response to this notice will be summarized and/or included in the request for OMB's clearance of this information collection.

Dated: December 10, 2020.

Kim Miller,

Senior Grants Management Specialist, Institute of Museum and Library Services.

[FR Doc. 2020–27605 Filed 12–15–20; 8:45 am]

BILLING CODE 7036–01–P

NATIONAL SCIENCE FOUNDATION

Request for Information: Interdisciplinary Frontiers of Understanding the Brain

AGENCY: National Science Foundation.

ACTION: Request for information.

SUMMARY: The National Science Foundation seeks public input on new scientific opportunities at the interface of neuroscience and other science and engineering disciplines.

DATES: Written comments must be submitted no later than March 31, 2021.

ADDRESSES: Submit comments via web form at *https://www.surveymonkey.com/r/LQBPS6S*. Email comments to *brain-frontiers@nsf.gov*. Send written submissions to Dr. Edda Thiels, Division of Integrative and Organismal Systems, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314.

FOR FURTHER INFORMATION CONTACT: Dr. Edda Thiels at *brain-frontiers@nsf.gov* or (703) 292–8167.

SUPPLEMENTARY INFORMATION: Exciting new opportunities at the interface of neuroscience and other science and engineering disciplines, catalyzed by transformative new discoveries and technologies, are poised to reshape brain research and its applications. Advances at these interdisciplinary frontiers depend on dialogue across many areas of scholarship, including behavioral, biological, cognitive, computing, educational, engineering, mathematical, and physical sciences research, as well as fields and subfields that have not traditionally been linked to neuroscience. The National Science Foundation seeks community input that illuminates these interdisciplinary opportunities, from theory to applications, and points to how they might best be realized.

Further information and instructions to submitters may be found at *https://www.nsf.gov/publications/pub_summ.jsp?ods_key=nsf21031* (NSF 21–31).

(Authority: 42 U.S.C. 1861.)

Dated: December 11, 2020.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2020–27671 Filed 12–15–20; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Request for Information; Strategic Plan

AGENCY: National Science Foundation.

ACTION: Request for information; correction.

SUMMARY: The National Science Foundation (NSF) published a document in the **Federal Register** of December 10, 2020, concerning a request for public comment on the *2022–2026 Strategic Plan for the National Science Foundation.* The notice was published without links to the document under review as well as the current strategic plan. This notice now includes those links. The Government Performance and Results Act (GPRA) and GPRA Modernization act of 2010 requires federal agencies to publish their strategic and performance plans in pursuit of their missions. Through this Request for Information (RFI), the National Science Foundation (NSF) seeks public comment on the key elements of the strategic plan—the Vision, Core Values, Strategic Goals, and Strategic Objectives—and high-level questions that will guide the development of the 2022–2026 NSF Strategic Plan.

DATES: Please send comments on or before January 22, 2021. Comments received after that date will be considered to the extent practicable. Send comments to the address below.

ADDRESSES: Submit comments to the strategic planning website, *https://www.nsf.gov/od/oia/strategicplan/feedback.jsp.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1.800.877.8339, 24 hours a day, 7 days a week, 365 days a year (including Federal holidays).

SUPPLEMENTARY INFORMATION:

1.0 Background

NSF was created ''to promote the progress of science; to advance the national health, prosperity, and welfare; to secure the national defense . . .'' (1950, as amended). Looking ahead, NSF aims to advance the frontiers of research into the future and secure global leadership in science and engineering, while ensuring accessibility and inclusivity. To meet these aims, NSF expands knowledge in science, engineering, and learning, and advances the capability of the nation to meet current and future challenges, while continuing to enhance its performance.

2.0 Request for Information

Through this Request for Information (RFI), the National Science Foundation (NSF) seeks comment from a broad array of stakeholders regarding the 2022–2026 Strategic Plan. Comments should be submitted to the strategic plan website, *https://www.nsf.gov/od/oia/strategicplan/feedback.jsp,* and should reference the previous NSF Strategic plan for FY 2018–2022 which can be found here, *https://www.nsf.gov/pubs/2018/nsf18045/nsf18045.pdf.* We welcome comments on the key elements of the strategic plan, including Vision, Core Values, Strategic Goals, and Strategic Objectives, and answers to the following questions:

1. What are the interests, values and emergent science and policy issues that the Strategic Plan should recognize?

2. How can NSF help maintain US leadership in an evolving global research and education landscape?

3. How can the plan best underscore the importance to the Nation of fundamental research and its broader impacts?

Dated: December 11, 2020.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2020–27672 Filed 12–15–20; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 70–1151; NRC–2020–0265]

Westinghouse Electric Company, LLC; Columbia Fuel Fabrication Facility; and US Ecology, Inc.; Idaho Resource Conservation and Recovery Act Subtitle C Hazardous Disposal Facility Located Near Grand View, Idaho

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment and exemption; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing an exemption and associated license amendment related to a request from Westinghouse Electric Company, LLC (WEC) from NRC regulations with respect to a request for alternate disposal and exemption for specified low-activity radioactive waste from the Columbia Fuel Fabrication Facility

(CFFF) in Hopkins, South Carolina for waste containing byproduct material and special nuclear material (SNM) under License Number SNM–1107. Additionally, the NRC is taking the related action of approving exemptions to US Ecology, Inc. (USEI) from the applicable licensing requirements to allow USEI to receive and possess the material from CFFF without an NRC license. The USEI disposal facility, located near Grand View, Idaho, is a Subtitle C Resource Conservation and Recovery Act (RCRA) hazardous waste disposal facility permitted by the State of Idaho to receive low-level radioactive waste and is not licensed by the NRC. Approval of the alternate disposal request from WEC, the exemptions and license amendment requested by WEC and associated exemptions for USEI would allow WEC to transfer the specific waste from CFFF for disposal at USEI.

DATES: This exemption is effective on December 9, 2020.

ADDRESSES: Please refer to Docket ID NRC–2020–0265 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0265. Address questions about Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The Request for Alternate Disposal Approval and Exemption for Specific Columbia Fuel Fabrication Facility Waste (License No. SNM–1197, Docket No. 70–1151) is available in ADAMS under Package Accession No. ML20129J934. The Response to Request for Additional Information—Alternate Disposal Approval and Exemptions for Specific Columbia Fuel Fabrication Facility Waste (License No. SNM–1107, Docket No. 70–1151) dated September 22, 2020 is available in ADAMS under Accession No. ML20266G551. The Response to Request for Additional Information—Alternate Disposal Approval and Exemptions for Specific Columbia Fuel Fabrication Facility Waste (License No. SNM–1107, Docket No. 70–1151) dated October 13, 2020 is available in ADAMS under Accession No. ML20287A545. The staff's Safety Evaluation Report dated November 30, 2020 is available in ADAMS under Package Accession No. ML20329A352.
- Attention: The PDR, where you may examine and order copies of public documents is currently closed. You may submit your request to the PDR via email at *pdr.resource@nrc.gov* or call 1–800–397–4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: David Tiktinsky, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington DC 20555–0001; telephone: 301–415–8740, email: *David.Tiktinsky@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Westinghouse Electric Company, LLC (WEC) is the holder of a Special Nuclear Materials (SNM) License SNM–1107 under part 70 of title 10 of the *Code of Federal Regulations* (10 CFR), which authorizes the fabrication of nuclear fuel at the Columbia Fuel Fabrication Facility (CFFF). The US Ecology, Inc. (USEI) disposal facility near Grand View, Idaho is a Subtitle C Resource Conservation and Recovery Act (RCRA) hazardous waste disposal facility permitted by the State of Idaho to receive radioactive waste that is not licensed or exempted from licensing by the NRC.

II. Request/Action

The proposed action would approve the alternate disposal request and provide exemptions to 10 CFR 70.3 and 10 CFR 30.3, and an associated WEC license amendment, allowing WEC to transfer and USEI to receive and dispose specific wastes.

The East Lagoon is a treatment/settling pond that is approximately 160′ × 130′. The East Lagoon receives liquid inputs such as effluent from the Deionized Water Building (primarily from regeneration water from resin beds) and rainwater from containment areas such as the chemical tank farm. The East Lagoon also provides extra capacity for overflow from other lagoons or for containment in the event of a spill or emergency. Current East Lagoon operations are regulated under Westinghouse's National Pollutant Discharge Elimination System permit for the Columbia site. However, based on past wastewater treatment area operations and the age of the East Lagoon liner, a Wastewater Treatment Area Operable Unit was established under the South Carolina Department of Health and Environmental Control (SCDHEC) Consent Agreement signed on February 26, 2019. As part of the Consent Agreement, the East Lagoon is planned for closure and remediation. The East Lagoon contains approximately 3 to 4 feet of radiologically contaminated sludge. The East Lagoon was originally lined in the early 1980's. While this liner is still in place, WEC assumes it may have lost some integrity. Therefore, there is the possibility of soil contamination under and around the East Lagoon due to leaching that would also be excavated and disposed of as part of this action. Approximately 45,000 ft^3 of sludge, soil and debris will be generated from the closure of the East Lagoon. The waste from the East Lagoon being considered under this request is contaminated with SNM (low enriched uranium {<5 wt. % U–235}) and the fission product Technetium-99 (Tc-99). The SNM and Tc-99 contaminated wastes were generated from plant operations during the fabrication of nuclear fuel. Tc-99 is present in the process due to uranium feed that originated from sources of recycled uranium or down-blended high enriched uranium. In addition to the material generated from the closure of the East Lagoon, WEC intends to dispose of approximately 1428 m^3 (50,400 ft^3) of solid CaF_2 sludge previously dredged from the Calcium Fluoride Lagoons and subsequently placed in a storage pile. The CaF_2 sludge was generated as a waste from uranium recovery waste treatment process and is contaminated with SNM (low enriched uranium {<5 wt. % U–235}) as well.

The sludge, soil, and debris associated with the closure of the East Lagoon will be shipped with the CaF_2 sludge to USEI using a combination of trucks and railcars.

WEC also intends to dispose of up to 526 obsolete UF_6 Cylinders, which represent a disposal volume of approximately 651 m^3 (23,000 ft^3) prior to downsizing. The UF_6 Cylinders are transportation containers that are no longer in service. The UF_6 Cylinders are solid form (steel), approximately 1.8 m (6 ft) in length and 0.76 m (2.5 ft) in diameter. The UF_6 Cylinders are empty and have been through the UF_6 Cylinder internal wash/rinse process following their last use and prior to being placed into storage pending disposal. The UF_6

Cylinders will be downsized to eliminate void space prior to packaging for shipment offsite for disposal. While emptied and cleaned, the UF_6 Cylinders are still internally contaminated with SNM.

The UF_6 Cylinders will be transported to the USEI site by trucks, separate from the aggregated waste shipments described above.

III. Discussion

Pursuant to 10 CFR 70.17 and 10 CFR 30.11, the Commission may, upon application of any interested person or upon its own initiative, grant such exemptions from the requirements of 10 CFR part 70 and part 30 respectively, as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest.

The Exemption Is Authorized by Law

The proposal provides that the material described above would be transported in compliance with U.S. Department of Transportation regulations to USEI in Idaho, which is a Subtitle C RCRA hazardous waste disposal facility permitted by the State of Idaho. As such, the material will be removed per State and local regulations, will be shipped per existing Federal regulations to a location approved by the State of Idaho to receive the material, and such disposal is not otherwise contrary to NRC requirements, and is therefore authorized by law.

The Exemption Will Not Endanger Life, Property and Is Consistent With the Common Defense and Security

NRC staff reviewed the information provided by WEC to support their 10 CFR 20.2002 alternate disposal request and for the specific exemptions from 10 CFR 30.3 and 10 CFR 70.3 and associated license amendment in order to dispose of aggregated waste and UF_6 Cylinders at USEI. As documented in the Safety Evaluation Report, the NRC staff concludes that, consistent with 10 CFR 20.2002, WEC provided an adequate description of the materials and the proposed manner and conditions of waste disposal. The NRC staff also concluded that the use of the site-specific dose assessment methodology to evaluate the projected doses associated with the transportation and disposal of the waste streams at USEI are acceptable. The NRC staff reviewed the input parameters included in this modeling and found that they are appropriate for the scenarios considered. The NRC staff also evaluated the potential doses associated with transportation, waste handling, and disposal and found that the projected doses have been appropriately estimated and are demonstrated to meet the NRC's alternate disposal standard of contributing a dose of not more than ''a few millirem per year'' to any member of the public and are as low as is reasonably achievable. The NRC staff also concluded that the projected doses from the post-closure and intruder scenarios at USEI are also within ''a few millirem per year'' over a period of 1,000 years. Lastly, because of the presence of SNM, the NRC evaluated potential criticality in its SER, and found no concerns. Therefore, the NRC concludes that issuance of the exemption is will not endanger life, property, and is consistent with the common defense and security.

The Exemption Is in the Public Interest

Issuance of the exemptions to WEC and USEI is in the public interest because it would provide for the efficient and safe disposal for the subject waste material, would facilitate the decommissioning of the East Lagoon at the CFFF site consistent with the consent agreement between CFFF and SCDHEC, and would conserve low-level radioactive waste disposal capacity at licensed low-level radioactive disposal sites, while ensuring that the material being considered is disposed of safely in a regulated facility. Therefore, based upon the evaluation above, an exemption is appropriate pursuant to 10 CFR 30.11 and 10 CFR 70.17.

IV. Environmental Considerations

As required by 10 CFR 51.21, the NRC performed an environmental assessment (EA) that analyzes the environmental impacts of the proposed exemption in accordance with the National Environmental Policy Act of 1969 and NRC implementing regulations in 10 CFR part 51. Based on that EA, the NRC staff has determined not to prepare an environmental impact statement for the proposed exemption and has issued a finding of no significant impact (FONSI). The EA and FONSI were published in the **Federal Register** on December 9, 2020 (85 FR 79228).

V. Conclusions

Accordingly, the Commission has determined that, pursuant to 10 CFR 70.17 and 10 CFR 30.11, the exemptions for WEC and USEI and associated WEC license amendment are authorized by law, will not present an undue risk to the public health and safety, is consistent with the common defense and security, and is in the public interest. Therefore, the Commission hereby grants WEC and USEI exemptions from 10 CFR 70.3 and 10 CFR 30.3 to allow WEC to transfer the specifically identified byproduct material and SNM waste described above from the WEC CFFF for disposal at the USEI disposal facility located near Grand View, Idaho, and issues WEC a conforming license amendment.

Dated: December 10, 2020.

For the Nuclear Regulatory Commission.

Damaris Marcano,

Acting Chief, Fuel Facility Licensing Branch, Division of Fuel Management, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2020–27608 Filed 12–15–20; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. PI2021–1; Order No. 5777]

Public Inquiry

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is revisiting the methodology it uses to estimate the value of the Postal Service's universal service obligation (USO), which the Commission last considered in 2008. This document informs the public of this proceeding and the technical conference, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* March 15, 2021.

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

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

SUPPLEMENTARY INFORMATION:

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I. Introduction
II. Background
III. Discussion
IV. Comments
V. Ordering Paragraphs

I. Introduction

In this docket, the Commission intends to revisit the methodology it uses to estimate the cost of the Postal Service's universal service obligation (USO), which the Commission last

considered in 2008.[1] In particular, the Commission seeks to determine whether all of the assumptions underlying that methodology remain valid in light of changed conditions over the intervening twelve years. To that end, the Commission seeks public comment with respect to the current USO valuation methodology, including any suggested modifications or enhancements.

II. Background

Section 702 of the Postal Accountability and Enhancement Act (PAEA), Public Law 109–435, 120 Stat. 3198 (2006), required the Commission to submit a report to the president and Congress on ''universal postal service and the postal monopoly in the United States. . . .'' This report was required to include ''a comprehensive review of the history and development of universal service . . .,'' as well as ''the scope and standards of universal service . . . provided under current law . . .'' PAEA, Pulic Law 109–435, 702(a)(2), 120 Stat. 3198 (2006). The Commission released the report on December 19, 2008. *See* 2008 USO Report. The Commission found that the USO consisted of seven different attributes: Geographic scope; product range; access; delivery; pricing; service quality; and an enforcement mechanism. *Id.* at 18–33.

In completing the report, the Commission was also required to estimate the costs of the USO. *Id.* at 101. Generally speaking, these costs are calculated as the difference between the amount of profit the Postal Service earns while fulfilling its USO and the amount of profit the Postal Service could theoretically earn if it were not required to provide universal service, or any specific component thereof. *Id.* at 101–102. The Commission identified various USO elements based on statutory requirements or on what Congress might be expected to include if it were to specifically define a postal USO. For each element, the Commission determined what level of service a theoretical profit-maximizing Postal Service without a USO would provide. *Id.* at 119–143. The difference in profit between the former and the latter can be thought of as the cost of providing universal service. *Id.*

The Commission updates its estimate of the cost of the USO each year in its Annual Report to the President and Congress based on the methodological approach adopted in the 2008 USO Report.[2] That methodological approach is dependent on assumptions concerning what a profit-maximizing Postal Service would do absent a particular USO mandate. 2008 USO Report at 121. Such assumptions are necessarily based on economic, technological, legislative, and societal considerations at the time they are made. The assumptions underlying the 2008 USO Report were thoroughly debated at that time, with contractors retained by both the Commission and the Postal Service presenting differing assumptions and the Commission ultimately exercising its judgment as to which assumptions it found to be the most reasonable. *Id.* at 119–143.

In Docket No. PI2014–1, the Commission interpreted ''other public services or activities'' under 39 U.S.C. 3651(b)(1)(C) to include statutorily-required offerings and ''public facing'' actions by the Postal Service.[3] Applying the framework developed in that docket, the Commission in the FY 2019 Annual Report clarified its interpretation of the scope of the USO, determining that it should include the net cost of the Postal Inspection Service. FY 2019 Annual Report at 49. The methodologies used to estimate the cost of all other elements of the USO have remained essentially unchanged from the 2008 USO Report.[4]

Much has changed in the United States since 2008—economically, technologically, and societally. Consequently, revisiting the assumptions underlying the 2008 USO Report is appropriate in order to ensure that the Commission's valuation of the USO continues to reflect the environment in which the Postal Service operates.

III. Discussion

The Commission invites comment with respect to any and all aspects of the current USO valuation methodology. The Commission has also identified two USO components in particular with valuation assumptions that appear to be ripe for revisiting—frequency of delivery and maintaining small post offices. It is important to note that the Commission is not proposing or recommending changes to these or any other USO components at this time. Rather, the Commission is seeking input into whether the level of service that a theoretical profit-maximizing Postal Service without a USO would provide has changed since 2008. This is necessary in order to place an accurate value on the cost of the USO, and to evaluate that cost through a transparent process.

A. Frequency of Delivery

In the 2008 USO Report, the Commission noted that in every year since 1984 Congress has inserted language into postal appropriation legislation requiring that 6-day delivery shall continue ''at the 1983 level.'' 2008 USO Report at 20, 22, 29, 123. The insertion of this language into appropriation legislation has continued since 2008, and thus 6-day delivery continues to constitute the current USO requirement for frequency of delivery.

In terms of valuing this USO component, the Commission sought in the 2008 USO Report to determine what the minimum frequency of delivery would be for a theoretical profit-maximizing Postal Service without a USO. *Id.* at 123–131. The Commission considered assumptions by the two separate contractors. The contractor hired by the Commission concluded that the minimum frequency of delivery would be 3 days per week. *Id.* at 124. The contractor hired by the Postal Service concluded that the Postal Service would theoretically maximize profits by varying frequency of delivery to equalize volume across 3-digit ZIP Codes, or potentially even 5-Digit ZIP Codes or mail routes. *Id.* at 131. The two contractors reached different conclusions with regard to what the cost savings associated with reducing delivery frequency would be. *Id.* at 124–131.

The Commission determined that the minimum frequency of delivery for a theoretical profit-maximizing Postal Service without a USO would be 5 days per week. *Id.* at 123. It based this conclusion on the fact that ''frequency of delivery is generally a priority for businesses,'' and ''bills, remittances, and date-specific advertising remain major sources of revenue.'' *Id.* (footnote omitted). The Commission found that ''[w]ithout at least 5-day delivery, it would be difficult for the mail to remain an attractive channel for communications of this kind.'' *Id.* This conclusion did not make any

[1] *See* Report on Universal Postal Service and the Postal Monopoly, December 19, 2008 (2008 USO Report).

[2] *See* 39 U.S.C. 3651(b); *see, e.g.,* Postal Regulatory Commission, FY 2019 Annual Report to the President and Congress, January 21, 2020, at 41–51 (FY 2019 Annual Report). The most recent estimate of the USO's cost was $5.21 billion. *See* FY 2019 Annual Report at 42, Table IV–1.

[3] Docket No. PI2014–1, Order Interpreting 39 U.S.C. 3651(b)(1)(C), November 17, 2015, at 24 (Order No. 2820).

[4] One notable exception is that the methodology for estimating the cost of 6-day delivery reflects refined and more comprehensive costs based on the Commission's findings in its Advisory Opinion on Elimination of Saturday Delivery. *See* Docket No. N2010–1, Advisory Opinion on Elimination of Saturday Delivery, March 24, 2011; Postal Regulatory Commission, FY 2011 Annual Report to the President and Congress, December 21, 2011, at 41 (FY 2011 Annual Report).

differentiation between mail types or mail destinations. The Commission accepted as most reasonable an estimate that reducing delivery frequency from 6 to 5 days would have increased the Postal Service's FY 2007 net income by $1.930 billion (2 percent of the Postal Service's total costs). *Id.* at 123–124.

Since FY 2007, the mail mix has changed significantly. According to the Postal Service, it has lost about a third of First-Class Mail and USPS Marketing Mail volume.[5] At the same time, package volumes have nearly doubled and have become the Postal Service's primary source of revenue growth, although the Postal Service reports that growth has begun to slow since FY 2017 as commercial customers have begun insourcing more of their last mile deliveries. Postal Service Five-Year Strategic Plan at 8. In the time since the 2008 USO Report, the Postal Service has also begun delivering some packages on Sundays, thereby in some circumstances providing greater delivery frequency than what is required by the USO.[6]

A theoretical profit-maximizing Postal Service without a USO might differentiate the frequency of delivery of letters and flats from that of packages. The Commission therefore seeks input as to whether, in the absence of a requirement for 6-day delivery, the Postal Service would be likely to provide different frequency of delivery for different types of mail. The Commission also seeks input as to what the minimum frequency of delivery would be for each type of mail (*e.g.,* letters, flats, or packages).

A theoretical profit-maximizing Postal Service without a USO might also provide different levels of service to high-density, as opposed to low-density, areas.[7] It could deliver more frequently to high-density areas, and less frequently to low-density areas. Alternatively, it could implement a surcharge for delivery to low-density areas. The Commission seeks input as to how a theoretical profit-maximizing Postal Service without a USO would be most likely to address delivering to areas that differ in density.

In sum, the Commission seeks to better understand whether a theoretical profit-maximizing Postal Service without a USO in today's operating environment would maintain uniform 5-day delivery as previously assumed, or whether it might differentiate delivery frequency either between different types of mail, or between high-density and low-density areas, or both.

B. Maintaining Small Post Offices

The Postal Service is required to ''establish and maintain postal facilities of such character and in such locations, that postal patrons throughout the Nation will, consistent with reasonable economies of postal operations, have ready access to essential postal services.'' 39 U.S.C. 403(b)(3). In the 2008 USO Report, the Commission noted that in developing rural free delivery services in the early 20th century, Congress substituted rural carrier services for the services of small post offices in many rural areas. 2008 USO Report at 136. The Commission also noted that since FY 1985, Congress had added language to annual appropriations bills that prohibited the Postal Service from using appropriated funds to close or consolidate small rural and other small post offices, but the Commission acknowledged that this did not appear to bar the Postal Service from using other funds to close or consolidate small post offices because the Postal Service had closed or consolidated hundreds of small post offices since 1985. *Id.*

Two contractors addressed this issue in the 2008 USO Report. They differed as to how many small post offices would be closed in the absence of a USO—the contractor hired by the Commission concluded that a theoretical profit-maximizing Postal Service without a USO would close all post offices in Cost Ascertainment Groups (CAGs) K and L, while the contractor hired by the Postal Service concluded that it would close post offices in CAGs H through L.[8] The Commission found the first scenario (CAGs K and L) to be more plausible, and accepted a valuation based on adjusting the gross savings from closing such post offices with the cost of replacement services and the amount of lost revenue, which came to $0.586 billion. *Id.* at 138. In accepting this valuation, the Commission also adopted the assumption of one of the two contractors that rural carrier services could be substituted for small post offices in the absence of a USO. *Id.* at 137.

The Commission invites interested persons to comment on whether a theoretical profit-maximizing Postal Service without a USO would utilize other alternatives besides rural carrier services in place of CAGs K and L, and whether additional post offices besides CAGs K and L would be eliminated. Since postal customers can access products and services online and at grocery stores, office supply chains, pharmacies, and other retail outlets, it is unclear whether the assumption that only CAGs K and L would be replaced or consolidated still holds. It is also possible that post offices could be replaced by Contract Postal Units (CPUs)[9] or Automated Postal Centers (APCs).[10] Therefore, the Commission seeks input from interested persons on whether to revise the assumptions regarding which post offices would be closed by a theoretical profit-maximizing Postal Service without a USO and what replacement services would be utilized.

IV. Comments

The Commission invites interested persons to identify components of the current USO valuation methodology where the underlying assumptions about how a theoretical profit-maximizing Postal Service without a USO would behave are no longer compelling. The Commission further seeks suggestions concerning how to revise any outdated assumptions, as well as what data and analytical methods would be necessary to incorporate any suggested changes into the calculation of the USO's cost. Comments are due March 15, 2021. Material filed in this docket will be available for review on the Commission's website, *http://www.prc.gov.*

Pursuant to 39 U.S.C. 505, Kenneth R. Moeller is appointed to serve as an officer of the Commission (Public

[5] *See* United States Postal Service, The U.S. Postal Service Five-Year Strategic Plan FY2020–FY2024, available at: *https://about.usps.com/strategic-planning/five-year-strategic-plan-2020-2024.pdf,* at 8 (Postal Service Five-Year Strategic Plan).

[6] *See* Docket Nos. MC2014–1 and CP2014–1, Order Adding Parcel Select and Parcel Return Service Contract 5 to the Competitive Product List, October 29, 2013 (Order No. 1863).

[7] In this context, density can be interpreted as geographic density of delivery points (delivery points per square mile), or alternatively as ''mail density'' (volume per delivery point). Commenters who address this topic are requested to specify how they would define density as used to determine the provision of different frequency of delivery to different areas.

[8] *Id.* at 137–138. CAGs classify post offices based on revenue units. A revenue unit is the average amount of revenue per fiscal year from postal rates and fees for 1,000 pieces of originating mail and Special Service transactions. CAG H–J offices have 190–949 revenue units; CAG K offices have 36–189 revenue units; and CAG L offices have less than 36 revenue units. *See* United States Postal Service, Glossary of Postal Terms, available at: *https://usps.com/publications/pub32* (Publication 32).

[9] A CPU is a supplier-owned or supplier-leased site operated by the supplier, under contract with the Postal Service to provide postal products and services to the public at Postal Service prices. *See* Publication 32.

[10] An APC is a self-service kiosk that allows customers to mail letters, flats, and packages; buy stamps and some Special Services; and mail international letters. It also offers ZIP Code and tracking lookup and provides information on different services. *See* Publication 32.

Representative) to represent the interests of the general public in this docket.

V. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. PI2021–1 for the purpose of considering potential changes to the Commission's valuation methodology for the Universal Service Obligation.

2. Interested persons may submit written comments on any or all aspects of the Universal Service Obligation valuation methodology no later than March 15, 2021.

3. Pursuant to 39 U.S.C. 505, Kenneth R. Moeller is appointed to serve as Public Representative in this proceeding.

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

By the Commission.

Erica A. Barker,

Secretary.

[FR Doc. 2020–27635 Filed 12–15–20; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2020–194; CP2020–197; CP2020–200; CP2020–201]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 18, 2020.

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

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

SUPPLEMENTARY INFORMATION:

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I. Introduction
II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

1. *Docket No(s).:* CP2020–194; *Filing Title:* Notice of the United States Postal Service of Filing Modification One to International Priority Airmail, Commercial ePacket, Priority Mail Express International, Priority Mail International & First-Class Package International Service Contract 8 Negotiated Service Agreement; *Filing Acceptance Date:* December 10, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Gregory S. Stanton; *Comments Due:* December 18, 2020.

2. *Docket No(s).:* CP2020–197; *Filing Title:* Notice of the United States Postal Service of Filing Modification One to Priority Mail Express International, Priority Mail International, First-Class Package International Service & Commercial ePacket Contract 6 Negotiated Service Agreement; *Filing Acceptance Date:* December 10, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Gregory S. Stanton; *Comments Due:* December 18, 2020.

3. *Docket No(s).:* CP2020–200; *Filing Title:* Notice of the United States Postal Service of Filing Modification One to International Priority Airmail, Commercial ePacket, Priority Mail Express International, Priority Mail International & First-Class Package International Service with Reseller Contract 3 Negotiated Service Agreement; *Filing Acceptance Date:* December 10, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Gregory S. Stanton; *Comments Due:* December 18, 2020.

4. *Docket No(s).:* CP2020–201; *Filing Title:* Notice of the United States Postal Service of Filing Modification One to International Priority Airmail, Commercial ePacket, Priority Mail Express International, Priority Mail International & First-Class Package International Service with Reseller Contract 4 Negotiated Service Agreement; *Filing Acceptance Date:* December 10, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Gregory S. Stanton; *Comments Due:* December 18, 2020.

This Notice will be published in the **Federal Register.**

Erica A. Barker,

Secretary.

[FR Doc. 2020–27647 Filed 12–15–20; 8:45 am]

BILLING CODE 7710–FW–P

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90626; File Nos. SR–DTC–2020–015; SR–FICC–2020–016; SR–NSCC–2020–019]

Self-Regulatory Organizations; The Depository Trust Company; Fixed Income Clearing Corporation; National Securities Clearing Corporation; Notice of Filings and Immediate Effectiveness of Proposed Rule Changes To Amend the Clearing Agency Operational Risk Management Framework

December 10, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 1, 2020, The Depository Trust Company (''DTC''), Fixed Income Clearing Corporation (''FICC''), and National Securities Clearing Corporation (''NSCC,'' and collectively, the ''Clearing Agencies'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule changes as described in Items I, II and III below, which Items have been primarily prepared by the Clearing Agencies. The Clearing Agencies filed the proposed rule changes pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(3) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule changes from interested persons.

I. Clearing Agencies' Statement of the Terms of Substance of the Proposed Rule Changes

The proposed rule changes consist of amendments to the Clearing Agency Operational Risk Management Framework (''ORM Framework'' or ''Framework'') of Clearing Agencies. Specifically, the proposed rule changes would (1) include a description of the Clearing Agencies' incident management procedures; (2) update the ORM Framework to reflect recent changes to group names and responsibilities, and other processes and matters described in the Framework; and (3) enhance the descriptions of certain matters within the ORM Framework to improve its clarity and comprehensiveness, as further described below.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(3).

II. Clearing Agencies' Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

In their filings with the Commission, the Clearing Agencies included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments they received on the proposed rule changes. The text of these statements may be examined at the places specified in Item IV below. The Clearing Agencies have prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agencies' Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

1. Purpose

The Clearing Agencies adopted the ORM Framework[5] to provide an outline for how each of the Clearing Agencies manages its operational risks. In this way, the Framework supports the Clearing Agencies' compliance with Rules 17Ad–22(e)(17) of the Standards for Covered Clearing Agencies (''Standards'') under the Act,[6] as described in the Initial Filing. In addition to setting forth the manner in which each of the Clearing Agencies addresses these requirements, the ORM Framework also contains a section titled ''Framework Ownership and Change Management'' that, among other matters, describes the Framework ownership and the required governance process for review and approval of changes to the Framework.

In connection with the annual review and approval of the Framework by the Boards of Directors of each of the Clearing Agencies (each a ''Board'' and collectively, the ''Boards''), the Clearing Agencies are proposing to make certain revisions to the Framework.

Such proposed changes would include a description of the Clearing Agencies' incident management procedures in connection with its information technology risk management. The proposed changes would also update the ORM Framework to reflect recent changes to group names and responsibilities, certain processes and other matters described in the Framework. Finally, the proposed changes would enhance the descriptions of certain matters within the ORM Framework to improve its clarity and comprehensiveness. Each of these proposed changes are further described below.

[5] *See* Securities Exchange Act Release No. 81745 (September 28, 2017), 82 FR 46332 (October 4, 2017) (SR–DTC–2017–014; SR–NSCC–2017–013; SR–FICC–2017–017) (''Initial Filing'').

[6] 17 CFR 240.17Ad–22(e)(17).

i. Proposed Amendments To Describe Incident Management Procedures

First, the proposed changes would add a description of the Clearing Agencies' incident management procedures in Section 5 of the Framework, which currently describes information technology management. The Clearing Agencies currently follow these incident management procedures, which support the Clearing Agencies' compliance with the requirements of Rule 17Ad–22(e)(17)(i) and (ii) and define the actions that are taken following detection of systems incidents.[7] The purpose of these procedures, as proposed to be described in Section 5 of the Framework, is to define the actions that are taken following the detection of systems incidents. Generally, these actions include identification and classification, investigation and diagnosis, and resolution and recovery of the incidents that affect the Clearing Agencies' systems.

The proposed change would be to include a description of these existing procedures in the Framework in connection with its description of information technology management. This proposed change would improve the Framework by including this important aspect of operational risk management and providing a more complete description of the Clearing Agencies' processes that support their compliance with the requirements of Rule 17Ad–22(e)(17)(i) and (ii).

ii. Proposed Amendments To Update the Framework

Second, the proposed changes would update the ORM Framework to reflect recent developments with respect to the names and responsibilities of groups that take certain actions described in the Framework. The proposed changes would also reflect updates to processes and other matters described in the Framework, as described below. These proposed changes do not substantively impact how the Clearing Agencies manage operational risk in compliance with the requirements of Rule 17Ad–22(e)(17).[8]

1. Proposed Change to the Name of Business Continuity Management

Section 6 of the ORM Framework describes the Clearing Agencies' management of business continuity risk and the business continuity plans that

[7] 17 CFR 240.17Ad–22(e)(17)(i) and (ii).

[8] 17 CFR 240.17Ad–22(e)(17).

have been established and maintained by the Clearing Agencies in compliance with the requirements of Rule 17Ad–22(e)(17)(iii).[9] The group responsible for these activities was previously called Business Continuity Management. While the role and responsibilities of this risk management function have not changed, its name has been changed to ''Business Continuity & Resiliency'' to reflect an increased focus on strengthening the resiliency of the Clearing Agencies and the ability of their systems to sustain and recover from numerous incidents. The Framework would be updated to reflect the change to the name of this group.

2. Proposed Change To Revise Description of Document Repository

Section 4.1 of the ORM Framework describes Risk Tolerance Statements, which document the overall risk reduction or mitigation objectives for the Clearing Agencies with respect to identified risks to the Clearing Agencies. Risk Tolerance Statements also document the risk controls and other measures used to manage identified risks, including escalation requirements in the event of risk metric breaches. Currently, Section 4.1 states that Risk Tolerance Statements are located in the DTCC Enterprise Policy Repository.

The name of the repository where all policies, procedures and related documents are maintained has changed. Therefore, the Clearing Agencies are proposing to update this Section of the Framework to refer generally to the central repository for all policies, procedures and related documents, rather than refer to the specific name of that central repository. This proposed change would allow the Framework to accurately describe where Risk Tolerance Statements are maintained, notwithstanding this recent, and any potential future, change to the name of that document management tool.

3. Proposed Change To Reflect Expansion of Operating Centers

Section 6 of the ORM Framework, which describes business continuity risk management, currently includes a statement that the operating centers that support the Clearing Agencies are run from no fewer than three geographic regions in the United States. Since the ORM Framework was adopted the Clearing Agencies have expanded the geographic spread and diversity of their operating centers. In order to reflect this change, the ORM Framework would be updated to state that these operating centers are run from geographic regions globally (*i.e.,* without the limitation that they are located in the United States).

iii. Proposed Amendments To Clarify and Enhance Descriptions in the Framework

Finally, the proposed changes would enhance the descriptions of certain matters within the ORM Framework to improve its clarity and comprehensiveness, as described below.

1. Proposed Change To Describe Annual Approval of Framework by Boards

Section 2 of the ORM Framework addresses the Framework's ownership and change management. This section currently states that the Framework should be reviewed by the document owner no less frequently than annually but does not specify the regulatory requirement that the Framework also be approved by the Boards on an annual basis. The Clearing Agencies are proposing to amend Section 2 of the Framework to include the requirement that the Framework be approved by the Boards, or a duly authorized committee of the Boards, annually.

Rule 17Ad–22(e)(3) under the Act requires that the Clearing Agencies maintain a sound risk management framework for comprehensively managing the risks that arise in or are borne by the Clearing Agencies, including operational risks.[10] Rule 17Ad–22(e)(3)(i) under the Act requires that the risk management policies, procedures, and systems that are maintained in compliance with Rule 17Ad–22(e)(3) be subject to review on a specified periodic basis and be approved by the Boards annually.[11] As stated above, the Framework provides an outline for how each of the Clearing Agencies manage operational risks, as required by both Rules 17Ad–22(e)(3) and (17) under the Act.[12] Therefore, the ORM Framework is reviewed and approved by the Boards annually, as required by Rule 17Ad–22(e)(3)(i) under the Act.[13]

The Clearing Agencies are proposing to amend Section 2 of the Framework to state that the Framework shall be approved by the Boards, or a duly authorized committee of the Boards, annually. The proposed change would enhance the comprehensiveness of the Framework to specify this requirement, which is aligned with the applicable requirements of Rule 17Ad–22(e)(3)(i) under the Act.[14]

2. Proposed Change To Clarify Description of Risk Profiles

Section 4.2 of the ORM Framework describes the Risk Profiles, which are tools used by the Operational Risk Management group within the Group Chief Risk Office of The Depository Trust & Clearing Corporation (''ORM'')[15] to document risk assessments and consolidate pertinent operational risk and control data, including, without limitation, incidents, audit findings, compliance testing results, and risk metrics, to support an overall assessment of the applicable Clearing Agency Business' or Clearing Agency Support Area's inherent risk and residual risk. The Clearing Agencies are proposing changes to this Section to clarify and simplify the description of Risk Profiles.

First, the proposed changes would clarify that the assessments documented in Risk Profiles both (1) assess inherent risks, and (2) identify residual risks. The proposed changes would do this by revising the relevant sentence and by removing the current description of risk acceptance of residual risks, which is a process that is separate from the description of Risk Profiles. The proposed changes would focus the description on the two types of risks that are relevant to the Risk Profiles.

Second, the proposed change would simplify the description of how the Risk Profiles are created by removing reference to ORM as the responsible group. Currently, both ORM and the Clearing Agency business and support areas are jointly responsible for the tasks related to creating and documenting Risk Profiles. Over time, the responsibility for these tasks has shifted away from ORM, and to the Clearing Agency business and support areas. The proposed changes would continue to identify the crucial tasks related to the creation and maintenance of Risk Profiles but would simplify this section of the Framework by removing reference to the division of responsibilities among these groups.

Third, the proposed changes would clarify that Clearing Agency businesses and support areas are responsible for the day-to-day management of all risk applicable to their area. Currently, Section 4.2 states that these groups are only responsible for the management of residual risks. The proposed change

[9] 17 CFR 240.17Ad–22(e)(17)(iii).

[10] 17 CFR 240.17Ad–22(e)(3).

[11] 17 CFR 240.17Ad–22(e)(3)(i).

[12] 17 CFR 240.17Ad–22(e)(3), (17).

[13] 17 CFR 240.17Ad–22(e)(3)(i).

[14] *Id.*

[15] The parent company of the Clearing Agencies is The Depository Trust & Clearing Corporation (''DTCC''). DTCC operates on a shared services model with respect to the Clearing Agencies. Most corporate functions are established and managed on an enterprise-wide basis pursuant to intercompany agreements under which it is generally DTCC that provides a relevant service to a Clearing Agency.

would correct this statement and clarify these groups' responsibilities.

Finally, the proposed changes would clarify that the Clearing Agency businesses and support areas are responsible for updating their policies and procedures to support risk management at the Clearing Agencies. Currently, the relevant sentence in Section 4.2 states that such policies and procedures support operational risk management at the Clearing Agencies. The proposed change would clarify the responsibilities of these groups and the role of policies and procedures in risk management.

3. Proposed Change To Clarify the Responsibilities of the ORM Group

Section 4.3 of the ORM Framework describes the responsibilities of ORM. Currently, this Section states that this group is responsible for reviewing, revising and creating Risk Tolerance Statements. However, ORM is responsible for working with the businesses that own the relevant risks in reviewing, revising and creating Risk Tolerance Statements. Therefore, the proposed changes would clarify ORM's responsibilities with respect to Risk Tolerance Statements.

4. Proposed Changes To Clarify Description of Business Continuity Risk Management

Section 6 of the ORM Framework describes how the Clearing Agencies manage business continuity risks. The Clearing Agencies are proposing changes to this section to clarify the description of business continuity risk management and to make this section more comprehensive.

First, the proposed changes would include a reference to events that have the potential to disrupt the Clearing Agencies' businesses in a statement that refers generally to the types of events that could impact the Clearing Agencies. This update would make the statement more comprehensive by including events that are considered ''near-miss'' events, or events that did not have had an impact on the Clearing Agencies but had the potential of causing an impact on their businesses. This proposed change would align the description to current practice, by which the Clearing Agencies take into account ''near-miss'' events in its risk management processes.

Second, the proposed changes would update the description of the ''tiers'' that are used to rank the criticality of the Clearing Agencies' businesses and support areas. The proposed changes would not impact the way these tiered rankings are applied and would align the description in the Framework to the current description in the Clearing Agencies' internal procedures. Among the updates to the description of the tiers, the proposed changes would include a clarifying statement that the Clearing Agencies' support areas are automatically assigned the same tier as the Clearing Agency business that they support, and would remove references to the Clearing Agency support areas in the description of the process that results in a group's tier.

Finally, the proposed changes to Section 6 would clarify statements in connection with the creation of business impact analyses (''BIA''), which are used to assign each Clearing Agency business with a tier. The proposed changes would clarify, for example, that appropriate risk controls may be applied with respect to an applicable Clearing Agency business at any time, and not only during a business continuity event. The proposed changes would also clarify that the BIA identify product dependencies within an applicable Clearing Agency business. While the process for creating BIA has not changed, the proposed changes to Section 6 of the Framework would enhance the description of the process by making it clearer and more comprehensive.

2. Statutory Basis

The Clearing Agencies believe that the proposed changes are consistent with Section 17A(b)(3)(F) of the Act [16] and Rule 17Ad–22(e)(3)(i), and (17)(i) and (ii) promulgated under the Act,[17] for the reasons described below.

The Clearing Agencies believe that the proposed changes are consistent with Section 17A(b)(3)(F) of the Act, which requires, in part, that the rules of a registered clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions, and to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible, for the reasons described below.[18] The proposed changes would update and clarify the Framework and would make it more comprehensive in how it describes operational risk management of the Clearing Agencies, as described above. By creating clearer, updated and more comprehensive descriptions, the Clearing Agencies believe the proposed changes would make the ORM Framework more effective in providing an overview of the important risk management activities described therein.

As described in the Initial Filing, the risk management functions described in the ORM Framework allow the Clearing Agencies to continue the prompt and accurate clearance and settlement of securities and can continue to assure the safeguarding of securities and funds which are in their custody or control or for which they are responsible notwithstanding the default of a member of an affiliated family. The proposed changes to improve the clarity and accuracy of the descriptions of these functions within the ORM Framework would assist the Clearing Agencies in carrying out these risk management functions. Therefore, the Clearing Agencies believe the proposed changes are consistent with the requirements of Section 17A(b)(3)(F) of the Act.[19]

Rule 17Ad–22(e)(3)(i) under the Act requires, in part, that each covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to maintain a sound risk management framework for comprehensively managing operational risks that arise in or are borne by the covered clearing agency, which includes risk management policies, procedures, and systems that are subject to review on a specified periodic basis and approved by the board of directors annually.[20] As described above, the Framework is currently approved by the Board annually, in compliance with the requirements of Rule 17Ad–22(e)(3)(i). The proposed changes would describe this annual approval in Section 2 of the Framework, where the Framework's ownership and change management is addressed. By including a description of the required annual Board approval of the Framework, the proposed changes are consistent with the requirements of Rule 17Ad–22(e)(3)(i) under the Act.[21]

Rule 17Ad–22(e)(17) under the Act requires, in part, that each covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to manage the covered clearing agency's operational risks by (i) identifying the plausible sources of operational risk, both internal and external, and mitigating their impact through the use of appropriate systems, policies, procedures, and controls; and (ii) ensuring that systems have a high degree of security, resiliency,

[16] 15 U.S.C. 78q–1(b)(3)(F).

[17] 17 CFR 240.17Ad–22(e)(17)(i) and (ii).

[18] 15 U.S.C. 78q–1(b)(3)(F).

[19] *Id.*

[20] 17 CFR 240.17Ad–22(e)(3)(i).

[21] *Id.*

operational reliability, and adequate, scalable capacity.[22]

The Framework would be amended to include a description of the Clearing Agencies' incident management procedures. As described above, these procedures address how the Clearing Agencies detect, identify, investigate and resolve incidents that affect the Clearing Agencies' systems. These procedures are designed to help address the Clearing Agencies' compliance with the requirements of Rule 17Ad–22(e)(17)(i) and (ii).[23] Therefore, the Clearing Agencies believe that the proposed rule changes to include a description of these procedures in the Risk Management Framework is consistent with Rule 17Ad–22(e)(17)(i) and (ii).[24]

(B) Clearing Agencies' Statement on Burden on Competition

The Clearing Agencies do not believe that the proposed changes to the ORM Framework described above would have any impact, or impose any burden, on competition. As described above, the proposed rule changes would update the Framework and would improve the clarity and comprehensiveness of the descriptions of certain matters within the Framework. Therefore, the proposed changes are technical and non-material in nature, relating mostly to the operation of the ORM Framework rather than the risk management functions described therein. As such, the Clearing Agencies do not believe that the proposed rule changes would have any impact on competition.

(C) Clearing Agencies' Statement on Comments on the Proposed Rule Changes Received From Members, Participants, or Others

The Clearing Agencies have not solicited or received any written comments relating to this proposal. The Clearing Agencies will notify the Commission of any written comments received by the Clearing Agencies.

III. Date of Effectiveness of the Proposed Rule Changes, and Timing for Commission Action

The foregoing rule changes have become effective pursuant to Section 19(b)(3)(A)[25] of the Act and paragraph (f)[26] of Rule 19b–4 thereunder. At any time within 60 days of the filing of the proposed rule changes, the Commission summarily may temporarily suspend such rule changes if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule changes are 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–DTC–2020–015, SR–FICC–2020–016, or SR–NSCC–2020–019 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–DTC–2020–015, SR–FICC–2020–016, or SR–NSCC–2020–019. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Clearing Agencies and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–DTC–2020–015, SR–FICC–2020–016, or SR–NSCC–2020–019 and should be submitted on or before January 6, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[27]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–27596 Filed 12–15–20; 8:45 am]

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[22] 17 CFR 240.17Ad–22(e)(17)(i) and (ii).

[23] *Id.*

[24] *Id.*

[25] 15 U.S.C 78s(b)(3)(A).

[26] 17 CFR 240.19b–4(f).

[27] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90629; File No. SR–NYSEArca–2020–109]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Modifying the NYSE Arca Options Fee Schedule Regarding the Criteria To Qualify for the Market Maker Incentive for Penny Issues

December 10, 2020.

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 December 7, 2020, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify the NYSE Arca Options Fee Schedule (''Fee Schedule'') regarding the criteria to qualify for a Market Maker Incentive for Penny Issues. The Exchange proposes to implement the fee change effective December 7, 2020.[4] The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange originally filed to amend the Fee Schedule on December 1, 2020 (SR–NYSEArca–2020–106) and withdrew such filing on December 7, 2020.

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 amend the Fee Schedule to modify the criteria to qualify for a Market Maker Incentive For Penny Issues. The Exchange proposes to implement the rule change on December 7, 2020.

The Exchange currently provides several incentives for OTP Holders and OTP Firms (collectively, ''OTPs'') designed to encourage OTPs to direct additional order flow to the Exchange to achieve more favorable pricing and higher credits. Among these incentives are enhanced posted liquidity credits based on achieving certain percentages of Total Industry Customer equity and ETF option average daily volume (''TCADV'').[5]

Currently, Market Maker orders in Penny Issues that post liquidity and are executed on the Exchange earn a base credit of ($0.28) per contract, and may be eligible for increased credits based on the participant's activity. The Fee Schedule provides for three Penny Credit Tiers for Market Makers, with increasing minimum volume thresholds (as well as increasing credits) associated with each tier, ranging from per contract credits of ($0.32) to ($0.42) for Market Makers that achieve the Select Tier up to Super Tier II, respectively.[6] The Exchange also offers various incentives that increase the possible posting credit applied to a Market Maker's orders, such as cross asset incentives for activity on the NYSE Arca Equity Market. One such incentive is the Market Maker Incentive For Penny Issues (the ''Incentive'').

Currently, there are two components to the qualification for the Incentive, the first being at least 0.75% of TCADV from affiliated or appointed Order Flow Provider Customer posted interest in all issues. The second component of the qualification currently is an ADV from Market Maker posted interest equal to 0.70% of TCADV.

The Exchange proposes to modify the qualifying criteria for the Incentive to (1) lower the minimum volume threshold of the Market Maker posted interest component from 0.70% to 0.40% of TCADV, and (2) specify that volume from SPY[7] would be excluded from the qualifying volume for the credit.[8] The amount of the credit will remain the same, ($0.41) per contract. The Exchange believes that the proposed change to exclude volume from SPY but lower the minimum volume threshold to qualify for the Incentive would still encourage OTPs to achieve the Incentive with increased Market Maker posted interest in issues other than SPY,[9] which would bring increased liquidity and order flow to the Exchange for the benefit of all market participants.

The Exchange cannot predict with certainty whether any OTPs would qualify for the incentive under the modified criteria; however, the Exchange believes that the proposed Incentive would continue to encourage OTPs to increase Market Maker posted volume in issues other than SPY to qualify for this Incentive.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[11] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers, and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers, or dealers.

The Proposed Rule Change Is Reasonable

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and also recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [12]

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[13] Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in August 2020, the Exchange had slightly more than 10% market share of executed volume of multiply-listed equity and ETF options trades.[14]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue or reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain options exchange transaction fees. Stated otherwise, changes to exchange transaction fees and rebates can have a direct effect on the ability of an exchange to compete for order flow, including with options exchanges that offer similar posting credits on Market Maker executions.[15]

The Exchange believes that the proposed modification to the criteria to qualify for the Incentive is reasonably designed to continue to incent OTPs to

[5] TCADV includes OCC calculated Customer volume of all types, including Complex Order Transactions and QCC transactions, in equity and ETF options. *See* Endnote 8 to the Fee Schedule.

[6] *See* Fee Schedule, NYSE Arca OPTIONS: TRADE–RELATED CHARGES FOR STANDARD OPTIONS, MARKET MAKER PENNY AND SPY POSTING CREDIT TIERS.

[7] SPY is the trading acronym for SPDR S&P 500 ETF Trust.

[8] *See* proposed Fee Schedule, NYSE Arca OPTIONS: TRADE-RELATED CHARGES FOR STANDARD OPTIONS, Market Maker Incentive For Penny Issues.

[9] The Exchange notes that there are separate incentives specifically related to Market Maker posted interest in SPY.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4) and (5).

[12] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7–10–04) (''Reg NMS Adopting Release'').

[13] The OCC publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, available at: *https://www.theocc.com/market-data/volume/default.jsp*.

[14] Based on OCC data, the Exchange's market share in equity-based options was 9.59% for the month of August 2019 and 10.20% for the month of August 2020. *See id*.

[15] *See e.g.,* MIAX Pearl Fee Schedule, available at: *https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_PEARL_Fee_Schedule_11052020.pdf* (regarding Market Maker Posting credits).

increase the amount and type of Market Maker posted interest sent to the Exchange. The Exchange notes that Market Makers are still eligible to qualify for Market Maker Penny and SPY Posting Credit Tiers based on a specified benchmark in posted interest in all issues from Market Maker posted interest.[16] By continuing to provide alternative methods to qualify for enhanced Penny posting credits, the Exchange believes OTPs will have increased opportunities to qualify for credits, which benefits all participants through increased volume to the Exchange.

To the extent that the proposed change attracts to the Exchange more Market Maker posted interest in both Penny and non-Penny issues, this increased order flow would continue to make the Exchange a more competitive venue for order execution, which, in turn, promotes just and equitable principles of trade and removes impediments to and perfects the mechanism of a free and open market and a national market system.

The Exchange cannot predict with certainty whether any Market Makers would qualify for the Incentive under the modified criteria; however, the Exchange believes that OTPs would continue to be encouraged to increase Market Maker posted volume to qualify for this Incentive.

The Proposed Rule Change Is an Equitable Allocation of Credits and Fees

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits. The proposal is based on the amount and type of business transacted on the Exchange, and OTPs can opt to avail themselves of the modified criteria to qualify for the Incentive or not. Moreover, the proposal is designed to incent OTPs to aggregate all Customer posting interest and Market Maker interest at the Exchange as a primary execution venue. To the extent that the proposed change attracts more Market Maker posting interest to the Exchange, this increased order flow would continue to make the Exchange a more competitive venue for, among other things, order execution. Thus, the Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, therefore, attract more order flow to the Exchange, thereby improving market-wide quality and price discovery.

The Proposed Rule Change Is Not Unfairly Discriminatory

The Exchange believes that the proposed rule change is not unfairly discriminatory because all similarly-situated market participants would be eligible to qualify for the Incentive pursuant to the modified criteria on an equal and non-discriminatory basis.

The proposal is based on the amount and type of business transacted on the Exchange, and Market Makers are not obligated to try to qualify for the Incentive, as modified, nor are they obligated to execute posted interest. Rather, the proposal is designed to encourage OTPs to utilize the Exchange as a primary trading venue for Customer posted interest and Market Maker posted interest (if they have not done so previously) or increase volume sent to the Exchange. To the extent that the proposed change attracts to the Exchange more Market Maker interest, including posted interest, this increased order flow would continue to make the Exchange a more competitive venue for order execution. Thus, the Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, as a consequence, attract more order flow to the Exchange, thereby improving market-wide quality and price discovery. The resulting increased volume and liquidity would provide more trading opportunities and tighter spreads to all market participants and thus would promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act, the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed change would encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery and transparency, and enhancing order execution opportunities for all market participants. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [17]

Intramarket Competition. The proposed change is designed to attract additional order flow (particularly Market Maker posted interest) to the Exchange. The Exchange believes that the proposed modification to the Incentive would continue to incent Market Makers to direct their posted interest to the Exchange. Greater liquidity benefits all market participants on the Exchange, and increased Market Maker interest would increase opportunities for execution of other trading interest. The proposed modification would be available to all similarly-situated market participants that execute Customer posted interest and also make markets, and, accordingly, would not impose a disparate burden on competition among market participants on the Exchange.

Intermarket Competition. The Exchange operates in a highly competitive market in which market participants can readily favor one of the 16 competing option exchanges if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and to attract order flow to the Exchange. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[18] Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in August 2020, the Exchange had slightly more than 10% market share of executed volume of multiply-listed equity and ETF options trades.[19]

The Exchange believes that the proposed modification to the criteria to qualify for the Incentive reflects this competitive environment because it modifies the Exchange's fees in a manner designed to encourage Market

[16] *See supra* note 5.

[17] *See* Reg NMS Adopting Release, *supra* note 9, at 37499.

[18] The OCC publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, available at: *https://www.theocc.com/market-data/volume/default.jsp*.

[19] Based on OCC data, the Exchange's market share in equity-based options was 9.59% for the month of August 2019 and 10.20% for the month of August 2020. *See id*.

Makers to continue to direct trading interest (particularly Market Maker posted interest) to the Exchange, provide liquidity, and attract order flow. To the extent that this purpose is achieved, all the Exchange's market participants should benefit from the improved market quality and increased opportunities for price improvement.

The Exchange believes that the proposed change could promote competition between the Exchange and other execution venues, including those that currently offer similar Market Maker posting credits, by encouraging additional orders to be sent to the Exchange for execution.

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) [20] of the Act and subparagraph (f)(2) of Rule 19b–4 [21] 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) [22] 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–2020–109 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–2020–109. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2020–109, and should be submitted on or before January 6, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–27598 Filed 12–15–20; 8:45 am]

BILLING CODE 8011–01–P

[20] 15 U.S.C. 78s(b)(3)(A).

[21] 17 CFR 240.19b–4(f)(2).

[22] 15 U.S.C. 78s(b)(2)(B).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90624; File No. SR–NYSENAT–2020–36]

Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Shorten the Time Period Before a Letter of Acceptance, Waiver, and Consent Under Rule 10.9216 and an Uncontested Offer of Settlement Under Rule 10.9270(f)

December 10, 2020.

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 December 3, 2020, NYSE National, Inc. (''NYSE National'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II, 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 shorten the time period before a letter of acceptance, waiver, and consent under Rule 10.9216 and an uncontested offer of settlement under Rule 10.9270(f) becomes final and the corresponding time period to request review of these settlements under Rule 10.9310 from 25 days to 10 days. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to shorten the time period before a letter of acceptance, waiver, and consent (''AWC'') under Rule 10.9216 and an uncontested offer of settlement under Rule 10.9270(f) becomes final and the corresponding time period to request review of these settlements under Rule 10.9310 from 25 days to 10 days.

In 2018, NYSE National adopted disciplinary rules that are, with certain exceptions, substantially the same as the FINRA Rule 8000 Series and Rule 9000 Series, and which set forth rules for conducting investigations and enforcement actions.[4] In adopting disciplinary rules modeled on FINRA's rules, the Exchange established processes for settling disciplinary matters both before and after issuance of a complaint.[5] As adopted, Rules 10.9216, 10.9270 and 10.9310 permit a Director and any member of the Committee for Review (''CFR'') to require a review by the Board of any AWC letter under Rule 10.9216 and any offer of settlement under Rule 10.9270 within 25 days after the AWC letter or offer of settlement was sent to each Director and each member of the CFR.

Proposed Rule Change

Rule 10.9216 (Acceptance, Waiver, and Consent; Procedure for Imposition of Fines for Minor Violation(s) of Rules) establishes AWC procedures by which a ETP Holder or Associated Person, prior to the issuance of a complaint, may execute a letter accepting a finding of violation, consenting to the imposition of sanctions, and agreeing to waive such ETP Holder's or Associated Person's right to a hearing, appeal and certain other procedures. The rule also establishes procedures for executing a minor rule violation plan letter.

Under Rule 10.9216(a)(4), an AWC accepted by the Chief Regulatory Officer (''CRO'') must be sent to each Director and each member of the CFR and would be deemed final and constitute the complaint, answer, and decision in the matter 25 days after being sent to each Director and each member of the CFR, unless review by the Exchange Board of Directors is requested pursuant to Rule 10.9310(a)(1)(B).[6]

The Exchange proposes that an AWC accepted by the CRO would be deemed final and constitute the complaint, answer, and decision in a matter 10 days after being sent to each Director and each member of the CFR, unless review is requested pursuant to Rule 10.9310(a)(1)(B)(i). As described below, the time period to request review under Rule 10.9310(a)(1)(B)(i) would also be shortened to 10 days.

Rule 10.9270 (Settlement Procedure) provides a settlement procedure for a Respondent who has been notified of the initiation of a proceeding. Specifically, Rule 10.9270(f) provides that uncontested settlement offers accepted by the CRO, the Hearing Panel or, if applicable, Extended Hearing Panel must be issued and sent to each Director and each member of the CFR and becomes final 25 days after being sent to each Director and each member of the CFR, unless review by the Exchange Board of Directors is requested pursuant to Rule 10.9310(a)(1).

The Exchange proposes that uncontested settlement offers accepted by the CRO, the Hearing Panel or, if applicable, Extended Hearing Panel (together, a ''Panel'') under Rule 10.9270(f) would become final 10 days after being sent to each Director and each member of the CFR, unless review by the Exchange Board of Directors is requested pursuant to Rule 10.9310(a)(1). As noted, the time to request review of an uncontested settlement under Rule 10.9310(a)(1) would also be shortened to 10 days.

Finally, under Rule 10.9310(a)(1)(B)(i), any Director and any member of the CFR may require a review by the Board of any determination or penalty, or both, imposed in connection with an AWC letter under Rule 10.9216 or an offer of settlement determined to be uncontested before a hearing on the merits has begun under Rule 10.9270(f), except that none of those persons could request Board review of a determination or penalty concerning an affiliate of the Exchange as such term is defined in Rule 12b–2 under the Exchange Act. A request for review under this provision is made by filing with the Secretary of the Exchange a written request stating the basis and reasons for such review, within 25 days after an AWC letter or an offer of settlement has been sent to each Director and each member of the CFR pursuant to Rule 10.9216(a)(4) or Rule 10.9270(f)(3).

To permit AWC letters and uncontested settlements to become final within 10 days as proposed, the Exchange would amend Rule 10.9310(a)(1)(B)(i) to provide that a request for review of these settlements as permitted by the rule must be made by filing the requisite written request with the Secretary of the Exchange within 10 days after the AWC letter or an offer of settlement is sent to each Director and each member of the CFR pursuant to Rule 10.9216(a)(4) or Rule 10.9270(f)(3).[7]

The Exchange believes maintaining a 25 day waiting period for negotiated settlements under Rule 10.9216 and uncontested settlements pursuant to 10.9270(f) unnecessarily delays final resolution of matters that have been resolved by the parties and accepted by the CRO or a Panel. Shortening the waiting period to 10 days, and requiring requests for Board of Directors review to be made within that same 10 day period, would significantly expedite the settlement process in situations where ETP Holders, Associated Persons and Respondents have entered into a consensual, negotiated settlement with Enforcement or made settlement offers that Enforcement does not oppose, while continuing to ensure the independence and integrity of the regulatory process by preserving the ability of Directors and CFR members to call those settlements for review.

Further, the Exchange believes that the proposed 10 day period to call a settlement for review under Rule 10.9310(a)(1)(B)(i) is reasonable and sufficient. Like the current 25 day period, the time to call a settlement for review would begin when the AWC or uncontested settlement is sent to each Director and member of the CFR. Rules 10.9216 and 10.9270 specify that an AWC or uncontested settlement accepted by the CRO or a Panel can be sent to each Director and each CFR member via courier, express delivery or electronic means. As a practical matter,

[4] *See* Securities Exchange Act Release No. 34–83289 (May 17, 2018), 83 FR 23968 (May 23, 2018) (SR–NYSENAT–2018–02) (''Approval Order'').

[5] *See* Approval Order, 83 FR at 23973.

[6] Requests for review of an AWC accepted by the CRO are governed by Rule 10.9310(a)(1)(B)(i). For the sake of clarity and transparency, the Exchange proposes the non-substantive change of including the omitted reference to subsection (B)(i) of Rule 10.9310(a)(1) in both in the current and proposed text of Rule 10.9216(a)(4).

[7] The time period for requesting review pursuant to Rule 10.9310(a)(1)(B)(ii) of any rejection by the CRO of any AWC letter under Rule 10.9216 or of an uncontested offer of settlement under Rule 10.9270(f), would remain unchanged as would the time period to request for review of any determination or penalty, or both, imposed by a Panel under the Rule 10.9310(a)(1)(A) other than an offer of settlement determined to be uncontested after a hearing on the merits have begun under Rule 10.9270(f). For the avoidance of doubt, the Exchange would add text to Rule 10.9310(a)(1)(A) providing that any request for review of an offer of settlement determined to be uncontested after a hearing on the merits has begun under Rule 10.9270(f) that has been accepted by a Panel shall be governed by Rule 10.9310(a)(1)(B)(i).

AWCs and settlements are sent to the Directors and CFR members by email, which ensures prompt and instantaneous communication. As a result, the Directors and members of the CFR will have the full 10 day period to determine whether to call these settlements for review. Moreover, the requirement in Rule 10.9310(a)(1)(B)(i) that a request for review be in writing and state the basis and reasons for such review can similarly be satisfied by a Director or CFR member sending an email to the Secretary of the Exchange requesting that a specific matter be reviewed within the proposed 10 day period. The Director or CFR member would need to take no additional steps nor include any additional information in order to call a matter for review under Rule 10.9310(a)(1)(B)(i). In light of these facts, and the relative infrequency of calls for review of AWCs and uncontested settlements,[8] the Exchange believes that 10 days are more than sufficient for a Director or member of the CFR to determine whether to call a settlement for review. Once accepted by the CRO or Panel, the proposed 10 day period for negotiated settlements to be called for review or become final would expedite disciplinary proceedings and provide finality to the disciplinary process sooner, to the benefit of the parties and the investing public.

Finally, the Exchange also believes that shortening these time periods would further promote efficiency in connection with cross-market settlements involving multiple self-regulatory organizations (''SROs''). Often such settlements are contingent upon the acceptance of a settlement by all of the SROs involved in the matter. In these situations, a settlement with the Exchange would not be final until the end of the time period specified in Rules 10.9216 and 10.9270 while a settlement with other SROs could be final once accepted.[9] Thus by reducing the amount of time these settlements are outstanding at the Exchange, the proposed change could speed up the settlement process for cross-market settlements involving multiple SROs, to the benefit of the parties and the investing public.

The Exchange intends to announce the operative date of the amended time periods in Rules 10.9216(a)(4), 10.9270(f)(3) and 10.9310(a)(1) at least 30 days in advance via regulatory notice.[10] To further facilitate an orderly transition from the current rules to the new rules, the Exchange proposes that matters already initiated under the current rules would be completed under such rules. Specifically, the Exchange proposes to apply the current 25 day period for AWCs prepared and submitted to an ETP Holder or Associated Person under Rule 10.9216(a)(1) prior to the operative date and to uncontested settlement offers in proceedings where a Party was served with a complaint by Enforcement pursuant to Rule 10.9131 prior to the operative date. Rules 10.9216(a)(4), 10.9270(f)(3) and 10.9310(a)(1)(B)(i) would be amended to reflect the transition process. When the transition is complete, the Exchange intends to submit a proposed rule change that would delete the unnecessary transition provisions of 10.9216(a)(4), 10.9270(f)(3) and 10.9310(a)(1)(B)(i).

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[11] in general, and furthers the objectives of Section 6(b)(5),[12] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[13] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Specifically, the Exchange believes that shortening the waiting period for negotiated settlements and uncontested offers of settlement would serve to expedite the final resolution of both Exchange and cross-market matters that have been resolved by the parties and accepted by the CRO or Panel, thereby protecting investors and the public interest by addressing rule violations and achieving finality in disciplinary matters sooner. The proposed rule change to shorten the waiting period before an AWC letter and offer of settlement becomes final and the member of CFR or Board's time to call such settlements for review will therefore provide for a more efficient, streamlined disciplinary process.

The Exchange further believes that the proposed amendments are consistent with Section 6(b)(6) of the Act,[14] which provides that members and persons associated with members shall be appropriately disciplined for violation of the provisions of the rules of an exchange by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction. As noted, the proposed changes will not affect the ability of Enforcement to enter into negotiated settlements or accepting uncontested settlement offers when appropriate, and will not alter the requirement that settlements be scrutinized by the CRO or Panel, who will continue to approve them, or the Directors and members of the CFR, whose right to call both types of voluntary settlements for review will not change.

For the same reasons, the Exchange believes that the proposed changes are designed to provide a fair procedure for the disciplining of members and persons associated with members, consistent with Sections 6(b)(7) and 6(d) of the Act.[15] Moreover, as noted, the Exchange believes that the proposed 10 day period to call a settlement for review under Rules 10.9310(a)(1)(B)(i) is reasonable and sufficient, and provides an appropriate balance between the procedural safeguards of the call for review process and the benefits of expediting the resolution of disciplinary matters and providing finality to the disciplinary process sooner. Reducing the period for review would also mean that AWCs and uncontested settlements would be published two weeks earlier, thereby allowing ETP Holders, Associated Persons and the investing public to be educated about the issues they addressed sooner. Finally, the Exchange believes that the proposed transition plan is designed to provide a

[8] For example, no AWC letter or uncontested settlement has been called for review in the past year.

[9] *See, e.g.,* FINRA Rule 9216(a)(4) (''If the [AWC] letter is accepted by the National Adjudicatory Council, the Review Subcommittee, or the Office of Disciplinary Affairs, it shall be deemed final and shall constitute the complaint, answer, and decision in the matter.''); FINRA Rule 9270(e)(3) (''If the offer of settlement and order of acceptance are accepted by the National Adjudicatory Council, the Review Subcommittee, or the Office of Disciplinary Affairs, they shall become final and the Director of the Office of Disciplinary Affairs shall issue the order and notify the Office of Hearing Officers. The Department of Enforcement shall provide a copy of an issued order of acceptance to each FINRA member with which a Respondent is associated.''). *See also e.g.,* Nasdaq Rule 9216(a)(4) & 9270(e)(3); Cboe BZX Exchange, Inc. Rule 8.8(a); Cboe EDGA Exchange, Inc. Rule 8.8(a).

[10] The effective date of the new time periods would be simultaneously communicated to the Directors and to the members of the CFR.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

[13] *Id.*

[14] 15 U.S.C. 78f(b)(6).

[15] 15 U.S.C. 78f(b)(7) and 78f(d).

fair procedure for the disciplining of ETP Holders and Associated Persons by providing for a clearly demarcated and orderly transition from the current 25 day period to the proposed 10 day period.

Finally, the Exchange believes that the non-substantive changes to clarify the cross-reference to Rule 10.9310 in Rules 10.9216 would remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, protect investors and the public interest because the proposed non-substantive changes would add clarity, transparency and consistency to the Exchange's disciplinary rules. The Exchange believes that market participants would benefit from the increased clarity, thereby reducing potential confusion and ensuring that persons subject to the Exchange's jurisdiction, regulators, and the investing public can more easily navigate and understand the Exchange's rules.

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 is not intended to address competitive issues but is rather concerned with facilitating less burdensome regulatory compliance and processes and enhancing the quality of the regulatory process. The Exchange believes the proposed rule changes would reduce the burdens within the disciplinary process, as well as move matters through the process expeditiously by providing for more efficient finality of negotiated settlements and offers of settlement, to the benefit of all ETP Holders, Associated Persons and the investing public.

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

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[16] and subparagraph (f)(6) of Rule 19b–4 thereunder.[17]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSENAT–2020–36 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–NYSENAT–2020–36. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSENAT–2020–36, and should be submitted on or before January 6, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–27595 Filed 12–15–20; 8:45 am]

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[16] 15 U.S.C. 78s(b)(3)(A)(iii).

[17] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90635; File No. SR–FINRA–2020–011]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, To Address Brokers With a Significant History of Misconduct

December 10, 2020.

I. Introduction

On April 3, 2020, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend FINRA's rules to help further address the issue of associated persons with a significant history of misconduct and the broker-dealers that employ them.

The proposed rule change was published for comment in the **Federal**

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Register on April 14, 2020.[3] On May 27, 2020, FINRA consented to an extension of the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to July 13, 2020.[4] On July 2, 2020, FINRA responded to the comment letters received in response to the Notice and filed an amendment to the proposed rule change (''Amendment No. 1'').[5] On July 13, 2020, the Commission filed an Order Instituting Proceedings to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.[6] On October 5, 2020, FINRA consented to an extension of the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to December 10, 2020.[7] On October 7, FINRA responded to the comment letter received in response to the Order Instituting Proceedings.[8] This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposed Rule Change

Background

FINRA's proposed rule change would: (1) Amend the FINRA Rule 9200 Series (Disciplinary Proceedings) and the 9300 Series (Review of Disciplinary Proceedings by National Adjudicatory Council and FINRA Board; Application for SEC Review) to allow a hearing officer to impose conditions or restrictions on the activities of a respondent member broker-dealer or respondent associated person (each a ''Respondent'' or collectively ''Respondents''), and require the member broker-dealer employing a respondent associated person to adopt heightened supervisory procedures for such associated persons, when a disciplinary matter is appealed to the National Adjudicatory Council (''NAC'') or called for NAC review; (2) amend the FINRA Rule 9520 Series (Eligibility Proceedings) to require member broker-dealers to adopt heightened supervisory procedures for statutorily disqualified associated persons during the period a statutory disqualification eligibility request is under review by FINRA; (3) amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure) to require disclosure through FINRA BrokerCheck of the status of a member broker-dealer as a ''taping firm'' under FINRA Rule 3170 (Tape Recording of Registered Persons by Certain Firms); and (4) amend the FINRA Rule 1000 Series (Member Application and Associated Person Registration) to require a member broker-dealer to submit a written request to FINRA's Department of Member Regulation (''Member Regulation''), through the Membership Application Group (''MAP Group''), seeking a materiality consultation[9] and approval of a continuing membership application, if required, when a natural person seeking to become an owner, control person, principal, or registered person of the member broker-dealer has, in the prior five years, one or more ''final criminal matters'' or two or more ''specified risk events.''[10]

Proposed Rule Change to the FINRA Rule 9200 Series (Disciplinary Proceedings) and 9300 Series (Review of Disciplinary Proceeding by National Adjudicatory Council and FINRA Board; Application for SEC Review)

FINRA proposed amendments to the Rule 9200 Series and Rule 9300 Series to address investor protection concerns during the pendency of an appeal from, or a NAC review of, a hearing panel or hearing officer disciplinary decision, by authorizing hearing officers to impose conditions or restrictions on disciplined Respondents and requiring broker-dealers to adopt heightened supervision plans concerning their associated persons who are disciplined respondents.[11] The proposed rule change would also establish a process for an expedited review by the Review Subcommittee of the NAC of any conditions or restrictions imposed.[12] Currently, when a hearing panel or hearing officer decision is on appeal or review before the NAC, any sanctions imposed by the decision, including bars and expulsions, are automatically stayed and not enforced against the Respondent during the pendency of the appeal or review proceeding.[13] Thereafter, the filing of an application for Commission review stays the effectiveness of any sanction, other than a bar or an expulsion, imposed in a decision constituting a final FINRA disciplinary action.[14]

Proposed Rule 9285(a) would provide that the hearing officer who participated in an underlying disciplinary proceeding may impose conditions or restrictions on the activities of the Respondent during the appeal of any adverse finding. Specifically, if the hearing officer found that a Respondent violated a statute or rule provision, which is subsequently appealed to the NAC or called for NAC review, the hearing officer may impose conditions or restrictions reasonably necessary for the purpose of preventing customer harm.[15] The scope of these conditions or

[3] *See* Exchange Act Release No. 88600 (Apr. 8, 2020), 85 FR 20745 (Apr. 14, 2020) (File No. SR–FINRA–2020–011) (''Notice'').

[4] *See* letter from Michael Garawski, Associate General Counsel, Office of General Counsel, FINRA, to Daniel Fisher, Branch Chief, Division of Trading and Markets, Commission, dated May 27, 2020.

[5] *See* letter from Michael Garawski, Associate General Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated July 2, 2020 (''FINRA July 2 Letter''). The FINRA July 2 Letter is available at the Commission's website at *https://www.sec.gov/comments/sr-finra-2020-011/srfinra2020011-7399761-219028.pdf*. Amendment No. 1 is available at *https://www.finra.org/sites/default/files/2020-07/sr-finra-2020-011-amendment-no-1.pdf*.

[6] *See* Exchange Act Release No. 89305 (July 13, 2020), 85 FR 43627 (July 17, 2020) (File No. SR–FINRA–2020–011) (''Order Instituting Proceedings'').

[7] *See* letter from Michael Garawski, Associate General Counsel, Office of General Counsel, FINRA, to Daniel Fisher, Branch Chief, Division of Trading and Markets, Commission, dated October 5, 2020.

[8] *See* letter from Michael Garawski, Associate General Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated October 7, 2020 (''FINRA October 7 Letter''). The FINRA October 7 Letter is available at the Commission's website at *https://www.sec.gov/comments/sr-finra-2020-011/srfinra2020011-7884211-224193.pdf*.

[9] In general, a member broker-dealer initiates a materiality consultation with Member Regulation by submitting a letter, requesting its determination on whether a proposed change is material such that it requires the submission of a Continuing Membership Application (''CMA''). If Member Regulation determines that a proposed change is material, it will instruct the broker-dealer to file a CMA if it intends to proceed with the proposed change. *See* Regulatory Notice 18–23 (Proposal Regarding the Rules Governing the New and Continuing Membership Application Process) (July 2018).

[10] *See* Notice at 20745.

[11] *See* Notice at 20746.

[12] *Id.*

[13] *See* FINRA Rules 9311(b) and 9312(b).

[14] *See* FINRA Rule 9370(a).

[15] *See* Notice at 20747. Under the proposed rule, the hearing officer could not impose these conditions or restrictions sua sponte but rather may only act on a motion by FINRA's Department of Enforcement (''Enforcement''). Proposed Rule 9285(a)(1) would allow Enforcement, within ten days after service of a notice of appeal from, or the notice of a call for NAC review of, a disciplinary decision of a hearing officer or hearing panel, to file a motion for the imposition of conditions or restrictions on the activities of a Respondent that are reasonably necessary for the purpose of preventing customer harm. The motion must specify the conditions and restrictions that are sought to be imposed and explain why they are necessary. A Respondent would have the right to file an opposition or other response to the motion within ten days after service of the motion, unless otherwise ordered by the hearing officer, and must explain why no conditions or restrictions should be imposed or specify alternative conditions and restrictions that would prevent customer harm. The hearing officer would then decide Enforcement's motion for conditions or restrictions based on the

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restrictions would depend on what the hearing officer determines to be reasonably necessary for the purpose of preventing customer harm. Further, the conditions and restrictions would target the misconduct demonstrated in the disciplinary proceeding and be tailored to the specific risks posed by the Respondents during the appeal period.[16] Accordingly, the conditions and restrictions are not intended to be as restrictive as the underlying sanctions and would likely not be economically equivalent to imposing the sanctions during the appeal.[17] In addition, Respondents would be able to seek expedited reviews of orders imposing conditions or restrictions.[18]

Currently, any sanctions imposed by the hearing panel or hearing officer decision, including bars and expulsions, are automatically stayed and not enforced against the Respondent during the pendency of the NAC appeal or review proceeding.[19] Under the proposed rule change, the conditions or restrictions imposed by a hearing officer would remain in place until FINRA's final decision takes effect and all appeals are exhausted.[20] In addition, proposed FINRA Rule 9285(e) would require a member broker-dealer to adopt a written plan of heightened supervision for an associated person who is found to have violated a statute or rule provision. The plan of heightened supervision would be required to comply with FINRA Rule 3110, be reasonably designed and tailored to include specific supervisory policies and procedures that address the violations found by the hearing panel or hearing officer, and be reasonably designed to prevent or detect a reoccurrence of these violations.[21]

Proposed Rule Change to the FINRA Rule 9520 Series (Eligibility Proceedings)

A broker-dealer is not currently required to place a statutorily disqualified individual on heightened supervision while FINRA reviews the member broker-dealer's application to continue associating with the individual (although FINRA generally will not approve an application without an acceptable plan of supervision).[22] Under the proposed rule change, FINRA would amend FINRA Rule 9522 to require a member broker-dealer that files an application to continue associating with a statutorily disqualified associated person under FINRA Rule 9522(a)(3) or 9522(b)(1)(B) to include an interim plan of heightened supervision that would be in effect throughout the entirety of the application review process.[23] The proposed rule changes would delineate the circumstances under which a statutorily disqualified individual may remain associated with a FINRA member while FINRA is reviewing the application.[24]

Proposed Rule Change to FINRA Rule 8312 (FINRA BrokerCheck Disclosure)

FINRA proposed an amendment to FINRA Rule 8312 governing the information FINRA releases to the public through its BrokerCheck system. Currently, FINRA Rule 8312(b) requires that FINRA release information about, among other things, whether a particular member broker-dealer is subject to the provisions of FINRA Rule 3170 (''Taping Rule''), but only in response to telephonic inquiries via the BrokerCheck toll-free telephone listing.[25] The Taping Rule is designed to ensure that a member broker-dealer with a significant number of registered persons that previously were employed by ''disciplined firms'' [26] has specified supervisory procedures in place to prevent fraudulent and improper sales practices or customer harm, including, among other things, procedures for recording all telephone conversations between the taping firm's registered persons and both existing and potential customers.[27] Proposed Rule 8312(b) would not eliminate the toll-free telephone listing but rather would also require FINRA to release through BrokerCheck information as to whether a particular member broker-dealer is subject to the Taping Rule.[28] The proposed rule change would remove the requirement in FINRA Rule 8312(b) that FINRA inform the public that a member broker-dealer is subject to the Taping Rule only in response to telephonic inquiry via the BrokerCheck toll-free telephone listing.[29] FINRA believes that broadening the disclosure through BrokerCheck of the status of a member broker-dealer as a taping firm would help inform more investors of the heightened procedures required of the firm, which may incentivize investors to research more carefully the background of a registered representative associated with the taping firm.[30]

Proposed Rule Change to FINRA Rule 1000 Series (Member Application and Associated Person Registration)

The FINRA Rule 1000 Series governs, among other things, FINRA's membership proceedings. Currently, a member broker-dealer is permitted (subject to exceptions) to expand its business under the safe harbor set forth in FINRA interpretive material IM–1011–1 without the filing and prior approval of a CMA.[31] For example, under the existing parameters of this safe harbor, a broker-dealer could hire an associated person even if he or she has a significant history of misconduct.[32] The proposed rule change would limit the application of the safe harbor by imposing additional obligations on a member broker-dealer when a natural person who has, in the prior five years, either one or more ''final criminal matters'' or two or more ''specified risk events'' seeks to become

moving and opposition papers. *See* Proposed Rule 9285(a)(2)–(5) and (c); *see also* Notice at 20747.

[16] *See* Notice at 20747.

[17] *See* Notice at 20756.

[18] *Id.*

[19] *See* FINRA Rules 9311(b) and 9312(b); *see also* Notice at 20747. *See also* FINRA Rule 9370(a), which states that the filing of an application for review by the SEC of the NAC's decision shall stay the effectiveness of any sanction, other than a bar or expulsion imposed in a final disciplinary action by FINRA.

[20] *See* Notice at 20748. The proposed rule change would also amend Rule 9556 to grant FINRA the authority to bring an expedited proceeding against a Respondent that fails to comply with conditions and restrictions imposed pursuant to proposed Rule 9285 that could result in a suspension or cancellation of membership or suspension or bar from associating with any FINRA member. *See* Notice at 20749.

[21] *See* Notice at 20748.

[22] *See* Notice at 20750.

[23] *See* Notice at 20749.

[24] *Id.*

[25] *See* FINRA Rule 8312(b). Under the Taping Rule, a broker-dealer with a specified percentage of registered persons who have been associated with disciplined firms in a registered capacity in the last three years is designated as a ''taping firm.'' *See* FINRA Rule 3170.

[26] *See* FINRA Rule 3170(a)(2) (defining the term ''disciplined firm'').

[27] *See* Notice at 20751.

[28] FINRA Rule 8312 (FINRA BrokerCheck Disclosure) governs the information FINRA releases to the public through its BrokerCheck system (the BrokerCheck website address is *brokercheck.finra.org*). BrokerCheck helps investors make informed choices about the brokers and member firms with which they conduct business by providing registration and disciplinary history to investors. FINRA requires member firms to inform their customers of the availability of BrokerCheck. Specifically, FINRA Rule 2210(d)(8) requires that each of a member's websites include a readily apparent reference and hyperlink to BrokerCheck on the initial web page that the member intends to be viewed by retail investors and any other web page that includes a professional profile of one or more registered persons who conduct business with retail investors; and FINRA Rule 2267 requires members to provide to customers the FINRA BrokerCheck Hotline Number and a statement as to the availability to the customer of an investor brochure that includes information describing BrokerCheck. *See* Notice at 20751.

[29] *Id.*

[30] *Id.*

[31] *See* Notice at 20752.

[32] *Id.*

an owner, control person, principal, or registered person of the broker-dealer.[33] Specifically, when a natural person seeking to become an owner, control person, principal, or registered person of a member broker-dealer has, in the prior five years, one or more ''final criminal matters'' or two or more ''specified risk events,'' proposed Rule 1017(a)(7) would require a member broker-dealer to either: (1) File a CMA; or (2) submit a written request seeking a materiality consultation for the contemplated activity with FINRA's MAP Group.[34] If the broker-dealer seeks a materiality consultation, the MAP Group would consider, among other things, whether the ''final criminal matters'' or ''specified risk events'' are customer-related; whether they represent discrete actions or are based on the same underlying conduct; the anticipated activities of the person; the disciplinary history, experience and background of the proposed supervisors, if applicable; and the disciplinary history, supervisory practices, standards, systems and internal controls of the member broker-dealer and whether they are reasonably designed to achieve compliance with applicable securities laws and regulations and FINRA rules.[35] Where FINRA determines that a contemplated organizational change is material, FINRA would instruct the broker-dealer to file a CMA if it intends to proceed with such change.

Additionally, the proposed rule change would adopt a corresponding change to IM–1011–1 (Business Expansions and Persons with Specified Risk Events) to specify that the safe-harbor for business expansions in IM–1011–1 would not be available to any broker-dealer seeking to add a natural person who: (i) Has, in the prior five years, one or more ''final criminal matters'' or two or more ''specified risk events'' and (ii) seeks to become an owner, control person, principal, or registered person of the member.[36] In those circumstances, proposed IM–1011–3 would provide that if the broker-dealer is not otherwise required to file a CMA, it must comply with the requirements of proposed FINRA Rule 1017(a)(7).[37] Proposed Rule 1017(a)(7) would establish that the safe-harbor for business expansions in IM–1011–1 would not be available to a member broker-dealer when a materiality consultation is required.[38]

The proposed rule change would also make non-substantive changes to the MAP rules by renumbering paragraphs and updating cross-references to reflect the other proposed rule changes.

III. Discussion and Commission Findings

After careful review of the proposed rule change, as modified by Amendment No. 1, the comment letters, and FINRA's responses to the comments, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to a national securities association.[39] Specifically, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 15A(b)(6) of the Exchange Act,[40] which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

Rule 9200 Series (Disciplinary Proceedings) and 9300 Series (Review of Disciplinary Proceeding by National Adjudicatory Council and FINRA Board; Application for SEC Review)

The proposed rule change to authorize hearing officers to impose conditions or restrictions on disciplined Respondents reasonably necessary for the purpose of preventing customer harm, and to require broker-dealers to adopt heightened supervision plans concerning individual respondents, will help protect investors from associated persons found to have violated a statute or rule provision, by potentially preventing them from engaging in additional misconduct during the appeal process. These proposed rule changes are designed to help prevent fraudulent and manipulative acts and practices and address concerns related to misconduct that may occur during the pendency of an appeal from, or a NAC review of, a hearing panel or hearing officer disciplinary decision.[41] The Commission believes the ability to impose conditions or restrictions along with the proposed requirement to adopt a plan of heightened supervision will lead to greater oversight of disciplined Respondents' activities during the appeal period, thereby reducing the

[33] *Id.* The proposed rule change would also adopt definitions of ''final criminal matter'' and ''specified risk event'' to help identify when a member broker-dealer must submit a materiality consultation or continuing membership application when a natural person seeks to become an owner, control person, principal, or registered person of the firm and the person's history of misconduct meets one or more of these definitions. Amendment No. 1 amended proposed FINRA Rule 1011(h) to include in the definition of ''final criminal matter'' a relevant criminal event that ''is or was'' required to be disclosed on a Uniform Registration Form, and to make some grammar- and syntax-related modifications. The amendment clarified that both ''final criminal matter'' and ''specified risk event'' include disclosures that are required if the member broker-dealer and natural person proceed with the contemplated change, including disclosures that are required on Uniform Registration Forms that have not yet been executed. For example, Sections 14A and 14B of Form U4 (defined below) require representatives of broker-dealers to disclose, among other things, if they have ever been convicted of or pled guilty or nolo contendere (''no contest'') in a domestic, foreign or military court to (1) any felony, or (2) a misdemeanor involving: investments or an investment-related business or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses. Proposed Rule 1011(r) would define ''Uniform Registration Forms'' to mean the Uniform Application for Broker-Dealer Registration (Form BD), the Uniform Application for Securities Industry Registration or Transfer (Form U4), the Uniform Termination Notice for Securities Industry Registration (Form U5) and the Uniform Disciplinary Action Reporting Form (Form U6), as such may be amended or any successor(s) thereto.

[34] *See* Notice at 20752 and 20753. This requirement would not apply when the member is required to file a statutory disqualification application or written request for relief pursuant to Rule 9522 for approval of the same contemplated association. *Id.* at 20753 and note 51.

[35] *See* Notice at 20753.

[36] *Id.*

[37] *See* Notice at 20753. Proposed Rule 1017(a)(7) would require the broker-dealer to submit a written request seeking a materiality consultation for the contemplated activity so that FINRA's MAP Group can determine whether a CMA is required. In a teleconference between Michael Garawski, Associate General Counsel, Office of General Counsel, FINRA, Kosha Dalal, Vice President and Associate General Counsel, Legal Policy, Office of General Counsel, FINRA, Lourdes Gonzalez, Assistant Chief Counsel, Division of Trading and Markets, Commission, Daniel Fisher, Branch Chief, Division of Trading and Markets, Commission, Edward Schellhorn, Special Counsel, Division of Trading and Markets, Commission, and Meredith MacVicar, Special Counsel, Division of Trading and Markets, Commission, on December 3, 2020, FINRA staff stated that of the 388 materiality consultations received in 2019, the average processing time was approximately 15 calendar days. FINRA completed the review of 336 CMAs that were received in 2019 and the average processing time was approximately 97 calendar days.

[38] *See* Notice at 20753.

[39] In approving this rule change, the Commission has considered the rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[40] 15 U.S.C. 78o–3(b)(6).

[41] In a teleconference between Michael Garawski, Associate General Counsel, Office of General Counsel, FINRA, Kosha Dalal, Vice President and Associate General Counsel, Legal Policy, Office of General Counsel, FINRA, Lourdes Gonzalez, Assistant Chief Counsel, Division of Trading and Markets, Commission, Daniel Fisher, Branch Chief, Division of Trading and Markets, Commission, Edward Schellhorn, Special Counsel, Division of Trading and Markets, Commission, and Meredith MacVicar, Special Counsel, Division of Trading and Markets, Commission, on December 1, 2020 (''December 1, 2020 Teleconference''), FINRA stated that during 2013–2019 the NAC issued decisions in 131 disciplinary matters. The NAC affirmed the hearing panel or hearing officer findings 121 times (92%), modified the findings 6 times (5%), and reversed or dismissed the findings 4 times (3%).

potential risk of customer harm that may occur during this period.

Two commenters supported the proposed rule change.[42] Two other commenters, however, expressed concern that these proposed rule changes to the Rule 9200 Series and 9300 Series do not adequately ensure due process and one specifically recommended FINRA take additional steps to ''ensure due process, both in appearance and actual.'' [43] In response, FINRA detailed the procedural protections proposed Rule 9285 would establish. Specifically, prior to imposing any conditions or restrictions the proposed rule change would: (i) Require Enforcement to file a motion with a hearing officer, seeking the imposition of conditions or restrictions that are reasonably necessary for the purpose of preventing customer harm, specifying the conditions and restrictions that are sought to be imposed, and explaining why they are necessary; (ii) provide the Respondent an opportunity to file a written opposition or other response to the motion; (iii) require the hearing officer to issue a written order ruling upon the motion no later than 20 days after any opposition or response is filed; and (iv) afford a Respondent the right to seek expedited review [44] before the NAC's Review Subcommittee of an order that imposes conditions or restrictions, and an automatic stay when a Respondent requests such an expedited review.[45]

As stated above, currently any sanctions imposed by the hearing panel or hearing officer decision, including bars and expulsions, are automatically stayed and not enforced against the respondent during the pendency of the NAC appeal or review proceeding.[46] One of the commenters urging FINRA to ensure due process stated that the proposed rule change should not ''be stripped away'' by changing the existing stay and giving a hearing officer authority to impose conditions and restrictions on the Respondent during the process of appealing a hearing officer's decision. Accordingly, the commenter expressed concern that the imposition of such conditions or restrictions could ruin a broker-dealer's business before the expedited review process has concluded, especially a smaller broker-dealer with fewer alternatives to withstand extended impediments to one of its business lines.[47] Another commenter,[48] however, expressed support for the proposed rule change and advocated for FINRA to go further by eliminating the existing stay of decisions by the hearing officer or hearing panel in disciplinary matters pursuant to Rule 9268 [49] or Rule 9269,[50] in which the adjudicator finds that a Respondent violated a statute or rule provision, during an appeal to the NAC by repealing FINRA Rule 9311.[51]

FINRA considered both suggestions and decided not to amend the proposed rule change. Specifically, FINRA believes that enforcing the hearing panel's disciplinary sanctions against the Respondents during the pendency of the appeal or review proceedings could be too restrictive in disciplinary matters with significant sanctions and where the risk of harm may be specific to particular activities.[52] On the other hand, FINRA stated that the proposed rule change would authorize a hearing officer to impose conditions and restrictions that are tailored specifically to the risk posed by the Respondent during the pendency of the appeals, and reasonably necessary for the purpose of preventing customer harm that may occur during the pendency of the appeal. Accordingly, FINRA determined that the proposed rule change would strike a reasonable balance between protecting investors and preventing undue burden on individuals and firms while their appeals are pending.[53]

A system designed to protect investors and the public interest will generally produce both costs and benefits. In this instance, FINRA's proposed rule change should reduce the probability of investor losses resulting from the violation of statutes or rules. At the same time, a decision to impose conditions or restrictions may disrupt the business opportunities of certain broker-dealers and individuals. In order to assess the potential risk posed by brokers during the appeal period, FINRA examined cases that were appealed to the NAC during the period of 2013–2016 and determined whether the brokers associated with an appeal to the NAC had a new disclosure event—for this analysis, a ''final criminal matter'' or a ''specified risk event,'' as defined above—at any time from the filing of the appeal through the year-end after the year in which the appeal reached a decision. Based on this analysis, FINRA estimated that 21 of the 75 brokers who appealed to the NAC during the 2013–2016 period were associated with a total of 28 disclosure events that occurred during the interstitial period after the filing of their appeal to the NAC.[54]

[42] *See* letter from William A. Jacobson, Esq., Clinical Professor of Law, Cornell Law School, and Director, Securities Law Clinic, and Ayomikun Loye, Student, Cornell Law School, to Vanessa Countryman, Secretary, Commission, dated May 5, 2020; letter from Samuel B. Edwards, President, Public Investors Advocate Bar Association, to Brent J. Fields, Secretary, Commission, dated May 5, 2020.

[43] *See* letter from Professor Lisa Miller, Esq., dated April 30, 2020; *see also* letter from Aaron D. Lebenta, Parsons Behle & Latimore, to Vanessa Countryman, Secretary, Commission, dated August 3, 2020 (''Lebenta Letter'') (concerned that the proposed rule change does not establish an effective appeal process to help ensure FINRA's disciplinary decision is correct, and that the sanctions are warranted, before they are imposed).

[44] Under proposed Rule 9285, an expedited review should take no longer than 45 days from the date the hearing officer serves the written order imposing conditions or restrictions on the Respondent. Specifically, proposed Rule 9285(b)(1) states that the Respondent may file a motion to modify or remove any or all of the conditions or restrictions within ten (10) days after service of the order, proposed Rule 9285(b)(3) would provide Enforcement up to five (5) days from service of Respondent's motion to file an opposition or other response to the motion, and proposed Rule 9285(b)(5) would provide the Review Subcommittee up to thirty (30) days after any opposition filed pursuant to Rule 9285(b)(3) to serve a written order ruling upon a motion to modify or remove conditions or restrictions in an expeditious manner.

[45] *See* FINRA July 2 Letter and FINRA October 7 Letter; *see also* Notice at 20746.

[46] *See* FINRA Rules 9311(b) and 9312(b).

[47] *See* Lebenta Letter (stating that a hearing officer restricting a broker-dealer from engaging in the same activity which is the subject of the initial sanction during its appeal of that sanction would essentially impose the original sanction while the matter is on appeal).

[48] *See* letter from Lev Bagramian, Senior Securities Policy Advisor, Better Markets, Inc. to Vanessa A. Countryman, Secretary, Commission, dated June 19, 2020 (''Better Markets Letter'').

[49] FINRA Rule 9268(f) states that unless otherwise provided in the majority decision constituting a final disciplinary action of FINRA issued under Rule 9268(a), a sanction (other than a bar or an expulsion) specified in the decision shall become effective on a date to be determined by FINRA, and a bar or an expulsion specified in a decision shall become effective immediately upon the decision becoming the final disciplinary action of FINRA.

[50] FINRA Rule 9269(d) states that unless otherwise provided in the default decision constituting a final disciplinary action of FINRA, the sanctions shall become effective on a date to be determined by FINRA staff, except that a bar or expulsion shall become effective immediately upon the default decision.

[51] FINRA Rule 9311(b) states that an appeal to the NAC from a decision issued pursuant to Rule 9268 or Rule 9269 shall operate as a stay of that decision until the NAC issues a decision pursuant to Rule 9349 (National Adjudicatory Council Formal Consideration; Decision) or, in cases called for discretionary review by the FINRA Board, until a decision is issued pursuant to Rule 9351 (Discretionary Review by FINRA Board). Any such appeal, however, will not stay a decision, or that part of a decision, that imposes a permanent cease and desist order.

[52] *See* Notice at 20760.

[53] *See* Notice at 20760.

[54] *See* Notice at 20756. FINRA notes that these estimates likely underrepresent the overall risk of customer harm posed by these brokers, because they are based on a specific set of events and outcomes used for classifying brokers for the proposed amendments to the MAP Rules. In addition, these brokers had other disclosure events after their appeal was filed, and some of these other events may also be associated with risk of customer harm. *See* Notice at note 75.

After considering these benefits and costs, the Commission believes that the proposed procedural protections provide a reasonable process to Respondents who may disagree with the particular set of conditions or restrictions imposed by a hearing officer to challenge those conditions or restrictions before they go into effect by, among other things, establishing an expedited process for the review of a hearing officer's order by the Review Subcommittee of the NAC. During a hearing officer's review, he or she may consider the specific facts and circumstances when weighing the additional risk(s) posed by the Respondent while the matter is on appeal against the costs of possible restrictions and sanctions. The Commission believes this potential disruption of the business opportunities of certain broker-dealers and individuals has been appropriately balanced against the investor protections the proposed rule change would establish, as well as the need to prevent potential customer harm from Respondents who have been found in violation of FINRA rules by a hearing officer or hearing panel.[55]

Rule 9520 (Eligibility Proceedings)

The proposed rule change to require broker-dealers to include a plan of heightened supervision with an application to continue associating with a statutorily disqualified individual that would be in effect throughout the entirety of the application review process also would address an investor protection concern by lowering the risk of customer harm during the pendency of an application. One commenter opposed this proposed rule change, arguing that establishing plans of heightened supervision are costly and burdensome and would discourage broker-dealers from hiring associated persons who have been disciplined.[56] However, FINRA is not creating an additional burden with respect to the requirement to create a plan of heightened supervision; it is only requiring a member broker-dealer implement such plan at an earlier point in time than under the existing rules. Currently, as part of the application process, a member broker-dealer will propose a written plan of heightened supervision to become effective upon approval of the application, and generally, the continued association of a statutorily disqualified person approved through a FINRA eligibility proceeding is conditioned on the individual being subject to a heightened supervision plan.[57] This proposed rule change would help limit the potential for customer harm at an earlier point in time and thereby help protect customers. In order to assess the potential risk posed by a statutorily disqualified person during the pendency of his or her application, FINRA examined whether individuals who filed an application between 2013–2016 had a disclosure event at any time from the filing of the application through two years after filing. Based on this analysis, FINRA estimated that 26 (or 51 percent) of the 51 individuals associated with an applications during the 2013–2016 period had a total of 41 disclosure events during the interstitial period after the filing of their application.[58]

As stated above, although the Commission recognizes the potential burden imposed by requiring the supervision plan to become effective at an earlier stage of this process, it believes that the benefits of added oversight of disqualified individuals subject to the pending application process justifies the earlier timeframe. Accordingly, while the proposed rule change may negatively impact the ability of certain individuals to retain or find employment, it is a reasonable approach for seeking to achieve greater oversight by sponsoring broker-dealers of the activities of statutorily disqualified individuals during the pendency of an application. The Commission believes that applying heightened supervision specifically tailored in response to the misconduct giving rise to the statutory disqualification at an earlier stage in the process will facilitate a broker-dealer's supervision of statutorily disqualified individuals and better protect its customers from future harm.

Rule 8312 (FINRA BrokerCheck Disclosure)

The proposed rule change adding disclosure in BrokerCheck of member broker-dealers that are subject to the Taping Rule would help inform more investors when certain broker-dealers are subject to certain heightened procedures.[59] One commenter stressed that this disclosure may not be sufficient to ensure investors understand what it means to be designated a ''taping firm'' and suggested that FINRA amend the proposed rule change to require the BrokerCheck profiles of individual registered representatives to denote when they are associated with taping firms. FINRA did not accept this comment because it would be a substantive amendment to what is otherwise a proposed technical change.[60] FINRA also expressed concern that the commenter's suggestion to include a disclosure on the BrokerCheck profile of individuals would capture registered representatives of a taping firm with clean disciplinary histories.[61] The commenter also recommended that any disclosure of a firm as a taping firm on BrokerCheck should include ''clear and complete information, comprehensible to investors, explaining what it means to be such a firm.'' [62] FINRA agreed with the view expressed that the BrokerCheck disclosure should include a clear explanation of what it means to be subject to the Taping Rule to help investors understand why the taping firm is subject to heightened procedures.[63] FINRA did not make a corresponding amendment to the rule but the Commission understands that FINRA has committed to including a

[55] The Commission notes that the proposed rule change is consistent with the adopted rules of other SROs, including: BOX Rule 12110 (''Pending effectiveness of a decision imposing a sanction on the Respondent, the person, committee or panel issuing the decision (the 'adjudicator') may impose such conditions and restrictions on the activities of the Respondent as it considers reasonably necessary for the protection of investors and the Exchange''); CBOE Rule 13.11(b) (''Pending effectiveness of a decision imposing a sanction on the Respondent, the Hearing Panel or the Chief Regulatory Officer (''CRO''), as applicable, may impose such conditions and restrictions on the activities of the Respondent as the Hearing Panel or the CRO, as applicable, considers reasonably necessary for the protection of investors and the Exchange''); and CBOE BZX Rule 8.11 (''Pending effectiveness of a decision imposing a penalty on the Respondent, the CRO, Hearing Panel or committee of the Board, as applicable, may impose such conditions and restrictions on the activities of the Respondent as he, she or it considers reasonably necessary for the protection of investors, creditors and the Exchange.''). *See* Notice at note 112.

[56] *See* Lebenta Letter. This commenter also recommended FINRA streamline the statutory disqualification review process to produce faster results, noting that imposing heightened supervisory procedures would be unduly costly and burdensome if the statutorily disqualified associated person's proposed association with a member broker-dealer is denied. *See* Lebenta Letter. The Commission must consider the proposed rule change that was filed and FINRA's process for reviewing applications for statutorily disqualified associated persons to associate with a member broker-dealer is beyond the scope of this filing.

[57] *See* FINRA Regulatory Notice 18–23 and Notice at 20750.

[58] *See* Notice at 20757. FINRA notes that these results likely underrepresent the overall risk of customer harm, because the disclosure events in this analysis included only final criminal matters and specified risk events. *See* Notice at note 84.

[59] Currently, investors can only learn about a broker-dealer's status as a Taping Firm in response to telephonic inquiries via the BrokerCheck toll-free telephone listing. *See* FINRA Rule 8312(b).

[60] December 1, 2020 Teleconference.

[61] *Id.*

[62] *See* Better Markets Letter.

[63] *See* Notice at 20765.

clear explanation on BrokerCheck about what being subject to the Taping Rule means.[64]

The Commission believes that this proposed rule change would improve the ease of obtaining this information for investors through a preexisting database with which the public is already familiar. Furthermore, the Commission believes that the proposed rule change would incentivize investors to research more carefully the background of a registered representative associated with a broker-dealer that is designated as a taping firm, including those registered representatives associated with the firm who are not subject to heightened supervision.

Rule 1000 Series (Member Application and Associated Person Registration)

The proposed rule change, requiring a member broker-dealer to seek a materiality consultation when a natural person seeking to become an owner, control person, principal, or registered person has a significant history of misconduct, would give FINRA an opportunity to assess whether the proposed association is material and warrants closer regulatory scrutiny. Similarly, in situations where a proposed association of a natural person with a significant history of misconduct would require the broker-dealer to submit a CMA, FINRA would be able to: (i) Assess whether the broker-dealer would continue to meet all of the membership standards in FINRA Rule 1014 if the proposed association were approved, and (ii) prevent the proposed association if the broker-dealer does not demonstrate that it can continue to meet those standards. This proposed rule change will further promote investor protection by applying additional safeguards and disclosure obligations for a broker-dealer's continuing membership with FINRA and for changes to a current member broker-dealer's ownership, control, or business operations. The heightened scrutiny by FINRA of registered representatives, registered principals, owners, and control persons who meet the proposed definitions and criteria would be beneficial in promoting investor protection by disincentivizing broker-dealers from engaging in higher-risk activity that could lead to additional regulatory restrictions.[65] For example, one commenter stated that this proposed rule would create obstacles for broker-dealers seeking to hire and onboard associated persons with a significant history of misconduct,[66] which may incentivize broker-dealers to reexamine their hiring practices and certain associated persons to change their behavior to avoid future misconduct.[67]

Two commenters raised several concerns about, and suggested revisions to, the proposed rule changes to the Rule 1000 Series (Member Application and Associated Person Registration).[68] One of these commenters questioned whether adding one person should constitute a material change in business operations. Specifically, the commenter disagreed that adding a new owner or control person is sufficient to make a material impact in business operations unless that person is involved in sales. Accordingly, the commenter recommended revising proposed IM–1011–3 to exclude from the IM–1011–1 safe harbor only broker-dealers increasing their business operations by adding associated persons involved in sales.[69] FINRA declined to amend the proposed rule change as suggested because adding a natural person as an owner, control person, principal, or registered person who has, in the prior five years, one or more final criminal matters or two or more specified risk events could constitute a material change in business operations given the greater risk of harm to customers than the risk stemming from other associated persons. FINRA reiterated that IM–1011–3 is designed to prevent broker-dealers from relying on the IM–1011–1 safe harbor to avoid a materiality consultation—and any CMA that is subsequently required—when it seeks to add such persons.[70]

The Commission agrees with FINRA's assessment of what could constitute a material change in business operations. Specifically, the Commission believes that natural persons with a certain history of misconduct holding authority to control a firm's business operations may increase the risk of investor harm. Accordingly, limiting the interpretation of materiality to persons involved in sales as suggested by the commenter could weaken the effectiveness of the proposed rule change to protect investors and incentivize improved behavior. The Commission also notes that the materiality consultation process required by proposed Rule 1017(a)(7) would be similar to FINRA's existing materiality consultation process and would provide the member broker-dealer an opportunity to be heard on whether the contemplated change is material. Specifically, under proposed Rule 1017(a)(7), a member broker-dealer would submit a written request seeking a materiality consultation and addressing the issues that are central to the materiality consultation; as part of the materiality consultation, Member Regulation must consider the written request and other information or documents provided by the member, including whether the proposed association would materially impact the broker-dealer's business operations. If Member Regulation determines that a CMA is required, the CMA would be governed by the existing process set forth in FINRA Rule 1017 and the Rule 1010 Series, including its appeal rights. The Commission agrees with FINRA's assessment that these procedures would be similar to FINRA's existing materiality consultation process and would provide the member broker-dealer an opportunity to be heard on whether the contemplated change is material.[71]

The other commenter, critical of the proposed changes to the Rule 1000 Series, believes that the proposed rule changes are overbroad and that inclusion of settled matters as a

[64] In a teleconference between Michael Garawski, Associate General Counsel, Office of General Counsel, FINRA, and Daniel Fisher, Branch Chief, Division of Trading and Markets, Commission, on October 5, 2020, FINRA confirmed with the Division of Trading and Markets that between now and the effective date of the proposed rule change it has committed to including a clear explanation on BrokerCheck about what being subject to the Taping Rule means.

[65] According to FINRA, the cost of this proposed rule change would fall on the broker-dealers that seek to add owners, control persons, principals, or registered persons who meet the proposed criteria. These broker-dealers would be directly impacted through the requirements to seek a materiality consultation with FINRA and, potentially, to file a CMA. While there is no FINRA fee for seeking a materiality consultation, broker-dealers may incur internal costs or costs associated with engaging external experts in conjunction with filing a CMA. In addition, the proposed rule change could result in delays to a broker-dealer's ability to add owners, control persons, principals or registered persons who meet the proposed criteria, during the time the mandatory materiality consultation and any required CMA is being processed. These anticipated costs may deter some broker-dealers from hiring individuals meeting the proposed criteria, who as a result may find it difficult to remain in the industry. *See* Notice at 20758.

[66] *See* Better Markets Letter (stating that requiring materiality consultations before hiring is an important regulatory innovation); *see also* Notice at 20766.

[67] The proposed rule change would not prevent a firm from hiring an associated person with a history of ''final criminal matters'' or ''specified risk events.'' Instead, the proposed rule change would establish a system of investor protections tailored to the facts and circumstances for firms that do seek to hire such associated persons.

[68] *See* letter from Andrew R. Harvin, Partner, Doyle, Restrepo, Harvin & Robbins, LLP, to Jill M. Peterson, Assistant Secretary, Commission, dated April 28, 2020 (''Harvin Letter''); *see also* Lebenta Letter.

[69] *See* Harvin Letter.

[70] *See* FINRA July 2 Letter.

[71] *Id.*

criterion is ''indefensible.'' [72] FINRA considered this comment but did not exclude settled matters from the list of determining factors. Instead, FINRA chose not to include certain settled matters in the proposed rule changes to the Rule 1000 Series in order to exclude individuals who are less likely to subsequently pose risk of harm to customers.[73] Specifically, in order to focus its analysis on outcomes that are more likely associated with material customer harm, FINRA studied complaints that led to an award against a broker or settled above a de minimis threshold ($15,000), which is the current CRD settlement threshold for reporting customer complaints on Uniform Registration Forms. FINRA found that a proposal based on events disclosed on the Uniform Registration Forms, which are generally available to firms and FINRA, was important to avoid confusion and provide transparency about the events that will trigger the need for a materiality consultation.[74]

The Commission agrees that the proposed rule changes to the Rule 1000 Series are tailored sufficiently to achieving the goal of protecting investors from the risks associated with associated persons who have a significant history of misconduct. Specifically, the Commission agrees that excluding some settled matters from these thresholds is appropriate. For instance, recently settled matters are likely more indicative of an associated person's future misconduct than matters occurring over five years ago (absent any intervening disciplinary or other regulatory events); and individuals with a history of misconduct who have little or no control over a broker-dealer's activities may pose less threat to the broker-dealer's customers than individuals who can exercise some discretion when performing their jobs. Accordingly, settlements beyond the five-year lookback period and settlements by persons other than those seeking to be an owner, control person, principal, or registered person may have less relevance in achieving the goal of protecting investors from the risks associated with associated persons who have a significant history of misconduct.[75]

This commenter also argued that FINRA's proposed definition of a ''specified risk event''—a key triggering factor for the proposed enhanced membership application proceedings—is overbroad and would lead to unnecessary costs, burdens and disruptions for broker-dealer members.[76] As proposed, the definition would include any ''final investment-related, consumer initiated arbitration'' that results in an award or a settlement ''at or above $15,000.'' The commenter believes the use of arbitration awards and settlements with customers at such a ''low'' dollar threshold is over-inclusive and would not appropriately describe a ''risk event'' that should require a CMA or the proposed mandatory materiality consultation.[77]

FINRA disagrees with the commenter's assessment that the proposed definition of ''specified risk event'' attempts to replace the analysis conducted in a CMA with a bright-line rule that any customer arbitration at or above the $15,000 threshold is defined as creating a risk to investors.[78] Under proposed Rule 1017(a)(7), only arbitration awards or settlements meeting the specific parameters detailed in Rule 1017(a)(7) and IM–1011–3 would be considered for determining when a materiality consultation would be required.[79] Moreover, a single award or settlement would not necessarily require a materiality consultation. In fact, even if a person meets the Rule 1017(a)(7) standard, it would not necessarily mean a CMA is required or, if it is, that the broker-dealer could not satisfy FINRA's membership standards.[80] FINRA also stated that the dollar thresholds as proposed are appropriate given that settlements at that level are more likely to be associated with material customer harm [81] and they are the same thresholds as those used for determining appropriate disclosure events in FINRA's Uniform Registration Forms.[82] FINRA has noted that using different thresholds may result in less transparency to the public, registered persons, and broker-dealers.[83]

The Commission believes FINRA made a reasonable argument for including settlements of at least $15,000 in its study [84] and that its proposed definition of ''specified risk event'' furthers the goal of protecting investors from high risk associated persons. In addition, the Commission believes that the proposed criteria and definitions of ''final criminal matter'' and ''specified risk event'' would provide transparency regarding how the proposed rules would be applied, as the underlying events are based on disclosure events required to be reported on the Uniform Registration Forms. Accordingly, broker-dealers would be able to identify the specific set of disclosure events that would count towards the proposed criteria and, using available data, determine independently whether a proposed association with an individual would require a materiality consultation.

One commenter also challenged FINRA's statistical justification for the proposed rule change.[85] In particular, the commenter questioned whether the studies upon which FINRA relied adequately demonstrate that past disciplinary and other regulatory events associated with a member broker-dealer or individual can be predictive of similar future events, such as repeated disciplinary actions, arbitrations, and

[72] *See* Lebenta Letter (stating that the inclusion of settlements is indefensible by FINRA because respondents may choose to settle for any number of reasons that do not reflect the respondent's own liability). When Member Regulation evaluates compliance with the Rule 1000 Series, it takes into consideration, among other things, whether persons associated with an applicant are the subject of disciplinary actions taken against them by industry authorities, criminal actions, civil actions, arbitrations, customer complaints, remedial actions, or other industry-related matters that could pose a threat to public investors. Some of these matters are considered whether they are adjudicated, settled or pending. *See* Notice at 20752.

[73] *See* FINRA October 7 Letter.

[74] *See* FINRA Study at 9; *see also* Notice at 20761 and 20767.

[75] *Id.*

[76] *See* Lebenta Letter.

[77] *Id.* This commenter also argued that FINRA's inclusion of customer-initiated arbitration settlements for $15,000 or more in the statistics it used to measure the recent rate of disciplinary events was overly broad and thus does not support the premise of the proposed rule change that there is a pattern of increased risk to customers. Similarly, the commenter believes that relying on past violative conduct to predict future wrongdoing undermines the principle of due process and is not supported by FINRA's data. *But see* Better Markets Letter (opining that the proposed rule change would reflect an improvement over the status quo but is still insufficient, and that FINRA should do more to reduce the number of brokers with a significant history of misconduct and the prevalence of recidivism (*e.g.,* banning registered representatives with two criminal convictions or three ''specified risk events'' at a $5,000 level (instead of the proposed $15,000 level) and immediately and permanently expelling a broker-dealer where more than 20% of its registered representatives have three or more ''specified risk events'').

[78] *See* FINRA October 7 Letter (citing the Lebenta Letter).

[79] *See* FINRA October 7 Letter (outlining the proposed parameters including the lookback period, the number of disclosure events required, and the types of roles sought).

[80] *Id.*

[81] *Id.*

[82] *See supra* note 33.

[83] *See* FINRA October 7 Letter.

[84] *See* Hammad Qureshi & Jonathan Sokobin, Do Investors Have Valuable Information About Brokers? (FINRA Office of the Chief Economist Working Paper, Aug. 2015) (''FINRA Study''). The Commission believes the FINRA Study dealt with a common issue in empirical work, the tradeoff between an increase in statistical power that results from a larger sample size and the inclusion of data points that may not be of the most interest, and made a reasonable empirical design decision. Accordingly, contrary to the commenter's concern, the Commission believes that FINRA had a sound basis upon which to base the proposed rule change.

[85] *See* Lebenta Letter.

complaints.[86] The commenter suggested, among other things, that FINRA's reports used data (*i.e.,* violative events) to measure the likelihood of recidivist behavior that would not be the subject of a disciplinary action under the proposed rule change. Accordingly, the commenter did not believe FINRA's statistical evidence justified the proposed rule change, including the additional costs and loss of rights that would result from approving the proposed rule change.[87]

In response, FINRA reiterated its concern about the potential risks posed by broker-dealers that persistently employ associated persons who engage in misconduct, as well as its findings that past disciplinary and other regulatory events, such as repeated disciplinary actions, arbitrations and complaints associated with a member broker-dealer or individual can be predictive of similar future events.[88] Moreover, FINRA believes the estimated number of disclosure events associated with persons who appeal disciplinary decisions reflects a specific potential risk to investors.[89] FINRA asserted that the proposed rule change would adopt processes directly tailored to target this specific misconduct and minimize further investor harm.[90]

The Commission believes that the commenter's challenge to FINRA's statistical justification for the proposed rule change obfuscates the point of the FINRA Study. In its study, FINRA uses a model that predicts investor harm based on information publicly released in BrokerCheck and non-public Central Registration Depository data and found that 20% of the 181,133 brokers in their sample with the highest *ex ante* predicted probability of investor harm are associated with more than 55% of the investor harm events and more than 55% of total dollar harm. Accordingly, FINRA concluded that the risk of future harm is predictable.[91] The Commission believes that the methodology used in the FINRA Study had a sound statistical basis. The Commission understands the commenter's point that the FINRA Study measured the likelihood of recidivist behavior using data (*i.e.,* violative acts) that would not be captured under the proposed rule change; however, the Commission believes FINRA shows its result is not sensitive to a particular threshold value. In addition, while the Commission understands the commenter's point that FINRA continues the analysis through the year-end after the year in which the appeal reached a decision, the FINRA Study states that the complaint system tracks the date the complaint was filed but not the date of the actual occurrence of investor harm. The study makes a conservative assumption that the harm occurred the year before the filing so that when running a regression to predict an occurrence of harm, FINRA would not be predicting an event with data that was only available concurrently with or subsequent to the event.[92] Accordingly, the Commission believes that the methodology FINRA used to conduct its study had a sound statistical basis and that FINRA had a sound basis upon which to base the proposed rule change.

In sum, for the above reasons, the Commission believes that the proposed rule change would strengthen the tools available to FINRA in responding to associated persons who have a significant history of misconduct. In addition, the Commission believes that the proposed rule change has sufficiently tailored the proposed processes to target the specific misconduct it seeks to address, which would minimize the potential costs to broker-dealers. Moreover, the proposed rules would establish processes by which an associated person or broker-dealer would have adequate opportunities to challenge the imposed conditions and restrictions and seek further review.

Accordingly, the Commission finds the proposed rule change would result in greater investor protections by helping address the concerns raised by associated persons with a significant history of misconduct and the broker-dealers that employ them while narrowly tailoring the review process to mitigate the potential burdens on those individuals and broker-dealers.

IV. Conclusion

It Is Therefore Ordered pursuant to Section 19(b)(2) of the Exchange Act[93] that the proposed rule change (SR–FINRA–2020–011), as modified by Amendment No. 1, be, and hereby is, approved.

Jill M. Peterson,

Assistant Secretary.

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[86] *Id.* (stating that in the FINRA Study, the rate of new disclosure events by associated persons during the pendency of their appeals is less than 30%).

[87] *Id.* (arguing that the FINRA Study continued its analysis through the year-end after the year in which the appeal reached a decision thus skewing its results).

[88] *See* FINRA October 7 Letter; *see also* Notice at 20745–46, 20755 and note 5.

[89] *See* FINRA October 7 Letter; *see also* Notice at 20748.

[90] *See* FINRA October 7 Letter; *see also* Notice at 20750, 20754.

[91] *See* FINRA Study at 17. Additional academic research suggests that a higher rate of new disciplinary and other disclosure events is highly correlated with past disciplinary and other disclosure events, as far back as nine years prior. *See* Notice at note 5.

[92] *See* FINRA Study at 9–10.

[93] 15 U.S.C. 78s(b)(2).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90627; File No. SR–ICEEU–2020–013]

Self-Regulatory Organizations; ICE Clear Europe Limited; Order Approving Proposed Rule Change Relating to the ICE Clear Europe Investment Management Procedures

December 10, 2020.

I. Introduction

On October 23, 2020, ICE Clear Europe Limited (''ICE Clear Europe'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend its Investment Management Procedures (the ''Procedures'') to make certain clarifications and updates with respect to permissible investments.[3] The proposed rule change was published for comment in the **Federal Register** on November 5, 2020.[4] The Commission did not receive comments regarding the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description of the Proposed Rule Change

The proposed rule change would amend the Procedures to clarify the requirements for investment of customer funds by FCM/BD Clearing Members[5] resulting from the expansion of permitted investments to include qualifying Euro-denominated non-U.S. sovereign debt pursuant to an exemptive order issued by the U.S. Commodity

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing of Proposed Rule Change Relating to the ICE Clear Europe Investment Management Procedures, Exchange Act Release No. 90290 (October 30, 2020), 85 FR 70697 (November 5, 2020) (SR–ICEEU–2020–013) (''Notice'').

[4] *See* Notice *supra* note 3.

[5] Capitalized terms used but not defined herein have the meanings specified in the Procedures or the ICE Clear Europe Clearing Rules (the ''Rules''), as applicable.

Futures Trading Commission (the ''CFTC Order'').[6]

In Section 1 of the Procedures, ICE Clear Europe proposes to amend its investment management objective to clarify that the cash subject to investment excludes its corporate cash held for operating purposes, but would include cash held for the purposes of meeting ICE Clear Europe's contributions to the guaranty fund (referred to below as ''skin in the game''), maintaining its capital pursuant to applicable regulatory requirements (referred to below as ''regulatory capital''), or for any other purpose in connection with its daily treasury activities for the management of Clearing Members' margin or guaranty fund contributions. ICE Clear Europe represented that this clarification is consistent with current practice.[7]

In Section 2 of the Procedures, ICE Clear Europe proposes three main changes to its overall investment considerations, which are a list of criteria that ICE Clear Europe considers when making investments. First, it would clarify that the goal for non-overnight investments to have a variety of maturity dates only applies where applicable and thus not necessarily in all cases, such as investments in bank deposits. Second, it would amend the description of how futures commission merchant (''FCM'') customer funds may be invested by permitting investments in cash deposits, clarifying that direct purchases with U.S. dollar cash are limited to U.S. sovereign bonds, and providing that direct purchases with Euro cash may be made in French and German sovereign bonds as permitted in the CFTC Order. Third, it would clarify that ICE Clear Europe calculates the requirement of no more than 5% of the investible funds should be held as unsecured cash over an average period of one calendar month. In addition, ICE Clear Europe would make certain other typographical and similar corrections to this section of the Procedures.

ICE Clear Europe would also amend its table of authorized investments and concentration limits for cash from Clearing Members and from skin in the game to expand the investments in which ICE Clear Europe may invest such cash and skin in the game. This table identifies the permitted instruments for investment and then identifies, for each instrument: (i) The maximum issuer or counterparty concentration limits; (ii) the maximum portfolio concentration limits; (iii) the maximum maturity; and (iv) the minimum credit ratings of the instrument or allowed issuers of the instrument. The proposed rule change would retain the permitted investments currently listed in this table (*i.e.,* reverse repurchase agreements, US, UK, and EU sovereign obligations, US, UK, and EU government agency bonds, central bank obligations, and commercial bank obligations) and make four main changes with respect to the currently permitted instruments. First, it would apply the existing maximum issuer/counterparty concentration limit of 15% of the total EUR balance in a single government issuer only to government bonds issued by Belgium and the Netherlands, and provide no limit for French and German government bonds. Second, it would remove the current reference to the issuer limit and impose new maximum portfolio concentration limits for EU government bonds at 20% of the total EUR balance in a single issue for German or French government bonds, and 10% of the total EUR balance in a single issue for Belgian or Dutch government bonds. Third, for investments of FCM customer funds in EU government bonds, it would apply additional criteria as required in the CFTC Order, as described further below in the new defined term ''Permitted Purchases of Euro denominated debt for FCM Customer Funds'' in the Glossary section of the Procedures. Fourth, with respect to central bank deposits, it would add the Federal Reserve and the European Central Bank (ECB) to the list of allowed central banks. While ICE Clear Europe represented that it does not necessarily have access to deposits at such central banks at this time, the amendment would allow for possible future developments.[8]

The proposed rule change would also add a new instrument category of commercial bank deposits to ICE Clear Europe's table of authorized investments and concentration limits for its regulatory capital. This table currently lists US, UK, and EU sovereign obligations, and US, UK, and EU government agency bonds as the only permitted investments for ICE Clear Europe's regulatory capital. The addition of commercial bank deposits thus expands this list. For this instrument category, ICE Clear Europe would set unsecured cash limits separately for financial service providers; impose a maximum portfolio concentration limit at no more than 5% of the total investible funds in unsecured cash on average each calendar month; set the maximum maturity at overnight; and require minimum credit ratings of A–1/P–1.

The Procedures currently contain an additional table that describes the collateral acceptable for reverse repurchase agreements (also referred to below as ''reverse repo''). This table specifies the currency of the agreement, the currency of the collateral, the credit rating, the securities used as collateral, and the haircut applied by ICE Clear Europe. The proposed rule change would expand the scope of acceptable collateral for reverse repurchase agreements to allow ICE Clear Europe to use GBP and EUR agency bonds with AA–/Aa3 credit ratings and a 2% haircut. The proposed rule change would also remove the current credit rating requirement of AA–/Aa3 for UK and US sovereign bonds. For FCM customer funds invested in EUR reverse repurchase agreements, the proposed rule change would specify that only collateral meeting the CFTC Order requirements will be accepted.

ICE Clear Europe would also update the Glossary section of the Procedures to add central banks to the definition of ''Permitted Depositories for FCM Customer Funds'' where the CFTC has provided the relevant exemption to ICE Clear Europe. In addition, the proposed rule change would include a definition of the term ''Permitted Purchases of Euro denominated debt for FCM Customer Funds.'' This new definition would set forth the conditions under the CFTC Order for investment of FCM customer funds in euro-denominated sovereign debt issued by the French Republic and the Federal Republic of Germany.[9]

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization.[10] For the reasons given below, the Commission finds that the proposed

[6] Order Granting Exemption From Certain Provisions of the Commodity Exchange Act Regarding Investment of Customer Funds and From Certain Related Commission Regulations, 83 FR 35241, 35245 (July 25, 2018) (permitting the investment of futures and swap customer funds in euro-denominated debt issued by the French Republic and the Federal Republic of Germany under specified conditions, and granting other related limited exemptions to CFTC-registered derivatives clearing organizations or ''DCOs'').

[7] *See* Notice, 85 FR at 70697.

[8] *See* Notice, 85 FR at 70697.

[9] Specifically, the proposed definition of ''Permitted Purchases of Euro denominated debt for FCM Customer Funds'' would include the conditions listed in section (3)(a) through (d) in the CFTC Order. *See supra* note 6 at 35245.

[10] 15 U.S.C. 78s(b)(2)(C).

rule change is consistent with Section 17A(b)(3)(F) of the Act [11] and Rule 17Ad–22(e)(16).[12]

A. Consistency With Section 17A(b)(3)(F) of the Act

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of ICE Clear Europe be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, as well as to assure the safeguarding of securities and funds which are in the custody or control of ICE Clear Europe or for which it is responsible.[13]

The Commission believes that, by clarifying ICE Clear Europe's criteria for investments of cash received from Clearing Members and certain other cash it holds for skin in the game and regulatory capital, and updating the requirements for investment of customer funds by FCM/BD Clearing Members resulting from the CFTC's authorized expansion of permitted investments to include qualifying Euro-denominated sovereign debt, the proposed rule change generally should provide ICE Clear Europe with enhanced efficiency and flexibility in how it manages and invests customer funds and cash balances, in a manner consistent with applicable regulatory requirements. The Commission believes that these aspects of the proposed rule change would help to diversify permissible investments for such cash in a conservative manner that protects against loss. Thus, the Commission believes these aspects of the proposed rule change should ensure that ICE Clear Europe will have sufficient resources to promptly and accurately clear and settle securities transactions and, therefore, are consistent with Section 17A(b)(3)(F) of the Act.[14] Further, the Commission believes that the proposed amendments to add a new category of commercial bank deposits as an authorized investment for ICE Clear Europe's regulatory capital, to facilitate investments in bank deposits or other non-overnight investments by only requiring a variety of maturity dates where applicable, and to add GBP and EUR agency bonds with AA–/Aa3 credit ratings and a 2% haircut as acceptable collateral for reverse repo, should also enhance ICE Clear Europe's efficiency in meeting its investment management objective to safeguard the principal of cash and maintain sufficient liquidity for its payment obligations. By having defined investment criteria and conservative investment management procedures, the Commission believes that these aspects of the proposed rule change should also help to ensure that cash is invested reasonably, conservatively, and in a manner that protects against loss, which, in turn, should help to thereby assuring the safeguarding of securities and funds which are in the custody or control of ICE Clear Europe or for which it is responsible, and, therefore, are consistent with Section 17A(b)(3)(F) of the Act.[15]

Similarly, the Commission believes that by facilitating ICE Clear Europe's use of central bank deposits, including by expanding the list of allowed central banks; updating certain concentration and similar limits for investment in US, UK, and EU government bonds; and adding acceptable collateral for reverse repo, the proposed rule change would expand ICE Clear Europe's permitted investments to include investments that should be generally reasonable and conservative and have minimal credit, market, and liquidity risks. Moreover, the Commission believes that the other changes to the authorized investments discussed above, *i.e.,* eliminating the maximum issuer/counterparty concentration limit for French and German sovereign bonds, removing the credit rating requirement for UK and US sovereign bonds as acceptable collateral for reverse repo, and specifying that only collateral that meets the CFTC Order requirements is acceptable for FCM customer funds invested in EUR reverse repo, should not reduce the reasonableness or conservativeness of ICE Clear Europe's permitted investments. Thus, the Commission believes these aspects of the proposed rule change should provide ICE Clear Europe additional investment options that should help to safeguard skin in the game, regulatory capital, and Clearing Member cash against loss. Because the loss of skin in the game, regulatory capital, and Clearing Member cash could impair ICE Clear Europe's ability to operate and therefore clear and settle transactions and safeguard securities and funds, the Commission believes that these aspects of the proposed rule change should be consistent with Section 17A(b)(3)(F) of the Act.[16]

Therefore, for these reasons, the Commission finds that the proposed rule change should promote the prompt and accurate clearance and settlement of securities transactions and assure the safeguarding of securities and funds in ICE Clear Europe's custody and control, consistent with the Section 17A(b)(3)(F) of the Act.[17]

B. Consistency With Rule 17Ad–22(e)(16)

Rule 17Ad–22(e)(16) requires that ICE Clear Europe establish, implement, maintain and enforce written policies and procedures reasonably designed to, among other things, safeguard its own and its Clearing Members' assets, minimize the risk of loss of loss and delay in access to these assets, and invest such assets in instruments with minimal credit, market, and liquidity risks.[18] The Commission believes that by clarifying ICE Clear Europe's criteria for investments of cash, updating investment concentration limits and similar requirements for EU, US, and UK government bonds, and generally expanding permitted investment options to facilitate ICE Clear Europe's flexibility to diversify investments, the proposed rule change should help to ensure that ICE Clear Europe safeguards its own and its participants' assets—specifically, ICE Clear Europe's deposits of cash, which would include cash posted by Clearing Members to satisfy their margin and guaranty fund requirements—in a manner that should appropriately minimize the risk of loss or delay of such assets.

In addition, the proposed rule change would facilitate ICE Clear Europe's use of commercial and central bank deposits, in particular by adding the Federal Reserve and ECB to the list of allowed central banks to facilitate access to these deposits. Further, the proposed rule change would expand the scope of acceptable collateral in reverse repurchase agreements subject to appropriate limitations. The Commission believes these investments, as well as the investments currently permitted under the Procedures, constitute instruments with minimal credit, market, and liquidity risks. Therefore, the Commission believes the proposed rule change generally should help to ensure that ICE Clear Europe invests cash reasonably and in a manner that protects against loss which, in turn, should help ICE Clear Europe to safeguard its own and its Clearing Members' assets and invest such assets in instruments with minimal credit, market, and liquidity risks. For these reasons, the Commission finds that the

[11] 15 U.S.C. 78q–1(b)(3)(F).

[12] 17 CFR 240.17Ad–22(e)(16).

[13] 15 U.S.C. 78q–1(b)(3)(F).

[14] 15 U.S.C. 78q–1(b)(3)(F).

[15] 15 U.S.C. 78q–1(b)(3)(F).

[16] 15 U.S.C. 78q–1(b)(3)(F).

[17] 15 U.S.C. 78q–1(b)(3)(F).

[18] 17 CFR 240.17Ad–22(e)(16).

proposed rule change is consistent with Rule 17Ad–22(e)(16).[19]

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and in particular, with the requirements of Section 17A(b)(3)(F) of the Act[20] and Rule 17Ad–22(e)(16).[21]

It is therefore ordered pursuant to Section 19(b)(2) of the Act[22] that the proposed rule change (SR–ICEEU–2020–013), be, and hereby is, approved.[23]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–27597 Filed 12–15–20; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice 11278]

30-Day Notice of Proposed Information Collection: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. In accordance with the Paperwork Reduction Act of 1995 we are requesting comments on this collection from all interested individuals and organizations. The purpose of this Notice is to allow 30 days for public comment.

DATES: Submit comments up to January 15, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents to Pamela Watkins, Department of State, Office of Directives Management, who may be reached at *watkinspk@state.gov* or 202–485–2159.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.
- *OMB Control Number:* 1405–0193.
- *Type of Request:* Extension of a Currently Approved Collection.
- *Originating Office:* Office of Directives Management, A/GIS/DIR.
- *Form Number:* Various public surveys.
- *Respondents:* Individuals responding to Department of State customer service evaluation requests.
- *Estimated Number of Respondents:* 2,000,000.
- *Estimated Number of Responses:* 2,000,000.
- *Average Time per Response:* 3.5 minutes.
- *Total Estimated Burden Time:* 116,667 annual hours.
- *Frequency:* Once per request.
- *Obligation to Respond:* Voluntary.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

The information collection activity will garner qualitative customer feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. This qualitative feedback will provide insights into customer perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers. It will also allow feedback to contribute directly to the improvement of program management.

Feedback collected under this generic clearance will provide useful information, but it will not yield data that can be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: the target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

The 60-day Notice was published on July 15, 2020 (85 FR 42966). The annual burden was increased to 116,667 from 58,333 in this 30-day Notice to capture the impact of COVID–19 on Department services.

Methodology

Respondents will fill out a brief customer survey after completing their interaction with a Department Program Office or Embassy. Surveys are designed to gather feedback on the customer's experiences.

Zachary Parker,

Director.

[FR Doc. 2020–27636 Filed 12–15–20; 8:45 am]

BILLING CODE 4710–24–P

[19] 17 CFR 240.17Ad–22(e)(16).

[20] 15 U.S.C. 78q–1(b)(3)(F).

[21] 17 CFR 240.17Ad–22(e)(16).

[22] 15 U.S.C. 78s(b)(2).

[23] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[24] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Public Notice for Waiver for Aeronautical Land-Use Assurance at El Paso International Airport, El Paso, Texas

AGENCY: Federal Aviation Administration (FAA) DOT.

ACTION: Notice of intent for waiver of aeronautical land-use.

SUMMARY: The Federal Aviation Administration is considering a proposal to change a portion of the airport from aeronautical to nonaeronautical use and to authorize the conversion of the airport property. The proposal consists of one parcel of land containing a total of approximately 1,179.25 acres. Ownership of the associated property transferred land from the United States of America To the city of El Paso under the Surplus Property Act of 1944 on July 8, 1969. The land comprising this parcel is outside the forecasted need for aviation development and, thus, is no longer needed for indirect or direct aeronautical use. The income from the conversion of this parcel will benefit the aviation community by reinvestment into the airport.

Approval does not constitute a commitment by the FAA to financially assist in the conversion of the subject airport property nor a determination of eligibility for grant-in-aid funding from the FAA. The disposition of proceeds from the conversion of the airport property will be in accordance with FAA's policy and Procedures Concerning the Use of Airport Revenue, published in the **Federal Register** on February 16, 1999. In accordance with Section 47107(h) of Title 49, United States Code, this notice is required in the **Federal Register** 30 days before modifying the land-use assurance that requires the property to be used for an aeronautical purpose.

DATES: Comments must be received on or before January 11, 2021.

ADDRESSES: Send comments on this document to Mr. Jesse Carriger, Federal Aviation Administration, Manager, Texas Airports Development office, 10101 Hillwood Parkway, Fort Worth, TX 76177.

FOR FURTHER INFORMATION CONTACT: Mr. Sam Rodriquez, Director of Aviation El Paso International Airport, 6701 Convair Road, El Paso, Texas 79925, Ms. Sarah Conner Program Manager, Federal Aviation Administration, Texas Airports Development Office, ASW–650, 10101 Hillwood Parkway, Fort Worth, Texas 76177, telephone (817) 222–5682. Documents reflecting this FAA action may be reviewed at the above locations.

Issued in Fort Worth, Texas, on December 11, 2020.

Ignacio Flores,

Manager, Airports Division, FAA, Southwest Region.

[FR Doc. 2020–27688 Filed 12–15–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Request To Release Airport Property at the Monroe Regional Airport, Monroe, Louisiana

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of request to release airport property.

SUMMARY: The FAA proposes to rule and invite public comment on the release of land at the Monroe Regional Airport under the provisions of Section 125 of the Wendell H. Ford Aviation Investment Reform Act for the 21st Century (AIR 21).

DATES: Comments must be received on or before January 15, 2021.

ADDRESSES: Comments on this application may be mailed or delivered to the FAA at the following address: Mr. Lacey D. Spriggs, Manager, Federal Aviation Administration, Southwest Region, Airports Division, Louisiana/New Mexico Airports Development Office, ASW–640, Fort Worth, Texas 76177.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. C. Tom Janway, Airport Director, at the following address: 5400 Operations Road, Monroe, Louisiana 71203.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Tollefson, Program Manager, Federal Aviation Administration, Louisiana/New Mexico Airports Development Office, ASW–640, 10101 Hillwood Parkway, Fort Worth, Texas 76177; Telephone: (817) 222–5643; Email: *Richard.w.tollefson@faa.gov;* Fax: (817) 222–5989.

SUPPLEMENTARY INFORMATION: The FAA invites public comment on the request to release property at the Monroe Regional Airport under the provisions of the AIR 21.

The following is a brief overview of the request:

The City of Monroe requests the release of 0.223 acres of non-aeronautical airport property. The land was acquired by Deed without Warranty from the United States on September 08, 1949. The property to be released will be sold to allow for future development.

Any person may inspect the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**.

In addition, any person may, upon request, inspect the application, notice and other documents relevant to the application in person at the City of Monroe Legal Department, telephone number (318) 329–2240.

Issued in Fort Worth, Texas, on December 11, 2020.

Ignacio Flores,

Director, Office of Airports Southwest Region.

[FR Doc. 2020–27666 Filed 12–15–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Request To Release Airport Property at the El Paso International Airport, El Paso, Texas

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of request to release airport property.

SUMMARY: The FAA proposes to rule and invite public comment on the release of land at the El Paso International Airport under the provisions of Section 125 of the Wendell H. Ford Aviation Investment Reform Act for the 21st Century (AIR 21).

DATES: Comments must be received on or before January 15, 2021.

ADDRESSES: Comments on this application may be mailed or delivered to the FAA at the following address: Mr. Jesse Carriger, Manager, Federal Aviation Administration, Southwest Region, Airports Division, Texas Airports Development Office, ASW–650, 10101 Hillwood Parkway, Fort Worth, Texas 76177.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Sam Rodriguez, Director of Aviation, at the following address: 6701 Convair Road, El Paso, Texas 79925.

FOR FURTHER INFORMATION CONTACT: Ms. Sarah Conner, Program Manager, Federal Aviation Administration, Texas Airports Development Office, ASW–650, 10101 Hillwood Parkway, Fort Worth, Texas 76177, Telephone: (817) 222–5682, Email: *Sarah.Conner@faa.gov*, Fax: (817) 222–5989.

The request to release property may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA invites public comment on the request to release property at the El Paso International Airport under the provisions of the AIR 21. The following is a brief overview of the request:

The City of El Paso requests the release of 17.0868 acres of non-aeronautical airport property. The land was acquired by Deed without Warranty from the United States on August 21, 1972. The property to be released will be sold to allow for future development of the airport.

Any person may inspect the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**.

In addition, any person may, upon request, inspect the application, notice and other documents relevant to the application in person at the El Paso International Airport, telephone number (915) 212–0333.

Issued in Fort Worth, Texas on December 11, 2020.

Ignacio Flores,

Manager, Airports Division.

[FR Doc. 2020–27689 Filed 12–15–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2020–0028]

Qualification of Drivers; Exemption Applications; Hearing

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of applications for exemption; request for comments.

SUMMARY: FMCSA announces receipt of applications from 20 individuals for an exemption from the hearing requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) to operate a commercial motor vehicle (CMV) in interstate commerce. If granted, the exemptions would enable these hard of hearing and deaf individuals to operate CMVs in interstate commerce.

DATES: Comments must be received on or before January 15, 2021.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA–2020–0028 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/docket?D=FMCSA-2020-0028.* Follow the online instructions for submitting comments.
- *Mail:* Dockets Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2020–0028), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov/docket?D=FMCSA-2020-0028.* Click on the ''Comment Now!'' button and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

B. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to *http://www.regulations.gov/docket?D=FMCSA-2020-0028* and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

C. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.transportation.gov/privacy.*

II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The 20 individuals listed in this notice have requested an exemption from the hearing requirement in 49 CFR 391.41(b)(11). Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by statute.

The physical qualification standard for drivers regarding hearing found in § 391.41(b)(11) states that a person is physically qualified to drive a CMV if that person first perceives a forced whispered voice in the better ear at not

less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5–1951.

This standard was adopted in 1970 and was revised in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid, 35 FR 6458, 6463 (April 22, 1970) and 36 FR 12857 (July 3, 1971).

On February 1, 2013, FMCSA announced in a Notice of Final Disposition titled, ''Qualification of Drivers; Application for Exemptions; National Association of the Deaf,'' (78 FR 7479), its decision to grant requests from 40 individuals for exemptions from the Agency's physical qualification standard concerning hearing for interstate CMV drivers. Since that time the Agency has published additional notices granting requests from hard of hearing and deaf individuals for exemptions from the Agency's physical qualification standard concerning hearing for interstate CMV drivers.

III. Qualifications of Applicants

Hassan Abdi

Mr. Abdi, 30, holds a class A CPL in Minnesota.

Matthew Acken

Mr. Acken, 35, holds a class D license in Utah.

Ryan Bailey

Mr. Bailey, 28, holds a class E license in Florida.

Gage Burchett

Mr. Burchett, 28, holds a class D license in Virginia.

Andrew Cho

Mr. Cho, 26, holds a class D license in New York.

Jeffrey Daniel

Mr. Daniel, 52, holds a class C license in Nevada.

Tyler Davis

Mr. Davis, 25, holds a class C license in Texas.

Gabriel Despanie

Mr. Despanie, 61, holds a class A license in Louisiana.

Zachrey Gill

Mr. Gill, 23, holds a class E license in Michigan.

Nicholas Grabanski

Mr. Grabanski, 27, holds a class C license in Texas.

Michael Hartman

Mr. Hartman, 56, holds a class D license in Oklahoma.

Andrew Hatch

Mr. Hatch, 41, holds a class D license in Iowa.

Joshua Johnson

Mr. Johnson, 28, holds a class R license in Colorado.

William Lavender

Mr. Lavender, 64, holds a class A license in Ohio.

MarcKenzie Loriston

Mr. Loriston, 31, holds a class E license in Florida.

Ronald Pridgen

Mr. Pridgen, 57, holds a class C license in North Carolina.

Zachary Reagan

Mr. Reagan, 40, holds a class C license in Texas.

Michael L. Smith

Mr. Smith, 66, holds a class A license in North Carolina.

Carlos Sotelo Sanchez

Mr. Sanchez, 26, holds a class C license in California.

Matthew Spainhoward

Mr. Spainhoward, 34, holds a class D license in Kentucky.

IV. Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315(b), FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated under the **DATES** section of the notice.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–27650 Filed 12–15–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2020–0055; Notice 1]

Notice of Receipt of Petition for Decision That Nonconforming Model Year 2018 Harley Davidson Tri Glide Motorcycles Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, Department of Transportation (DOT).

ACTION: Receipt of petition.

SUMMARY: This document announces the National Highway Traffic Safety Administration (NHTSA) receipt of a petition for a decision that model year (MY) 2018 Harley Davidson Tri Glide motorcycles that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards (FMVSS), are eligible for importation into the United States because they are substantially similar to vehicles that were originally manufactured for sale in the United States and that were certified by their manufacturer as complying with the safety standards (the U.S.-certified version of the 2018 Harley Davidson Tri Glide motorcycles) and are capable of being readily altered to conform to the standards.

DATES: The closing date for comments on the petition is January 15, 2021.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited in the title of this notice and may be submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal Holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard along with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000, (65 FR 19477–78).

FOR FURTHER INFORMATION CONTACT: Robert Mazurowski, Office of Vehicle Safety Compliance, NHTSA (202–366–1012).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same MY as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable FMVSS.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice of each petition that it receives in the **Federal Register**, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

Skytop Rover Co., Inc., (Registered Importer R–6–343), of Philadelphia, Pensylvania has petitioned NHTSA to decide whether nonconforming MY 2018 Harley Davidson Tri Glide motorcycles are eligible for importation into the United States. The vehicles which Skytop Rover Co., Inc. believes are substantially similar are MY 2018 Harley Davidson Tri Glide motorcycles sold in the United States and certified by their manufacturer as conforming to all applicable FMVSS and are capable of being readily altered to conform to all applicable FMVSS.

Skytop Rover Co., Inc. submitted information with its petition intended to demonstrate that non-U.S. certified MY 2018 Harley Davidson Tri Glide motorcycles, as originally manufactured, conform to many applicable FMVSS, or are capable of being readily altered to conform to those standards. Specifically, the petitioner claims that the non-U.S. certified MY 2018 Harley Davidson Tri Glide motorcycles, as originally manufactured, conform to: FMVSS Nos. 106, *Brake Hoses*, 111, *Rear Visibility*, 116, *Motor Vehicle Brake Fluids*, 119, *New Pneumatic Tires for Motor Vehicles with a GVWR of More Than 4,536 kilograms (10,000 pounds) and Motorcycles*, 122, *Motorcycle Brake Systems*, 123, *Motorcycle Controls and Displays*, 205, *Glazing Materials*, and the requirements of 49 CFR part 565, *Vehicle Identification Requirements.*

The petitioner also contends that the subject non-U.S. certified vehicles are capable of being readily altered to meet the following FMVSS, in the manner indicated:

FMVSS No. 108, *Lamps, Reflective Devices, and Associated Equipment*: Rear lamps, headlight, side and rear reflectors, and turn signal lenses will need to be replaced. FMVSS No. 120, *Tire Selection and Rims and Motor Home/Recreation Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of More Than 4,536 kilograms (10,000 pounds)*: A tire placard will be added.

Authority: 49 U.S.C. 30141(a)(1)(A), (a)(1)(B), and (b)(1); 49 CFR 593.7; delegation of authority at 49 CFR 1.95 and 501.8.

Otto G. Matheke III,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2020–27690 Filed 12–15–20; 8:45 am]

BILLING CODE 4910–59–P

FEDERAL REGISTER

Vol. 85 Wednesday,
No. 242 December 16, 2020

Part II

Department of Energy

Federal Railroad Administration

10 CFR Part 430
Energy Conservation Program: Energy Conservation Standards for Fluorescent Lamp Ballasts; Final Rule

DEPARTMENT OF ENERGY

10 CFR Part 430

[EERE–2015–BT–STD–0006]

RIN 1905–AD51

Energy Conservation Program: Energy Conservation Standards for Fluorescent Lamp Ballasts

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Final determination.

SUMMARY: The Energy Policy and Conservation Act, as amended (''EPCA''), prescribes energy conservation standards for various consumer products and certain commercial and industrial equipment, including fluorescent lamp ballasts (''FLBs''). EPCA also requires the U.S. Department of Energy (''DOE'') to periodically determine whether more-stringent standards would be technologically feasible and cost effective, and would result in significant energy savings. In this final determination, DOE has determined that energy conservation standards for fluorescent lamp ballasts do not need to be amended.

DATES: The effective date of this final determination is December 16, 2020.

ADDRESSES: The docket for this rulemaking, which includes **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at *https://www.regulations.gov.* All documents in the docket are listed in the *https://www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

The docket web page can be found at *https://www.regulations.gov/document?D=EERE-2015-BT-STD-0006.* The docket web page contains instructions on how to access all documents, including public comments, in the docket.

For further information on how to review the docket, contact the Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: *ApplianceStandardsQuestions@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT:

Mr. John Cymbalsky, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–1692. Email: *ApplianceStandardsQuestions@ee.doe.gov.*

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I. Synopsis of the Final Determination

Title III, Part B [1] of the Energy Policy and Conservation Act, as amended (''EPCA''),[2] established the Energy Conservation Program for Consumer Products Other Than Automobiles. (42 U.S.C. 6291–6309) These products include fluorescent lamp ballasts, the subject of this final determination.

Pursuant to the EPCA requirement that not later than 6 years after issuance of any final rule establishing or amending an energy conservation standard for a covered product, DOE must publish either a notice of determination indicating that standards for the product do not need to be amended, or a notice of proposed rulemaking (''NOPR'') including new proposed energy conservation standards. (42 U.S.C. 6295(m)(1)(A) and (B))

[1] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

[2] All references to EPCA in this document refer to the statute as amended through America's Water Infrastructure Act of 2018, Public Law 115–270 (October 23, 2018).

DOE analyzed fluorescent lamp ballasts subject to standards specified in title 10 of the Code of Federal Regulations (''CFR'') 430.32(m). In addition, DOE evaluated whether current standards should be extended to additional fluorescent lamp ballasts. Specifically, DOE considered standards for dimming ballasts and 4-foot T8 medium bipin (''MBP'') programmed start (''PS'') ballasts with an average current less than 140 milliampere (''mA'') (hereafter low-current PS ballasts). Hence, potential amended energy conservation standards in this final determination refer not only to changes to existing standards but also extension of standards to additional fluorescent lamp ballasts.

DOE first analyzed the technological feasibility of more efficient fluorescent lamp ballasts. For those fluorescent lamp ballasts for which DOE determined it to be technologically feasible to have higher standards or be subject to standards, DOE estimated energy savings that would result from potential energy conservation standards by conducting a national impact analysis (''NIA''). DOE evaluated whether these amended standards would be cost effective by conducting life-cycle cost (''LCC'') and payback period (''PBP'') analyses, and estimated the net present value (''NPV'') of the total costs and benefits experienced by consumers. In addition to the consideration of these criteria, DOE conducted a manufacturer impact analyses (''MIA'').

Based on the results of these analyses summarized in section V of this document, DOE has determined that current standards for fluorescent lamp ballasts do not need to be amended because amended standards would not be cost effective and would not result in significant energy savings.

II. Introduction

The following section briefly discusses the statutory authority underlying this final determination, as well as some of the relevant historical background related to the establishment of standards for fluorescent lamp ballasts.

A. Authority

EPCA authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. Title III Part B of EPCA, established the Energy Conservation Program for Consumer Products Other Than Automobiles. These products include fluorescent lamp ballasts, the subject of this document. (42 U.S.C. 6292(a)(13)) EPCA prescribed energy conservation standards for these products (42 U.S.C. 6295(g)(5), and directs DOE to conduct future rulemakings to determine whether to amend these standards. (42 U.S.C. 6295(g)(7)(A)–(B)) Through amendments to EPCA under the Energy Policy Act of 2005 (''EPACT 2005''), Public Law 109–58, Congress promulgated new energy conservation standards for certain fluorescent lamp ballasts. (EPACT 2005 section 135(c)(2); codified at 42 U.S.C. 6295(g)(8)(A))

The energy conservation program under EPCA, consists essentially of four parts: (1) Testing, (2) labeling, (3) the establishment of Federal energy conservation standards, and (4) certification and enforcement procedures. Relevant provisions of the EPCA specifically include definitions (42 U.S.C. 6291), test procedures (42 U.S.C. 6293), labeling provisions (42 U.S.C. 6294), energy conservation standards (42 U.S.C. 6295), and the authority to require information and reports from manufacturers (42 U.S.C. 6296).

Subject to certain criteria and conditions, DOE is required to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of each covered product. (42 U.S.C. 6295(o)(3)(A) and 42 U.S.C. 6295(r)) Manufacturers of covered products must use the prescribed DOE test procedure as the basis for certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA and when making representations to the public regarding the energy use or efficiency of those products. (42 U.S.C. 6293(c) and 42 U.S.C. 6295(s)) Similarly, DOE must use these test procedures to determine whether the products comply with standards adopted pursuant to EPCA. (42 U.S.C. 6295(s)) The DOE test procedures for fluorescent lamp ballasts appear at title 10 CFR part 430, subpart B, appendix Q.

Federal energy efficiency requirements for covered products established under EPCA generally supersede State laws and regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a)–(c)) DOE may, however, grant waivers of Federal preemption in limited instances for particular State laws or regulations, in accordance with the procedures and other provisions set forth under EPCA. (See 42 U.S.C. 6297(d)).

Pursuant to the amendments contained in the Energy Independence and Security Act of 2007 (''EISA 2007''), Public Law 110–140, any final rule for new or amended energy conservation standards promulgated after July 1, 2010, is required to address standby mode and off mode energy use. (42 U.S.C. 6295(gg)(3)) Specifically, when DOE adopts a standard for a covered product after that date, it must, if justified by the criteria for adoption of standards under EPCA (42 U.S.C. 6295(o)), incorporate standby mode and off mode energy use into a single standard, or, if that is not feasible, adopt a separate standard for such energy use for that product. (42 U.S.C. 6295(gg)(3)(A)–(B)) DOE's current test procedure and standards for fluorescent lamp ballasts address standby mode and off mode energy use. In this analysis, DOE considers such energy use in its determination of whether energy conservation standards need to be amended.

DOE is issuing this final determination pursuant to 42 U.S.C. 6295(m), which states that DOE must periodically review its already established energy conservation standards for a covered product no later than 6 years from the issuance of a final rule establishing or amending a standard for a covered product. As a result of this review, DOE must either publish a determination that standards do not need to be amended or a NOPR, including new proposed standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)(1)) EPCA further provides that, not later than 3 years after the issuance of a final determination not to amend standards, DOE must make a new determination and publish either a notice of determination that standards for the product do not need to be amended, or a NOPR including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)(3)(B))

DOE must make the analysis on which the determination is based publicly available and provide an opportunity for written comment. (42 U.S.C. 6295(m)(2)) A determination that amended standards are not needed must be based on consideration of whether amended standards will result in significant conservation of energy, are technologically feasible, and are cost effective. (42 U.S.C. 6295(m)(1)(A) and 42 U.S.C. 6295(n)(2)) Additionally, any new or amended energy conservation standard prescribed by the Secretary for any type (or class) of covered product shall be designed to achieve the maximum improvement in energy efficiency which the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Among the factors DOE

considers in evaluating whether a proposed standard level is economically justified includes whether the proposed standard at that level is cost-effective, as defined under 42 U. S.C. 6295(o)(2)(B)(i)(II). Under 42 U.S.C. 6295(o)(2)(B)(i)(II), an evaluation of cost effectiveness requires that DOE consider savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price of, or initial charges for, or maintenance expenses of, the covered products that are likely to result from the standard. (42 U.S.C. 6295(n)(2) and 42 U.S.C. 6295(o)(2)(B)(i)(II))

B. Background

1. Current Standards

In a final rule published on November 14, 2011, DOE prescribed the current energy conservation standards for fluorescent lamp ballasts manufactured on and after November 14, 2014 (''2011 FL Ballast Rule''). 76 FR 70548. These standards require a minimum power factor of 0.9 or greater for ballasts that are not residential ballasts or 0.5 or greater for residential ballasts and a minimum ballast luminous efficiency (''BLE'') as set forth in DOE's regulations at 10 CFR 430.32(m) and repeated in Table II.1.

TABLE II.1—FEDERAL ENERGY CONSERVATION STANDARDS FOR FLUORESCENT LAMP BALLASTS

BLE = A / (1 + B * average total lamp arc power^−C) Where A, B, and C are as follows:			
Description	A	B	C
Instant start and rapid start ballasts (not classified as residential) that are designed and marketed to operate: 4-foot medium bipin lamps. 2-foot U-shaped lamps. 8-foot slimline lamps.	0.993	0.27	0.25
Programmed start ballasts (not classified as residential) that are designed and marketed to operate: 4-foot medium bipin lamps. 2-foot U-shaped lamps. 4-foot miniature bipin standard output lamps. 4-foot miniature bipin high output lamps.	0.993	0.51	0.37
Instant start and rapid start ballasts (not classified as sign ballasts) that are designed and marketed to operate 8-foot high output lamps	0.993	0.38	0.25
Programmed start ballasts (not classified as sign ballasts) that are designed and marketed to operate 8-foot high output lamps	0.973	0.70	0.37
Sign ballasts that are designed and marketed operate 8-foot high output lamps	0.993	0.47	0.25
Instant start and rapid start residential ballasts that are designed and marketed operate: 4-foot medium bipin lamps. 2-foot U-shaped lamps. 8-foot slimline lamps.	0.993	0.41	0.25
Programmed start residential ballasts that are designed and marketed to operate: 4-foot medium bipin lamps. 2-foot U-shaped lamps.	0.973	0.71	0.37

2. History of Standards Rulemaking for Fluorescent Lamp Ballasts

In support of the present review of the fluorescent lamp ballast energy conservation standards, DOE prepared the ''Energy Conservation Standards Rulemaking Framework Document for Fluorescent Lamp Ballasts'' (''Framework Document''), which describes the procedural and analytical approaches DOE anticipated using to evaluate energy conservation standards for fluorescent lamp ballasts. On June 23, 2015, DOE published a notice announcing the availability of the Framework Document. 80 FR 35886. The Framework Document is available in the docket provided under the **ADDRESSES** section. DOE held a public meeting on July 17, 2015, at which it described the various analyses that DOE would conduct as part of its review of the energy conservation standards for fluorescent lamp ballasts, such as the engineering analysis, the LCC and PBP analyses, and the NIA. Representatives for manufacturers, trade associations, environmental and energy efficiency advocates, and other interested parties attended the meeting. The transcript of the public meeting is available in the docket provided under the **ADDRESSES** section.

On October 22, 2019, DOE published a notice of proposed determination (''October 2019 NOPD'') with the initial determination that energy conservation standards for fluorescent lamp ballasts do not need to be amended. 84 FR 56540. DOE held a webinar on October 30, 2019 to discuss the analysis and results of the October 2019 NOPD. A transcript of the webinar is available in the docket provided under the **ADDRESSES** section.

DOE received six comments in response to the October 2019 NOPD from the interested parties listed in Table II.2.

TABLE II.2—OCTOBER 2019 NOPD WRITTEN COMMENTS

Organization(s)	Reference in this final determination	Organization type
Pacific Gas and Electric Company (PG&E), San Diego Gas and Electric (SDG&E), and Southern California Edison (SCE).	CA IOUs	Utilities.
Signify North America Corporation	Signify	Manufacturer.
National Electrical Manufacturers Association	NEMA	Trade Association.
Lutron Electronics Co., Inc	Lutron	Manufacturer.

TABLE II.2—OCTOBER 2019 NOPD WRITTEN COMMENTS—Continued

Organization(s)	Reference in this final determination	Organization type
Institute for Policy Integrity	IPI	Think Tank.
John Danison	Danison	Individual.

A parenthetical reference at the end of a comment quotation or paraphrase provides the location of the item in the public record.[3]

III. General Discussion

DOE developed the conclusions in this notice after considering oral and written comments, data, and information from interested parties that represent a variety of interests.

A. Product Classes and Scope of Coverage

When evaluating and establishing energy conservation standards, DOE divides covered products into product classes by the type of energy used or by capacity or other performance-related features that justify differing standards. In making a determination whether a performance-related feature justifies a different standard, DOE must consider such factors as the utility of the feature to the consumer and other factors DOE determines are appropriate. (42 U.S.C. 6295(q))

The product classes for this proposed determination are discussed in further detail in section IV.B.3 of this document. This final determination covers fluorescent lamp ballasts defined as devices that are used to start and operate fluorescent lamps by providing a starting voltage and current and limiting the current during normal operation. 10 CFR 430.2. The scope of coverage is discussed in further detail in section IV.B.1 of this document.

B. Test Procedure

EPCA sets forth generally applicable criteria and procedures for DOE's adoption and amendment of test procedures. (42 U.S.C. 6293) Manufacturers of covered products must use these test procedures to certify to DOE that their product complies with energy conservation standards and to quantify the efficiency of their product. DOE's current energy conservation standards for fluorescent lamp ballasts are expressed in terms of BLE. 10 CFR 430.32(m)

DOE initiated a review of the FLB test procedure and on March 18, 2019, published a notice of proposed rulemaking (NOPR) for the FLB test procedure. In that NOPR DOE proposed to (1) update references to industry standards, (2) clarify the selection of reference lamps, (3) provide a second stabilization option for measuring ballast luminous efficiency, (4) provide a test procedure for measuring the performance of ballasts at light outputs less than full light output, and (5) revise the test procedure for measuring standby mode energy consumption. 84 FR 9910. In the final rule published September 14, 2020 DOE adopted (1) updates to references to industry standards, (2) clarification of selection reference lamps, (3) a second stabilization option for measuring BLE and general updates to the stabilization steps, and (4) revision of the standby mode energy consumption test procedure. 85 FR 56475. DOE did not adopt the proposed test procedure for measuring performance of ballasts at light output less than full light output. 85 FR 56485

C. Technological Feasibility

1. General

In each energy conservation standards rulemaking, DOE conducts a screening analysis based on information gathered on all current technology options and prototype designs that could improve the efficiency of the products or equipment that are the subject of the rulemaking. As the first step in such an analysis, DOE develops a list of technology options for consideration in consultation with manufacturers, design engineers, and other interested parties. Section 6(c)(1) of 10 CFR part 430, subpart C, appendix A (the ''Process Rule''). DOE then determines which of those means for improving efficiency are technologically feasible. DOE considers technologies incorporated in commercially available products or in working prototypes to be technologically feasible. Sections 6(c)(3)(i) and 7(b)(1) of the ''Process Rule''.

After DOE has determined that particular technology options are technologically feasible, it further evaluates each technology option in light of the following additional screening criteria: (1) Practicability to manufacture, install, and service; (2) adverse impacts on product utility or availability; (3) adverse impacts on health or safety; and (4) unique-pathway proprietary technologies. Sections 6(c)(3)(ii)–(v) and 7(b)(2)–(5) of the Process Rule. Section IV.C of this document discusses the results of the screening analysis for fluorescent lamp ballasts, particularly the designs DOE considered, those it screened out, and those that are the basis for the standards considered in this rulemaking. For further details on the screening analysis for this rulemaking, see chapter 4 of the final determination technical support document (''TSD'').

2. Maximum Technologically Feasible Levels

When DOE considers amended standards for a type or class of covered product, it must determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible for such product. (42 U.S.C. 6295(p)(1)) Accordingly, in the engineering analysis, DOE determined the maximum technologically feasible (''max-tech'') improvements in energy efficiency for fluorescent lamp ballasts, using the design parameters for the most efficient products available on the market or in working prototypes. The max-tech levels that DOE determined for this rulemaking are described in section IV.D of this final determination and in chapter 5 of the final determination TSD.

D. Energy Savings

1. Determination of Savings

For each efficiency level (''EL''), DOE projected energy savings from the application of the EL to fluorescent lamp ballasts purchased in the 30-year period that begins in the year of compliance with the potential standards

[3] The parenthetical reference provides a reference for information located in the docket of DOE's rulemaking to develop energy conservation standards for fluorescent lamp ballasts. (Docket No. EERE- EERE–2015–BT–STD–0006, which is maintained at *http://www.regulations.gov/docket?D=EERE-2015-BT-STD-0006*). The references are arranged as follows: (commenter name, comment docket ID number at page of that document).

(2023–2052).[4] The savings are measured over the entire lifetime of fluorescent lamp ballasts purchased in the 30-year analysis period. DOE quantified the energy savings attributable to each EL as the difference in energy consumption between each standards case and the no-new-standards case. The no-new-standards case represents a projection of energy consumption that reflects how the market for a product would likely evolve in the absence of amended energy conservation standards.

DOE used its NIA spreadsheet models to estimate national energy savings (''NES'') from potential amended standards for fluorescent lamp ballasts. The NIA spreadsheet model (described in section IV.I of this document) calculates energy savings in terms of site energy, which is the energy directly consumed by products at the locations where they are used. For electricity, DOE reports NES in terms of primary energy savings, which is the savings in the energy that is used to generate and transmit the site electricity. For natural gas, the primary energy savings are considered to be equal to the site energy savings. DOE also calculates NES in terms of full fuel cycle (''FFC'') energy savings. The FFC metric includes the energy consumed in extracting, processing, and transporting primary fuels (*i.e.,* coal, natural gas, petroleum fuels), and thus presents a more complete picture of the impacts of energy conservation standards.[5] DOE's approach is based on the calculation of an FFC multiplier for each of the energy types used by covered products or equipment. For more information on FFC energy savings, see section V.A.2.a of this document.

2. Significance of Savings

In determining whether amended standards are needed, DOE must consider whether such standards will result in significant conservation of energy. (42 U.S.C. 6295(m)(1)(A); 42 U.S.C. 6295(n)(2)) The term ''significant'' is not defined in EPCA. DOE has established a significance threshold for energy savings. (See Section 6(b) of the Process Rule.) In evaluating the significance of energy savings, DOE conducts a two-step approach that considers both an absolute site energy savings threshold and a threshold that is the percent reduction in the covered energy use. *Id.* DOE first evaluates the projected energy savings from a potential max-tech standard over a 30-year period against a 0.3 quads of site energy threshold. (See Section 6(b)(2) of the Process Rule.) If the 0.3 quad-threshold is not met, DOE then compares the max-tech savings to the total energy usage of the covered equipment to calculate a percentage reduction in energy usage. (See Section 6(b)(3) of the Process Rule.) If this comparison does not yield a reduction in site energy use of at least 10 percent over a 30-year period, DOE proposes that no significant energy savings would likely result from setting new or amended standards. (See Section 6(b)(4) of the Process Rule.) The two-step approach allows DOE to ascertain whether a potential standard satisfies EPCA's significant energy savings requirements in 42 U.S.C. 6295(o)(3)(B) to ensure that DOE avoids setting a standard that ''will not result in significant conservation of energy.''

EPCA defines ''energy efficiency'' as the ratio of the useful output of services from a consumer product to the *energy use* of such product, measured according to the Federal test procedures. (42 U.S.C. 6291(5), *emphasis added*) EPCA defines ''energy use'' as the quantity of energy directly consumed by a consumer product at point of use, as measured by the Federal test procedures. (42 U.S.C. 6291(4)) Further, EPCA uses a household energy consumption metric as a threshold for setting standards for new covered products. (42 U.S.C. 6295(l)(1)(A–B)) Given this context, DOE relies on site energy as the appropriate metric for evaluating the significance of energy savings.

At the time of the October 2019 NOPD analysis, the two-step approach to determining significant energy savings had not been finalized. In the October 2019 NOPD, DOE reported the projected site energy savings over a 30-year analysis period for each EL evaluated. DOE tentatively determined in the October 2019 NOPD that amended standards at the evaluated ELs would not be cost effective. 84 FR 56540, 56583.

E. Cost Effectiveness

Under EPCA's six-year-lookback review provision for existing energy conservation standards at 42 U.S.C. 6295(m)(1), cost-effectiveness of potential amended standards is a relevant consideration both where DOE proposes to adopt such standards, as well as where it does not. In considering cost-effectiveness when making a determination of whether existing energy conservation standards do not need to be amended, DOE considers the savings in operating costs throughout the estimated average life of the covered product compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered product that is likely to result from a standard. (42 U.S.C. 6295(m)(1)(A)(*referencing* 42 U.S.C. 6295(n)(2))) Additionally, any new or amended energy conservation standard prescribed by the Secretary for any type (or class) of covered product shall be designed to achieve the maximum improvement in energy efficiency which the Secretary determines is technologically feasible and economically justified. 42 U.S.C. 6295(o)(2)(A) Cost-effectiveness is one of the factors that DOE must ultimately consider under 42 U.S.C. 6295(o)(2)(B) to support a finding of economic justification, if it is determined that amended standards are appropriate under the applicable statutory criteria. (42 U.S.C. 6295(o)(2)(B)(i)(II))

F. Other Analyses

In addition to the analyses conducted in consideration of the statutory criteria under EPCA's periodic review requirement at 42 U.S.C. 6295(m)(1), DOE also conducted an MIA that determines the potential economic impact of amended standards on FLB manufacturers.

The analyses employed by DOE in its consideration of each of the criteria applied are discussed in the following sections.

IV. Methodology and Discussion of Related Comments

This section addresses the analyses DOE has performed for this final determination with regards to fluorescent lamp ballasts. Separate subsections address each component of DOE's analyses and respond to comments received.

A. Analysis Approach and Determination

DOE conducted several analyses (described in the following subsections) to estimate the impact of the standards considered in this document. Several of these analyses utilized spreadsheets as tools to generate quantitative results. The first spreadsheet calculates the LCC savings and PBP of potential amended or new energy conservation standards. The NIA uses a second spreadsheet set that provides shipments projections and calculates NES and net NPV of total consumer costs and savings expected to result from potential energy conservation standards. DOE uses the third spreadsheet, the Government

[4] DOE also presents a sensitivity analysis that considers impacts for products shipped in a 9-year period.

[5] The FFC metric is discussed in DOE's statement of policy and notice of policy amendment. 76 FR 51282 (Aug. 18, 2011), as amended at 77 FR 49701 (Aug. 17, 2012).

Regulatory Impact Model (''GRIM''), to assess manufacturer impacts of potential standards. These three spreadsheet tools are available on the DOE website for this rulemaking: *https://www.regulations.gov/docket?D=EERE-2015-BT-STD-0006.*

DOE received several comments on its analytical approach. IPI stated that by not including an analysis of potential emissions reductions from setting higher efficiency standards for fluorescent lamp ballasts DOE violated the statutory requirements. (IPI, No. 26 at p. 1) First, IPI discussed the significance of energy conservation criteria and asserted that even if significance of the energy conservation, technological feasibility, and cost effectiveness are the criteria for a determination, emissions reductions are directly relevant to the ''significance'' of the energy savings. Further, IPI stated that ''significance'' can be evaluated by comparing whether the ''value'' of energy savings ''outweighed'' the ''cost'' (citing *NRDC* v. *Herrington,* 768 F.2d 1355, 1374 n.19 (D.C. Cir. 1985)) and under that interpretation, environmental benefits should be a central factor in weighing the significance of energy savings. (IPI, No. 26 at p. 2) IPI further asserted EPCA provides analogous factors to the ''significance of energy'' criteria, such as consideration of the ''need for national energy . . . conservation'' in evaluating the economic justification for standards, which include consideration of environmental effects, and that DOE must consider these additional factors. (IPI, No. 26 at pp. 2, 3; referencing *Zero Zone Inc.* v. *Dept. of Energy,* 832 F.3d 654, 677 (7th Cir. 2016)) IPI also relied on court interpretations of statutory authority other than that governing the Appliance Standards Program. (IPI, No. 26 at p. 3)

Second, IPI discussed DOE's reliance on cost effectiveness rather than economic justification for the determination. IPI stated that DOE summarizes it review of standards as fulfilling the requirements ''to periodically determine whether more stringent, amended standards would be technologically feasible and economically justified'', but failed to explain why it ignored the factors for determining if a standard is economically justified. IPI asserted that there are two possible outcomes outlined in 42 U.S.C. 6295(m)(1) of a single review process and that criteria for developing an amended standard should be relevant in determination if amended standards are appropriate or not, which includes ''the need for nation energy . . . conservation''. (IPI, No. 26 at pp. 2–3)

Additionally, IPI stated that by not including an analysis of the potential emissions reductions and the monetized values of such reductions, DOE violated the 2015 Framework Document, which described emissions analysis as part of the methodology DOE would employ. Additionally, IPI stated DOE contravened past DOE practices of routinely analyzing emissions and considering the social cost of greenhouse gasses in its analysis. (IPI, No. 26 at p. 1)

DOE disagrees with IPI's characterization of the statutory requirements applicable in the present case. In the Process Rule, DOE defined how to determine significance of energy savings under EPCA and developed a two-step process to make that determination. (See 85 FR 8703, 8655–8676.) In this rulemaking DOE applied the two-step approach which considers both an absolute site energy savings threshold and a threshold that is the percent reduction in the covered energy use. (See Section 6(b) of the Process Rule.)

Further, as stated in section II.A of this document, DOE is issuing this final determination pursuant to periodic review required under 42 U.S.C. 6295(m). Section 6295(m) provides that not later than 6 years after issuance of any final rule establishing or amending a standard, the Secretary of Energy (''Secretary'') shall publish (A) a notice of the determination of the Secretary that standards for the product do not need to be amended, based on the criteria established under subsection (n)(2); or (B) a notice of proposed rulemaking including new proposed standards based on the criteria established under subsection (o) and the procedures established under subsection (p). (42 U.S.C. 6295(m)(1)(A) and (B)) The statute plainly provides two separate sets of criteria—one set for a determination that standards do not need to be amended, and one set for proposed standards. The criteria that are the basis for proposed standards include the requirements that any new or amended standard for a covered product must be designed to achieve the maximum improvement in energy efficiency that the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(m)(1)(B) and 42 U.S.C. 6295(o)(2)(A) and 42 U.S.C. 6295(3)(B)) A determination of ''economically justified'' requires consideration of seven factors,[6] including the ''need for national energy conservation'' factor cited by IPI. (42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII))

However, DOE did not propose amended or new standards for fluorescent lamp ballasts, and is not adopting any such amendments. DOE proposed to determine that energy conservation standards for fluorescent lamp ballasts do not need to be amended. EPCA explicitly provides a more limited set of criteria on which a determination that standards do not need to be amended must be based. Such a determination must be based on consideration of whether amended standards will result in significant conservation of energy, are technologically feasible, and are *cost effective.* (42 U.S.C. 6295(m)(1)(A) and 42 U.S.C. 6295(n)(2); *emphasis added*) The ''cost effective'' consideration is a more limited consideration than the ''economically justified'' consideration required for proposing and adopting amended energy conservation standards.

EPCA specifies that consideration of cost effectiveness requires DOE consider, only one of the seven factors for economic justification, savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the standard. (42 U.S.C. 6295(n)(2) and 42 U.S.C. 6295(o)(2)(B)(i)(II)) The cost effectiveness evaluation required by the plain language of EPCA requires DOE to evaluate impacts to consumers (*i.e.,* operating costs and increase in initial price). DOE has historically addressed the ''cost effectiveness'' criterion

[6] In deciding whether a proposed standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens. (42 U.S.C. 6295(o)(2)(B)(i)) DOE must make this determination after receiving comments on the proposed standard, and by considering, to the greatest extent practicable, the following seven statutory factors: (1) The economic impact of the standard on manufacturers and consumers of the products subject to the standard; (2) the savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the standard; (3) the total projected amount of energy (or as applicable, water) savings likely to result directly from the standard; (4) any lessening of the utility or the performance of the covered products likely to result from the standard; (5) the impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the standard; (6) the need for national energy and water conservation; and (7) other factors the Secretary considers relevant. (42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII))

through LCC, PBP, and NPV analyses,[7] and has continued to do so in the present case. IPI's reliance on the ''need for national energy conservation'' and related interpretations are misplaced. EPCA does not direct DOE to consider the ''need for national energy conservation'' as part of a determination that energy conservation standards do not need to be amended.

In advance of the October 2019 NOPD, DOE prepared the Framework Document, which describes the procedural and analytical approaches DOE anticipated using to evaluate FLB standards. As stated in that document, the Framework Document provided a starting point for developing standards used to facilitate input and was not definitive with respect to any issue to be determined in the rulemaking. (Framework Document, No. 1 at p. 1) Discussion of an emissions analysis in the Framework Document was presented in the context of the analyses DOE would expect to conduct for a NOPR, *i.e.,* analyses that would be conducted in support of proposed standards. (Framework Document, No. 1 at pp. 5–6) As stated, DOE is not proposing new or amended standards for fluorescent lamp ballasts.

DOE received general comments agreeing with its tentative conclusion in the October 2019 NOPD that amended FLB standards are not warranted. NEMA, Signify, Lutron, and CA IOUs agreed with DOE's proposed determination to not amend FLB standards. (NEMA, No. 24 at p. 2; Signify, No. 27 at p. 2; Signify, Public Meeting Transcript, No. 21 at p. 50; Lutron, No. 23 at p. 2; CA IOUs, No. 25 at p. 1) CA IOUs stated that because of the steady decline of ballast shipments due to advances in light-emitting diode (''LED'') luminaires, the changes in ballast technology to achieve what would be minimal energy savings are not warranted and would also likely not be cost effective. (CA IOUs, No. 25 at p. 2) Lutron also cited the small potential for energy savings and conclusions of DOE's NPV analysis as reasons not to amend standards. (Lutron, No. 23 at p. 2) NEMA stated that manufacturers are focusing on LED lighting systems and are not investing now or in the future in fluorescent ballast technology. NEMA stated that any changes to existing standards would result in manufacturers discontinuing products, thereby limiting product availability. NEMA stated that the burdens and negative impacts of such actions would not be outweighed by the minor energy savings that may remain at the max tech efficiency level. (NEMA, No. 24 at pp. 1–3) Signify added that regulatory action was not necessary to accelerate the transition from fluorescent lighting to LED lighting. (Signify, No. 27 at p. 2) Lutron agreed that amended standards would result in discontinuing products that in turn could require end users to replace entire systems when doing only minor retrofits or replacing failed components. (Lutron, No. 23 at p. 2)

NEMA asserted that there is naturally-occurring market adoption of LED technology by users of fluorescent technology. NEMA stated that the switch to LED fixtures can be triggered by (1) newer lamp/older ballast compatibility problems in lamp replacements, (2) ballast failure, (3) reducing electricity operating costs, or (4) building renovation. NEMA added that lower cost and longer life are driving forces for migration away from FLB technology, and this consumer and technology driven shift is a good example of ''other than regulatory action'' accomplishing an intended outcome without government regulation. NEMA concluded that regulations that impacted cost or availability of products to hasten migration to other technology are unnecessary. (NEMA, No. 24 at pp. 5–6)

Lutron requested that if DOE changed the conclusion of the proposed determination based on stakeholder comments, a supplementary NOPR or similar document with an updated analysis be published for comment. (Lutron, No. 23 at p. 2)

In this final determination, DOE is finalizing its initial conclusion that changes to FLB standards are not warranted (see section V.B for further details). The following sections describe the analyses DOE conducted in support of this final determination.

B. Market and Technology Assessment

DOE develops information in the market and technology assessment that provides an overall picture of the market for the products concerned, including the purpose of the products, the industry structure, manufacturers, market characteristics, and technologies used in the products. This activity includes both quantitative and qualitative assessments, based primarily on publicly-available information. The subjects addressed in the market and technology assessment for this rulemaking include: (1) A determination of the scope of the rulemaking and product classes, (2) manufacturers and industry structure, (3) existing efficiency programs, (4) shipments information, (5) market and industry trends, and (6) technologies or design options that could improve the energy efficiency of fluorescent lamp ballasts. The key findings of DOE's market assessment are summarized in the following sections. See chapter 3 of the Final Determination TSD for further discussion of the market and technology assessment.

1. Scope of Coverage

Fluorescent lamp ballast means a device that is used to start and operate fluorescent lamps by providing a starting voltage and current and limiting the current during normal operation. 10 CFR 430.2. In this analysis, DOE relied on the definition of ''fluorescent lamp'' in 10 CFR 430.2, which provides the specific lamp lengths, bases, and wattages included by the term. Any product meeting the definition of fluorescent lamp ballast is included in DOE's scope of coverage, though all products within the scope of coverage may not be subject to standards.

As part of its review of energy conservation standards for fluorescent lamp ballasts, DOE evaluated whether current standards should be extended to additional fluorescent lamp ballasts.

Fluorescent lamp ballasts manufactured on or after November 14, 2014, that are designed and marketed to operate at an input voltage at or between 120 volts (V) and 277 V, to operate with an input current frequency of 60 hertz, and for use with fluorescent lamps as defined in 10 CFR 430.2 are currently required to comply with the energy conservation standards at 10 CFR 430.32(m)(1).

Fluorescent lamp ballasts manufactured on or after November 14, 2014, that are designed and marketed to operate at an input voltage at or between 120 and 277 V; to operate with an input current frequency of 60 hertz for dimming to 50 percent or less of the maximum output of the ballast; and to operate one or two F34T12 lamps, two F96T12 Energy Saver (''ES'') lamps, or two F96T12 high output (''HO'') ES lamps are required to comply with the energy conservation standards at 10 CFR 430.32(m)(2).

The following fluorescent lamp ballasts are exempt from standards: (1) A dimming ballast designed and marketed to operate exclusively lamp types other than one F34T12, two

[7] *See e.g.,* 76 FR 70548, 70595 (''Consumers affected by new or amended standards usually experience higher purchase prices and lower operating costs. Generally, these effects on individual consumers are best summarized by changes in LCCs and by the payback period.'') and 76 FR 70548, 70562 (''For consumers in the aggregate, DOE calculates the NPV from a national perspective of the economic impacts on consumers over the forecast period used in a particular rulemaking.'')

F34T12, two F96T12/ES, or two F96T12HO/ES lamps; (2) a low-frequency ballast that is designed and marketed to operate T8 diameter lamps, is designed and marketed for use in electromagnetic interference-sensitive-environments only, and is shipped by the manufacturer in packages containing 10 or fewer ballasts; and (3) a programmed start ballast that operates 4-foot medium bipin T8 lamps and delivers on average less than 140 mA to each lamp. 10 CFR 430.32(m)(3).

Of these exemptions, in the October 2019 NOPD, DOE included in the analysis all fluorescent lamp ballasts that are dimmable and PS ballasts operating 4-foot MBP T8 lamps and using less than 140 mA (*i.e.,* low-current PS ballasts). 84 FR 56540, 56545–56548.

In the October 2019 NOPD, DOE determined that alternative options such as using PS ballasts with operating current at 140 mA or higher, paired with reduced-wattage lamps or decreasing the number of lamps in the system could provide low light output levels comparable to those attained using low-current PS ballasts. DOE identified lamp-and-ballast replacements that maintained system light output within 10 percent of a lamp-and-ballast system using a low-current PS ballast and saved energy. Because reasonable alternatives to providing low light output utility offered by low-current PS ballasts were available, DOE found no reason to continue the exemption of low-current PS ballasts. DOE did not receive any comments on this assessment. 84 FR 56540, 56547. In this final determination, DOE continued to include low-current PS ballasts in the analysis.

In the October 2019 NOPD, DOE determined that standards for dimming ballasts could potentially result in energy savings. Since the 2011 FL Ballast Rule, DOE has observed an increase in dimming products. DOE's review of manufacturer catalogs indicates a wide range of dimming ballast products available for use with several lamp types.[8] Further, DOE has observed a range of efficiencies for dimming ballasts, indicating that less efficient products can be improved. Additionally, state and local regulations and building codes with increased dimming and/or lighting control requirements (*e.g.,* CA Title 24 and ANSI/ASHRAE/IES Standard 90.1–2016 [9]) will continue to support installation of dimming ballasts in the near future. 84 FR 56540, 56545–56546. DOE did not receive any comments on this assessment. In this final determination, DOE continued to include dimming ballasts in the analysis.

In summary, in addition to fluorescent lamp ballasts subject to current energy conservation standards, in this analysis DOE evaluated all fluorescent lamp ballasts that are dimmable and PS fluorescent lamp ballasts that operate 4-foot T8 MBP lamps and deliver on average less than 140 mA to each lamp.

2. Metric

DOE's current energy conservation standards for fluorescent lamp ballasts are expressed in terms of BLE. It is calculated using the following equation where A, B, and C are predefined constants and power is the total lamp arc power operated by a ballast (see section IV.D.4 for further details):

$$BLE = \frac{A}{1 + B * power^{-C}}$$

NEMA stated that the constants used to determine BLE would need to be adjusted for dimming ballasts as these ballasts have greater fixed losses due to the additional functionality. (NEMA, No. 24 at p. 3)

In this final determination, as in the October 2019 NOPD, DOE evaluated dimming ballasts as a separate product class in order to account for the added circuitry in dimming ballasts that make them less efficient than comparable standard ballasts. (*See* section IV.B.3 and 84 FR 56540, 56555–6). Because dimming ballasts have a separate set of efficiency levels, a separate equation to account for their lower efficiency compared to standards ballasts is not required.

NEMA stated that due to complications in evaluating cathode heat losses, effective and repeatable BLE measurements of dimming ballasts could only be taken at full light output. (NEMA, No. 24 at p. 3) Signify agreed stating that at full light output when the filament (*i.e.,* cathode) heating circuit is disconnected. (Signify, No. 27 at p. 1) NEMA also commented that as ballasts enter dimming mode, the operational frequency increases, as well introducing instrument uncertainty. Additionally, NEMA stated that while no change is required to the current DOE test procedure for measuring dimming ballasts at 100 percent light output, at any other light output, a new test circuit and multiport power analyzer equipment would be required. (NEMA, No. 24 at p. 3)

No comments were received suggesting that dimming ballasts be tested at an output other than 100 percent.

This analysis is based on measuring the BLE at full light output for all ballasts, including dimming ballasts.

3. Product Classes

In general, when evaluating and establishing energy conservation standards, DOE divides the covered product into classes by: (1) The type of energy used; (2) the capacity of the product; or (3) any other performance-related feature that affects energy efficiency and justifies different standard levels, considering factors such as consumer utility. (42 U.S.C. 6295(q)(1))

In the October 2019 NOPD, DOE assessed the product classes shown in the following list in its analysis. 84 FR 56540, 56556. In describing product classes, DOE includes the types of lamps each class of ballast operates. In the October 2019 NOPD, DOE updated the lamp types for existing product classes based on a review of the latest product offerings on the market and added 4-foot miniature bipin (MiniBP) standard output (''SO'') and 4-foot MiniBP HO lamp types to the instant start (''IS'')/rapid start (''RS'') (not classified as residential), IS/RS residential, and PS residential product classes. *Id.* Additionally, DOE evaluated dimming ballasts as a separate product class. *Id.* at 84 FR 56555. The product classes assessed are as follows:

(1) IS and RS ballasts (not classified as residential) that operate
  (a) 4-foot MBP lamps
  (b) 2-foot U-shaped lamps
  (c) 4-foot MiniBP SO lamps
  (d) 4-foot MiniBP HO lamps
  (e) 8-foot single pin (''SP'') slimline lamps
(2) PS ballasts (not classified as residential) that operate
  (a) 4-foot MBP lamps
  (b) 2-foot U-shaped lamps
  (c) 4-foot MiniBP SO lamps
  (d) 4-foot MiniBP HO lamps
(3) IS and RS ballasts (not classified as sign ballasts) that operate
  (a) 8-foot HO lamps
(4) PS ballasts (not classified as sign ballasts) that operate
  (a) 8-foot HO lamps
(5) Sign ballasts that operate
  (a) 8-foot HO lamps
(6) IS and RS residential ballasts that operate

[8] Specifically, 4-foot MBP lamps, 2-foot U-shaped lamps, 4-foot MiniBP SO lamps, and 4-foot MiniBP HO lamps.

[9] American Society of Heating, Refrigerating, and Air-Conditioning Engineers. *ANSI/ASHRAE/IES Standard 90.1–2016—Energy Standard for Buildings Except Low-Rise Residential Buildings.* Atlanta, GA: ASHRAE, 2016.

(a) 4-foot MBP lamps
(b) 2-foot U-shaped lamps
(c) 4-foot MiniBP SO lamps
(d) 4-foot MiniBP HO lamps
(e) 8-foot SP slimline lamps
(7) PS residential ballasts that operate
(a) 4-foot MBP lamps
(b) 2-foot U-shaped lamps
(c) 4-foot MiniBP SO lamps
(d) 4-foot MiniBP HO lamps
(8) Dimming ballasts that operate
(a) 4-foot MBP lamps
(b) 2-foot U-shaped lamps
(c) 4-foot MiniBP SO lamps
(d) 4-foot MiniBP HO lamps
Id. at 84 FR 56556.

DOE did not receive comments on product classes presented in the October 2019 NOPD. In this final determination DOE continues to separate fluorescent lamp ballasts into the same product classes as in the October 2019 NOPD. See chapter 3 of the final determination TSD for further discussion.

4. Technology Options

In the October 2019 NOPD market and technology assessment, DOE identified the technology options listed in Table IV.1 to improve the efficiency of fluorescent lamp ballasts, as measured by the DOE test procedure.

TABLE IV.1—FLUORESCENT LAMP BALLAST TECHNOLOGY OPTIONS

Technology option	Description
Electronic ballast	Use an electronic ballast design
Improved Components:	
Transformers/Inductors	Use litz wire to reduce winding losses. Use wire with multiple smaller coils instead of one larger coil to increase the number of turns of wire. Use optimized-gauge copper to increase the conductor cross section to reduce winding losses. Use shape-optimized winding to reduce the proximity effect. Use low-loss ferrite materials to create the core of the inductor.
Diodes	Use diodes with a lower voltage drop.
Capacitors	Use capacitors with a lower effective series resistance.
Transistors	Use transistors with low drain-to-source resistance.
Improved Circuit Design:	
Cathode Cutout or Cutback	Remove or reduce cathode/filament heating after lamp has started.
Integrated Circuits	Substitute discrete components with an integrated circuit.
Starting Method	Use the IS starting method instead of a rapid start RS starting method.

84 FR 56540, 56552.

CA IOUs stated that the use of smaller coils or increasing steel laminations would cause larger ballast sizes and that shape-optimized windings are not cost effective for the small savings potential. (CA IOUs, No. 25 at p. 1)

As an initial matter, DOE does not consider cost when identifying technology options; a cost assessment of each efficiency level is assessed in the LCC and PBP analysis and NIA. Using multiple smaller coils instead of one larger coil will increase the number of turns of wire, which can increase the induced voltage, and thereby minimize losses from the transformer.[10] The total number of windings needed is divided into several coils, which allows for greater flexibility in utilizing the space of the assembly and not changing the size of the ballast.[11] Regarding increasing steel laminations, this technology option was not proposed in the October 2019 NOPD as DOE determined that it may not minimize losses in ballasts that operate at high frequencies (*i.e.,* electronic ballasts), which are the ballasts analyzed in this determination. 84 FR 56540, 56551.

NEMA asserted that there had been no technological changes in FLB technology since the last DOE energy conservation standards rule on fluorescent lamp ballasts became effective in 2014. (NEMA, No. 24 at p. 2)

Based on DOE's review of the product offerings and their efficiencies in manufacturer catalogs and DOE's Compliance Certification Database (''CCD''), there are ballasts on the market at multiple levels of efficiencies. DOE finds that the technology options identified, individually and/or in combination, are being utilized to improve the efficiency of products.

DOE continues to consider the technology options identified in the October 2019 NOPD (see Table IV.1) in this final determination. See chapter 3 of the final determination TSD for further discussion.

C. Screening Analysis

DOE uses the following five screening criteria to determine which technology options are suitable for further consideration in an energy conservation standards rulemaking:

(1) *Technological feasibility.* Technologies that are not incorporated in commercial products or in commercially-viable, existing prototypes will not be considered further.

(2) *Practicability to manufacture, install, and service.* If it is determined that mass production of a technology in commercical products and reliable installation and servicing of the technology could not be achieved on the scale necessary to serve the relevant market at the time of the projected compliance date of the standard, then that technology will not be considered further.

(3) *Impacts on product utility or product availability.* If a technology is determined that a technology would have significant adverse impact on the utility of the product to subgroups of consumers, or would result in the unavailability of any covered product type with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as products generally available in the United States at the time, it will not be considered further.

(4) *Adverse impacts on health or safety.* If it is determined that a technology would have significant adverse impacts on health or safety, it will not be considered further.

(5) *Unique-Pathway Proprietary Technologies.* If a technology has proporiety protection and represents a unique pathway to achieving a given

[10] US20110018666A1, Multiple coils fluorescent lamp ballast. April 1, 2008. Available at *https://patents.google.com/patent/US20110018666.*

[11] US20110018666A1, Multiple coils fluorescent lamp ballast. April 1, 2008. Available at *https://patents.google.com/patent/US20110018666.*

efficiency level, it will not be considered further.

Sections 6(c)(3) and 7(b) of the Process Rule.

In summary, if DOE determines that a technology, or a combination of technologies, fails to meet one or more of the listed five criteria, it will be excluded from further consideration in the engineering analysis.

1. Screened-Out Technologies

In the October 2019 NOPD, DOE did not screen out any technology options identified. DOE did not receive any comments on technology options that should be screened out. 84 FR 56540, 56554. In this final determination, DOE did not screen out any technology options identified.

2. Remaining Technologies

Through a review of each technology, DOE concludes that all of the identified technologies listed in section IV.B.4 meet all five screening criteria and are examined further as design options. In summary, DOE did not screen out the following technology options:

(1) Electronic Ballasts
(2) Improved Components
(a) Use litz wire to reduce winding losses.
(b) Use wire with multiple smaller coils instead of one larger coil to increase the number of turns of wire.
(c) Use optimized-gauge copper or increase the conductor cross section to reduce winding losses.
(d) Use shape-optimized winding to reduce the proximity effect losses.
(e) Use diodes with lower voltage drop to lower losses.
(f) Use capacitors with a lower effective series resistance.
(g) Use transistors with low drain-to-source resistance.
(h) Use low-loss ferrite to create the core of the inductor.
(3) Improved Circuit Design
(a) Remove filament heating after the lamp has started.
(b) Substitute discrete components with an integrated circuit.

DOE determined that these technology options are technologically feasible because they are being used or have previously been used in commercially-available products or working prototypes. DOE also finds that these technology options meet the other screening criteria (*i.e.,* practicable to manufacture, install, and service; do not result in adverse impacts on product utility, product availability, health, or safety; and are not proprietary).

John Danison, an individual commentator, stated researchers should make fluorescent lamp ballasts safer, more cost effective, and last longer. He stated the current expectancy of a ballast is 6 months after which it will start leaking and/or sparking, and if a bad ballast burns, it could release toxins resulting in serious health issues. (Danison, No. 22 at p. 1)

As noted, DOE has determined that the design options used to achieve the efficiency of fluorescent lamp ballasts do not have an adverse impact on product utility or safety. Danison provided references regarding pre-1979 ballast technology and general information on fluorescent ballasts but did not provide any support for his stated safety concern, and DOE was unable to verify it through other resources. DOE did not receive any comments during any phase of this rulemaking or the previous 2011 FL Ballast Rule to indicate that a ballast's life expectancy is only 6 months or that its mode of failure could present health and safety concerns. DOE also did not find any similar concerns cited in relevant product or industry literature. Therefore, DOE continues to consider the design options identified in the October 2019 NOPD in this final determination. For additional details, see chapter 4 of the final determination TSD.

D. Engineering Analysis

As in the October 2019 NOPD, for this final determination, DOE selected more efficient substitutes in the engineering analysis and determined the end-user consumer prices of those substitutes in the product price determination. DOE estimated the consumer price of ballasts directly because reverse engineering ballasts is impractical due to the use of potting, which is a black pitch added to the ballast enclosure to reduce vibration damage and act as a heat sink for the circuit board. Potting does not allow for the visual observation and identification of individual components of the ballast making it infeasible to apply a reverse-engineering approach. By combining the results of the engineering analysis and the product price determination, DOE derived typical inputs for use in the LCC analysis and NIA. Section IV.E discusses the product price determination (see chapter 6 of the final determination TSD for further detail).

The methodology for the engineering analysis consists of the following steps:

(1) selecting representative product classes,

(2) selecting baseline ballasts,

(3) identifying more efficient substitutes,

(4) developing efficiency levels, and

(5) scaling efficiency levels to non-representative product classes.

DOE used the BLE values from the compliance certification database to identify ballasts for all product classes except dimming. Because most dimming ballasts are not currently subject to standards and therefore do not have data in the compliance certification database, DOE determined BLE values by using catalog input power and the associated total lamp arc power. As fluorescent lamp ballasts are designed to operate fluorescent lamps, DOE considered properties of the entire lamp-and-ballast system in the engineering analysis. DOE paired baseline and more-efficient ballasts with full-wattage and/or reduced wattage lamps, where appropriate, to reflect the most common configurations of lamp-and-ballast systems.

The results of these steps are summarized in the following sections. The details of the engineering analysis are discussed in chapter 5 of the final determination TSD.

1. Representative Product Classes

In the case where a covered product has multiple product classes, DOE may identify and select certain product classes as ''representative'' and concentrates its analytical effort on those classes. For fluorescent lamp ballasts, DOE chose product classes as representative primarily because of their high market volumes. Within certain representative product classes, DOE also selected multiple representative ballast types to account for multiple high-volume units within the same product class.

Table IV.2 shows the FLB product classes, and shaded in grey are the representative product classes and representative ballast types selected for analysis in the October 2019 NOPD.

TABLE IV.2—REPRESENTATIVE PRODUCT CLASSES AND REPRESENTATIVE BALLAST TYPES

Product class description *	Representative ballast type(s)
IS/RS Commercial	
IS/RS Commercial ballasts that operate:	2L 4-foot MBP; 4L 4-foot MBP, 2L 8-foot SP slimline.

TABLE IV.2—REPRESENTATIVE PRODUCT CLASSES AND REPRESENTATIVE BALLAST TYPES—Continued

Product class description *	Representative ballast type(s)
• 4-foot MBP. • 2-foot U-shaped. • 4-foot MiniBP SO. • 4-foot MiniBP HO. • 8-foot SP slimline lamps.	
PS Commercial	
PS Commercial ballasts that operate: • 4-foot MBP • 2-foot U-shaped • 4-foot T5 SO • 4-foot T5 HO lamps	2L 4-foot MBP, 4L 4-foot MBP, 2L 4-foot MiniBP SO, 2L 4-foot MiniBP HO.
IS/RS 8-foot HO	
IS/RS ballasts that operate 8-foot HO lamps	2L 8-foot recessed double contact (RDC) HO.
PS 8-foot HO	
PS ballasts that operate 8-foot HO lamps	N/A.
Sign	
Sign ballasts that operate 8-foot HO lamps	4L 8-foot RDC HO.
IS/RS Residential	
IS/RS Residential ballasts that operate: • 4-foot MBP. • 2-foot U-shaped. • 4-foot MiniBP SO. • 4-foot MiniBP HO. • 8-foot SP slimline lamps.	2L 4-foot MBP.
PS Residential	
PS Residential ballasts that operate: • 4-foot MBP. • 4-foot MiniBP SO. • 4-foot MiniBP HO. • 2-foot U-shaped.	N/A.
Dimming	
Dimming ballasts that operate: • 4-foot MBP. • 4-foot MiniBP SO. • 4-foot MiniBP HO. • 2-foot U-shaped.	2L 4-foot MBP 0–10V, 2L 4-foot MiniBP SO 0–10 V, 2L 4-foot MiniBP HO 0–10 V.

* Grey shading indicates a representative product class.

84 FR 56540, 56558.

DOE did not receive any comments on the representative product classes presented in the October 2019 NOPD. DOE continues to analyze the representative product classes analyzed in the October 2019 NOPD in this final determination.

2. Baseline Ballasts

For each representative product class, DOE selected a baseline ballast as a reference point against which to measure changes resulting from energy conservation standards. Typically, the baseline ballast is the most common, least efficient ballast that meets existing energy conservation standards. In this analysis, DOE selected as baselines the least efficient ballast meeting standards that operated the most common lamp type (*i.e.,* wattage and diameter) and where possible, has the most common ballast factor, input voltage, and operating voltage type [12] for the product class. In the October 2019 NOPD, DOE directly analyzed the baseline ballasts shown in Table IV.3.

TABLE IV.3—BASELINE BALLASTS

Product class	Ballast type	Lamp type	Starting method	Input voltage/ operating voltage * (*V*)	Power factor	Ballast factor	Input power (*W*)	BLE
IS/RS Commercial	2L 4-foot MBP	32 W T8	IS	277, Universal	0.97	0.89	57.6	0.903
	4L 4-foot MBP	32 W T8	IS	277, Universal	0.98	0.88	112.2	0.916
	2L 8-foot SP slimline	59 W T8	IS	277, Universal	0.98	0.88	109.2	0.920
PS Commercial	2L 4-foot MBP	32 W T8	PS	277, Universal	0.90	0.88	57.1	0.900
	4L 4-foot MBP	32 W T8	PS	277, Universal	0.90	0.87	110.5	0.920
	2L 4-foot MiniBP SO	28 W T5	PS	277, Universal	0.98	1.00	62.4	0.891
	2L 4-foot MiniBP HO	54 W T5	PS	277, Universal	0.98	0.99	116.8	0.912
IS/RS 8-foot HO	2L 8-foot RDC HO	110 W T12	RS	277, Universal	0.99	0.89	197.7	0.900
Sign	4L 8-foot RDC HO	110 W T12	RS	120, Dedicated	0.90	** 0.61	271.6	0.898
IS/RS Residential	2L 4-foot MBP	32 W T8	IS	120, Dedicated	0.50	0.88	58.9	0.872
Dimming	2L 4-foot MBP 0–10V	32 W T8	PS	277, Universal	0.98	0.88	59.0	0.871
	2L 4-foot MiniBP SO 0–10V	28 W T5	PS	277, Universal	0.98	1.00	64.0	0.869

[12] Operating voltage type denotes whether the ballast can operate multiple voltages and is considered universal or can only operate one voltage and is considered dedicated.

TABLE IV.3—BASELINE BALLASTS—Continued

Product class	Ballast type	Lamp type	Starting method	Input voltage/ operating voltage * (*V*)	Power factor	Ballast factor	Input power (*W*)	BLE
	2L 4-foot MiniBP HO 0–10V	54 W T5	PS	277, Universal ...	0.98	1.00	118.0	0.912

* Universal indicates that the ballast can operate multiple voltages (*i.e.,* 120 V or 277 V); dedicated indicates it can only operate the voltage specified.
** DOE found limited information on ballast factors of ballasts in the Sign product class. Based on this information, DOE used the most common ballast factor found in catalogs for the product class for representative units that did not specify ballast factor.

84 FR 56540, 56559.

DOE did not receive any comments on the baseline ballasts selected in the October 2019 NOPD and maintained the selected baseline ballasts for this final determination. See chapter 5 of the final determination TSD for more detail.

3. More Efficient Ballasts

In the analysis for the October 2019 NOPD, DOE selected more-efficient ballasts as replacements for each of the baseline ballasts by considering technologies not eliminated in the screening analysis. 84 FR 56540, 56559. DOE considered these technologies in the engineering analysis, either by modeling potential efficiency improvements due to the design options or by analyzing commercially available ballasts in which the design options are incorporated. *Id.*

DOE selected a more-efficient fluorescent lamp ballast with the same or similar ballast factor as the baseline ballast, so that light output would be maintained without needing to change the spacing of the fixture. *Id.* Specifically, DOE ensured that potential substitutes maintained the system light output within 10 percent of the baseline lamp-and-ballast system light output. *Id.* Finally, DOE selected more-efficient substitutes that showed an improvement in BLE and a reduction in input power. *Id.*

DOE did not receive any comments on the more-efficient ballasts selected in the October 2019 NOPD. DOE maintained the more-efficient ballasts selected in the October 2019 NOPD for this final determination. See section IV.D.4 and chapter 5 of the final determination TSD for more detail.

4. Efficiency Levels

After identifying more-efficient substitutes for each of the baseline ballasts, DOE developed ELs based on the consideration of several factors, including: (1) The design options associated with the specific ballasts being studied, (2) the ability of ballasts across wattages to comply with the standard level of a given product class, and (3) the max-tech level. In the October 2019 NOPD, DOE used the same equation-based approach used in the 2011 FL Ballast Rule. 84 FR 56540, 56560. DOE determined that a power law equation best modeled the observed trend between total lamp arc power and average BLE. Specifically, DOE used the following equation to develop ELs that relate the total lamp arc power operated by a ballast to BLE:

$$BLE = \frac{A}{1 + B * power^{-C}}$$

The ELs and the characteristics of the representative units identified in the October 2019 NOPD (84 FR 56540, 56564) are summarized in Table IV.4 to Table IV.9. Product classes have up to two or three levels of efficiencies. EL 1 represents an improved ballast with more-efficient components (*e.g.,* transformers, diodes, capacitors, transistors) that minimize losses and improved circuit design (*e.g.,* integrated circuitry). EL 2 represents an advanced ballast with improved components and improved circuit design. EL 3 represents a ballast with the most efficient combination of improved components and circuit design.

CA IOUs stated that the last FLB standards rule set requirements that drove the market to achieve the highest tier of efficiency practically available and they were unaware of higher efficiency ballasts on the market. CA IOUs stated that ballasts on the market are at or close to achieving the highest operational efficiency that is still cost effective, and there is no premium ballast that represents EL 4. (CA IOUs, No. 25 at pp. 1–2) NEMA also commented that no changes should be made to the ELs. (NEMA, No. 24 at p. 3)

Signify stated it was unsure of the validity of the data used to project a BLE increase from 0.913 (EL 1) to 0.940 (max-tech) for the 2-lamp 4-foot MBP ballasts in the IS/RS commercial product class and that it had to conduct a more detailed review. Signify further stated that regardless, the increase in BLE is too small to support amending standards. (Signify, No. 27 at p. 1)

DOE used BLE values certified by manufacturers in the DOE compliance certification database to develop efficiency levels. For each representative ballast type, DOE examined the spread of BLE values, including clusters of similar BLE values and distinctive increases in BLE values to identify ELs. DOE also examined BLE values for different product families for each of several manufacturers to confirm tiers of efficiencies.

DOE maintained the ELs and associated representative units presented in the October 2019 NOPD in this final determination. The ELs and the representative units for each representative product class are shown in Table IV.4 through Table IV.9. See chapter 5 of the final determination TSD for more detail.

TABLE IV.4—IS/RS COMMERCIAL REPRESENTATIVE UNITS

Product class	EL	Ballast type	Lamp type	Starting method	Input voltage/ operating voltage, (*V*)*	Power factor	Ballast factor	Input power (*W*)	BLE
IS/RS Commercial ...	EL 1	2L 4-foot MBP	32 W T8	IS	277, Universal ...	0.98	0.88	56.3	0.913
		4L 4-foot MBP	32 W T8	IS	277, Universal ...	0.98	0.88	110.9	0.927
		2L 8-foot SP slimline	59 W T8	IS	277, Universal ...	0.98	0.88	108.5	0.926
IS/RS Commercial ...	EL 2	2L 4-foot MBP	32 W T8	IS	277, Universal ...	0.98	0.88	55.7	0.923
		4L 4-foot MBP	32 W T8	IS	277, Universal ...	0.98	0.88	109.7	0.937
		2L 8-foot SP slimline	59 W T8	IS	277, Universal ...	0.98	0.87	106.4	0.934
IS/RS	EL 3	2L 4-foot MBP	32 W T8	IS	277, Universal ...	0.99	0.89	55.3	0.940
		4L 4-foot MBP	32 W T8	IS	277, Universal ...	0.98	0.87	107.0	0.950

TABLE IV.4—IS/RS COMMERCIAL REPRESENTATIVE UNITS—Continued

Product class	EL	Ballast type	Lamp type	Starting method	Input voltage/ operating voltage, (*V*)*	Power factor	Ballast factor	Input power (*W*)	BLE
		2L 8-foot SP slimline**	59 W T8	IS	277, Universal	0.98	0.87	105.1	0.945

* Universal indicates that the ballast can operate multiple voltages (*i.e.,* 120 V or 277 V).
** Grey shading indicates a modeled product.

TABLE IV.5—PS COMMERCIAL REPRESENTATIVE UNITS

Product class	EL	Ballast type	Lamp type	Starting method	Input voltage/ operating voltage (*V*)*	Power factor	Ballast factor	Input power (*W*)	BLE
PS Commercial	EL 1	2L 4-foot MBP	32 W T8	PS	277, Universal	0.97	0.88	56.3	0.913
		4L 4-foot MBP	32 W T8	PS	277, Universal	0.98	0.87	109.5	0.928
		2L 4-foot MiniBP SO	28 W T5	PS	277, Universal	0.98	1.00	61.4	0.905
		2L 4-foot MiniBP HO	54 W T5	PS	277, Universal	0.97	1.00	115.9	0.928
	EL 2	2L 4-foot MBP	32 W T8	PS	277, Universal	0.98	0.88	53.9	0.953
		4L 4-foot MBP	32 W T8	PS	277, Universal	0.99	0.87	107.6	0.944
		2L 4-foot MiniBP SO	28 W T5	PS	277, Universal	0.98	1.00	59.8	0.929
		2L 4-foot MiniBP HO	54 W T5	PS	277, Universal	0.98	1.00	113.6	0.947

* Universal indicates that the ballast can operate multiple voltages (*i.e.,* 120 V or 277 V).

TABLE IV.6—IS/RS 8-FOOT HO REPRESENTATIVE UNITS

Product class	EL	Ballast type	Lamp type	Starting method	Input voltage/ operating voltage (*V*)*	Power factor	Ballast factor	Input power (*W*)	BLE
IS/RS 8-foot HO	EL 1	2L 8-foot RDC HO**	110 W T12	RS	277, Dedicated	0.98	0.90	192.7	0.934
	EL 2	2L 8-foot RDC HO	110 W T12	RS	277, Universal	0.98	0.90	188.0	0.957

* Universal indicates that the ballast can operate multiple voltages (*i.e.,* 120 V or 277 V).

TABLE IV.7—SIGN REPRESENTATIVE UNITS

Product class	EL	Ballast type	Lamp type	Starting method	Input voltage/ operating voltage (*V*)*	Power factor	Ballast factor**	Input power (*W*)	BLE
Sign	EL 1	4L 8-foot RDC HO	110 W T12	IS	120, Dedicated	0.99	0.61	265.1	0.920
	EL 2	4L 8-foot RDC HO	110 W T12	IS	120, Dedicated	0.90	0.61	258.4	0.944

* Dedicated indicates it can only operate the voltage specified.
** DOE found limited information for ballast factor, and therefore used the most common ballast factor found in product class for representative units that did not specify ballast factor.

TABLE IV.8—IS/RS RESIDENTIAL REPRESENTATIVE UNITS

Product class	EL	Ballast type	Lamp type	Starting method	Input voltage/ operating voltage (*V*)*	Power factor	Ballast factor	Input power (*W*)	BLE
IS/RS Residential	EL 1	2L 4-foot MBP	32 W T8	IS	120, Dedicated	0.56	0.85	56.2	0.884
	EL 2	2L 4-foot MBP	32 W T8	IS	120, Dedicated	0.56	0.85	55.2	0.899
	EL 3	2L 4-foot MBP	32 W T8	IS	120, Dedicated	0.55	0.83	53.1	0.913

* Dedicated indicates it can only operate the voltage specified.

TABLE IV.9—DIMMING REPRESENTATIVE UNITS

Product class	EL	Ballast type	Lamp type	Starting method	Input voltage/ operating voltage (*V*)*	Power factor	Ballast factor	Input power (*W*)	BLE
Dimming	EL 1	2L 4-foot MBP 0–10V	32 W T8	PS	277, Universal	0.98	0.87	57.0	0.891
		2L 4-foot MiniBP SO 0–10V	28 W T5	PS	277, Universal	0.98	1.00	63.0	0.883
		2L 4-foot MiniBP HO 0–10 V	54 W T5	PS	277, Universal	0.98	1.00	118.0	0.912
	EL 2	2L 4-foot MBP 0–10V**	.....		.....	.....	.....	.....	.....
		2L 4-foot MiniBP SO 0–10V	28W T5	PS	277, Universal	0.98	1.00	62.0	0.897
		2L 4-foot MiniBP HO 0–10 V**	.....		.....	.....	.....	.....	.....
	EL 3	2L 4-foot MBP 0–10V	32 W T8	PS	277, Universal	0.99	0.88	56.0	0.918
		2L 4-foot MiniBP SO 0–10V	28 W T5	PS	277, Universal	0.99	1.00	61.0	0.911
		2L 4-foot MiniBP HO 0–10V	54 W T5	PS	277, Universal	0.98	1.00	115.9	0.928

* Universal indicates that the ballast can operate multiple voltages (*i.e.,* 120 V or 277 V).
** Grey shading indicates levels at which products did not exist.

Table IV.10 summarizes the efficiency requirements at each EL for the representative product classes.

TABLE IV.10—SUMMARY OF ELS FOR REPRESENTATIVE PRODUCT CLASSES

Representative product class	Efficiency level	BLE = A / (1 + B * total lamp arc power − C) where A, B, and C are as follows:		
		A	B	C
IS/RS Commercial	EL 1	0.993	0.24	0.25
	EL 2		0.21	
	EL 3		0.16	
PS Commercial	EL 1	0.993	0.43	0.37
	EL 2		0.31	
IS/RS Residential	EL 1	0.993	0.33	0.25
	EL 2		0.28	
	EL 3		0.24	
IS/RS 8-foot HO	EL 1	0.993	0.24	0.25
	EL 2		0.14	
Sign	EL 1	0.993	0.32	0.25
	EL 2		0.24	
Dimming	EL 1	0.993	0.56	0.37
	EL 2		0.48	
	EL 3		0.40	

5. Scaling to Other Product Classes

DOE identified and selected certain product classes as representative and analyzed these product classes directly. DOE chose these representative product classes primarily due to their high market volumes. The ELs for product classes that were not directly analyzed (''non-representative product classes'') were then determined by scaling the ELs of the representative product classes. Specifically, DOE did not analyze PS 8-foot HO ballasts or PS residential ballasts directly. In the October 2019 NOPD, DOE developed ELs for the PS 8-foot HO product class by scaling the ELs of the IS/RS 8-foot HO product class and developed ELs for PS residential product class by scaling the ELs of the IS/RS residential product class. 84 FR 56540, 56564. The primary difference between these sets of product classes is the starting method. From its analysis of pairs of ballasts between the product classes, DOE determined that the ballasts with a PS starting method are 2 percent less efficient than those with IS starting method. DOE then applied this reduction in BLE to develop the appropriate EL equation curves for the PS 8-foot HO and PS residential product class. See chapter 5 of the final determination TSD for more detail. Table IV.11 summarizes the efficiency requirements at each EL for the non-representative product classes.

DOE did not receive any comments on the scaling to non-representative product classes presented in the October 2019 NOPD. In this final determination, DOE maintained the scaling factors and resulting efficiency levels from the October 2019 NOPD for the non-representative product classes.

TABLE IV.11—SUMMARY OF ELS FOR NON-REPRESENTATIVE PRODUCT CLASSES

Non-representative product class	Efficiency level	BLE = A / (1 + B * total lamp arc power − C) where A, B, and C are as follows:		
		A	B	C
PS 8-foot HO	EL 1	0.973	0.45	0.37
	EL 2		0.26	
PS Residential	EL 1	0.973	0.54	0.37
	EL 2		0.46	
	EL 3		0.39	

E. Product Price Determination

Typically, DOE develops manufacturer selling prices (''MSPs'') for covered products in the engineering analysis and applies markups to create end-user prices to use as inputs to the LCC analysis and NIA. Because fluorescent lamp ballasts are difficult to reverse-engineer (*i.e.,* not easily disassembled due to potting), DOE directly derives end-user prices for the ballasts covered in this final determination.

In the October 2019 NOPD, DOE developed end-user consumer prices for the representative units sold in each of the main distribution channels identified for fluorescent lamp ballasts. DOE then calculated an average weighted consumer price using estimated shipments that go through each distribution channel. 84 FR 56540, 56565–56566.

DOE did not receive any comments on the pricing methodology or results. For this final determination DOE maintained the methodology and final average weighted end-user prices for representative units from the October 2019 NOPD. See chapter 6 of the final determination TSD for further details and pricing results.

F. Energy Use Analysis

The purpose of the energy use analysis is to determine the annual energy consumption of fluorescent lamp ballasts at different BLE in representative U.S. commercial and industrial buildings, outdoor

installations, and single-family homes and multi-family residences, and to assess the energy savings potential of increased BLE for fluorescent lamp ballasts. The energy use analysis estimates the range of energy use of fluorescent lamp ballasts in the field (*i.e.,* as they are actually used by consumers). The energy use analysis provides the basis for other analyses DOE performed, particularly assessments of the energy savings and the savings in consumer operating costs that could result from adoption of amended standards.

The energy conservation standards for fluorescent lamps are not within the scope of this analysis; however, the input power of the complete lamp-and-ballast system is considered for the energy use analysis because ballasts are not intended to operate without lamps. The energy use characterization provides estimates of annual energy use for representative lamp-and-ballast systems that DOE evaluates in the LCC and PBP analyses and the NIA. To develop annual energy use estimates, DOE multiplied annual usage (in hours per year) by the system input power (in watts). In the October 2019 NOPD, DOE developed an energy use analysis. 84 FR 56540, 56566–56568.

DOE analyzed the typical operating hours of the different sectors. DOE then weighted the ballast operation by sector to develop average operating hours. DOE selected the most common fluorescent lamps used with each analyzed ballast to develop representative lamp-and-ballast systems. DOE developed the system input power estimates in the engineering analysis. To characterize the country's average use of fluorescent lamp ballasts for a typical year, DOE developed annual operating hours by sector, using the most recent data available from the 2015 U.S. Lighting Market Characterization (''LMC''), which was published in 2017.[13] 84 FR 56540, 56566.

Fluorescent lamp ballasts can operate a variety of lamp types. The October 2019 NOPD included a mixture of lamp types operated by the fluorescent lamp ballast including full wattage fluorescent lamp (*e.g.,* 32 W 4-foot T8), reduced wattage fluorescent lamp (*e.g.,* 30 W 4-foot T8, 28 W 4-foot T8, and 25 W 4-foot T8), and tubular light-emitting diode (''TLED'') lamps (*e.g.,* UL Type A 13 W 4-foot T8). The mixture of specific lamps operated by the fluorescent lamp directly relates to the input power of the fluorescent ballast. DOE included a mixture of full wattage fluorescent lamps, reduced wattage fluorescent lamps, and TLED lamps in the energy use analysis. 84 FR 56540, 56566–56568.

Lighting controls can reduce the energy use of fluorescent lamp ballasts. In the October 2019 NOPD, DOE assumed reduced energy from lighting controls for programmed-start ballasts. *Id.* These ballasts are intended for use with occupancy sensors.

In the October 2019 NOPD, DOE requested comment to improve DOE's energy-use analysis, as well as any data supporting alternate operating hour estimates or assumptions regarding dimming of fluorescent lamp ballasts, operating hours, and operating hour reductions from lighting controls in commercial, industrial, and residential sectors. 84 FR 56540, 56568. NEMA stated that DOE's methodology and estimating assumptions were sufficient. (NEMA, No. 24 a pp. 3–4) Signify provided some suggested papers regarding use of lighting controls that could be found within the Illuminating Engineering Society (''IES'') technical library. Signify also stated that the papers specifically cited in their comments were illustrative. (Signify, No. 27 at p. 2)

DOE's analysis did utilize research papers within the IES technical library. DOE included data from *Lighting Controls in Commercial Buildings,* which was published in an IES journal, in the energy use analysis (see chapter 7 of the final determination TSD).[14] DOE received no comments related to changing the mixture of lamp operated by the fluorescent ballasts, operating hours of the fluorescent lamp ballasts, nor the application of lighting controls. For the final determination, DOE maintained the mixture of lamps operated by the fluorescent ballasts, operating hours of the fluorescent lamp ballasts, and the application of lighting controls as in the analysis for the 2019 October NOPD. Chapter 7 of the final determination TSD provides details on DOE's energy use analysis for fluorescent lamp ballasts.

G. Life-Cycle Cost and Payback Period Analysis

DOE conducted LCC and PBP analyses to evaluate the economic impacts on individual consumers of potential energy conservation standards for fluorescent lamp ballasts in the October 2019 NOPD. 84 FR 56540, 56568. The effect of amended energy conservation standards on individual consumers usually involves a reduction in operating cost and an increase in purchase cost. DOE used the following two metrics to measure consumer impacts:

- The LCC is the total consumer expense of an appliance or product over the life of that product, consisting of total installed cost (MSP, distribution chain markups, sales tax, and installation costs) plus operating costs (expenses for energy use, maintenance, and repair). To compute the operating costs, DOE discounts future operating costs to the time of purchase and sums them over the lifetime of the product.
- The PBP is the estimated amount of time (in years) it takes consumers to recover the increased purchase cost (including installation) of a more-efficient product through lower operating costs. DOE calculates the PBP by dividing the change in purchase cost at higher efficiency levels by the change in annual operating cost for the year that amended standards are assumed to take effect.

For any given efficiency level, DOE measures the change in LCC relative to the LCC in the no-new-standards case. DOE refers to the change as ''LCC savings.'' LCC savings reflect the estimated efficiency distribution of fluorescent lamp ballasts in the absence of amended energy conservation standards. In contrast, the PBP for a given efficiency level is measured relative to the baseline product.

For each considered efficiency level in each product class, DOE calculated the LCC and PBP for a nationally representative set of potential customers. Fluorescent lamp ballasts are used widely in commercial, industrial, and residential settings. For each product class, DOE identified the types of customers likely to use the ballasts, the number of hours per year each customer type would likely use the ballasts, and a probability of selection for each customer type in the Monte Carlo analysis.

Inputs to the calculation of total installed cost include the cost of the product—which includes MPCs, all manufacturer, retailer and distributor markups, and sales taxes—and installation costs. Inputs to the calculation of operating expenses include annual energy consumption, energy prices and price projections, repair and maintenance costs, product lifetimes, and discount rates. DOE created distributions of values for product lifetime, discount rates, and

[13] U.S. Department of Energy–Office of Energy Efficiency and Renewable Energy. 2015 U.S. Lighting Market Characterization. November 2017. *https://energy.gov/eere/ssl/2015-us-lighting-market-characterization.*

[14] Williams, AA, BA Atkinson, K Garbesi, E Page, FM Rubinstein. *Lighting Controls in Commercial Buildings.* Leukos: The Journal of the Illuminating Engineering Society. 2012. 8(3): pp. 161–180. *https://eaei.lbl.gov/publications/lighting-controls-commercial.*

sales taxes, with probabilities attached to each value, to account for their uncertainty and variability.

The computer model DOE uses to calculate the LCC and PBP relies on a Monte Carlo simulation to incorporate uncertainty and variability into the analysis. The Monte Carlo simulations randomly sample input values from the probability distributions and FLB user samples. For this rulemaking, the Monte Carlo approach is implemented in MS Excel together with the Crystal Ball™ add-on.[15] The model calculated the LCC and PBP for products at each efficiency level for 10,000 FLB installations per simulation run. The analytical results include a distribution of 10,000 data points showing the range of LCC savings for a given efficiency level relative to the no-new-standards case efficiency distribution. In performing an iteration of the Monte Carlo simulation for a given consumer, product efficiency is chosen based on its probability. If the chosen product efficiency is greater than or equal to the efficiency of the standard level under consideration, the LCC and PBP calculation reveals that a consumer is not impacted by the standard level. By accounting for consumers who already purchase more-efficient products, DOE avoids overstating the potential benefits from increasing product efficiency. DOE calculated the LCC and PBP for all consumers of fluorescent lamp ballasts as if each were to purchase a new product in the first year of required compliance with new or amended standards. Amended standards apply to fluorescent lamp ballasts manufactured 3 years after the date on which any new or amended standard is published. (42 U.S.C. 6295(m)(4)(A)) Therefore, DOE used 2023 as the first year of compliance with any amended standards for fluorescent lamp ballasts.

Table IV.12 summarizes the approach and data DOE used to derive inputs to the LCC and PBP calculations. The subsections that follow provide further discussion. Details of the spreadsheet model, and of all the inputs to the LCC and PBP analyses, are contained in chapter 8 and its appendices of the final determination TSD.

TABLE IV.12—SUMMARY OF INPUTS AND METHODS FOR THE LCC AND PBP ANALYSIS *

Inputs	Source/method
Product Cost	Derived by multiplying product costs from the engineering analysis by (one plus) sales tax rates.
Installation Costs	Baseline installation cost determined with data from RS Means. Assumed no change with efficiency level.
Annual Energy Use	The total annual energy use multiplied by the hours per year. Average number of hours based 2015 LMC.
Energy Prices	Based on the Energy Information Administration's (EIA's) Form 861 data for 2018.** Average energy prices determined for 50 states plus the District of Columbia.
Energy Price Trends	Based on *Annual Energy Outlook 2020 (AEO2020)* price projections.
Repair and Maintenance Costs	Assumed no change with efficiency level.
Product Lifetime	Average: 12.5 years for commercial installations (approximately 38,000 hours), 12.5 years for outdoor installations (approximately 41,000 hours), 11.4 years for industrial installations (50,000 hours), and 15 years for residential installations (approximately 10,800 hours).
Discount Rates	For the residential product class, the calculations involve identifying all possible debt or asset classes that might be used to purchase fluorescent lamp ballasts or might be affected indirectly. The primary data source was the Federal Reserve Board's Survey of Consumer Finances. For other product classes, the calculations involve estimating weighted average cost of capital for large numbers of companies and using the results to develop discount rate distributions. The primary data were from the Damodaran Online web site † and the Federal Reserve Board. ‡
Rebound Effect	Rebound is not assumed to be present among FLB consumers. Most consumers are commercial and industrial consumers, and the FLB/light user tends to not see the bills so there would be no perceived change in the cost of using the light.
Compliance Date	2023.

* References for the data sources mentioned in this table are provided in the sections following the table or in chapter 8 of the final determination TSD.

** DOE used Average Price by State by Provider (EIA–826), sorted for Total Electric Industry, obtained from the EIA webpage *https://www.eia.gov/electricity/data/state/.*

† See the data page on Damodaran Online, *http://pages.stern.nyu.edu/~adamodar.*

‡ In addition to the previously referenced Survey of Consumer Finances, DOE used interest rate data obtained from the Federal Reserve Bank of St. Louis' FRED Economic Data tool found at *https://fred.stlouisfed.org/.*

1. Product Cost

As noted in section IV.E, DOE rulemaking engineering analyses typically calculate MSPs. Typically, the MSPs are used to develop consumer prices by applying wholesale and retail delivery chain markups developed in a separate markup analysis, and by adding sales taxes. For fluorescent lamp ballasts, the engineering analysis determined end-user prices directly; therefore, for the LCC analysis, the only adjustment was to add sales taxes.

In prior energy conservation standards rulemakings, DOE estimated the total installed costs per unit for equipment and then assumed that costs remain constant throughout the analysis period. For example, prices were held constant throughout the analysis period for the 2009 final rule for commercial ice-cream freezers; self-contained commercial refrigerators, commercial freezers, and commercial refrigerator-freezers without doors; and remote condensing commercial refrigerators, commercial freezers, and commercial refrigerators-freezers. 74 FR 1092 (Jan. 9, 2009) This assumption is conservative because equipment costs tend to decrease over time. In 2011, DOE published a notice of data availability (''NODA'') titled *Equipment Price Forecasting in Energy Conservation Standards Analysis.* 76 FR 9696 (Feb. 22, 2011). In the NODA, DOE proposed a methodology for determining whether equipment prices have trended downward in real terms. The methodology examines so-called price or experiential learning, wherein, with ever-increasing experience with the production of a product, manufacturers are able to reduce their production costs

[15] Crystal Ball™ is a commercially available software tool to facilitate the creation of these types of models by generating probability distributions and summarizing results within Excel, available at *http://www.oracle.com/technetwork/middleware/crystalball/overview/index.html* (last accessed June 18, 2020).

through innovations in technology and process.

Consistent with the February 2011 NODA, DOE examined historical price data specific to electronic ballasts for the October 2019 NOPD and the analysis yielded learning coefficients indicating a 14.8 percent decrease in ballast prices for every doubling in cumulative ballast shipments. However, the October 2019 NOPD analyses excluded the price trends from the LCC consumer prices, noting that with shipments falling from historical values, cumulative shipments do not double relative to 2015 (the last year of historical ballast price data compiled for evaluating price trends) in any shipments scenario. The price trends assumptions were presented in the October 2019 NOPD along with the request for comments on any aspect of the NOPD. 84 FR 56540, 56579–56580. DOE received no comments on the learning trends analysis. Consistent with the October 2019 NOPD, for this final determination DOE excluded price trends from the consumer costs of fluorescent lamp ballasts used in the LCC and PBP analysis as well as downstream analyses.

Lamp manufacturing is also subject to the learning process. The focus of this final determination is the fluorescent lamp ballast. However, fluorescent lamp ballasts are designed to operate fluorescent lamps and therefore, the cost analysis accounts for the lamp-and-ballast system. The analysis assumes a differing mixture of general service fluorescent lamps (''GSFL'') and TLEDs operated by the ballasts. TLED prices are expected to be affected by price learning and are expected to decline significantly over the next 3 years. Therefore, to better represent the total installed cost of the ballast and lamp systems, price learning was applied to the lamps operated by the fluorescent lamp ballasts.

Because this final determination is not analyzing lamps, lamp shipments and price information were not collected for this rulemaking. Rather, price trend information for lamps was developed from the final rule for the GSFL standards rulemaking published in January 2015. 80 FR 4041 (Jan. 26, 2015). As discussed in chapter 8 and Appendix 8C of this FLB final determination TSD, the GSFL price trends were incorporated into the LCC analysis to account for learning in the lamp manufacturing process. The distribution of lamps selected for use by consumers is not expected to differ for ballasts at different efficiency levels.

The calculations of product cost are consistent with the October 2019 NOPD calculations. The October 2019 NOPD requested input on all aspects of the analysis, and no comments were received on the calculation of product cost. DOE updated the analysis to 2019 dollars (2019$), updated the state sales tax rates, and otherwise retained the product costs calculations used in the October 2019 NOPD for use in the final determination.

2. Installation Cost

Installation cost includes labor, overhead, and any miscellaneous materials and parts needed to install the product. DOE used data from RSMeans to estimate the baseline installation cost for fluorescent lamp ballasts. For the October 2019 NOPD, DOE used the same installation costs for ballasts at each efficiency level. 84 FR 56540, 56569–56570. The October 2019 NOPD requested input on all aspects of the analysis, and no comments were received on the calculation of installation cost used in the NOPD. Given a lack of comment or other new evidence, DOE updated input data to use 2020 RSMeans values adjusted to 2019$ and continued using the same installation costs for ballasts at each efficiency level for the final determination.

3. Annual Energy Consumption

DOE determined the energy consumption for fluorescent lamp ballasts at different efficiency levels using the approach described previously in section IV.F of this document.

4. Energy Prices

DOE derived average annual electricity prices for 50 states plus the District of Columbia using data from the EIA's Form EIA–861 annual survey.[16] EIA calculated average electric prices by dividing total electric revenues by total kWh energy sales, using data aggregated by customer class and by state. The final determination analysis used the data for 2018, with prices adjusted to 2019$.

To estimate energy prices in future years, DOE multiplied the average state-level electricity prices by a projection of annual change in regional electricity prices in the *Annual Energy Outlook 2020* (''*AEO2020*''), which has an end year of 2050.[17] *AEO2020* includes price projections by Census regions, which were used for the analyses presented herein. To estimate future electricity prices, DOE uses the price index for the Census region corresponding to each state. To estimate price trends after 2050, DOE used the average annual rate of change in prices from 2040 through 2050.

DOE did not receive any comments on the energy prices used in the October 2019 NOPD. The final determination methodology for developing energy prices is the same as the October 2019 NOPD methodology. DOE used the most current data available for the final determination analyses. DOE updated base year electricity prices from 2017 to 2018, future price trends from EIA AEO2019 to AEO2020 projections, and the dollar year from 2018$ to 2019$.

5. Maintenance and Repair Costs

Repair costs are associated with repairing or replacing product components that have failed in an appliance; maintenance costs are associated with maintaining the operation of the product. Typically, small incremental increases in product efficiency produce no, or only minor, changes in repair and maintenance costs compared to baseline efficiency products. In the October 2019 NOPD, DOE modeled ballasts as not being repaired, and maintenance costs as lamp replacement costs only. 84 FR 56540, 56570. DOE received no comments on maintenance and repair costs. In this final determination, DOE treated ballasts as not repaired and maintenance as limited to lamp replacement.

6. Product Lifetime

For the October 2019 NOPD, DOE used a 12.5-year average lifetime for the commercial sector installations, 11.4-year average lifetime for industrial sector installations, a 12.5-year average lifetime for outdoor lighting, and a 15-year life for the residential sector. In the October 2019 NOPD, DOE explained that combining DOE's estimate of 50,000 hours from the FLB Framework Document and the average operating hours developed for the NOPD yielded average ballast lifetimes of 16.6 years and 11.4 years, for commercial and industrial installations, respectively. However, 16.6 years is significantly longer than the lifetime of commercial ballasts used in the 2011 Ballast Rule. 84 FR 56540, 56569–56570. For the 2011 Ballast Rule, DOE used 12.5 years. While preparing the October 2019 NOPD, DOE found no literature confirming a 16.6-year product lifetime and focused instead on searching for evidence contradicting the lifetime of 12.5 years. No such evidence was identified. For the October 2019 NOPD,

[16] Available at *https://www.eia.gov/electricity/data/state/.*

[17] U.S. Department of Energy—Energy Information Administration. *Annual Energy Outlook 2020 with Projections to 2050.* 2020. Washington, DC. (#AEO2020). Available at *https://www.eia.gov/outlooks/aeo/.*

DOE assumed commercial ballasts would have a 12.5-year average lifetime which, when multiplied by the average commercial sector operating hours per year, yields a lifetime of approximately 38,000 hours. 84 FR 56540, 56570. DOE received no comments on product lifetime. In this final determination, DOE has retained the product lifetimes expressed in years from the October 2019 NOPD.

7. Discount Rates

In the calculation of LCC, DOE applies discount rates appropriate to commercial, industrial, and residential consumers to estimate the present value of future operating costs. DOE estimated a distribution of discount rates for fluorescent lamp ballasts based on the cost of capital of publicly traded firms in the sectors that purchase fluorescent lamp ballasts.

As part of its analysis, DOE also applies weighted average discount rates calculated from consumer debt and asset data, rather than marginal or implicit discount rates.[18] DOE notes that the LCC does not analyze the product purchase decision, so the implicit discount rate is not relevant in this model. The LCC estimates net present value over the lifetime of the product, so the appropriate discount rate will reflect the general opportunity cost of household or business funds, taking this time scale into account. Given the long-time frame modeled in the LCC, the application of a marginal interest rate associated with an initial source of funds is inaccurate. Regardless of the method of purchase, consumers are expected to continue to rebalance their debt and asset holdings over the LCC analysis period, based on the restrictions consumers face in their debt payment requirements and the relative size of the interest rates available on debts and assets. DOE estimates the aggregate effect of this rebalancing using the historical distribution of debts and assets.

To establish residential discount rates for the LCC analysis, DOE identified all relevant household debt or asset classes in order to approximate a consumer's opportunity cost of funds related to appliance energy cost savings. It estimated the average percentage shares of the various types of debt and equity by household income group using data from the Federal Reserve Board's Survey of Consumer Finances [19] (''SCF'') for 1995, 1998, 2001, 2004, 2007, 2010, 2013, and 2016. Using the SCF and other sources, DOE developed a distribution of rates for each type of debt and asset by income group to represent the rates that may apply in the year in which amended standards would take effect. In the Crystal Ball™ analyses, for each of the 10,000 simulations, the model selects an income group and then selects a discount rate from the distribution for that group.

For commercial and industrial consumers, DOE used the cost of capital to estimate the present value of cash flows to be derived from a typical company project or investment. Most companies use both debt and equity capital to fund investments, so the cost of capital is the weighted-average cost to the firm of equity and debt financing. This corporate finance approach is referred to as the weighted-average cost of capital. DOE used currently available economic data in developing discount rates. See chapter 8 of the final determination TSD for details on the development of consumer discount rates.

DOE described the discount rate calculations in the October 2019 NOPD and the accompanying TSD chapter 8 and appendix 8D. 84 FR 56540, 56570–56571. DOE received no comments on the discount rate calculations. For the final determination, DOE used the same methodologies as used for the October 2019 NOPD. The residential discount rate and commercial discount rate calculations were updated to include more current input data from the Federal Reserve and Damodaran Online. The commercial discount rate update includes use of Damodaran Online data disaggregated by industry sector, and current as of the end of 2019.

8. Energy Efficiency Distribution in the No-New-Standards Case

To accurately estimate the share of consumers that would be affected by a potential energy conservation standard at a particular efficiency level, DOE's LCC analysis considered the projected distribution (market shares) of product efficiencies under the no-new-standards case (*i.e.,* the case without amended energy conservation standards) in the compliance year.

To estimate the energy efficiency distribution of fluorescent lamp ballasts for 2023, DOE analyzed the distribution of ballasts in the databases used in the engineering analysis. For the non-dimming ballasts, the main source of information is the DOE compliance certification database.[20] For non-dimming ballasts, DOE relied on product offerings in manufacturer catalogs.

DOE described the energy efficiency distribution in the October 2019 NOPD TSD chapter 8. 84 FR 56540, 56571. DOE received no comments on the NOPD energy efficiency distribution. DOE used the same distribution in the final determination. See chapter 8 of the final determination TSD for the estimated efficiency distributions.

9. Payback Period Analysis

The PBP is the amount of time it takes the consumer to recover the additional installed cost of more-efficient products, compared to baseline products, through energy cost savings. Payback periods are expressed in years. Payback periods that exceed the life of the product mean that the increased total installed cost is not recovered in reduced operating expenses.

The inputs to the simple PBP calculation for each efficiency level are the change in total installed cost of the product and the change in the first-year annual operating expenditures relative to the baseline. The PBP calculation uses the same inputs as the LCC analysis, except that discount rates are not needed.

H. Shipments Analysis

DOE uses projections of annual product shipments to calculate the national impacts of potential amended energy conservation standards on energy use, NPV, and future manufacturer cash flows.[21] The shipments model takes an accounting approach in tracking market shares of each product class and the vintage of units in the stock. Stock accounting uses product shipments as inputs to estimate the age distribution of in-service product stocks for all years. The age distribution of in-service product stocks is a key input to calculations of both the NES and NPV, because operating costs for any year depend on the age distribution of the stock.

In the October 2019 NOPD, DOE modeled four declining shipment scenarios. 84 FR 56540, 56572–56573. DOE received written comments supporting the projection of declining

[18] The implicit discount rate is inferred from a consumer purchase decision between two otherwise identical goods with different first cost and operating cost. It is the interest rate that equates the increment of first cost to the difference in net present value of lifetime operating cost, incorporating the influence of several factors: Transaction costs, risk premiums and response to uncertainty, time preferences, and interest rates at which a consumer is able to borrow or lend.

[19] Board of Governors of the Federal Reserve System. Survey of Consumer Finances. Available at *http://www.federalreserve.gov/PUBS/oss/oss2/scfindex.html.*

[20] *https://www.regulations.doe.gov/ccms.*

[21] DOE uses data on manufacturer shipments as a proxy for national sales, as aggregate data on sales are lacking. In general, one would expect a close correspondence between shipments and sales.

shipments. CA IOUs, Lutron, and NEMA all stated that there is an ongoing and continual decline in shipments of fluorescent lamp ballasts. (CA IOUs, No. 25 at p. 2; Lutron, No. 23 at p. 2; NEMA, No. 24 at p. 2)

Both Signify and NEMA also provided data in comments related to the shipment volume. Signify stated that the current (2019) fluorescent lamp ballast market may be only 15 percent of the total shipments in 2011. (Signify, No. 27 at p. 2) NEMA provided a figure indexed to 2015 indicating the 2019 volume was roughly 30 percent the volume of 2015 shipments. (NEMA, No. 24 at pp. 4, Fluorescent Driver Index graph)

In this final determination, DOE continued to rely on projections of declining shipments but calibrated the volume of shipments by reducing the volume of shipments per comments received. In the October 2019 NOPD, DOE modeled four shipment scenarios and DOE retained those scenarios for this final.

(1) Scenario #1—declining shipments that all terminate in 2024.

(2) Scenario #2—declining shipments that all terminate in 2040.

(3) Scenario #3—declining shipments that approach zero near the end of the analysis period (2052). This scenario is close to a year-over-year linear reduction of shipments by 20 percent.

(4) Scenario #4—declining shipments that terminate near the end of the analysis period. This scenario is based on a slower decline rate in the initial part of the analysis period and is similar to a projected decline in fluorescent lamps. See 84 FR 56540, 56572.

DOE presented in the October 2019 NOPD results under each of the four scenarios but relied on scenario #3 as the reference case. 84 FR 56540, 56572. DOE requested comment in the October 2019 NOPD about whether the shipment scenarios were reasonable and likely to occur. *Id.* at 84 FR 56574. DOE also requested comment on which of the four scenarios best characterize future shipments of fluorescent lamp ballasts. *Id.*

NEMA stated that any shipment scenario that includes a near-20 percent rate of decline is useful for estimations/modeling. (NEMA, No. 24 at p. 5)

Dimming ballasts were included in the shipment scenarios. DOE requested comment regarding the rate of decline for dimming ballast shipments as compared to non-dimming ballasts. 84 FR 56540, 56574. NEMA provided general information about the cost of dimming ballasts stating they involve more complex circuitry and tend to sell at a higher price than fixed output ballasts. NEMA stated that logically the higher price would equate to a higher rate of decline based on competition with LED technology. (NEMA, No. 24 at p. 4) NEMA stated that that the demand for dimming ballasts is declining faster than the decline for fluorescent lamps. (NEMA, No. 24 at p. 2) NEMA stated that the dimming ballast shipment scenario appears accurate. (NEMA, No. 24 at p. 5) Therefore, DOE utilized a similar declining shipment scenario for dimming ballasts in the 2019 NOPD and this final determination.

I. National Impact Analysis

DOE conducted a NIA in the October 2019 NOPD. 84 FR 56540, 56574–56576. The NIA assesses the NES and the NPV from a national perspective of total consumer costs and savings that would be expected to result from new or amended standards at specific efficiency levels.[22] (''Consumer'' in this context refers to consumers of the product being regulated.) DOE calculates the NES and NPV for the potential standard levels considered based on projections of annual product shipments, along with the annual energy consumption and total installed cost data from the energy use and LCC analyses. For the present analysis, DOE projected the energy savings, operating cost savings, product costs, and NPV of consumer benefits over the lifetime of fluorescent lamp ballasts sold from 2023 through 2052.

DOE evaluates the effects of amended standards by comparing a case without such standards with standards-case projections. The no-new-standards case characterizes energy use and consumer costs for each product class in the absence of amended energy conservation standards. For this projection, DOE considers historical trends in efficiency and various forces that are likely to affect the mix of efficiencies over time. DOE compares the no-new-standards case with projections characterizing the market for each product class if DOE adopted amended standards at specific energy efficiency levels (*i.e.,* the ELs or standards cases) for that class. For the standards cases, DOE considers how a given standard would likely affect the market shares of products with efficiencies greater than the standard.

DOE uses a spreadsheet model to calculate the energy savings and the national consumer costs and savings from each EL. Interested parties can review DOE's analyses by changing various input quantities within the spreadsheet.[23] The NIA spreadsheet model uses typical values (as opposed to probability distributions) as inputs.

Table IV.13 summarizes the inputs and methods DOE used for the NIA analysis for the final determination. Discussion of these inputs and methods follows the table. See chapter 10 of the final determination TSD for further details.

TABLE IV.13—SUMMARY OF INPUTS AND METHODS FOR THE NATIONAL IMPACT ANALYSIS

Inputs	Method
Shipments	Annual shipments from shipments model.
Compliance Date of Standard.	2023.
Efficiency Trends.	No-new-standards case, Standard cases.
Annual Energy Consumption per Unit.	Annual weighted-average values are a function of energy use at each EL.
Total Installed Cost per Unit.	Annual weighted-average values are a function of cost at each EL. Incorporates projection of future product prices based on historical data.
Annual Energy Cost per Unit.	Annual weighted-average values as a function of the annual energy consumption per unit and energy prices.
Repair and Maintenance Cost per Unit.	Annual values do not change with efficiency level.
Energy Price Trends.	*AEO2020* projections (to 2050) and extrapolation thereafter.
Energy Site-to-Primary and FFC Conversion.	A time-series conversion factor based on *AEO2020.*
Discount Rate	Three and seven percent.
Present Year ..	2020.

NEMA stated that in the 2011 FL Ballast Rule the difference in energy savings between the two TSLs with the highest efficiency levels was negligible, the increase in net benefit to the country was trivial, and the capital conversion costs for manufacturers were significant indicating fluorescent lamp ballasts are already very efficient and additional energy savings not needed.[24] (NEMA,

[22] The NIA accounts for impacts in the 50 states and U.S. territories.

[23] The spreadsheet is in the docket and can be found at *https://www.regulations.gov/document?D=EERE-2015-BT-STD-0006-0017.*

[24] For context, in the 2011 FL Ballast Rule, DOE evaluated trial standard levels (''TSLs'') 3A and 3B. TSL 3A represented energy conservation standards at the maximum technologically feasible level for all product classes except for residential and 8-foot HO IS/RS product classes; and TSL 3B represented the maximum technologically feasible level for all product classes. 76 FR 70547, 70596. The difference

No. 24 at p. 2) Similarly Lutron stated energy savings are small and supported DOE's net present value conclusion. (Lutron, No. 23 at p. 2) No stakeholder input was received related to different methods or additional data sets. The final determination NIA methodology was consistent with the October 2019 NOPD.

1. Product Efficiency Trends

A key component of the NIA is the trend in energy efficiency projected for the no-new-standards case and each of the standards cases. Section IV.G.8 of this document describes how DOE developed an energy efficiency distribution for the no-new-standards case (which yields a shipment-weighted average efficiency) for each of the considered product classes for the year of anticipated compliance with an amended or new standard.

For the standards cases, DOE used a ''roll-up'' scenario to establish the shipment-weighted efficiency for the year that standards are assumed to become effective (2023). In this scenario, the market shares of products in the no-new-standards case that do not meet the standard under consideration would ''roll up'' to meet the amended standard level, and the market share of products above the standard would remain unchanged.

DOE has included within the NIA model a standards-induced shift scenario in which if EL 1 is selected, 25 percent of the consumers would migrate to a new LED technology. If EL 2 is selected, 50 percent of the consumers would migrate to a new LED technology, and if EL 3 is selected, 75 percent of the consumers would migrate to a new LED technology. Within the NIA model, the percentage of customers migrating away is not fixed and can be changed by the user.

Within DOE's standard-induced shift away from a FLB scenario, DOE modeled the shift to occur at different increments at each EL and not at a specific PBP or specific increase in FLB price. The PBPs vary for all of the product classes and ballasts. The potential cost differential between the baseline ballast and a more efficient EL ballast varies across the products classes as well.

In the October 2019 NOPD, DOE requested comment about the following: (1) The percentage of customers that might migrate away from FLB technology, (2) the specific incremental cost that could trigger a standards-induced shift away from fluorescent lamp ballasts, (3) the approach for input power and price for LED devices considered in a standards-induced shift, (4) any potential impediments that would prevent users of fluorescent lamp ballasts from switching to LED lighting to garner additional energy savings, and (5) the expected effect of potential standards on the rate at which FLB consumers transition to non-FLB technology. 84 FR 56540, 56575. NEMA cited a lack of firsthand knowledge on the subjects. NEMA postulated the shift could be driven from amortization of current investments, LED conversion initial cost, and the role of TLEDs in the industry. Specifically, NEMA stated that TLEDs are compatible with most fixed-output fluorescent ballasts, though less so with dimming ballasts. NEMA also stated that low operating hours of an installation may decrease the incentive to switch to LED lighting. NEMA was not knowledgeable about the percentage of installations shifting to LED but noted the shift was occurring with any light source. (NEMA, No. 24 at p. 6) With no comments providing any additional data or suggestions for the modeling approach, for the final determination, DOE calculated product efficiency trends consistently with the October 2019 NOPD.

Chapter 10 of the final determination TSD provides details on DOE's NIA for fluorescent lamp ballasts.

2. National Energy Savings

The NES analysis involves a comparison of national energy consumption of the considered products between each potential standards case (*i.e.,* an EL) and the case with no amended energy conservation standards. DOE calculated the national energy consumption by multiplying the number of units (stock) of each product (by vintage or age) by the unit energy consumption (also by vintage). DOE calculated annual NES based on the difference in national energy consumption for the no-new-standards case and for each higher efficiency standard case. DOE estimated energy consumption and savings based on site energy and converted the electricity consumption and savings to source energy (*i.e.,* the energy consumed by power plants to generate site electricity) using annual conversion factors derived from *AEO2020.* Cumulative energy savings are the sum of the NES for each year over the timeframe of the analysis.

Use of higher-efficiency products is occasionally associated with a direct rebound effect, which refers to an increase in utilization of the product due to the increase in efficiency. As discussed in Table IV.12, DOE did not find rebound present in the FLB market and therefore was not included in the NIA.

In 2011, in response to the recommendations of a committee on ''Point-of-Use and Full-Fuel-Cycle Measurement Approaches to Energy Efficiency Standards'' appointed by the National Academy of Sciences, DOE announced its intention to use FFC measures of energy use and greenhouse gas and other emissions in the national impact analyses and emissions analyses included in future energy conservation standards rulemakings. 76 FR 51281 (Aug. 18, 2011). After evaluating the approaches discussed in the August 18, 2011 notice, DOE published a statement of amended policy in which DOE explained its determination that EIA's National Energy Modeling System (''NEMS'') is the most appropriate tool for its FFC analysis and its intention to use NEMS for that purpose. 77 FR 49701 (Aug. 17, 2012). NEMS is a public domain, multi-sector, partial equilibrium model of the U.S. energy sector [25] that EIA uses to prepare its *Annual Energy Outlook.* The FFC factors incorporate losses in production and delivery in the case of natural gas (including fugitive emissions) and additional energy used to produce and deliver the various fuels used by power plants. The approach used generally for deriving FFC measures of energy use and emissions is described in chapter 10 of the final determination TSD.

The calculations of energy savings are consistent with the October 2019 NOPD calculations with updates to energy prices, costs, and shipments described in IV.G and IV.H of this document.

3. Net Present Value Analysis

The inputs for determining the NPV of the total costs and benefits experienced by consumers are (1) total annual installed cost, (2) total annual operating costs (energy costs and repair and maintenance costs), and (3) a discount factor to calculate the present value of costs and savings. DOE calculates net savings each year as the difference between the no-new-standards case and each standards case in terms of total savings in operating costs versus total increases in installed costs. DOE calculates operating cost

in NPV between 3Aand 3B rounded to 1 percent at a 7 percent discount rate and rounded to 0 percent at a 3 percent discount rate. The impact on industrial net present value was a decrease of $33 million between 3A and 3B, or a decrease of 4.4 percent relative to the no-new-standards base. 76 FR 70547, 70620.

[25] For more information on NEMS, refer to *The National Energy Modeling System: An Overview 2009,* DOE/EIA–0581(2009), October 2009. Available at *https://www.eia.gov/outlooks/aeo/nems/overview/index.html.*

savings over the lifetime of each product shipped during the projection period.

As discussed in section IV.G of this document, DOE developed FLB price trends based on electronic ballasts. By 2052, which is the end date of the projection period, the average FLB price is projected to drop 4.5 percent relative to 2016. DOE's projection of product prices is described in appendix 8C of the final determination TSD. Consistent with the October 2019 NOPD, for this final determination, DOE excluded price trends from the consumer costs of fluorescent lamp ballasts used in the NIA.

The operating cost savings are energy cost savings, which are calculated using the estimated energy savings in each year and the projected price of the appropriate form of energy. To estimate energy prices in future years, DOE multiplied the average regional energy prices by the projection of annual national-average energy price changes in the Reference case from *AEO2020,* which has an end year of 2050. To estimate price trends after 2050, DOE used the average annual rate of change in prices from 2040 through 2050.

In calculating the NPV, DOE multiplies the net savings in future years by a discount factor to determine their present value. For this final determination, DOE estimated the NPV of consumer benefits using both a 3-percent and a 7-percent real discount rate. DOE uses these discount rates in accordance with guidance provided by the Office of Management and Budget (''OMB'') to Federal agencies on the development of regulatory analysis.[26] The discount rates for the determination of NPV are in contrast to the discount rates used in the LCC analysis, which are designed to reflect a consumer's perspective. The 7-percent real value is an estimate of the average before-tax rate of return to private capital in the U.S. economy. The 3-percent real value represents the ''social rate of time preference,'' which is the rate at which society discounts future consumption flows to their present value.

No stakeholder input was received that suggested either a different methodology or additional data sets. In the final determination NIA methodology was consistent with the October 2019 NOPD.

[26] United States Office of Management and Budget. *Circular A–4: Regulatory Analysis.* September 17, 2003. Section E. Available at *http://www.whitehouse.gov/omb/memoranda/m03-21.html.*

J. Manufacturer Impact Analysis

1. Overview

DOE performed an MIA to estimate the financial impacts of potential amended energy conservation standards on manufacturers of fluorescent lamp ballasts. DOE relied on the GRIM, an industry cash flow model with inputs specific to this rulemaking. The key GRIM inputs include data on the industry cost structure, unit production costs, product shipments, manufacturer markups, and investments in research and development (''R&D'') and manufacturing capital required to produce compliant products. The key GRIM outputs are the industry net present value (''INPV''), which is the sum of industry annual cash flows over the analysis period, discounted using the industry-weighted average cost of capital, and the impact to domestic manufacturing employment. The GRIM calculates cash flows using standard accounting principles and compares changes in INPV between the no-new-standards case and each standards case. The difference in INPV between the no-new-standards case and a standards case represents the financial impact of the amended energy conservation standard on manufacturers.

To capture the uncertainty relating to manufacturer pricing strategies following amended standards, the GRIM estimates a range of possible impacts under different markup scenarios.

DOE created initial estimates for the industry financial inputs used in the GRIM (*e.g.,* tax rate; working capital rate; net property plant and equipment expenses; selling, general, and administrative (''SG&A'') expenses; R&D expenses; depreciation expenses; capital expenditures; and industry discount rate) based on publicly available sources, such as company filings of form 10–K from the SEC or corporate annual reports.[27] DOE then further calibrated these initial estimates during manufacturer interviews to arrive at the final estimates used in the GRIM.

The GRIM uses several factors to determine a series of annual cash flows starting with the announcement of potential standards and extending over a 30-year period following the compliance date of potential standards. These factors include annual expected revenues, costs of sales, SG&A and R&D expenses, taxes, and capital expenditures. In general, energy conservation standards can affect manufacturer cash flow in three distinct ways: (1) Creating a need for increased investment, (2) raising production costs per unit, and (3) altering revenue due to higher per-unit prices and changes in sales volumes.

The GRIM spreadsheet uses inputs to arrive at a series of annual cash flows, beginning in 2020 (the reference year of the analysis) and continuing to 2052. DOE calculated INPVs by summing the stream of annual discounted cash flows during this period. DOE used a real discount rate of 9.6 percent for FLB manufacturers. This initial discount rate estimate was derived using the capital asset pricing model in conjunction with publicly available information (*e.g.,* 10-year treasury rates of return and company specific betas). DOE then confirmed this initial estimate during manufacturer interviews. Additional details about the GRIM, the discount rate, and other financial parameters can be found in chapter 11 of the final determination TSD.

2. Manufacturer Production Costs

Manufacturing more efficient fluorescent lamp ballasts is typically more expensive because of the use of more complex components, which are typically more costly than baseline components. The changes in the MPCs of covered products can affect the revenues, gross margins, and cash flow of the industry. Typically, DOE develops MPCs for the covered products using reverse-engineering. These costs are used as an input to the LCC analysis and NIA. However, because ballasts are difficult to reverse-engineer, DOE directly derived end-user prices in the engineering analysis and then used the end-user prices in conjunction with markups to calculate the MPCs of fluorescent lamp ballasts. DOE used the same end-user prices in this final determination that were used in the proposed determination, however, DOE updated the prices to 2019$. See IV.E for a further explanation of product price determination.

To determine MPCs of fluorescent lamp ballasts from the wholesale prices calculated in the engineering analysis, DOE divided the wholesale prices by the wholesaler markup to calculate the MSP. DOE then divided the MSP by the manufacturer markup to get the MPCs. DOE determined the wholesaler markup to be 1.23 and the manufacturer markup to be 1.40 for all fluorescent lamp ballasts. DOE used the same markups in this final determination that were used in the proposed determination. Markups are further described in section IV.J.5 of this document.

[27] 10-Ks are collected from the SEC's EDGAR database: *https://www.sec.gov/edgar.shtml* or from annual financial reports collected from individual company websites.

3. Shipments Projections

The GRIM estimates manufacturer revenues based on total unit shipment projections and the distribution of those shipments by EL. Changes in sales volumes and efficiency mix over time can significantly affect manufacturer finances. For this analysis, the GRIM uses the NIA's annual shipment projections from shipments scenario #3 (reference case, see section IV.H) starting in 2020 (the reference year) and ending in 2052 (the end year of the analysis period). DOE updated the shipment analysis for the final determination (see section IV.H). The GRIM uses these updated shipments as part of the final determination MIA. See chapter 9 of the final determination TSD for additional shipment details.

4. Product and Capital Conversion Costs

Potential amended energy conservation standards could cause manufacturers to incur conversion costs to bring their production facilities and equipment designs into compliance. DOE evaluated the level of conversion-related expenditures that would be needed to comply with each considered EL in each product class. For the MIA, DOE classified these conversion costs into two major groups: (1) Product conversion costs; and (2) capital conversion costs. Product conversion costs are investments in research, development, testing, marketing, and other non-capitalized costs necessary to make product designs comply with amended energy conservation standards. Capital conversion costs are investments in property, plant, and equipment necessary to adapt or change existing production facilities such that new compliant product designs can be fabricated and assembled.

To evaluate the level of capital conversion costs manufacturers would likely incur to comply with the analyzed energy conservation standards, DOE used data from the 2011 FL Ballast Rule to estimate costs to update manufacturer production lines by product class. DOE then estimated the number of production lines currently in existence and the number of production lines that would be required to be updated at each analyzed EL using DOE's compliance certification database. DOE then multiplied these numbers together (*i.e.,* capital conversion costs per production line and number of production lines that would need to be updated) to get the final estimated capital conversion costs for each product class at each analyzed EL. To evaluate the level of product conversion costs manufacturers would likely incur to comply with the analyzed energy conservation standards, DOE used data from the 2011 FL Ballast Rule to estimate per model R&D and testing and certification costs for each product class and EL. DOE then estimated the number of models that would need to be redesigned for each product class at each analyzed EL. DOE then multiplied these numbers together to get the final estimated product conversion costs for each product class at each analyzed EL. DOE used the same conversion cost estimates in this final determination that were used in the proposed determination; however, DOE updated the conversion cost estimates to 2019$.

In general, DOE assumes all conversion-related investments occur between the announcement of a potential energy conservation standard (*i.e.,* the publication of the final rule) and the year by which manufacturers must comply with the potential amended standards. The conversion cost figures used in the GRIM can be found in Table V.6 and Table V.7 of this document. For additional information on the estimated capital and product conversion costs, see chapter 11 of the final determination TSD.

DOE received comments related to manufacturers' willingness to make investments related to fluorescent lamp ballasts. Lutron stated it is not making investments to create new fluorescent lamp ballast products or improving existing ones. (Lutron, No. 23 at p. 2) Similarly, NEMA stated no NEMA manufacturer is investing in fluorescent lamp ballast technology and changes to standards will lead discontinuation of products rather than new investment to meet potential energy conservation standards. NEMA added that product R&D in this area has shifted to LED technology (*i.e.,* LED drivers). (NEMA, No. 24 at p. 2)

DOE understands that fluorescent lamp ballasts are a declining lighting technology and that most manufacturers are focused on products that utilize LED technology. However, DOE estimated the conversion costs necessary for manufacturers to produce the quantity of fluorescent lamp ballasts projected in the shipment analysis. As stated previously these industry conversion cost estimates are displayed in Table V.6 and Table V.7 of this document.

5. Markup Scenarios

To calculate the MPCs used in the GRIM, DOE divided the wholesaler prices calculated in the engineering analysis by the wholesaler markup and the manufacturer markup. The wholesaler markup was calculated in the 2011 FL Ballast Rule by reviewing SEC 10–K reports of electrical wholesalers. DOE also coordinated with the National Association of Electrical Distributors by contacting two representative electrical wholesalers, who confirmed that DOE's calculated markups were consistent with their actual ballast markups. DOE continued to use a wholesaler markup of 1.23 in this final determination.

The manufacturer markup accounts for the non-production costs (*i.e.,* SG&A, R&D, and interest) along with profit. Modifying the manufacturer markup in the standards case yields different sets of impacts on manufacturers. For the MIA, DOE modeled two standards-case markup scenarios to represent uncertainty regarding the potential impacts on prices and profitability for manufacturers following the implementation of analyzed energy conservation standards: (1) A preservation of gross margin percentage markup scenario and (2) a preservation of operating profit markup scenario. These scenarios lead to different manufacturer markup values that, when applied to the MPCs, result in varying revenue and cash flow impacts.

Under the preservation of gross margin percentage scenario, DOE applied a single uniform ''gross margin percentage'' markup across all ELs, which assumes that manufacturers would be able to maintain the same amount of profit as a percentage of revenues at all ELs within a product class. To calculate the preservation of gross margin markup, DOE took the manufacturer markup used in the 2011 FL Ballast Rule and compared it to the manufacturer markups calculated by examining the SEC 10-Ks of all publicly traded FLB manufacturers and confirmed this with manufacturers during interviews. DOE determined that the manufacturer markup used in the 2011 FL Ballast Rule was consistent with the current SEC 10-Ks of the publicly traded FLB manufacturers and most manufacturers agreed during manufacturer interviews. Therefore, DOE used 1.40 as the manufacturer markup in the preservation of gross margin markup scenario. DOE assumes that this markup scenario represents the upper bound to industry profitability under analyzed energy conservation standards.

Under the preservation of operating profit markup scenario, DOE modeled a situation in which manufacturers are not able to increase operating profit in proportion to increases in manufacturer production costs. Under this scenario, as the cost of production increases, manufacturers are generally required to

reduce the manufacturer markups to maintain cost competitive offerings in the market. Therefore, gross margin (as a percentage) shrinks in the standards cases in this markup scenario. This markup scenario represents the lower bound to industry profitability under amended energy conservation standards. DOE used the same manufacturer markups in this final determination that were used in the proposed determination.

DOE did not receive comment on the markup scenarios and continued with the approach as presented in the October 2019 NOPD. A comparison of industry financial impacts under the two manufacturer markup scenarios is presented in section V.A.3.a of this document.

6. Manufacturer Interviews

Prior to the publication of the October 2019 NOPD, DOE interviewed manufacturers of fluorescent lamp ballasts and asked them to describe their major concerns regarding a potential rulemaking to amend the standards for fluorescent lamp ballasts. Major areas of concerns identified in manufacturer interviews were discussed in the October 2019 NOPD. 84 FR 56540, 56578. DOE considered the information received during these interviews in the development of the NOPD and this final determination as discussed in the October 2019 NOPD. *See id.*

V. Analytical Results and Conclusions

The following section addresses the results from DOE's analyses with respect to the considered energy conservation standards for fluorescent lamp ballasts. It addresses the ELs examined by DOE, and the projected impacts of each of these levels. Additional details regarding DOE's analyses are contained in the final determination TSD supporting this document.

A. Economic Justification and Energy Savings

1. Economic Impacts on Individual Consumers

DOE analyzed the economic impacts on FLB consumers by looking at the effects that potential amended standards at each EL would have on the LCC and PBP. DOE usually evaluates the LCC impacts of potential standards on identifiable subgroups of consumers that may be affected disproportionately by a national standard. However, given the negative NPV at each EL and the conclusion discussed in section V.B.2, DOE did not conduct a consumer subgroup analysis for this final determination.

In general, higher-efficiency products affect consumers in two ways: (1) Purchase price increases and (2) annual operating costs decrease. Inputs used for calculating the LCC and PBP include total installed costs (*i.e.,* product price plus installation costs) and operating costs (*i.e.,* annual energy use, energy prices, energy price trends, repair costs, and maintenance costs). The LCC calculation also uses product lifetime and a discount rate. Table V.1 shows the LCC and PBP results for the ELs considered for fluorescent lamp ballasts.

TABLE V.1—AVERAGE LCC AND PBP RESULTS FOR FLUORESCENT LAMP BALLASTS

Efficiency level *	LCC savings 2019$	Simple payback period years
EL 1	0	12
EL 2	1	10
EL 3	1	10

* **Note:** The results for each EL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

2. National Impact Analysis

This section presents DOE's estimates of the NES and the NPV of consumer impacts that would result from each of the ELs considered as potential amended standards.

a. Significance of Energy Savings

To estimate the energy savings attributable to potential amended standards for fluorescent lamp ballasts, DOE compared their energy consumption under the no-new-standards case to their anticipated energy consumption under each EL. The savings are measured over the entire lifetime of products purchased in the 30-year period that begins in the year of anticipated compliance with amended standards (2023–2052). Table V.2 presents DOE's projections of the NES for each EL considered for fluorescent lamp ballasts for reference shipment scenario 3 (see IV.H). Results of all shipment scenarios are provided in chapter 10 of the final determination TSD. The savings were calculated using the approach described in section IV.I.2 of this document.

TABLE V.2—CUMULATIVE NATIONAL ENERGY SAVINGS FOR FLUORESCENT LAMP BALLASTS; 30 YEARS OF SHIPMENTS (2023–2052)

	Efficiency level		
	Quads		
	1	2	3
Site energy	0.009	0.026	0.032
Source energy	0.023	0.069	0.086
FFC energy	0.024	0.072	0.090

OMB Circular A–4 [28] requires agencies to present analytical results, including separate schedules of the monetized benefits and costs that show the type and timing of benefits and costs. Circular A–4 also directs agencies to consider the variability of key elements underlying the estimates of benefits and costs. For this rulemaking, DOE undertook a sensitivity analysis using 9 years, rather than 30 years, of product shipments. The choice of a 9-year period is a proxy for the timeline in EPCA for the review of certain energy conservation standards and potential revision of and compliance with such revised standards.[29] The review timeframe established in EPCA is generally not synchronized with the product lifetime, product manufacturing cycles, or other factors specific to fluorescent lamp ballasts. Thus, such results are presented for informational purposes only and are not indicative of any change in DOE's analytical methodology. The NES sensitivity analysis results based on a 9-year analytical period are presented in Table V.3 for reference shipment scenario 3 (see section IV.H). The impacts are counted over the lifetime of fluorescent lamp ballasts urchased in 2023–2031.

[28] U.S. Office of Management and Budget. *Circular A–4: Regulatory Analysis.* September 17, 2003. *http://www.whitehouse.gov/omb/circulars_a004_a-4/.*

[29] Section 325(m) of EPCA requires DOE to review its standards at least once every 6 years, and requires, for certain products, a 3-year period after any new standard is promulgated before compliance is required, except that in no case may any new standards be required within 6 years of the compliance date of the previous standards. While adding a 6-year review to the 3-year compliance period adds up to 9 years, DOE notes that it may undertake reviews at any time within the 6 year period and that the 3-year compliance date may yield to the 6-year backstop. A 9-year analysis period may not be appropriate given the variability that occurs in the timing of standards reviews and the fact that for some products, the compliance period is 5 years rather than 3 years.

TABLE V.3—CUMULATIVE NATIONAL ENERGY SAVINGS FOR FLUORESCENT LAMP BALLASTS; 9 YEARS OF SHIPMENTS (2023–2031)

	Efficiency level		
	Quads		
	1	2	3
Site energy	0.006	0.017	0.022
Source energy	0.015	0.045	0.058
FFC energy	0.016	0.047	0.061

b. Net Present Value of Consumer Costs and Benefits

DOE estimated the cumulative NPV of the total costs and savings for consumers that would result from the ELs considered for fluorescent lamp ballasts. In accordance with OMB's guidelines on regulatory analysis,[30] DOE calculated NPV using both a 7-percent and a 3-percent real discount rate. Table V.4 shows the consumer NPV results with impacts counted over the lifetime of products purchased in 2023–2052 for reference shipment scenario 3 (see section IV.H). Results of all shipment scenarios are provided in chapter 10 of the final determination TSD.

TABLE V.4—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR FLUORESCENT LAMP BALLASTS; 30 YEARS OF SHIPMENTS (2023–2052)

	Efficiency level		
	billion 2019$		
	1	2	3
3 percent	(0.077)	(0.053)	(0.098)
7 percent	(0.71)	(0.084)	(0.127)

The NPV results based on the aforementioned 9-year analytical period and reference shipment scenario (see section IV.H) are presented in Table V.5. The impacts are counted over the lifetime of products purchased in 2023–2031. As mentioned previously, such results are presented for informational purposes only and are not indicative of any change in DOE's analytical methodology or decision criteria.

TABLE V.5—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR FLUORESCENT LAMP BALLASTS; 9 YEARS OF SHIPMENTS (2023–2031)

	Efficiency level		
	billion 2019$		
	1	2	3
3 percent	(0.050)	(0.023)	(0.043)
7 percent	(0.053)	(0.059)	(0.087)

3. Economic Impacts on Manufacturers

In addition to the analysis conducted as required under 42 U.S.C. 6395(m)(1)(A), DOE performed an MIA to estimate the impact of analyzed energy conservation standards on manufacturers of fluorescent lamp ballasts. The following sections describe the expected impacts on fluorescent lamp manufacturers at each EL. Chapter 11 of the final determination TSD explains the analysis in further detail.

a. Industry Cash Flow Analysis Results

In this section, DOE provides the results from the MIA, which examines changes in the industry that would result from the analyzed standards. The following tables illustrate the estimated financial impacts (represented by changes in INPV) of potential amended energy conservation standards on manufacturers of fluorescent lamp ballasts, as well as the conversion costs that DOE estimates manufacturers of fluorescent lamp ballasts would incur at each EL.

To evaluate the range of cash-flow impacts on the FLB industry, DOE modeled two markup scenarios that correspond to the range of anticipated market responses to potential standards. Each scenario results in a unique set of cash flows and corresponding industry values at each EL. In the following discussion, the INPV results refer to the difference in industry value between the no-new-standards case and the standards cases that result from the sum of discounted cash flows from the reference year (2020) through the end of the analysis period (2052).

To assess the upper (less severe) end of the range of potential impacts on FLB manufacturers, DOE modeled a preservation of gross margin markup scenario. This scenario assumes that in the standards case, manufacturers would be able to pass along all the higher production costs required for more efficient products to their consumers. To assess the lower (more severe) end of the range of potential impacts, DOE modeled a preservation of

[30] U.S. Office of Management and Budget. *Circular A–4: Regulatory Analysis.* September 17, 2003. *http://www.whitehouse.gov/omb/circulars_a004_a-4/.*

operating profit markup scenario. The preservation of operating profit markup scenario assumes that in the standards cases, manufacturers would be able to earn the same operating margin in absolute dollars as they would in the no-new-standards case.

Table V.6 and Table V.7 present the results of the industry cash flow analysis for FLB manufacturers under the preservation of gross margin and preservation of operating profit markup scenarios, respectively. See chapter 11 of the final determination TSD for results of the complete industry cash flow analysis by product class.

TABLE V.6—MANUFACTURER IMPACT ANALYSIS FOR ALL FLUORESCENT LAMP BALLAST—PRESERVATION OF GROSS MARGIN MARKUP SCENARIO

	Units	No-new-standards case	EL 1	EL 2	EL 3
INPV	*2019$ millions*	210.0	147.4	83.4	70.6
Change in INPV	*2019$ millions*		(62.6)	(126.6)	(139.5)
	%		(29.8)	(60.3)	(66.4)
Product Conversion Costs	*2019$ millions*		69.2	132.9	147.7
Capital Conversion Costs	*2019$ millions*		17.5	33.2	35.9
Total Conversion Costs	*2019$ millions*		86.7	166.2	183.6

TABLE V.7—MANUFACTURER IMPACT ANALYSIS FOR ALL FLUORESCENT LAMP BALLAST—PRESERVATION OF OPERATING PROFIT MARKUP SCENARIO

	Units	No-new-standards case	EL 1	EL 2	EL 3
INPV	*2019$ millions*	210.0	144.3	76.4	61.0
Change in INPV	*2019$ millions*		(65.7)	(133.7)	(149.0)
	%		(31.3)	(63.6)	(70.9)
Product Conversion Costs	*2019$ millions*		69.2	132.9	147.7
Capital Conversion Costs	*2019$ millions*		17.5	33.2	35.9
Total Conversion Costs	*2019$ millions*		86.7	166.2	183.6

b. Direct Impacts on Employment

DOE typically presents quantitative estimates of the potential changes in production employment that could result from the analyzed energy conservation standard levels. However, for this final determination, DOE determined that no manufacturers have domestic FLB production. Therefore, this determination would not have a significant impact on domestic employment in the FLB industry.

c. Impacts on Manufacturing Capacity

DOE does not anticipate any significant capacity constraints at any of the analyzed energy conservation standards. The more efficient components are currently being used in existing FLB models and worldwide supply would most likely be able to meet the increase in demand given the 3-year compliance period for any potential energy conservation standards.

d. Impacts on Subgroups of Manufacturers

Using average cost assumptions to develop an industry cash-flow estimate may not be adequate for assessing differential impacts among manufacturer subgroups. Small manufacturers, niche equipment manufacturers, and manufacturers exhibiting cost structures substantially different from the industry average could be affected disproportionately. DOE only identified one manufacturer subgroup for fluorescent lamp ballasts, small manufacturers. Given that DOE is issuing this final determination pursuant to 42 U.S.C. 6295(m)(1) and given the conclusion discussed in section V.B, DOE did not conduct a manufacturer subgroup analysis on small business manufacturers for this final determination.

e. Cumulative Regulatory Burden

One aspect of assessing manufacturer burden involves looking at the cumulative impact of multiple DOE standards and the product-specific regulatory actions of other Federal agencies that affect the manufacturers of a covered product. While any one regulation may not impose a significant burden on manufacturers, the combined effects of several existing or impending regulations may have serious consequences for some manufacturers, groups of manufacturers, or an entire industry. Assessing the impact of a single regulation may overlook this cumulative regulatory burden. In addition to energy conservation standards, other regulations can significantly affect manufacturers' financial operations. Multiple regulations affecting the same manufacturer can strain profits and lead companies to abandon product lines or markets with lower expected future returns than competing products. For these reasons, DOE typically conducts an analysis of cumulative regulatory burden as part of its rulemakings proposing new or amended energy conservation standards. However, given the conclusion discussed in section V.A.3, DOE did not conduct a cumulative regulatory burden analysis.

B. Final Determination

As required by EPCA, this final determination analyzes whether amended standards for fluorescent lamp ballasts would result in significant conservation of energy, be technologically feasible, and be cost-effective. (42 U.S.C. 6295(m)(1)(A) and 42 U.S.C. 6295(n)(2)) Any new or amended standards issued by the Secretary would be required to comply with the economic justification and other requirements of 42 U.S.C. 6295(o). In addition to these criteria, DOE also estimated the impact on manufacturers. The criteria considered under 42 U.S.C. 6295(m)(1)(A) and the additional analysis are discussed below. Because an analysis of cost effectiveness and

energy savings first require an evaluation of the relevant technology, DOE first discusses the technological feasibility of amended standards. DOE then addresses the cost effectiveness and energy savings associated with potential amended standards.

1. Technological Feasibility

EPCA mandates that DOE consider whether amended energy conservation standards for fluorescent lamp ballasts would be technologically feasible. (42 U.S.C. 6295(m)(1)(A) and 42 U.S.C. 6295(n)(2)(B)) DOE has determined that there are technology options that would improve the efficiency of fluorescent lamp ballasts. These technology options are being used in commercially available fluorescent lamp ballasts and therefore are technologically feasible. (See section IV.C.2 for further information.) Hence, DOE has determined that new and amended energy conservation standards for fluorescent lamp ballasts are technologically feasible.

2. Cost Effectiveness

EPCA requires DOE to consider whether energy conservation standards for fluorescent lamp ballasts would be cost effective through an evaluation of the savings in operating costs throughout the estimated average life of the covered product compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered products which are likely to result from the imposition of the standard. (42 U.S.C. 6295(m)(1)(A), 42 U.S.C 6295(n)(2)(C), and 42 U.S.C. 6295(o)(2)(B)(i)(II)) DOE conducted an LCC analysis to estimate the net costs/benefits to users from increased efficiency in the considered fluorescent lamp ballasts. (See results in Table V.1).

DOE then aggregated the results from the LCC analysis to estimate the NPV of the total costs and benefits experienced by the Nation. (See results in Table V.4.) As noted, the inputs for determining the NPV are (1) total annual installed cost, (2) total annual operating costs (energy costs and repair and maintenance costs), and (3) a discount factor to calculate the present value of costs and savings. DOE first considered the most efficient level, EL 3 (max-tech), which would result in negative NPV at a 3-percent and 7-percent discount rate. On the basis of negative NPV, DOE determined that EL 3 is not cost effective.

DOE then considered the next most efficient level, EL 2, which would result in negative NPV at a 3-percent and 7-percent discount rate. On the basis of negative NPV, DOE determined that EL 2 is not cost effective.

DOE then considered the next most efficient level, EL 1, which would result in negative NPV at a 3-percent and 7-percent discount rate. On the basis of negative NPV, DOE determined that EL 1 is not cost effective.

3. Significant Conservation of Energy

EPCA also mandates that DOE consider whether amended energy conservation standards for fluorescent lamp ballasts would result in significant conservation of energy. (42 U.S.C. 6295(m)(1)(A) and 42 U.S.C. 6295(n)(2)(A)) As discussed, to determine whether energy savings is significant, DOE conducts a two-step approach that considers both an absolute site energy savings threshold and a threshold that is the percent reduction in the covered energy use. (See Section 6(b) of the Process Rule.) DOE first evaluates the projected energy savings from a potential max-tech standard over a 30-year period against a 0.3 quads of site energy threshold. (See Section 6(b)(2) of the Process Rule.) If the 0.3 quad-threshold is not met, DOE then compares the max-tech savings to the total energy usage of fluorescent lamp ballast to calculate a percentage reduction in energy usage. (See Section 6(b)(3) of the Process Rule.) If this comparison does not yield a reduction in site energy use of at least 10 percent over a 30-year period, the energy savings are deemed to not be significant. (See Section 6(b)(4) of the Process Rule.)

DOE estimates that amended standards for fluorescent lamp ballasts would result in site energy savings of 0.009 quads at EL 1, 0.026 quads at EL 2, and 0.032 quads at EL 3 over a 30-year analysis period (2023–2052). (See results in Table V.2.) Therefore, the projected energy savings from potential standards for fluorescent lamp ballasts do not meet the 0.3 quad of site energy threshold.

DOE then determined that over the 30-year analysis period the percentage of reduction in energy use at the potential max-tech standard level compared to the total energy usage of fluorescent lamp ballasts was one percent. This does not yield a reduction in site energy use of at least 10 percent over a 30-year period.

Because neither criterion for determining significant energy savings specified in Section 6(b)(3) of the Process Rule are met by the potential max-tech standard for fluorescent lamp ballasts, no significant energy savings will result from setting new or amended standards.

4. Other Analysis

In this analysis, DOE also conducted an MIA to estimate the impact of potential energy conservation standards on manufacturers of fluorescent lamp ballasts. (See results in Table V.6 and Table V.7.) Each EL for all applicable product classes is estimated to result in FLB manufacturers experiencing a loss in INPV.

5. Summary

In this final determination, based on the consideration of cost effectiveness and significant energy savings, DOE is not amending energy conservation standards for fluorescent lamp ballasts.

VI. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866 and 13563

This final determination has been determined to be not significant for purposes of Executive Order (''E.O.'') 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (Oct. 4, 1993) and E.O. 13563, a supplement to E.O. 12866, 76 FR 3281 (Jan. 21, 2011). As a result, OMB did not review this final determination.

B. Review Under Executive Orders 13771 and 13777

On January 30, 2017, the President issued E.O. 13771, ''Reducing Regulation and Controlling Regulatory Costs.'' 82 FR 9339 (Feb. 3, 2017). E.O. 13771 stated the policy of the executive branch is to be prudent and financially responsible in the expenditure of funds, from both public and private sources. E.O. 13771 stated it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations.

Additionally, on February 24, 2017, the President issued E.O. 13777, ''Enforcing the Regulatory Reform Agenda.'' 82 FR 12285 (Mar. 1, 2017). E.O. 13777 required the head of each agency designate an agency official as its Regulatory Reform Officer (''RRO''). Each RRO oversees the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms, consistent with applicable law. Further, E.O. 13777 requires the establishment of a regulatory task force at each agency. The regulatory task force is required to make recommendations to the agency head regarding the repeal, replacement, or modification of existing regulations, consistent with applicable law. At a minimum, each regulatory reform task

force must attempt to identify regulations that:

(1) Eliminate jobs, or inhibit job creation;

(2) Are outdated, unnecessary, or ineffective;

(3) Impose costs that exceed benefits;

(4) Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;

(5) Are inconsistent with the requirements of Information Quality Act, or the guidance issued pursuant to that Act, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or

(6) Derive from or implement Executive orders or other Presidential directives that have been subsequently rescinded or substantially modified.

DOE concludes that this final determination is consistent with the directives set forth in these Executive orders.

As discussed in this document, DOE is not amending the energy conservation standards for fluorescent lamp ballasts. Therefore, this final determination is an E.O. 13771 other action.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (''IRFA'') and a final regulatory flexibility analysis (''FRFA'') for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by E.O. 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website (*http://energy.gov/gc/office-general-counsel*).

DOE reviewed this final determination under the provisions of the Regulatory Flexibility Act and the policies and procedures published on February 19, 2003. This final determination is not amending energy conservation standards for fluorescent lamp ballasts. Therefore, DOE certifies that this final determination has no significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a FRFA for this final determination. DOE will transmit this certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

D. Review Under the Paperwork Reduction Act

Manufacturers of fluorescent lamp ballasts must certify to DOE that their products comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for fluorescent lamp ballasts, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including fluorescent lamp ballasts. 76 FR 12422 (Mar. 7, 2011); 80 FR 5099 (Jan. 30, 2015). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (''PRA''). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 35 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any 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.

E. Review Under the National Environmental Policy Act of 1969

Pursuant to the National Environmental Policy Act of 1969 (''NEPA''), DOE has analyzed this final determination in accordance with NEPA and DOE's NEPA implementing regulations (10 CFR part 1021). DOE has determined that this rule qualifies for categorical exclusion A4 because it is an interpretation or ruling in regards to an existing regulation and otherwise meets the requirements for application of a categorical exclusion. See 10 CFR 1021.410. Therefore, DOE has determined that promulgation of this rule is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA, and does not require an environmental assessment or an environmental impact statement.

F. Review Under Executive Order 13132

E.O. 13132, ''Federalism,'' 64 FR 43255 (Aug. 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this final determination. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297) Therefore, no further action is required by Executive Order 13132.

G. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of E.O. 12988, ''Civil Justice Reform,'' imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity, (2) write regulations to minimize litigation, (3) provide a clear legal standard for affected conduct rather than a general standard, and (4) promote simplification and burden reduction. 61 FR 4729 (Feb. 7, 1996). Regarding the review required by section 3(a), section 3(b) of E.O. 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation (1) clearly specifies the preemptive effect, if any, (2) clearly specifies any effect on existing Federal law or regulation, (3) provides a clear legal standard for affected conduct while promoting

simplification and burden reduction, (4) specifies the retroactive effect, if any, (5) adequately defines key terms, and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of E.O. 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final determination meets the relevant standards of E.O. 12988.

H. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (''UMRA'') requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. DOE's policy statement is also available at *http://energy.gov/sites/prod/files/gcprod/documents/umra_97.pdf.*

This final determination does not contain a Federal intergovernmental mandate, nor is it expected to require expenditures of $100 million or more in any one year by the private sector. As a result, the analytical requirements of UMRA do not apply.

I. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999, (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This final determination would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

J. Review Under Executive Order 12630

Pursuant to E.O. 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 18, 1988), DOE has determined that this final determination would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

K. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this final determination under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

L. Review Under Executive Order 13211

E.O. 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (''OIRA'') at OMB, a Statement of Energy Effects for any significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

Because this final determination does not amend energy conservation standards for fluorescent lamp ballasts, it is not a significant energy action, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects on this final determination.

M. Information Quality

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy (''OSTP''), issued its Final Information Quality Bulletin for Peer Review (''the Bulletin''). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the Bulletin is to enhance the quality and credibility of the Government's scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are ''influential scientific information,'' which the Bulletin defines as ''scientific information the agency reasonably can determine will have, or does have, a clear and substantial impact on important public policies or private sector decisions.'' 70 FR 2664, 2667.

In response to OMB's Bulletin, DOE conducted formal peer reviews of the energy conservation standards development process and the analyses that are typically used and prepared a report describing that peer review.[31] Generation of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. DOE has determined that the peer-reviewed analytical process continues to reflect current practice, and the Department followed that process for developing its determination in the case of the present rulemaking.

N. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this final determination prior to its

[31] The 2007 ''Energy Conservation Standards Rulemaking Peer Review Report'' is available at the following website: *http://energy.gov/eere/buildings/downloads/energy-conservation-standards-rulemaking-peer-review-report-0.*

effective date. The report will state that it has been determined that the final determination is not a ''major rule'' as defined by 5 U.S.C. 804(2).

VII. Approval of the Office of the Secretary

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

Signing Authority

This document of the U.S. Department of Energy was signed on December 3, 2020, by Daniel R Simmons, Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the U.S. Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on December 4, 2020.

Treena V. Garrett,

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

[FR Doc. 2020–27045 Filed 12–15–20; 8:45 am]

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Part III

Department of Justice

Executive Office for Immigration Review

8 CFR Parts 1003 and 1240

Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure; Final Rule

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1003 and 1240

[Docket No. EOIR 19–0022; Dir. Order No. 05–2021]

RIN 1125–AA96

Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: Final rule.

SUMMARY: On August 26, 2020, the Department of Justice (''Department'') published a notice of proposed rulemaking (''NPRM'' or ''proposed rule'') that would amend the regulations of the Executive Office for Immigration Review (''EOIR'') regarding the handling of appeals to the Board of Immigration Appeals (''BIA'' or ''Board'').

The Department proposed multiple changes to the processing of appeals to ensure the consistency, efficiency, and quality of its adjudications.

The Department also proposed to amend the regulations to make clear that there is no freestanding authority of line immigration judges or BIA members to administratively close cases. Finally, the Department proposed to delete inapplicable or unnecessary provisions regarding the forwarding of the record of proceedings on appeal. This final rule responds to comments received in response to the NPRM and adopts the NPRM with minor changes as described below.

DATES: This rule is effective on January 15, 2021.

FOR FURTHER INFORMATION CONTACT: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, VA 22041, telephone (703) 305–0289.

SUPPLEMENTARY INFORMATION:

I. Background

A. Proposed Rule

On August 26, 2020, the Department published an NPRM that would amend EOIR's regulations regarding the BIA's handling of appeals. Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 FR 52491 (Aug. 26, 2020). Through the NPRM, the Department proposed a number of changes to EOIR's regulations in 8 CFR parts 1003 and 1240 to ensure that cases heard at the BIA are adjudicated in a consistent and timely manner.

B. Authority

The Department issued this final rule pursuant to section 1103(g) of the Immigration and Nationality Act (''INA'' or ''the Act,''), 8 U.S.C. 1103(g).

C. Final Rule

Following careful consideration of the public comments received, which are discussed in detail below in section II, the Department has determined to publish the provisions of the proposed rule as final with the following changes as noted below in sections I.C.3, I.C.4, I.C.5, I.C.8, I.C.9, and I.C.11 below.

The Department is also clarifying the generally prospective temporal application of the rule.[1] The provisions of the rule applicable to appellate procedures and internal case processing at the BIA apply only to appeals filed, motions to reopen or reconsider filed, or cases remanded to the Board by a Federal court on or after the effective date of the final rule. The provisions of the rule related to the restrictions on *sua sponte* reopening authority are effective for all cases, regardless of posture, on the effective date. The provisions of the rule related to restrictions on the BIA's certification authority are effective for all cases in which an immigration judge issues a decision on or after the effective date. The provisions of the rule regarding administrative closure are applicable to all cases initiated by a charging document, reopened, or recalendared after the effective date.

The rationale provided in the background of the proposed rule remains valid. Accordingly, the major provisions of the final rule are as follows:

1. Briefing Extensions

The final rule will reduce the maximum allowable time for an extension of the briefing schedule for good cause shown from 90 days to 14 days. 8 CFR 1003.3(c). Consistent with current BIA policy ''not to grant second briefing extension requests,'' the rule expressly limits the parties to one possible extension. EOIR, *Board of Immigration Appeals Practice Manual,* Ch. 4.7(c) (hereinafter *BIA Practice Manual*) (last updated Oct. 5, 2020).

2. Simultaneous Briefing

The rule adopts simultaneous briefing schedules instead of consecutive briefing schedules for all cases. 8 CFR 1003.3(c). Previously, the BIA used consecutive briefing for cases involving aliens who are not in custody. The rule does not affect the BIA's ability to permit reply briefs in certain cases, but it does establish a 14-day deadline for their submission.

3. BIA Remands for Identity, Law Enforcement, or Security Investigations or Examinations

The rule revises 8 CFR 1003.1(d)(6)(ii) to provide that, when a case before the BIA requires completing or updating identity, law enforcement, or security investigations or examinations in order to complete adjudication of the appeal, the exclusive course of action would be for the BIA to place the case on hold while identity, law enforcement, or security investigations or examinations are being completed or updated, unless DHS reports that identity, law enforcement, or security investigations or examinations are no longer necessary or until DHS does not timely report the results of completed or updated identity, law enforcement, or security investigations or examinations.

Additionally, the rule authorizes the BIA to deem an application abandoned when the applicant fails, after being notified by DHS, to comply with the requisite procedures for DHS to complete the identity, law enforcement, or security investigations or examinations within 90 days of the BIA's notice that the case is being placed on hold for the completion of the identity, law enforcement, or security investigations or examinations. The rule also retains from the NPRM the exception to abandonment when the immigration judge determines that the alien demonstrates good cause for exceeding the 90-day allowance. Upon such a good cause finding, the immigration judge may grant the alien no more than 30 days to comply with the requisite procedures.

Following the review of public comments received,[2] the final rule makes two changes from the proposed rule on this point. First, this rule contains an additional requirement that, if DHS is unable to independently update any required identity, law enforcement, or security investigations, DHS shall provide a notice to the alien with appropriate instructions, as DHS does before the immigration courts under 8 CFR 1003.47(d), and

[1] The Department notes that the NPRM confusingly indicated that some changes would apply ''on or after the effective date of publication,'' 85 FR at 52498 even though the effective date is 30 days after the date of publication. To correct any confusion from that statement and to provide additional clarity, the Department offers a more delineated explanation of the temporal application of this rule herein.

[2] *See* section II.C.3.e for a summary and response to the comments received on this topic.

simultaneously serve a copy of the notice with the BIA. Second, while the NPRM would have begun the alien's 90-day timeline for compliance with the biometrics update procedures began at the time the Board provided notice to the alien, the final rule aligns the 90-day time period to begin running at the time DHS submits the instructions notice to the alien, if such notice is applicable. The Department agrees with the commenters' concerns that without these changes, the provisions of the proposed rule could have resulted in situations where the alien may be unable to effectively comply with the biometrics requirements due to possible delays by DHS or lack of sufficient notice.

4. Finality of BIA Decisions and Voluntary Departure Authority

In addition, the rule amends 8 CFR 1003.1(d)(7) to provide further guidance regarding the finality of BIA decisions. To begin with, the rule adds a new paragraph (d)(7)(i) to clarify that the BIA has authority to issue final orders when adjudicating an appeal, including final orders of removal when a finding of removability has been made by an immigration judge and an application for protection or relief from removal has been denied; grants of relief or protection from removal; and, orders to terminate or dismiss proceedings.

The rule further adds new § 1003.1(d)(7)(ii) to provide instructions for the BIA regarding when the BIA may order a remand, rather than issuing a final order, after applying the appropriate standard of review to an immigration judge's decision. For example, the rule requires the BIA to first identify the standard of review that was applied and the specific error made by the immigration judge before remanding the proceeding. 8 CFR 1003.1(d)(7)(ii)(A). The final rule has one update from the same paragraph in the proposed rule to include a cross-reference to 8 CFR 1003.1(d)(6)(iii), which allows for BIA remands regarding information obtained as a result of the identity, law enforcement, or security investigations or examinations. The Department has included this cross-reference to prevent any unintended confusion that the remand procedures and options under 8 CFR 1003.1(d)(7)(ii) are the sole ones for the BIA.

Next, the rule adds new paragraph (d)(7)(iii) to 8 CFR 1003.1 to delegate clear authority to the BIA to consider issues relating to the immigration judge's decision on voluntary departure de novo and, within the scope of the BIA's review authority on appeal, to issue final decisions on requests for voluntary departure based on the record of proceedings. Additionally, the rule directly states that the BIA may not remand a case to the immigration court solely to consider a request for voluntary departure under section 240B of the Act, 8 U.S.C. 1229c.

The final rule makes three additional changes from the NPRM in response to public comments. First, in recognition of the fact that Board orders are generally served by mail—unlike orders of immigration judges which are frequently served in person—the final rule states that aliens will have 10 business days to post a voluntary departure bond if the Board's order of voluntary departure was served by mail. Further, as the Board is currently transitioning to an electronic filing system and expects to fully deploy that system within the next year, the final rule retains a period of five business days to post a voluntary departure bond if the Board's order is served electronically.

Second, in response to commenters' concerns about cases in which DHS appeals a separate grant of relief or protection, the Department is making edits from the NPRM to clarify the Board's procedure in that situation. Although cases in which an alien made multiple applications for relief or protection (including voluntary departure), an immigration judge granted at least one application but did not address the request for voluntary departure, DHS appealed the immigration judge's decision, the BIA determined that the immigration judge's decision was in error and that the alien's application(s) should be denied, and the BIA found a basis to deny all other applications submitted by the respondent without needing to remand the case, leaving only the request for voluntary departure unadjudicated, should be uncommon, the Department nevertheless makes clarifying edits to 8 CFR 1240.26(k)(2) and (3) [3] to indicate that the BIA may grant voluntary departure in cases in which DHS appeals provided that the alien requested voluntary departure from the immigration judge and is otherwise eligible.

Third, in response to at least one commenter's concern regarding the expiration of an alien's travel documents, the Department is making changes to the final rule to make clear that if the record does not contain evidence of travel documentation sufficient to assure lawful entry into the country to which the alien is departing—and the alien otherwise has both asserted a request for voluntary departure and established eligibility under the other requirements—the Board may nevertheless grant voluntary for a period not to exceed 120 days, subject to the condition that the alien within 60 days must secure such documentation. This additional provision is consistent with similar authority already contained in 8 CFR 1240.26(b)(3)(ii).[4]

5. Prohibition on Consideration of New Evidence, Limitations on Motions To Remand, Factfinding by the BIA, and the Standard of Review

The rules make several changes to clarify the BIA's ability to take certain actions in adjudicating an appeal to ensure that appeals are adjudicated in a timely fashion without undue remands and consistent with the applicable law.

First, the rule limits the scope of motions to remand that the BIA may consider. Under new paragraph (d)(7)(v) to 8 CFR 1003.1, the BIA is prohibited from receiving new evidence on appeal, remanding a case for the immigration judge to consider new evidence in the course of adjudicating an appeal, or considering a motion to remand based on new evidence. Parties who wish to have new evidence considered in other circumstances may file a motion to reopen in accordance with the standard procedures for such motions, *i.e.,* compliance with the substantive requirements for such a motion at 8 CFR 1003.2(c). These prohibitions have three exceptions for new evidence: (1) The result of identity, law enforcement, or security investigations or examinations, including civil or criminal investigations of immigration fraud; (2) pertaining to a respondent's removability under the provisions of sections 212 and 237 of the Act, 8 U.S.C. 1182 and 1227; and (3) that calls into question an aspect of the jurisdiction of the immigration courts, such as evidence pertaining to alienage [5] or

[3] The Department also notes that 8 CFR 1240.26(k)(2) and (3) were duplicative in the NPRM and has further edited the provisions to remove the duplication since they apply to both types of voluntary departure under section 240B of the Act, 8 U.S.C 1229c.

[4] This provision was, arguably, already incorporated by reference in the NPRM through 8 CFR 1240.26(k)(4) which adopts the provisions of 8 CFR 1240.26(c), (d), (e), (h), and (i) (with one exception) regarding voluntary departure requests before an immigration judge and makes them applicable to requests before the Board. Nevertheless, the Department is specifically incorporating it into the text of the final rule to be applicable to a grant of voluntary departure under either section 240B(a) or 240B(b) of the Act, 8 U.S.C. 1229c(a) or 1229c(b).

[5] For example, EOIR has no jurisdiction over United States citizens with respect to removal proceedings; thus, evidence submitted on appeal

Continued

EOIR's authority vis-à-vis DHS regarding an application for immigration benefits.[6]

Second, the rule clearly delineates the circumstances in which the BIA may engage in factfinding on appeal. 8 CFR 1003.1(d)(3)(iv)(A) and (B). Although the rule maintains the general prohibition on factfinding by the BIA, the rule allows the BIA to take administrative notice of facts that are not reasonably subject to dispute, such as current events, the contents of official documents outside the record, or facts that can be accurately and readily determined from official government sources and whose accuracy is not disputed. If the BIA intends to administratively notice any such fact outside the record that would be the basis for overturning a grant of relief or protection issued by an immigration judge, the BIA must give notice to the parties and an opportunity for them to respond.

Third, the rule more clearly delineates the situations in which it is appropriate for the BIA to remand a case for further factfinding. 8 CFR 1003.1(d)(3)(iv)(C) and (D). Specifically, the BIA may not *sua sponte* remand a case for further factfinding unless doing is necessary to determine whether the immigration judge had jurisdiction. *Id.* § 1003.1(d)(3)(iv)(C). Further, the BIA may not grant a motion to remand for further factfinding unless the party seeking the remand preserved the issue and previously attempted to provide such information to the immigration judge, the factfinding would alter the case's outcome and would not be cumulative of other evidence already in the record, and either the immigration judge's factual findings were clearly erroneous or remand to DHS is warranted. *Id.* § 1003.1(d)(3)(iv)(D). Nothing in the rule, however, prohibits the BIA from remanding a case based on new evidence or information obtained after the date of the immigration judge's decision as a result of identity, law enforcement, or security investigations or examinations, including investigations occurring separate from those required by 8 CFR 1003.47.

Following review of public comments and in recognition of possible confusion regarding a situation in which additional factfinding would be a necessary adjunct of a remand due to an error of law, the final rule clarifies that, subject to other requirements, the Board may remand a case for additional factfinding in cases in which the immigration judge committed an error of law and that error requires additional factfinding on remand. For example, the Board may order additional factfinding on remand if it determines an immigration judge erred as a matter of law by not sufficiently developing the factual record for an alien proceeding without representation.

The rule also directly allows the BIA to affirm the decision of the immigration judge or DHS on any basis supported by the record, including a basis supported by facts that are not disputed. *Id.* § 1003.1(d)(3)(v).

Finally, the rule makes clear that the BIA cannot remand a case based solely on the ''totality of the circumstances'' as such a standard of review has never been contemplated by either the Act or the regulations. *Id.* § 1003.1(d)(7)(ii)(B). Nonetheless, in light of the confusion evidenced by commenters regarding that point, the Department in the final rule is making clear that the Board cannot remand a case following a totality of the circumstances standard of review, though an immigration judge's consideration of the totality of the circumstances may be a relevant subject for review under an appropriate standard.

6. Scope of a BIA Remand

The rule provides that the BIA may limit the scope of a remand while simultaneously divesting itself of jurisdiction on remand. *Id.* § 1003.1(d)(7)(iii). Thus, a remand for a limited purpose—*e.g.,* the completion of identity, law enforcement, or security investigations or examinations—would be limited solely to that purpose consistent with the BIA's intent, and the immigration judge may not consider any issues beyond the scope of the remand.

7. Immigration Judge Quality Assurance Certification of a BIA Decision

Additionally, to ensure the quality of BIA decision-making, the rule establishes a procedure for an immigration judge to certify BIA decisions reopening or remanding proceedings for further review by the Director in situations in which the immigration judge alleges that the BIA made an error. *Id.* § 1003.1(k).

The certification process is limited only to cases in which the immigration judge believes the BIA erred in the decision by: (1) A typographical or clerical error affecting the outcome of the case; (2) a holding that is clearly contrary to a provision of the INA, any other immigration law or statute, any applicable regulation, or a published, binding precedent; (3) failing to resolve the basis for appeal, including being vague, ambiguous, internally inconsistent; or, (4) clearly not considering a material factor pertinent to the issue(s) before the immigration judge. *Id.* § 1003.1(k)(1)(i)–(iv). In addition, in order to certify a BIA decision for review, the immigration judge must: (1) Issue the certification order, (a) within 30 days of the BIA decision if the alien is not detained, and (b) within 15 days of the BIA decision if the alien is detained; (2) specify in the order the regulatory basis for the certification and summarize the underlying procedural, factual, or legal basis; and (3) provide notice of the certification to both parties. *Id.* § 1003.1(k)(2)(i)–(iii).

To ensure a neutral arbiter between the immigration judge and the BIA, the Director will review any such certification orders. *Id.* § 1003.1(k)(3). In reviewing such orders, the Director's delegated authority from the Attorney General permits him to dismiss the certification and return the case to the immigration judge or remand the case back to the BIA for further proceedings. The Director may not, however, issue an order of removal, grant a request for voluntary departure, or grant or deny an application for relief or protection from removal. *Id.* In response to a concern raised by at least one commenter, the final rule will allow the Director, in his or her discretion, to request briefs or filings from the parties when considering a case under this quality-control certification process.

This quality assurance certification process is a mechanism to ensure that BIA decisions are accurate and precise—not a mechanism solely to express disagreements with BIA decisions or to lodge objections to particular legal interpretations. *Id.* § 1003.1(k)(4).

8. Administrative Closure Authority

The rule amends 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) to make clear that those provisions—and similar provisions in 8 CFR part 1240—provide no freestanding authority for immigration judges or Board members to administratively close immigration cases absent an express regulatory or judicially approved settlement basis to do so. For example, the rule amends 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) to provide explicitly, for clarity, that the existing references in those paragraphs to ''governing standards'' refer to the applicable governing standards as set forth in the existing provisions of

regarding whether a respondent is a United States citizen may be a basis for a remand in appropriate cases. *See Matter of Fuentes-Martinez,* 21 I&N Dec. 893, 898 (BIA 1997).

[6] As the NPRM noted, there are multiple situations in which a question of EOIR or DHS jurisdiction over an application may arise. *See* 85 FR at 52500.

§§ 1003.1(d)(1)(i) and 1003.10(d), respectively and do not refer to some more general, free-floating administrative closure authority.

The final rule makes non-substantive change to 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) from the proposed rule by inserting the word ''defer'' in place of the word ''suspend'' in both paragraphs and by making conforming stylistic changes to ensure that the language is clear that an administrative closure of a case is a type of deferral of adjudication of that case. The Department has made this change to prevent any unintended confusion regarding whether there is a distinction between cases whose adjudication is deferred and those whose adjudication is suspended and to make clear that an administrative closure is not the only type of deferral of adjudication.[7] The Department intended no distinctions and is clarifying that point by ensuring that the description of administrative closure as a type of deferral of adjudication is consistent throughout the rule.

9. *Sua Sponte* Authority

The rule removes the Attorney General's previous general delegation of *sua sponte* authority to the BIA and immigration judges to reopen or reconsider cases and instead limit such *sua sponte* reopenings only to correct minor mistakes, such as typographical errors or defects in service. 8 CFR 1003.2(a), 1003.23(b)(1).[8] These changes do not preclude parties from filing joint motions, including in situations in which there has been a relevant change in facts or law. Moreover, nothing in the rule precludes the ability of a respondent to argue, in an appropriate case, that a time limit is inapplicable due to equitable tolling.

In addition, to ensure that aliens whose removability is vitiated *in toto* prior to the execution of the removal order retain a mechanism for reopening their proceedings, the rule amends the regulations to allow the filing of a motion to reopen, notwithstanding the time and number bars, when an alien claims that an intervening change in law or fact renders the alien no longer removable at all and the alien has exercised diligence in pursuing his or her motion.[9] *Id.* §§ 1003.2(c)(3)(v), 1003.23(b)(4)(v). Similarly, the rule amends the regulations to allow the filing of a motion to reopen, notwithstanding the time and number bars, when an individual claims that he or she is a United States citizen or national in recognition that the law provides jurisdiction only in removal proceedings for aliens. *See* INA 240(a)(1), 8 U.S.C. 1229a(a)(1); *see also* 8 CFR 1003.2(c)(3)(vi), 1003.23(b)(4)(v).

Finally, to address the effects of removal of *sua sponte* reopening authority on DHS, the rule clarifies that the filing of a motion to reopen with the BIA by DHS in removal proceedings or in proceedings initiated pursuant to 8 CFR 1208.2(c) is not subject to the time and numerical limits applicable to such motions. 8 CFR 1003.2(c)(3)(vii).

10. Certification Authority

The rule also withdraws the BIA's delegated authority to review cases by self-certification, *id.* § 1003.1(c), due to concerns over the lack of standards for such certifications, the lack of a consistent application of the ''exceptional'' situations criteria for purposes of utilizing self-certification, the potential for lack of notice of the BIA's use of certification authority, the overall potential for inconsistent application and abuse of this authority, and the strong interest in finality,

11. Timeliness of Adjudication of BIA Appeals

The rule makes a variety of changes to ensure the timely adjudication of appeals. For example, the rule amends 8 CFR 1003.1(e)(8)(i) to harmonize the time limits for adjudicating cases so that both the 90- and 180-day deadlines are set from the same starting point—when the record is complete.[10] In addition, the rule established specific time frames for review by the screening panel, processing of transcripts, issuance of briefing schedules, and review by a single BIA member to determine whether a single member or a three-member panel should adjudicate the appeal, none of which were previously considered via regulation or tracked effectively to prevent delays. *Id.* § 1003.1(e)(1), (8). It also adds tracking and accountability requirements for the Board Chairman, also known as the Chief Appellate Immigration Judge, in cases where the adjudication of appeals must be delayed to ensure that no appeals are overlooked or lost in the process. *Id.* § 1003.1(e)(8)(v). Similarly, the rule establishes specific time frames for the adjudication of summary dismissals, providing substance to the current requirement at 8 CFR 1003.1(d)(2)(ii) that such cases be identified ''promptly'' by the screening panel, and for the adjudication of interlocutory appeals, which are not currently addressed in the regulations, except insofar as they may be referred to a three-member panel for review. *Id.* § 1003.1(e)(1).

Additionally, with two exceptions for cases subject to an extension under 8 CFR 1003.1(e)(8)(ii) or a hold under 8 CFR 1003.1(e)(8)(iii), the rule instructs the Board Chairman to refer appeals pending beyond 335 days to the Director for adjudication. *Id.* § 1003.1(e)(8)(v). Following the review of public comments received, including comments about the potential volume of cases subject to referral and the impact of other provisions of the rule, the final rule makes two changes from the NPRM.

First, it adds four further exceptions to 8 CFR 1003.1(e)(8)(v). Cases on hold pursuant to 8 CFR 1003.1(d)(6)(ii) to await the results of identity, law enforcement, or security investigations or examinations will not be subject to referral if the hold causes the appeal to remain pending beyond 335 days. Cases whose adjudication has been deferred by the Director pursuant to 8 CFR 1003.0(b)(1)(ii) will not be subject to referral if the deferral causes the appeal to remain pending beyond 335 days. Cases remanded by the Director under 8 CFR 1003.1(k) will not be subject to referral if the case remains pending beyond 335 days after the referral. Cases that have been administratively closed pursuant to a regulation promulgated by the Department of Justice or a previous judicially approved settlement that expressly authorizes such an action will not be subject to referral if the administrative closure occurred prior to the elapse of 335 days and causes the appeal to remain pending beyond 335 days. These changes, which are incorporated through a stylistic

[7] Administrative closure is not the only procedural mechanism for deferring adjudication of cases. For instance, EOIR deferred all non-detained removal hearings between March 17, 2020, and June 12, 2020, due to the outbreak of COVID–19 but did not administratively close the cases.

[8] The text of 8 CFR 1003.2(a) in the NPRM inadvertently removed the phrase ''or reconsider'' from the first sentence of that paragraph. This final rule reinserts that phrase to ensure that parties and the BIA are clear that the Board can reconsider a decision *sua sponte* in order to correct a typographical error or defect in service.

[9] This provision would apply only when the intervening change vitiated the alien's removability completely—an alien charged with multiple removability grounds would remain subject to the time and number bars unless the intervening change vitiated each removability ground. Additionally, this provision would apply only to grounds of removability. Aliens arguing that an intervening change in law or fact affected their eligibility for relief or protection from removal would remain subject to existing regulatory provisions on such motions.

[10] For appeals, the record is complete upon the earlier of the filing of briefs by both parties or the expiration of the briefing schedule. For motions, the record is complete upon the filing of a response to the motion or the expiration of the response period. For remands, the record is complete upon either the date the remand is received by the BIA or, if the BIA elects to order briefing following the remand, the earlier of the filing of briefs by both parties or the expiration of the briefing schedule.

restructuring of 8 CFR 1003.1(e)(8)(v) for clarity, recognize additional situations in which a case may appropriately remain pending beyond 335 days without adjudication or when referral back to the Director would be incongruous because the Director had remanded the case in the first instance.

Second, the final rule makes edits to eliminate confusion over the scope of 8 CFR 1003.1(e). As both the title of that paragraph (''Case management system'') and its general introductory language (''The Chairman shall establish a case management system to screen all *cases* and to manage the Board's caseload.'') make clear, the provisions of the paragraph apply to ''cases.'' *Id.* § 1003.1(e) (emphasis added). In turn, ''the term *case* means any proceeding arising under any immigration or naturalization law.'' *Id.* § 1001.1(g). At the Board, cases may be initiated in one of three ways: (1) The filing of a Notice of Appeal, (2) the filing of a motion directly with the Board (*e.g.,* a motion to reconsider or a motion to reopen), or (3) the receipt of a remand from a Federal court, the Attorney General, or—under this rule—the Director. In other words, the Board adjudicates multiple types of cases, not just appeals. Although the existing language of 8 CFR 1003.1(e) is clear that it applies to all types of cases at the Board, regardless of how they are initiated, the inconsistent, subsequent use of ''appeals'' throughout that paragraph creates confusion as to its scope since appeals are not the only type of case the Board considers. *See, e.g., id.* § 1003.1(e)(3) (in describing the Board's merits review process, using ''case'' in the first sentence, ''case'' and ''appeal'' in the second sentence, and ''appeal'' in the third sentence, all is describing a unitary process). To avoid continued confusion and to ensure that the scope of the other changes in the final rule regarding the Board's case management process are clear, the final rule makes edits to 8 CFR 1003.1(e) to ensure that it is clearly applicable to all cases before the Board, not solely cases arising through appeals.[11]

12. Forwarding the Record on Appeal

The rule revises 8 CFR 1003.5(a) regarding the forwarding of the record of proceedings in an appeal to ensure that the transcription process and the forwarding of records do not cause any unwarranted delays. Specifically, the rule clarifies that the immigration judge does not need to forward the record of the proceedings to the BIA if the BIA already has access to the record electronically and removes the process for immigration judge review of the transcript. *Id.* § 1003.5(a).

In addition, the rule removes language in 8 CFR 1003.5(b), which describes procedures regarding appeals from DHS decisions that are within the BIA's appellate jurisdiction, that is not applicable to EOIR's adjudicators and replaces outdated references to the former Immigration and Naturalization Service. These changes do not substantively affect the BIA's adjudication of any appeals from DHS officers that are within the BIA's jurisdiction.

II. Public Comments on the Proposed Rule

A. Summary of Public Comments

The comment period for the NPRM ended on September 25, 2020, with 1,284 comments received. The majority of comments were from individual and anonymous commenters, including coordinated campaigns. Other commenters included non-profit organizations, law firms, and members of Congress. While some commenters supported the NPRM, the majority of commenters expressed opposition to the rule, either in whole or part.

Many, if not most, comments opposing the NPRM either misunderstood what it actually provides, proceed from erroneous legal or factual premises—*e.g.,* that the rule applies only to aliens and not DHS or that its changes apply more heavily to aliens than to DHS—are founded in policy disagreements, or simply repeat tendentious or spurious claims about the Department's motivations in issuing the rule. Further, many commenters opposing the rule failed to engage with the specific reasons and language put forth by the Department in lieu of broad generalizations or hyperbolic, unsupported presumptions. Additionally, many comments appeared rooted in a belief that EOIR's adjudicators are incompetent or unethical and are either incapable or unwilling to adhere to applicable law. Finally, most, if not all, commenters in opposition to the rule viewed its procedural changes wholly through a results-oriented lens such that a proposal that commenters speculatively believed would cause aliens to ''win'' fewer cases was deemed objectionable, even without evidence that such a result would follow. In other words, any change perceived to lead to aliens ''winning'' fewer cases was deemed unfair, arbitrary and capricious, biased, a violation of due process, or otherwise inappropriate, regardless of the Department's justification for the change or the relevant law. Such a results-oriented view both misapprehended the procedural nature of the changes and appeared to have been based on a tacit belief that aliens were entitled to specific outcomes in specific cases, notwithstanding the relevant evidence or law applicable to a case, and that the rule inappropriately required adjudicators to maintain partiality in adjudicating cases rather than continuing to provide what commenters viewed as favorable treatment toward aliens.

To the extent that commenters simply disagree as a policy matter that Board cases should be completed in a timely manner, *see id.* 1003.1(d); *cf. INS* v. *Doherty,* 502 U.S. 314, 323 (1992) (''[A]s a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.''), or that the Department should take measures, consistent with due process, to ensure the timely completion of such cases, the Department finds such policy disagreements unpersuasive for the reasons given in the NPRM and throughout this final rule.

Similarly, the Department also categorically rejects any comments suggesting that adjudicators should provide favorable treatment to one party over another, *e.g.,* by granting a *sua sponte* motion to reopen contrary to well-established law. The Department expects all of its adjudicators to treat both parties fairly and to maintain impartiality when adjudicating cases. 8 CFR 1003.1(d)(1) (''The Board shall resolve the questions before it in a manner that is timely, *impartial,* and consistent with the Act and regulations.'' (emphasis added)); 8 CFR 1003.10(b) (''In all cases, immigration judges shall seek to resolve the questions before them in a timely and *impartial* manner consistent with the Act and regulations.'') (emphasis added)); 5 CFR 2635.101(b)(8) (''Employees [of the Federal Government] shall act impartially and not give preferential treatment to any private organization or individual.''); EOIR, *Ethics and Professionalism Guide for Members of the Board of Immigration Appeals* sec. V (May 4, 2011) [hereinafter *BIA Ethics and Professionalism Guide*] (''A Board Member shall act impartially and shall not give preferential treatment to any organization or individual when adjudicating the merits of a particular case.''), *available at https://*

[11] For similar reasons, the final rule also makes changes to 8 CFR 1003.1(d)(3)(iv) to clarify that 8 CFR 1003.1(d)(3)(iv)(A) applies to all cases at the Board, whereas 8 CFR 1003.1(d)(3)(iv)(D) applies only to direct appeals of immigration judge decisions.

www.justice.gov/eoir/page/file/992726/download; EOIR, *Ethics and Professionalism Guide for Immigration Judges* sec. V (Jan. 26, 2011) [hereinafter *IJ Ethics and Professionalism Guide*] (''An Immigration Judge shall act impartially and shall not give preferential treatment to any organization or individual when adjudicating the merits of a particular case.''), *available at https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf.* Further, the Department also rejects unsupported and almost ad hominem comments based on a belief that its adjudicators are incompetent or unethical, that they will fail to follow the law, or that they have some results-oriented view that will cause them to adjudicate cases in an inappropriate manner. *See United States* v. *Chem. Found., Inc.,* 272 U.S. 1, 14–15 (1926) (''The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'').

In sum, the Department issued the NPRM for the reasons given in order to bring needed clarity to certain areas of law, improve efficiency at the BIA, ensure authority is appropriately exercised, reduce the risk of gamesmanship by parties, and promote impartial and timely adjudications consistent with the law. It did not do so for any nefarious purpose, nor did it intend for its procedural changes to have any substantive bearing on the outcomes of additional cases, which flow from the evidence and the law, not the Department's process. As discussed herein, nothing in the NPRM singles out specific populations of aliens, including unrepresented aliens,[12] nor do any of its changes fall disproportionately upon such groups in an inappropriate manner. To the extent that commenters did not engage with the NPRM itself, provided unsupported assertions of fact or law, attacked—tacitly or explicitly—the motivations of the Department's adjudicators, or otherwise put forward suggestions based on their preferred results rather than an impartial process, the Department has nevertheless considered those comments but finds them unavailing. *See Home Box Office, Inc.* v. *FCC,* 567 F.2d 9, 35 n.58 (D.C. Cir. 1977) (per curiam) (''In determining what points are significant, the 'arbitrary and capricious' standard of review must be kept in mind. Thus only comments which, if true, raise points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule cast doubt on the reasonableness of a position taken by the agency. Moreover, comments which themselves are purely speculative and do not disclose the factual or policy basis on which they rest require no response. There must be some basis for thinking a position taken in opposition to the agency is true.''). Further, to the extent that commenters provided substantive analysis and raised important issues, the Department has considered all of them; however, on balance, except for changes noted below, it has determined that the policy and operational benefits of the rule expressed above—including consistency, impartiality, and efficiency—outweigh all of the issues raised by commenters. Accordingly, although the Department has reviewed all comments received, the vast majority of them fall into the groupings outlined above, and few of them are persuasive for reasons explained in more detail in Part II.C below.

B. Comments Expressing Support for the Proposed Rule

Comment: Commenters expressed general support for the rule and immigration reform. These commenters supported all aspects of the rule, which they stated would ''streamline'' BIA processes to help reduce the backlog and the number of frivolous appeals. One commenter stated that the rule ''will have a positive impact on immigration, especially limiting the burden placed on the system by pro se immigrants.''

Response: The Department appreciates the commenters' support for the rule.

C. Comments Expressing Opposition to the Proposed Rule

1. General Opposition

Comment: Many Commenters expressed general opposition to the rule.[13] Several commenters asserted that the rule was motivated by politics and would ''enable politicized and biased decision-making.'' Various commenters raised concerns that the rule would give the EOIR Director ''consolidated power over appeals.'' Similarly, several commenters voiced concern that the rule would turn the BIA into a ''political tool'' or that the changes would turn the BIA into a rubber stamp for deportation orders. Others were concerned that the rule would put increased pressure on immigration judges to decide cases quickly.

Some commenters expressed concerns that the rule was an attempt to end legal immigration. Other commenters alleged that the rule was motivated by an attempt to foreclose respondents' access to relief from removal.

Many commenters were concerned that the rule would eliminate a robust and meaningful appeal process. For example, one commenter stated that ''[a]ny individual facing judicial decision making deserves to have a full and fair right to appeal.'' The commenter went on to claim that the rule seeks ''to erode that right by making it more difficult for individuals to actualize the right to appeal to the BIA.'' Another commenter was concerned that the rule would completely strip respondents of ''their right to meaningfully contest a poorly reasoned or legally invalided decision.''

Several commenters expressed concern about the rule's impact on respondents' safety and security. One commenter claimed that the rule ''would greatly reduce the rights of noncitizens appearing before EOIR and would result in . . . the potential death of asylum seekers who are removed to their home countries to be killed.'' Another commenter noted that taking away a respondent's ability to appeal their case ''exposes them to more violence and risk of death if they are deported.'' Other commenters were concerned that the rule would lead to permanent family separations.

A number of commenters also made the generalized claim that the rule would entirely reshape the immigration system. Others stated that the rule would create significant administrative burdens. Several other commenters alleged that the rule would lead to an increased case backlog and make EOIR less efficient. Multiple commenters raised concerns regarding the impact of the intersection of the rule with other rules recently promulgated by the Department and by DHS, particularly the Department's proposed rule to increase fees for motions to reopen and appeals.

Response: Commenters are incorrect that the rule is the product of political or biased decision-making or that the rule would turn the BIA into a ''political tool.'' As noted in the NPRM, the BIA has seen recent significant increases in

[12] The Department has fully considered the possible impacts of this rule on the relatively small pro se population of aliens with cases before the Board. As discussed below, however, the rule neither singles such aliens out for particular treatment under the Board's procedures, nor does it restrict or alter any of the many procedural avenues such aliens already have available to them in advancing their cases. Further, nothing in the rule inhibits the availability of pro bono counsel to assist such aliens as appropriate.

[13] Commenters' specific concerns regarding different provisions of the rule are discussed separately below in section II.C.3.

its pending caseload. 85 FR at 52492. The number of appeals pending is currently at a record high, with 84,673 case appeals pending as of the end of FY 2020. EOIR, *Adjudication Statistics: Case Appeals Filed, Completed, and Pending,* Oct. 13, 2020, *available at https://www.justice.gov/eoir/page/file/1248501/download.* Accordingly, the Department has reviewed EOIR's regulations regarding the procedures for BIA appeals to determine what changes can be implemented to promote increased efficiencies and taken steps to address the BIA's growing caseload. In this manner, this rule builds on prior similar procedural reviews and amendments to the BIA's regulations. *See, e.g.,* Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 FR 54878 (Aug. 26, 2002) (final rule that revised the structure and procedures of the BIA, provided for an enhanced case management procedure, and expanded the number of cases referred to a single Board member for disposition).[14]

Similarly, commenters are incorrect that the rule is intended to have an effect on immigration rates or an alien's opportunity to be heard. As part of the Department of Justice, EOIR's mission remains to ''to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws.'' EOIR, *About the Office,* Aug. 14, 2018, *available at https://www.justice.gov/eoir/about-office.* Instead, as part of the Department's intention to increase efficiencies, the Department believes that the rule will have the effect of reducing the time required for the adjudication of appeals by DHS in cases where the immigration judge or the BIA has found the alien merits relief or protection from removal. In short, the changes to the rule should help both meritorious claims be adjudicated more quickly, which will benefit aliens, and meritless claims adjudicated more quickly, which will benefit the public and the government.

Commenters' statements regarding possible effects on aliens who are denied relief or who may be subject to removal are purely speculative. Moreover, such speculative effects exist currently and independently of the rule, as alien appeals may be denied or dismissed under current procedures. Further, nothing in the rule prevents or inhibits case-by-case adjudication by the Board in accordance with the evidence and applicable law for each such case. Accordingly, the Department finds commenters' concerns on this point unpersuasive.

Finally, the Department acknowledges that it has published multiple proposed rules in 2020, including one that would increase the fee for an appeal to the BIA and for certain motions to reopen for the first time in over 30 years. *See* Executive Office for Immigration Review; Fee Review, 85 FR 11866 (Feb. 28, 2020). The Department also acknowledges that DHS has imposed a $50 fee for asylum applications, U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 85 FR 46788, 46791 (Aug. 3, 2020),[15] that would also be applicable in EOIR proceedings, 8 CFR 1103.7(b)(4)(ii), though that rule has been enjoined.[16] *Immigrant Legal Resource Ctr.* v. *Wolf,* —F.Supp.3d—, 2020 WL 5798269 (N.D. Cal. 2020); *Nw. Immigrants Rights Proj.* v. *U.S. Citizenship & Immigration Servs.,* No. 19–3283 (RDM), 2020 WL 5995206 (D.D.C. Oct. 8, 2020).

The Department rejects any assertions, however, that it is proposing multiple rules for any sort of nefarious purpose. Each of the Department's rules stands on its own, includes explanations of their basis and purpose, and allows for public comment, as required by the APA. *See Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania,* 140 S. Ct. 2367, 2385 (2020) (explaining that the APA provides the ''maximum procedural requirements'' that an agency must follow in order to promulgate a rule). Further, the interplay and impact of all of these rules is speculative at the present time due to both ongoing and expected future litigation—which may allow all, some, or none of the rules to ultimately take effect—and the availability of fee waivers, 8 CFR 1103.7(c), which may offset the impact of some of the increases. Nevertheless, to the extent commenters noted some potential overlap or joint impacts, the Department regularly considers the existing and potential legal framework when a specific rule is proposed or implemented. Moreover, even if all rules were in effect, the Department has concluded that the benefits of the instant rule discussed in the NPRM, *e.g.,* 85 FR at 52509 and herein—as well as the benefits discussed in the other rules, *e.g.,* 85 FR at 11870[17]—ultimately outweigh any combined impact the rules may have on aliens, particularly vis-à-vis fee increases for appeals and motions to reopen.[18]

[14] In addition, the Department notes that it and EOIR have taken numerous steps, both regulatory and sub-regulatory, to increase EOIR's efficiencies and address the pending caseload. *See, e.g.,* Expanding the Size of the Board of Immigration Appeals, 85 FR 18105 (Apr. 1, 2020) (interim final rule expanding the size of the BIA from 21 to 23 members); EOIR, *Policy Memorandum 20–01: Case Processing at the Board of Immigration Appeals* [hereinafter PM 20–01] (Oct. 1, 2019), *available at https://www.justice.gov/eoir/page/file/1206316/download* (explaining various agency initiatives, including an improved BIA case management system, issuance of performance reports, and a reiteration of EOIR's responsibility to timely and efficiently decide cases in serving the national interest); EOIR, *Policy Memorandum 19–11: No Dark Courtrooms* (Mar. 29, 2019), *available at https://www.justice.gov/eoir/file/1149286/download* (memorializing policies to reduce and minimize the impact of unused courtrooms and docket time).

[15] The DHS rule did not impose a fee for an asylum application filed by a genuine UAC who is in removal proceedings conducted by EOIR. 85 FR 46788 at 46809 (''Notably, unaccompanied alien children in removal proceedings who file an application for asylum with USCIS are exempt from the Form I–589 fee.''). Thus, contrary to some commenters' concerns, a genuine UAC who files a motion to reopen based exclusively on an asylum application is not subject to a fee for that motion. 8 CFR 1003.8(a)(2)(ii), 1003.24(b)(2)(i), (ii).

[16] While the injunction of DHS's rule assessing a $50 fee for asylum applications is in effect, EOIR cannot charge a fee for asylum applications in its proceedings. Relatedly, while that injunction is in effect, it cannot charge a fee for a motion to reopen based exclusively on an asylum application. 8 CFR 1003.8(a)(2)(ii), 1003.24(b)(2)(i), (ii). Because the ultimate resolution of that litigation is unknown—and, thus, there is a possibility that DHS's rule may never take effect—commenters' concerns about the potential relationship between that rule and this final rule are even more speculative. Nevertheless, as discussed, even if all of the relevant rules were in effect, the Department has concluded that the benefits of the final rule outweigh any substantiated costs identified by commenters.

[17] In issuing its proposed rule regarding fees for applications administered by EOIR, the Department acknowledged the balance between the costs of increased fees and the public benefit associated with such fees, in addition to the need to comply with applicable law and policy in conducting more regular fee reviews. 85 FR at 11870 (''Although EOIR is an appropriated agency, EOIR has determined that it is necessary to update the fees charged for these EOIR forms and motions to more accurately reflect the costs for EOIR's adjudications of these matters. At the same time, however, EOIR recognizes that these applications for relief, appeals, and motions represent statutorily provided relief and important procedural tools that serve the public interest and provide value to those who are parties to the proceedings by ensuring accurate administrative proceedings. . . . As DHS is the party opposite the alien in these proceedings, EOIR's hearings provide value to both aliens seeking relief and the Federal interests that DHS represents. Given that EOIR's cost assessment did not include overhead costs or costs of non-salary benefits (*e.g.,* insurance), recovery of the processing costs reported herein is appropriate to serve the objectives of the IOAA and the public interest. The proposed fees would help the Government recoup some of its costs when possible and would also protect the public policy interests involved. EOIR's calculation of fees accordingly factors in both the public interest in ensuring that the immigration courts are accessible to aliens seeking relief and the public interest in ensuring that U.S. taxpayers do not bear a disproportionate burden in funding the immigration system.'').

[18] The Department also reiterates that the availability of fee waivers for appeals and motions to reopen, 8 CFR 1003.8(a)(3) and 8 CFR 1003.24(d), addresses the principal concern raised by

Comment: At least one commenter stated that the rule is pretext for restrictions on aliens' access to asylum or related relief. In support, the commenter argued that the rule provides preferential treatment to DHS versus aliens in proceedings and that the Department selectively compares the BIA at times to either Federal courts or other administrative tribunals, whichever best supports the restriction at issue. In addition, the commenter highlighted comments disparaging of immigrants or the immigration system by President Trump and the Attorney General.

Response: The rule is not a pretext for any nefarious motive targeting aliens for any reason, and it is appropriately supported by applicable law and examples. As discussed, *supra,* the rule generally applies to aliens and DHS equally and does not provide preferential treatment to either party. To the extent that commenters simply disagree with either the law or the examples provided, commenters did not provide a persuasive justification for why their particular policy preferences are superior to those adopted by the Department in the rule. Moreover, as explained in the NPRM and herein, this rule is just one example of the Department's actions, both recently and in the past, to increase efficiencies before the BIA and address the record pending caseload. The Department reiterates the reasoning set out in the proposed rule for the changes, and the discussion further below regarding commenters' concerns with particular provisions of the rule.

2. Violates Due Process

Comment: Many commenters expressed broad concerns that the rule would erode aliens' due process rights in immigration court or BIA proceedings. Specifically, several commenters claimed that the rule favored efficiency over fairness. Commenters stated that the rule claimed to promote efficiency, but that its proposed changes ''would sacrifice fairness and due process for this increased efficiency.'' Several commenters noted that due process should be more highly valued than efficiency in removal proceedings. For example, one commenter asserted that the rule ''has everything to do with efficiency and nothing to do with due process.'' A commenter also stated that that rule's ''goal should not be to create a more efficient production system for the rapid removal of litigants.'' Another commenter claimed that, under the rule, the BIA would put efficiency above its duties as an appellate body, which would thereby violate respondents' due process rights.

Furthermore, commenters voiced concern that the rule was attempting to inappropriately speed up and streamline procedures in a way that would negatively affect due process protections. One commenter stated that the streamlining of procedures ''will foster further inequities and affect due process for all people involved.'' A number of commenters pointed out that cases should not be decided quickly and that due process requires that attorneys be given a sufficient amount of time to prepare their clients' cases. Several other commenters raised concerns that the rule was an attempt by the Administration to prioritize deportations over due process protections.

Numerous commenters were also concerned with the possible consequences stemming from what they view as a potential erosion of due process protections. Commenters noted that the level of due process in immigration court proceedings can mean the difference between a respondent living safely in the United States and being returned to danger in another country.

Response: To the extent that commenters equate ''due process'' with an outcome favorable to the alien and an ''erosion'' of due process with an outcome adverse to the alien—and base their comments accordingly on that view—the Department declines to accept both that view of due process and the comments based on it. The foundation of due process is notice and an opportunity to be heard, and nothing in the rule eliminates either an alien's right to notice or an alien's opportunity to be heard on a case before the Board.[19] *See LaChance* v. *Erickson,* 522 U.S. 262, 266 (1998) (''The core of due process is the right to notice and a meaningful opportunity to be heard.''). The Department does not evaluate due process based on outcomes for either party, and it accordingly declines to adopt comments premised on the intimation that due process occurs only when the outcome of a case is favorable to an alien. *Cf. Pugel* v. *Bd. of Trs. of Univ. of Ill.,* 378 F.3d 659, 666 (7th Cir. 2004) (''Due process did not entitle [appellant] to a favorable result . . . only to a meaningful opportunity to present [a case].'').

As noted above, EOIR's mission is ''to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws.'' These objectives are generally complementary; for example, unnecessary delays in the receipt of relief for meritorious aliens is itself a fairness concern. Moreover, there is nothing inherently unfair in ensuring that a case is adjudicated by the Board within approximately 11 months—*i.e.,* 335 days—of its filing. To the contrary, excessive delay in adjudication, especially when issues of human welfare are at stake, may raise concerns themselves and increase the risk of litigation.[20] *See, e.g., Telecomms. Rsch.*

commenters regarding the instant rule's asserted impact on filing motions to reopen and the Department's proposed fee increase for motions to reopen.

[19] The Department notes that although the INA statutorily requires proceedings over which an immigration judge must preside to determine an alien's removability in many situations, under sections 240(a)(1) and (3) of the Act, 8 U.S.C. 1229a(a)(1) and (3), and acknolwedges that an administrative appeal may be permitted, *e.g.,* INA 101(a)(47)(B) and 208(d)(5)(A)(iv), 8 U.S.C. 1101(a)(47)(B) and 1158(d)(5)(A)(iv), there is no constitutional or statutory right to an administrative appeal to the BIA. *See Albathani* v. *INS,* 318 F.3d 365, 376 (1st Cir. 2003) (''An alien has no constitutional right to any administrative appeal at all. Such administrative appeal rights as exist are created by regulations promulgated by the Attorney General.'' (citations omitted)); *Guentchev* v. *INS,* 77 F.3d 1036, 1037–38 (7th Cir. 1996) (''The Constitution does not entitle aliens to administrative appeals. Even litigants in the federal courts are not constitutionally entitled to multiple layers of review. The Attorney General could dispense with the Board and delegate her powers to the immigration judges, or could give the Board discretion to choose which cases to review (a la the Appeals Council of the Social Security Administration, or the Supreme Court exercising its certiorari power).''); *cf.* Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, 78 FR 536, 554–55 (Jan. 3, 2013) (''In upholding the BIA's practice of 'affirmance without opinion' of immigration judge decisions, for example, several courts of appeals have recognized that Due Process does not require an agency to provide for administrative appeal of its decisions.''). Thus, the Department's administrative appellate process involving the BIA already provides more due process to aliens in removal proceedings than is required by either the INA or the Constitution, and the alteration of the BIA's procedures through regulations promulgated by the Attorney General is fully consonant with the provision of due process. *See Barradas* v. *Holder,* 582 F.3d 754, 765 (7th Cir. 2009) (stating that immigration proceedings that meet the statutory and regulatory standards governing the conduct of such proceedings generally comport with due process).

[20] The Department recognizes and agrees with the Supreme Court's observation that ''as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.'' *Doherty,* 502 U.S. at 323. Thus, it is aware that many aliens likely prefer substantial delays in the adjudications of their appeals by the BIA and, accordingly, oppose any efforts to increase the efficiency of such adjudications. Nevertheless, the Department finds any rationale for encouraging or supporting the dilatory adjudication of cases both inherently unpersuasive and wholly outweighed by the importance of timeliness and fairness—especially to aliens with meritorious claims—in BIA adjudications.

and Action Ctr. v. *FCC,* 750 F.2d 70, 80 (D.C. Cir. 1984) (outlining several factors for deciding unreasonable delay claims under the Administrative Procedures Act, including acknowledging ''delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake'').

Commenters are incorrect that the provisions of this rule impede aliens' due process rights in the manner alleged. Although the rule refines timing and other procedural requirements, the rule does not affect any party's fundamental rights to notice or an opportunity to be heard by the BIA. Moreover, the rule does not make proceedings before the BIA ''so fundamentally unfair that the alien was prevented from reasonably presenting his case.'' *Gutierrez* v. *Holder,* 662 F.3d 1083, 1091 (9th Cir. 2011) (citations and quotation marks omitted). None of the changes in the rule limit aliens in immigration proceedings before EOIR from filing appeals, briefs, or other evidence such that it prevents aliens from reasonably presenting their appeal. Further, many commenters assessed the rule through only a one-sided lens related to aliens and did not acknowledge that (1) most of the changes apply equally to DHS and (2) some of the changes—*e.g.,* the elimination of simultaneous briefing for non-detained cases—fall much more heavily on DHS than on aliens. In short, as the Department explained in the NPRM and reiterates in the final rule, the changes are designed for the benefit of all parties and the adjudicators and do not affect either party's entitlement to due process in immigration proceedings.

3. Specific Concerns With the NPRM

a. BIA Jurisdiction by Certification (8 CFR 1003.1(c))

Comment: Numerous commenters expressed concern over the Department's removal of the BIA's self-certification authority at 8 CFR 1003.1(c).

At least one commenter expressed dismay as to why the Department would retract the BIA's self-certification authority rather than retaining the authority but defining ''exceptional circumstances,'' which the commenter believed would be less costly and more beneficial.

Commenters were concerned that the removal of the BIA's self-certification authority will negatively impact aliens in proceedings, particularly pro se respondents. For example, a commenter explained that the changes would disproportionately impact pro se aliens because they are ''the parties least likely to have a sophisticated notion of when an appeal to the BIA is worth taking.'' Another commenter noted that removal of the self-certification authority would prevent the BIA from addressing defects in an alien's Notice of Appeal, which may be the result of factors outside the alien's control, such as mail delays, illness, or language ability.

One commenter characterized the change as removing an important check on immigration judge misconduct.

Taking issue with the Department's supposed analogy to Federal courts, another commenter claimed that Federal courts were distinct from immigration courts because the ''process of filing a notice of appeal in federal court is straightforward, [ ] the Federal Rules of Civil Procedure provide ample protection for pro se parties who make mistakes, [and] the stakes in most civil suits arising in federal district court are, unlike the stakes in most immigration court cases, not a matter of life and death.''

Response: As an initial point, the Department notes that many commenters objected to the limitation of the Board's certification authority solely because they perceived that authority to be beneficial only to respondents. Those comments, however, support the Department's concern about the inappropriate and inconsistent usage of that authority and its decision to limit that authority because it may be applied in a manner that benefits one party over the other.

As the Department discussed in the NPRM, the BIA's use of its self-certification authority has been subject to inconsistent usage, if not abuse, by the BIA in the past. For example, despite clear language that required the BIA to have jurisdiction in order to exercise its self-certification authority, BIA members often inverted that principle and used the self-certification authority to establish jurisdiction. *See, e.g., Matter of Carlos Daniel Jarquin-Burgos,* 2019 WL 5067262, at *1 n.1 (BIA Aug. 5, 2019) (''On March 29, 2019, we accepted the respondent's untimely appeal. To further settle any issues of jurisdiction, we accept this matter on appeal pursuant to 8 CFR 1003.1(c).''), *Matter of Daniel Tipantasig-Matzaquiza,* 2016 WL 4976725, at *1 (BIA Jul. 22, 2016) (''To settle any issues regarding jurisdiction, we will exercise our discretionary authority to accept this appeal on certification. *See* 8 CFR 1003.1(c).''), and *Matter of Rafael Antonio Hanze Fuentes,* 2011 WL 7071021, at *1 n.1 (BIA Dec. 29, 2011) (''In order to avoid any question regarding our jurisdiction over this appeal, we take jurisdiction over this matter by certification pursuant to 8 CFR 1003.1(c).'').

Commenters' own suggestions that removing this authority would harm alien appellants because the BIA often uses its self-certification authority inappropriately and contrary to existing case law to avoid finding appeals untimely or correct filing defects provide further support for the Department's decision. *See Matter of Jean,* 23 I&N Dec. 373, 380 n.9 (A.G. 2002) (the Board's certification authority, like its *sua sponte* authority, ''is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship'' (internal citation and quotation marks omitted)). Further, commenters did not explain how the Board could exercise jurisdiction through certification without determining its jurisdiction in the first instance. *See* 85 FR at 52506. Finally, most commenters did not acknowledge that the withdrawal of certification authority would also impact cases in which it may have been used contrary to precedent to accept appeals in favor of DHS. In other words, as the Department has noted, the impact of this provision is equally applicable to both parties and is not directed at one over the other.

The Department finds that the same risks would continue should the Department provide further definition of ''exceptional circumstances'' rather than remove the certification authority, as suggested by commenters. Indeed, the existence of a standard for ''exceptional circumstances'' applicable to BIA self-certification since at least 2002, *see Matter of Jean,* 23 I&N Dec. at 380 n.9, has not precluded the Board members from disregarding that standard as both the NPRM, 85 FR at 52506, and commenters recognize. Accordingly, the Department finds that further attempts to refine that standard would likely be unhelpful, if not futile, especially because there is no effective check on its usage to ensure consistency. Moreover, creating an additional definitional standard for ''exceptional circumstances'' would also create additional adjudicatory delays and arguments surrounding whether a case genuinely met that standard.

Regarding the possible impact of the rule on pro se aliens, the Department first notes that most aliens—*i.e.,* 86 percent, EOIR, *Current Representation Rates,* Oct. 13, 2020 [hereinafter *Representation Rates*], *available at https://www.justice.gov/eoir/page/file/*

1062991/download—whose cases are considered by the Board have representation. For those who do not, there are multiple avenues they may pursue to obtain representation.[21] For example, the Department maintains a BIA Pro Bono Project in which ''EOIR assists in identifying potentially meritorious cases based upon criteria determined by the partnering volunteer groups.'' EOIR, *BIA Pro Bono Project,* Oct. 16, 2020, *available at https://www.justice.gov/eoir/bia-pro-bono-project.*[22] Additionally, certain procedural doctrines, such as equitable tolling, may excuse noncompliance with filing deadlines for pro se aliens.[23]

[21] In an appeal to the Board in removal proceedings, ''the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.'' INA 292, 8 U.S.C. 1362. Despite this statutory right to counsel at no expense to the Government in appeals to the BIA in removal proceedings, the Department recognizes that some aliens do not obtain representation before the BIA. The Department understands that some aliens do not secure representation because they do not wish to pay the fee charged by a potential representative. The Department also understands that many representatives, due to ethical or professional responsibility obligations, will not take cases of aliens who are ineligible for any relief or protection from removal (*e.g.,* an alien with an aggravated felony drug trafficking conviction who has no fear of persecution or torture in his or her home country) because they do not wish to charge money for representation when representation will not affect the outcome of the proceeding. These situations illustrate only that some aliens may not ultimately secure counsel for reasons common to issues of representation in all civil cases—*i.e.,* the cost of the representation and the strength of the case—not that aliens are limited or prohibited from obtaining representation. *See United States* v. *Torres-Sanchez,* 68 F.3d 227, 231 (8th Cir. 1995) (''Although Torres-Sanchez expressed some frustration over his attempt to obtain counsel, that frustration, in our view of the record, stemmed from his realization that he faced the inevitable consequence of deportation, not from a lack of opportunity to retain counsel. In any event, the mere inability to obtain counsel does not constitute a violation of due process.''). As the Department is not involved in discussions between respondents and potential representatives, it cannot definitively state every reason that an alien who seeks representation may not obtain it. Nevertheless, it can state that this rule does not limit or restrict any alien's ability to obtain representation in accordance with section 292 of the Act, 8 U.S.C. 1362.

[22] In addition, as discussed elsewhere in this rule, the Department emphasizes that EOIR provides numerous resources to assist pro se individuals with self-representation and participation in their proceedings. For example, EOIR's Office of Policy seeks to increase access to information and raise the level of representation for individuals in hearings before immigration courts and the BIA. *See* EOIR, *Office of Legal Access Programs* (Feb. 19, 2020), *available at https://www.justice.gov/eoir/office-of-legal-access-programs.* In addition, EOIR has developed a thorough electronic resource for individuals in proceedings. EOIR, *Immigration Court Online Resource, available at https://icor.eoir.justice.gov/en/.*

[23] Although the Board has not formally adopted such a rule, by practice, it also construes pro se filings liberally. At least one court of appeals has held that the Board is legally required to liberally construe pro se filings. *See Higgs* v. *Att'y Gen. of the U.S.,* 655 F.3d 333, 339–40 (3d Cir. 2011).

Moreover, immigration judges have a duty to develop the record in cases involving pro se aliens which will assist such aliens in pursuing appeals if needed. *See Mendoza-Garcia* v. *Barr,* 918 F.3d 498, 504 (6th Cir. 2019) (collecting cases). The Department has fully considered the possible impacts of this rule on the relatively small pro se population of aliens with cases before the Board. However, the rule neither singles such aliens out for particular treatment under the Board's procedures, nor does it restrict or alter any of the avenues noted above that may assist pro se aliens.

Ultimately, however, unless a doctrine such as equitable tolling is applicable, BIA procedures are not excused for pro se respondents, just as they are not excused generally for pro se civil litigants. *See, e.g., McNeil* v. *United States,* 508 U.S. 106, 113 (1993) (''[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.''); *Edwards* v. *INS,* 59 F.3d 5, 8–9 (2d Cir. 1995) (rejecting a pro se alien litigant's arguments for being excused from Federal court procedural requirements due to his pro se status). Although the Department appreciates the challenges faced by pro se litigants and recommends that all aliens obtain representation, *but see* note 21, *supra* (explaining why aliens may not obtain representation), it declines to establish two separate procedural tracks for appeals depending on whether an alien has representation. Further, weighing the possibility of abuses of the certification process described above and in the NPRM, 85 FR at 52506–07, the size of the pro se population with cases before the BIA, and the well-established avenues of assistance for pro se aliens, the Department disagrees that it is necessary or appropriate to keep the certification process simply due to the possibility of its use as a means of relieving a party of his or her compliance with particular procedural requirements.

The Department is unsure why a commenter claimed the Department's underlying logic on this issue relied on an analogy to Federal court, as the entire section describing the changes is silent as to Federal appellate courts. *Id.* at 52506–07. Accordingly, the Department cannot provide an informed response to that comment.

As to removing a necessary procedural check on immigration judges, the Department notes that the regular appeals process to the BIA is unchanged, and parties that believe an immigration judge erred in his or her decision should seek an appeal at the BIA consistent with those procedures. Commenters did not provide an explanation as to why the certification process would provide a check that the regular appeal process would not, nor did they explain why EOIR's well-established complaint process for immigration judge misconduct would also not be a sufficient check on immigration judge behavior. *See* EOIR, *Summary of EOIR Procedures for Handling Complaints Concerning EOIR Adjudicators,* Oct. 15, 2018, *available at https://www.justice.gov/eoir/page/file/1100946/download* (last visited Nov. 24, 2020). In short, commenters did not persuasively explain why the BIA self-certification process, which is subject to inconsistent application and potential abuse, is superior to the normal appellate process and EOIR's immigration judge misconduct complaint process for monitoring immigration judge behavior; accordingly, the Department declines to accept the commenters' suggestions on that issue.

b. Administrative Closure (8 CFR 1003.1(d)(1)(ii), 1003.10)

Comment: Commenters raised concerns with the rule's general prohibition on administrative closure, explaining that the prohibition would prevent adjudicators from efficiently organizing and prioritizing cases on their dockets, resulting in increased backlogs. For example, commenters stated that immigration judges would not be able to prioritize terrorism suspects over persons who overstayed visas and have apparent eligibility for relief.

Commenters further explained that eliminating administrative closure would result in unfairly harsh consequences for persons who have pending applications with the United States Citizenship and Immigration Services (''USCIS''), such as U visas and applications for Special Immigrant Juvenile Status. Instead of allowing for administrative closure of their removal proceedings while those applications are being processed by USCIS, the commenters explained that persons would likely be required to appeal a removal order or file a motion to reopen once USCIS approves their application, potentially while the person is outside the United States. Moreover, commenters noted that this would

create inefficiencies due to simultaneous adjudications by EOIR and USCIS. Similarly, commenters noted that the rule would also prejudice persons with pending matters in State or Federal courts as well, such as direct appeals of criminal convictions or other post-conviction relief.

Commenters raised multiple concerns about the rule's effects on persons applying for provisional unlawful presence waivers with DHS. Commenters alleged that the rule conflicts with section 212(a)(9)(B)(v) of the Act, 8 U.S.C. 1182(a)(9)(B)(v), which provides for an unlawful presence hardship waiver. Commenters explained that the Secretary of Homeland Security implemented regulations at 8 CFR 212.7(e)(4)(iii) interpreting the waiver statute as allowing persons in removal proceedings to apply for a provisional waiver if their removal proceeding is administratively closed. In implementing this rule, the commenter alleges that the Department is implicitly amending the DHS regulation by rendering DHS's administrative closure language superfluous. As a result, commenters believe that the rule infringes on the Secretary's authority to interpret section 212(a)(9)(B)(v) of the Act, 8 U.S.C. 1182(a)(9)(B)(v).

Moreover, commenters also stated that, as a practical matter, the rule would act as a bar to persons in removal proceedings from obtaining provisional unlawful presence waivers from DHS in order to consular process because the waiver applicants would no longer be able to receive administrative closure, as required by DHS regulations. One commenter noted that, instead of administrative closure, immigration courts have been recently using status dockets to handle cases that have applications pending with USCIS. However, the commenter noted that status dockets do not allow persons to apply for provisional unlawful presence waivers because their removal cases remain pending.

Relatedly, at least one commenter stated that the administrative closure prohibition will push more aliens into filing applications for cancellation of removal, since they will be unable to administratively close their removal proceedings in order to apply for a provisional unlawful presence waiver. The commenter stated this would raise costs for EOIR since adjudicating cancellation of removal applications costs more than administratively closing proceedings in order for DHS to adjudicate the waiver applications.

As a general matter, commenters alleged that the Department's explanation for the administrative closure changes were insufficient and incapable of justifying the changes under the APA, including claiming that EOIR relied on flawed and misleading statistics and that the Department's reliance on *Matter of Castro-Tum,* 27 I&N Dec. 271 (A.G. 2018) is misplaced because *Castro-Tum* was wrongly decided. Commenters alleged that the Department's statements that prohibiting administrative closure will improve efficiency is not supported in the proposed rule and that administrative closure actually contributes to shrinking the backlog by allowing respondent to pursue ancillary relief. Moreover, commenters stated that the Department should have consulted with DHS to ensure that adjudications between the two agencies are consistent.

At least one commenter also raised constitutional concerns with the rule's administrative closure changes. The commenter alleged that the rule violates due process by depriving persons in removal proceedings of the right to submit applications for provisional unlawful presence waivers and by depriving United States citizens of the opportunity to live with their non-citizen spouse while the spouse's provisional unlawful presence waiver is being adjudicated by USCIS. The commenter similarly alleged that the rule violates the Equal Protection Clause because persons in removal proceedings will be prevented from applying for a provisional unlawful presence waiver simply because they are in removal proceedings when persons who have been ordered removed are allowed to apply for a waiver.

Response: EOIR is tasked with the efficient adjudication of immigration proceedings. *See, e.g.,* 8 CFR 1003.10(b) (explaining that ''immigration judges shall seek to resolve the questions before them in a timely and impartial manner''). As such, indefinitely delaying immigration court proceedings in order to allow aliens to pursue speculative relief that may take years to resolve does not comport with EOIR's mission to expeditiously adjudicate cases before it. *See, e.g., Matter of L-A-B-R-,* 27 I&N Dec. 405, 416 (A.G. 2018) (denying a continuance in part because an indefinite request would undermine administrative efficiency). With EOIR's pending caseload reaching record highs, EOIR simply cannot allow indefinite delays that prolong adjudication any longer than necessary for immigration judges to decide the issues squarely before them. *See Hernandez-Serrano* v. *Barr,* —F.3d—, 2020 WL 6883420, *3 (6th Cir. Nov. 24, 2020) (''The result of administrative closure, . . . is that immigration cases leave an IJ's active calendar and, more often than not, never come back. Thus the reality is that, in hundreds of thousands of cases, administrative closure has amounted to a decision not to apply the Nation's immigration laws at all.''). Therefore, the Department does not believe that administrative closure is a proper tool [24] for efficiently adjudicating proceedings and, as a result, is using its authority to clarify its own regulations to preclude immigration judges and the BIA from granting administrative closure, with limited exceptions. *See* INA 103(g)(2), 8 U.S.C. 1103(g)(2) (granting the Attorney General the authority to issue regulations as necessary for carrying out his authority as it relates to EOIR).

Additionally, the Department finds it necessary to provide this clarification to resolve competing interpretations of 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) that have resulted in the inconsistent nationwide application of administrative closure authority. *Compare Matter of Castro-Tum,* 27 I&N Dec. at 271 (holding that neither immigration judges nor the BIA have a general authority to indefinitely suspend immigration proceedings through administrative closure), *and Hernandez-Serrano,* 2020 WL 6883420 at *4 (''Indeed no one—neither Hernandez-Serrano, nor the two circuit courts that have rejected the Attorney General's decision in *Castro-Tum*—has explained how a general authority to close cases administratively can itself be lawful while leading to such facially unlawful results.''), *with Meza Morales* v. *Barr,* 973 F.3d 656 (7th Cir. 2020) (rejecting *Castro-Tum* and holding that immigration judges are not precluded from administratively closing cases), *and Romero* v. *Barr,* 937 F.3d 282 (4th Cir. 2019) (same). These conflicting decisions, and the possibility of additional such decisions, create uncertainty for immigration judges and the BIA, which this rule seeks to remedy through a consistent nationwide policy. *Cf. Meza Morales,* 973 F.3d at 667 (noting that the Attorney General may amend the regulations through the proper procedures to remove any perceived administrative closure authority).

The Department disagrees with commenters that the agency did not provide sufficient reasons for the change in the NPRM, or that the given reasons were false, erroneous, or relied on incorrect or misleading statistics.

[24] The Department notes that there are other potential tools available to respondents with pending relief or actions outside of EOIR, including requesting a continuance or working with DHS counsel to file a motion to dismiss. *See* 8 CFR 1003.29, 1239.2(c).

Rather, the Department explained that the general authority to administratively close cases ''failed as a policy matter and is unsupported by the law.'' *See* 85 FR at 52504. In the NPRM, the Department noted that, following the expansion of administrative closure in *Matter of Avetisyan,* 25 I&N Dec. 688 (BIA 2012), the backlog of immigration court cases has grown significantly. *See also Adjudication Statistics: Pending Cases, New Cases, and Total Completions,* Oct. 13, 2020, *available at https://www.justice.gov/eoir/page/file/1242166/download*. While the use of administrative closure is not solely responsible for this growth, the need for prompt adjudication of pending cases has only increased. Administrative closure merely delays a decision until an unknown future date, thus allowing the total number of cases at the immigration courts to grow, rather than requiring the immigration judge to adjudicate the issues before them in order to promptly move cases to completion.

The Department also explained in the NPRM that the agency believes the Attorney General's holding in *Matter of Castro-Tum* is correct that 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) do not provide for general administrative closure authority, citing the Attorney General's explanations that general administrative closure authority conflicts with the regulatory ''timely'' requirements, 27 I&N Dec. at 284; that the regulations do not ordinarily include the authority to suspend cases indefinitely, *id.* at 285; and that specific delegations that prior Attorneys General have made would be rendered superfluous, *id.* at 287–88, among others. *See also Hernandez-Serrano,* 2020 WL 6883420 at *1, *4 (stating that ''[a]s of October 2018, more than 350,000 of those [administratively closed] cases had not been reopened. An adjudicatory default on that scale strikes directly at the rule of law'' and that ''[t]he result of administrative closure, . . . is that immigration cases leave an IJ's active calendar and, more often than not, never come back. Thus the reality is that, in hundreds of thousands of cases, administrative closure has amounted to a decision not to apply the Nation's immigration laws at all.'').

Further, the Department also explained in the NPRM that the agency believes general administrative closure authority improperly allows immigration judges to determine which immigration cases should be adjudicated and which ones should not. *See* 85 FR at 52503. Similar to continuances, administrative closure is a tool to delay cases in certain instances. However, in practice, unlike continuances, administrative closure has at times been used to effectively terminate cases through indefinite delay. Thus, the Department believes that such authority is improper as a policy matter unless expressly provided for by regulation or judicially approved settlement.

Lastly, the Department also explained in the NPRM that existing regulations make clear that authority to defer the adjudication of cases lies with EOIR leadership and not with individual members of the BIA or immigration judges. *See* 8 CFR 1003.0(b)(1)(ii), 1003.1(a)(2)(i)(C), 1003.9(b)(3).

The Department also disagrees with commenters that this rule conflicts with section 212(a)(9)(B)(v) of the Act, 8 U.S.C. 1182(a)(9)(B)(v), as interpreted by DHS in 8 CFR 212.7(e)(4)(iii), which makes a person in removal proceedings ineligible for a provisional unlawful presence hardship waiver unless the proceedings are administratively closed. Regulations solely promulgated by and binding on DHS do not confer independent authority on immigration judges or the Board, and DHS does not have the power to provide immigration judges with the general authority to grant administrative closure or to prohibit EOIR from interpreting its own regulations, so any interpretation of § 212.7(e)(4)(iii) attempting to do sowould be erroneous. *See* INA 103(a)(1), 8 U.S.C. 1103(a)(1) (providing the Attorney General with the authority to make ''controlling'' determinations of the immigration laws); *see also Castro-Tum,* 27 I&N Dec. at 287 n.9 (''Because only the Attorney General may expand the authority of immigration judges or the Board, that regulation [8 CFR 212.7(e)(4)(iii)] cannot be an independent source of authority for administrative closure.''). The Department has considered the interplay of EOIR and DHS's regulations regarding provisional unlawful presence waivers and has decided to continue with a general prohibition on administrative closure in immigration proceedings before EOIR. DHS chose to limit the eligibility for provisional unlawful presence waivers as a matter of policy. *See* 78 FR at 544 (explaining that DHS chose to limit eligibility to aliens with administratively closed removal proceedings in order to be ''consistent with [DHS's] established enforcement priorities''). DHS may choose to update their regulations as a result of the Department's amendments regarding administrative closure authority, but any concerns with DHS's policy decisions are outside the scope of this rule.

Commenters did not identify an explicit conflict between the language of INA 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v), and the Department is unaware of any. That statutory provision refers to a waiver of inadmissibility based on an alien's unlawful presence in the United States, and this final rule does not purport to interpret, alter, or even address that provision. Rather, commenters assert that this rule's restriction on the use of administrative closure presents an undesirable policy choice to the extent that it may limit eligibility for that waiver based on DHS's current regulatory language. The Department acknowledges commenters' policy disagreement and has considered it. Nevertheless, the benefits of the final rule far outweigh its alleged costs, even crediting commenters' speculative assertions.[25] Moreover, regardless of policy preferences, the Attorney General has determined that the expansive version of administrative closure preferred by commenters is incompatible with existing law and does not warrant a delegation of such authority. *Matter of Castro-Tum,* 27 I&N Dec. at 292 (''The current practice of administrative closure lacks a valid legal foundation, and I do not believe it would be appropriate to delegate such authority.''); *cf. Hernandez-Serrano,* 2020 WL 6883420 at *4 (''Those concessions imply that the permanent closure of some 350,000 immigration cases was largely contrary to law. Indeed no one—neither Hernandez-Serrano, nor the two circuit courts that have rejected the Attorney General's decision in *Castro-Tum*—has explained how a general authority to close cases administratively can itself be lawful while leading to such facially unlawful results.''). In short, the Department finds no basis to contradict the Attorney General and adopt commenters' policy preferences.

The Department believes that any increase in cancellation of removal applications in response to this unrelated rule is purely speculative. Further, even if commenters' predictions turn out to be accurate, the Department is well-equipped to handle an increase in such applications as its adjudicators have considered them for decade and the relevant law is well-established. Additionally, commenters' speculation on this point implies that the majority of such applications would

[25] The final rule does not prohibit administrative closure altogether, and commenters did not generally acknowledge or account for those aliens who may still benefit from administrative closure under the rule in their assertions about the rule's impact.

be meritless; otherwise, the aliens would have already filed such applications because an approved application for cancellation of removal for non-permanent residents provides lawful permanent residence which is a preferable outcome to the limbo-like nature of adnministrative closure. The Department finds that a potential increase in meritless applications for relief is not a persuasive reason for altering this final rule, and any adjudicatory costs associated with such an increase are outweighed by the benefits of the rule.

The Departments disagree that the administrative closure provisions raise any constitutional concerns. There is no cognizable due process interest in access to or eligibility for a discretionary, provisional unlawful presence waiver of inadmissibility. *See, e.g., Champion* v. *Holder,* 626 F.3d 952, 957 (7th Cir. 2010) (''To articulate a due process claim, [the individual] must demonstrate that she has a protected liberty or property interest under the Fifth Amendment. Aliens have a Fifth Amendment right to due process in some immigration proceedings, but not in those that are discretionary.'') (citations omitted). Moreover, this rule's administrative closure changes do not violate the concept of equal protection—in either the Equal Protection Clause of the Fourteenth Amendment or as a component of the Fifth Amendment's Due Process Clause—as they do not impose any classifications that would invoke the doctrine. To the extent the administrative closure changes would have a disparate impact on persons in removal proceedings as compared to persons not in proceedings, the Departments note that the changes are rationally related to the Department's interest in efficiently allocating EOIR's limited adjudicatory capacity in order to decide cases in a timely manner. *Cf. DeSousa* v. *Reno,* 190 F.3d 175, 184 (3d Cir. 1995) (''[D]isparate treatment of different groups of aliens triggers only rational basis review under equal protection doctrine. Under this minimal standard of review, a classification is accorded 'a strong presumption of validity'. . . .'' (internal citations omitted)).

Overall, as discussed in more detail, *infra,* the Department has weighed the relevant equities of the rule's administrative closure provision. The Department does not believe that the administrative closure provision will have a significant impact on the public, as most immigration courts—63 out of 67, all but those in Arlington, Baltimore, Charlotte, and Chicago [26]—currently follow either *Matter of Castro-Tum* itself or an applicable Federal court decisioning affirming it, *e.g., Hernandez-Serrano,* 2020 WL 6883420 at *5 (''In summary, therefore, we agree with the Attorney General that §§ 1003.10 and 1003.1(d) do not delegate to IJs or the Board 'the general authority to suspend indefinitely immigration proceedings by administrative closure.''' (quoting *Matter of Castro-Tum,* 27 I&N Dec. at 272)). Therefore, the effect of this rule simply codifies the existing limitations on immigration judges' general authority to grant administrative closure.[27] Moreover, to the extent that commenters simply disagree with the decision in *Matter of Castro-Tum* as a policy matter, the Department has explained that the legal and policy issues implicated by the free-floating use of administrative closure and the efficiency that would follow from clearly delineating the circumstances of its usage outweigh the policy arguments advanced by commenters. *See also Hernandez-Serrano,* 2020 WL 6883420 at *1 (''A regulation delegating to immigration judges authority to take certain actions '[i]n deciding the individual cases before them' does not delegate to them general authority not to decide those cases at all. Yet in more than 400,000 cases in which an alien was charged with being subject to deportation or (after April 1, 1997) removal, immigration judges or the Board of Immigration Appeals have invoked such a regulation to close cases administratively—meaning the case was removed from the IJ's docket without further proceedings absent some persuasive reason to reopen it. As of October 2018, more than 350,000 of those cases had not been reopened. An adjudicatory default on that scale strikes directly at the rule of law.'').

Further, for those courts that are not bound by *Matter of Castro-Tum,* the Department disagrees that the change will result in unnecessary removal orders, as immigration judges are already tasked with resolving the proceedings before them, including determining removability and issuing removal orders if required. *See, e.g.,* 8 CFR 1003.10(b) (''In all cases, immigration judges shall seek to resolve the questions before them in a timely and impartial manner consistent with the Act and regulations.''). The Department declines to adopt commenters' speculation as to the counter-factual outcomes of cases that have been administratively closed, and commenters did not support their assertion that only cases in which an alien will be ordered removed are administratively closed.[28] To the contrary, aliens have sought recalendaring of their proceedings in order to apply for relief from removal for which they believe they are eligible, suggesting that in many cases, aliens themselves do not believe that a case that has been administratively closed would necessarily have otherwise resulted in a removal order. *See, e.g., Matter of W-Y-U-,* 27 I&N Dec. 17 (BIA 2017) (''[The respondent] filed a timely application for asylum and related relief and protection, which he seeks to have the Immigration Judge review in removal proceedings. The respondent argues that the administrative closure of his case prevents him from pursuing that relief.''), *overruled by Matter of Castro-Tum,* 27 I&N Dec. at 272.

As the Department asserted, free-floating authority to unilaterally administratively close cases is in significant tension with existing law, including regulations and longstanding Board case law. 85 FR at 52503–05. To the extent that commenters suggested the Department should retain the status quo and its problematic tension with

[26] The Department notes that *Matter of Castro-Tum* did not incorporate all of the legal arguments presented in the NPRM regarding whether immigration judges and Board members have free-floating authority to defer adjudication of cases. *E.g.,* 85 FR at 52503 (discussing tension created by interpreting 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) to allow free-floating authority to administratively close cases with references in those provisions to the ''disposition'' of cases and with the provisions of 8 CFR 1003.1(a)(2)(i)(C) and 8 CFR 1003.9(b)(3) which assign authority to defer case adjudications to the Board Chairman and the Chief Immigration Judge rather than to all Board members and all immigration judges); *accord Hernandez-Serrano,* 2020 WL 6883420 at *4 (''To the contrary, the regulations expressly limit their delegation to actions 'necessary *for the disposition'* of the case. And that more restricted delegation cannot support a decision *not* to decide the case for reasons of administrative 'convenience' or the 'efficient management of the resources of the immigration courts and the BIA.' '' (emphases in original). Thus, circuit court decisions abrogating *Matter of Castro-Tum* did not necessarily address all arguments surrounding administrative closure. Accordingly, independent of *Matter of Castro-Tum,* immigration judges and Board members may still come to the conclusion that they generally lack free-floating authority to administratively close cases.

[27] Although this rule codifies the result of *Matter of Castro-Tum,* its bases are broader than just that decision. *See supra* text accompanying note 26.

[28] The Department notes that simply delaying an alien's removal is not a compelling policy basis for declining to promulgate this rule. *See Nken* v. *Holder,* 556 U.S. 418, 436 (2009) (''There is always a public interest in prompt execution of removal orders: The continued presence of an alien lawfully deemed removable undermines the streamlined removal proceedings IIRIRA established, and permits and prolongs a continuing violation of United States law.'' (internal citations and quotation marks omitted)).

existing law, the Department simply disagrees.

The question of unlawful presence waivers was already addressed by *Matter of Castro-Tum,* 27 I&N Dec. at 278 n.3, 287 n.9, and this final rule does not impact such waivers accordingly. Moreover, the regulation identified by commenters, 8 CFR 212.7(e)(4)(iii) has no analogue in chapter V of title 8, and that regulation is not binding on the Department. Additionally, such a waiver is both ''provisional'' and ''discretionary,'' 8 CFR 212.7(e)(2)(i); like administrative closure itself, an alien has no right to such a waiver; and, a provisional and discretionary waiver to which an alien lacks any entitlement cannot be seen as necessary to the disposition of the alien's case in immigration proceedings. *See Gutierrez-Morales* v. *Homan,* 461 F.3d 605, 610 (5th Cir. 2006) (''We have squarely held that 'neither relief from removal under discretionary waiver nor *eligibility* for such discretionary relief is entitled to due process protection.' Stated differently, an alien has no due process right to a hearing to determine his eligibility for relief that is purely discretionary.'' (footnotes omitted, emphasis in original)).

Further, although aliens in removal proceedings (unless administratively closed) and aliens with administratively final orders of removal are barred from obtaining the waiver, 8 CFR 212.7(e)(4)(iii) and (iv), an alien with an administratively final order of voluntary departure is not, and by definition, aliens must voluntarily depart the United States in order to receive the benefit of such a waiver. Thus, the availability of administrative closure has no bearing on an alien's ability to receive and effectuate an order of voluntary departure, which is a practical prerequisite for obtaining the benefit of the waiver, and commenters did not explain why the restriction on administrative closure would have any impact at all on an alien's ability to obtain an order of voluntary departure and then a provisional waiver before departing to receive the final waiver abroad. Although the Department has considered the link between such waivers and administrative closure—just as the Attorney General did in *Matter of Castro-Tum*—that link is too attenuated to outweigh the significant legal and policy concerns raised by the Department regarding administrative closure.

Similarly, concerns about putative reliance interests are misplaced. First, as discussed, *infra,* the rule applies, in general, only prospectively, so it does not disturb cases that have already been administratively closed. Second, and relatedly, all changes in the law may impact matters of attorney strategy in interactions with clients, but that is an insufficient basis to decline to change the law.[29] To find otherwise would effectively preclude any law from ever being changed. Third, nothing in the rule prohibits a practitioner from seeking administrative closure; rather, it more clearly delineates the situations in which administrative closure is legally authorized. Fourth, a representative may not ethically guarantee any result in a particular case; thus, to the extent commenters suggest that the final rule restricts or interferes with an attorney's ability to guarantee an alien both a grant of administrative closure and the approval of a provisional waiver, the Department finds such a suggestion unavailing. *See* Model Rules of Prof'l Conduct R. 7.1 cmt. 3 (2020) (''A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case.''); *id.* cmt. 4 (''It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.'') (quoting R. 8.4(c)); *id.* R. 8.4(e) (''It is professional misconduct for a lawyer to . . . state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.'').

In short, the Department appropriately considered potential alternatives as well as the relevant interests and alleged costs in issuing the final rule regarding administrative closure. On balance, however, commenters' suggestions would not resolve the issues identified by the Department, and the concerns raised by commenters are far outweighed by both the significant legal and policy issues raised by the Department in the NPRM regarding administrative closure and the increased efficiency that a formal clarification of its use will provide.

With regards to the alleged costs to persons in removal proceedings who allegedly may no longer be eligible to obtain a provisional unlawful presence waiver without administrative closure, the Department first reiterates that situation is already the status quo in all but four immigration courts and has been so since 2018. As *Matter of Castro-Tum* was issued in 2018, aliens and their representatives in jurisdictions following *Castro-Tum* should not be currently relying on the expectation of administrative closure to pursue provisional unlawful presence waivers. Consequently, this final rule does not change the status quo regarding the availability of a provisional unlawful presence waiver for the overwhelming majority of aliens currently in removal proceedings, and commenters generally did not distinguish the reality of the status quo in making their speculative projections. Further, the Department believes that the strong interest in the efficient adjudication of cases and the legal and policy issues identified in the NPRM outweigh the potential inability of aliens at 4 out of 67 immigration courts to obtain provisional unlawful presence waivers, something to which they are not entitled to in the first instance. The Department notes that these persons may still apply for an unlawful presence waiver from outside the United States, and that DHS may choose, as a matter of policy, to amend their regulations to remove the administrative closure requirement for persons in removal proceedings applying for a provisional waiver.

The Department also disagrees that the general prohibition on administrative closure does not harmonize with DHS regulations regarding provisional unlawful presence waivers. As a Federal circuit court recently noted, the presence of references to administrative closure in existing regulations ''presuppose only the existence of a general practice of administrative closure, not its legality.'' *Hernandez-Serrano,* 2020 WL 6883420 at *4. Thus, assuming counter-factually—but as commenters asserted—that 8 CFR 212.7(e)(4)(iii) controlled the Department and that no aliens would be eligible to have their cases administratively closed after this final rule—and, thus, no aliens in immigration proceedings were eligible for a provisional waiver under 8 CFR 212.7(e)(4)(iii)—those factors, even if factually accurate, would not provide a strong policy basis to overrule the Attorney General's decision in *Matter of Castro-Tum* for all of the reasons given by the Department in the NPRM and this final rule. *See also Hernandez-Serrano,* 2020 WL 6883420 at *4 (''neither the IJs nor the Board [nor parties] enjoy a right of adverse possession as to the Attorney General's

[29] Furthermore, as reiterated herein, because *Matter of Castro-Tum* was issued in 2018, aliens and their representatives in jurisdictions following *Castro-Tum* should not be currently relying on the expectation of administrative closure to pursue provisional unlawful presence waivers.

regulations.''). The Department considered the interplay of EOIR and DHS's regulations and, due to the strong equities in favor of limiting administrative closure, decided to continue with a general prohibition on administrative closure in immigration proceedings before EOIR. DHS chose to limit the eligibility for provisional unlawful presence waivers as a matter of policy, and DHS may choose to update their more specific regulations accordingly as a result of this rule.

c. Enhanced BIA Factfinding (8 CFR 1003.1(d)(3)(iv))

i. Administrative Notice

Comment: As a general matter, many commenters asserted that the provisions regarding administrative notice were biased in favor of DHS, thereby demonstrating the allegedly partisan nature of the BIA and, more broadly, the Department. Similarly, one commenter explained that the administrative notice provisions were ''problematic'' because, as the commenter alleged, DHS could submit new evidence but the alien was not permitted to submit counter evidence under the new rules.

Commenters expressed concern about the types of items the rule would allow the BIA to administratively notice items ''not reasonably subject to dispute.'' 8 CFR 1003.1(d)(3)(iv)(A). Overall, commenters predicted disputes at both the BIA and the Federal courts over whether particular facts fit any of the listed exemplary categories of such evidence or otherwise constitute such items. 8 CFR 1003.1(d)(3)(iv)(A)(*1*)–(*4*). Such disputes, commenters alleged, would undermine the efficiency goals of the rule. One commenter explained that ''[m]ost of this information—especially that contained within government documents—will be adverse to respondents. The rule thus creates a one-sided system in which information favorable to DHS may be considered by the BIA, but information favorable to respondents may not be.'' Commenters claimed that the rule's inclusion of all of these facts was arbitrary and capricious.

Further, commenters specifically alleged that the ''the contents of official documents outside the record,'' 8 CFR 1003.1(d)(3)(iv)(A)(*2*), are subject to reasonable dispute because DHS records, including records from CBP and ICE, ''routinely contain [ ] egregious errors and coerced statements.'' Commenters also stated that current events, 8 CFR 1003.1(d)(3)(iv)(A)(*1*), could similarly be subject to reasonable dispute. Commenters stated that the contours of the category of facts from government sources was unclear, despite it being limited to ''facts that can be accurately and reliably determined,'' 8 CFR 1003.1(d)(3)(iv)(A)(*3*), because DHS records are unreliable. In addition, at least one commenter stated that the rule did not explain why facts that can be administratively noticed by the BIA may only be sourced from official or universally acclaimed documents.

At least one commenter alleged that the administrative notice provisions would allow the BIA to consider and act upon facts not raised by either party, thereby considering ''facts that did not constitute part of the immigration judge's decision-making.'' The commenter alleged that this would allow the BIA to act as prosecutor instead of a neutral arbiter. The commenter explained that because DHS rarely submits a brief on appeal, the administrative notice changes would disproportionately affect pro se individuals.

Several commenters stated that the provisions regarding notice and an opportunity to respond were insufficient because a response may require witnesses and additional clarifying evidence. Commenters explained that witnesses and additional evidence were more appropriately introduced at the immigration court level, given the immigration judge's unique position to assess facts and determine credibility and the general prohibition against factfinding by the BIA. Commenters also emphasized that the rule failed to consider that the BIA would need to give notice to the parties and an opportunity to respond if the BIA intended to administratively notice a fact that was outside the record and would serve as the basis for overturning a removal order or denial of relief. The commenter explained that the BIA does not appear to be neutral when it must only administratively notice facts that could be used to deny relief that was previously granted.

One commenter explained that the rule's changes to administrative notice would affect the standard of review for factual findings on appeal at the appellate court level. The commenter explained that the current use of the ''substantial evidence'' standard would not be justified, given that some factual findings would have been made only by the BIA in the first instance. Thus, the commenter suggested that the ''clearly erroneous'' standard replace the ''substantial evidence'' standard in these cases.

Response: As an initial point, the Department notes that the Board's ability to take administrative notice of certain facts is already well-established in both existing regulations, *e.g.,* 8 CFR 1003.1(d)(3)(iv) (2019) (allowing the Board to take administrative notice of current events and the contents of official documents), and case law, *e.g., Sankoh* v. *Mukasey,* 539 F.3d 456, 465 (7th Cir. 2008) (''The Board has the authority to take administrative notice of uncontroverted facts, meaning facts that can be characterized as commonly acknowledged.'' (internal citation and quotation marks omitted)). Thus, to the extent that commenters assert the Board should not be able to take administrative notice of facts not reasonably subject to dispute, they did not explain why the Department should reverse the Board's longstanding authority to do so.

Similarly, commenters did not persuasively explain why Federal Rule of Evidence 201(b), which is well-established in Federal jurisprudence and governs judicial notice by appellate courts, *In re Omnicare, Inc. Securities Litigation,* 769 F.3d 455, 466 (6th Cir. 2014) (''[Federal Rule of Evidence 201(b)] applies to appellate courts taking judicial notice of facts supported by documents not included in the record on appeal.'' (quoting *United States* v. *Ferguson,* 681 F.3d 826, 834 (6th Cir. 2012)), was not an appropriate model for the Board to follow. Without such explanations as to why the Department should overturn these longstanding and well-established principles, the Department finds commenters' unsupported policy preferences on this point unpersuasive.

Additionally, commenters' suggestions about the allegedly ''one-sided'' nature of this change belie both a misunderstanding of the rule and an acknowledgement of its importance to ensure that only meritorious claims are granted. First, contrary to the assertions of many commenters, the rule applies equally to DHS and to respondents. Thus, the Board may take administrative notice of facts both favorable and adverse to either party, as long as those facts are not reasonably subject to dispute. Second, the broad, hyperbolic, and unsupported assertion that official government documents should not be administratively noticed because they contain only information adverse to respondents is both inaccurate factually, *e.g., Dahal* v. *Barr,* 931 F.3d 15, 19 (1st Cir. 2019) (''Thus, far from undercutting Dahal's fears, the [Department of State] Country Report on the elections recognizes a remaining threat of Maoist persecution.''), and in tension with well-established Federal practice in which courts may take judicial notice of official government documents, *e.g.,*

Wells Fargo Bank, N.A. v. *Wrights Mill Holdings, LLC,* 127 F. Supp. 3d 156, 166 (S.D.N.Y. 2015) (''Under Federal Rule of Evidence 201, a court may take judicial notice, at 'any stage of the proceeding,' of any fact 'that is not subject to reasonable dispute because' it 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.' Fed. R. Evid. 201(b)(2), (d). . . . Pursuant to Rule 201, courts have considered newspaper articles, documents publicly filed with the SEC or FINRA, documents filed with a Secretary of State, documents filed with governmental entities and available on their official websites, and information publicly announced on certain non-governmental websites, such as a party's official website.''); *Kramer* v. *Time Warner Inc.,* 937 F.2d 767, 774 (2d Cir.1991) (''[A] . . . court may take judicial notice of the contents of relevant public disclosure documents . . . as facts 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.' '' (quoting Fed. R. Evid. 201(b)(2)).

Moreover, this suggestion misapprehends the nature of the rule and—perhaps unintentionally by the commenter—offers further support for maintaining it. The rule allows the Board to take administrative notice of ''[f]acts that can be accurately and readily determined from official government sources and whose accuracy is not disputed.'' 8 CFR 1003.1(d)(3)(iv)(A)(*3*). Commenters did not explain why facts whose accuracy is not disputed and that are unfavorable to an alien should not be considered by individuals adjudicating claims made by aliens—except that ignoring such facts would potentially increase the likelihood that non-meritorious claims would be granted, which is an outcome preference tacitly supported by many commenters. The Department finds it vitally important that all undisputed, accurate facts bearing on a claim should be considered in order to reduce adjudication errors and to ensure that meritorious claims are granted in a timely manner while unmeritorious ones are efficiently addressed. In short, the Department disagrees with the implicit suggestion of commenters that the Board should intentionally turn a blind eye to relevant, undisputed facts, regardless of which party those facts allegedly favor.

The rule does not authorize the BIA to rely on facts that did not constitute part of the immigration judge's decision-making, except when such ''facts [ ] are not reasonably subject to dispute.'' 8 CFR 1003.1(d)(3)(iv)(A) (proposed); *see also Matter of J-Y-C-,* 24 I&N Dec. 260, 261 n.1 (BIA 2007) (providing that issues not raised before an immigration judge are waived). The BIA must take administrative notice of those facts. 8 CFR 1003.1(d)(3)(iv)(A). Further, if the BIA were to reverse a grant of relief or protection from removal based on such facts, the BIA must give the parties notice and not less than 14 days to respond. 8 CFR 1003.1(d)(3)(iv)(B). Accordingly, contrary to commenters' assertions, an alien whose grant of relief or protection may be subject to reversal will have an opportunity to respond, including by submitting additional arguments and evidence such as affidavits or declarations.

Furthermore, the administrative notice provisions are not the product of partisanship or favoritism toward DHS, and contrary to an implicit assertion made by most commenters, they apply equally to both parties. The BIA has long been able to take administrative notice of commonly known facts and official government records, and these changes build on this prior practice. Moreover, contrary to the assertion of at least one commenter, the Department intends to ensure that an alien receives notice and an opportunity to respond if the BIA were to rely on a fact outside the record to reverse a grant of relief or protection from removal. If anything, the provision treats respondents more favorably than DHS because it does not require the BIA to provide notice to DHS if it intends to rely on facts outside the record to reverse an immigration judge's denial of relief or protection, yet many commenters failed to acknowledge this discrepancy or to explain why the Department should not adopt such a provision.

The Department emphasizes that regulations, not statute, determine appellate procedures at the BIA. *See generally* 8 CFR part 1003, subpart A; *see also* 85 FR at 52492. Accordingly, the Department properly exercised its rulemaking authority under section 103(g)(2) of the Act, 8 U.S.C. 1103(g)(2), to promulgate the administrative notice provisions to clarify appellate procedures at the BIA, with the overarching goal of increasing efficiencies and consistency in cases before the BIA.

The Department disagrees with commenters' suggestions that the regulation's list of facts that may be administratively noticed include disputable facts, as whether any given fact is ''disputable'' will depend on the putative fact at issue and the overall circumstances of the case. The Department recognizes that parties may disagree over whether a fact is truly undisputed, but factual disputes are already a common feature of immigration proceedings and can be resolved under existing law. Moreover, respondents will have at least 14 days to argue otherwise if the Board intends to rely on a fact ''not reasonably subject to dispute'' outside the record in order to reverse a rant of relief or protection. 8 CFR 1003.1(d)(3)(iv)(B).

Further, the Department rejects any allegation that official documents or government documents contain ''egregious errors'' and ''coerced statements,'' or are ''unreliable,'' as commenters claimed. Government documents, broadly speaking, provide reliable data and cite to reliable sources in support of the ideas presented and are meant to inform the public. Second, the Department disagrees with the commenters' concerns that all but paragraph (d)(3)(iv)(A)(*4*) could be disputable. The Department disagrees that administrative notice of any of those facts creates a biased system. Inclusion of these facts is not arbitrary or capricious; both ''current events'' and ''official documents'' were carried over from existing regulations. The ''official government sources'' category provides further clarification and distinction from the ''official documents'' category. In providing this list, the Department sought to delineate clear categories of facts that were indisputable, and the rule concurrently included the provision requiring notice and an opportunity to respond to ensure that both sides may address administratively noticed facts. Commenters' concerns regarding prolonged disputes at the BIA and the Federal courts are speculative, as are commenters' concerns regarding efficiency that stem from those litigation-related concerns. More specifically, all disputes at the BIA may potentially result in Federal litigation, including disputes over the appropriateness of the Board taking administrative notice of undisputed facts. The near-certainty of litigation, which has grown considerably in the immigration field well before the NPRM was published, is an insufficient basis, however, to decline to adopt the rule.

In regard to administratively noticed documents, those listed at 8 CFR 1003.1(d)(3)(iv)(A)(*1*)–(*4*) are examples of documents, as indicated by the words ''such as'' preceding the list provided at paragraphs (d)(3)(iv)(A)(*1*)–(*4*), that would generally raise facts not reasonably subject to dispute. The rule did not require that sources be ''official'' or ''universally acclaimed,'' as commenters claimed. Rather, the rule required that administratively noticed facts, regardless of their sources, be ''not

reasonably subject to dispute.'' Although official or universally acclaimed documents typically raise facts that are not in dispute, those are not the exclusive sources from which the BIA may administratively notice facts.

Because facts that may administratively noticed are not reasonably subject to dispute, the BIA does not act as a ''prosecutor'' when it takes administrative notice of such facts. Further, the regulation requires the BIA to provide parties at least 14 days to respond if it takes administrative notice of facts. 8 CFR 1003.1(d)(3)(iv)(B). Thus, regardless of whether DHS files a brief on appeal and regardless of whether an alien is represented, the alien is afforded an opportunity to respond to administratively-noticed facts outside the record if those facts will be used to overturn a grant or relief or protection. This rule also does not impose any specific limits on such a response, though the Board's ordinary rules for service and filing would still apply.

Although the Department agrees that immigration courts are generally best-positioned to engage in factfinding, *see generally* 85 FR at 52500–01, there are circumstances—similar to those recognized by Federal courts—in which procedural efficiency counsels in favor of being noticed on appeal in order to avoid remanding a case to address a fact that is undisputed. Thus, the Department has determined that certain facts described in 8 CFR 1003.1(d)(3)(iv)(A)(*1*)–(*4*) may appropriately be raised before the BIA. *See id.* at 52501.

Some commenters alleged that the rule permits DHS to submit new evidence and prevents the alien from submitting new evidence to counter DHS's new evidence. However, the rule does not permit either party to submit new evidence in this regard. To the extent that commenters framed this concern as one regarding exceptions related to factual issues raised by identity, law enforcement, or security investigations or examinations, or other investigations noted in 85 FR at 52500 n.21, that issue is distinct from the issue of administratively noticed facts and, for asylum applications, has a statutory foundation, INA 208(d)(5)(A)(i), 8 U.S.C. 1158(d)(5)(A)(i) (''[A]sylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum''). For further discussion on issues related to identity, law enforcement, or security investigations or examinations, *see* section II.C.3.e.

Commenters' concerns regarding use of the clearly erroneous standard in place of the substantial evidence standard is outside the scope of this rulemaking, as this rule does not propose or affect standards of review for factual findings at the appellate court level. The Department does not have the authority to issue a rule that would alter the standard of review employed by a Federal circuit court. This rule does not affect the commenters' ability to lobby Congress or advise other attorneys in regard to this concern.

ii. BIA Factfinding Remands

Comment: Commenters opposed the rule's prohibition on the BIA to remand a case for further factfinding, explaining that oftentimes combining excluded evidence with evidence in the record could determine the outcome of a case. Overall, one commenter explained that the rule ''defied logic'' by categorically restricting the BIA from exercising discretion to determine whether additional facts must be adduced. The commenter stated that the Department provided no data to support the rule's changes to the BIA's long-standing factfinding efforts, nor did the rule explain how restricting the BIA's factfinding capabilities would increase efficiency and consistency.

Commenters voiced general concern for pro se individuals, alleging that the rule's removal of the BIA's ability to remand a case *sua sponte* for further factfinding ''appears designed to quickly, and with finality, remove those without representation who would be least likely to understand that they have the ability to seek remand and would therefore most heavily rely on EOIR to protect their rights.'' More specifically, especially in the case of pro se individuals, commenters were concerned that respondents who were unaware of what was necessary to meet their burden would also similarly not have attempted to ''adduce the additional facts before the immigration judge,'' as required by proposed 8 CFR 1003.1(d)(3)(iv)(D)(*2*) for the BIA to remand a case. One commenter further explained that this provision would ''require respondents to predict a future that will be created by actors beyond their control in order to obtain the lawful status that is otherwise statutorily available to them.''

Similarly, commenters opposed proposed 8 CFR 1003.1(d)(3)(iv)(D)(*1*) requiring that an issue be ''preserved'' before the immigration judge because, the commenters explained, the respondent would be unaware of what factfinding the immigration judge had conducted until the decision is issued. Accordingly, commenters alleged that the respondent would have to ''interrupt the IJ as the IJ is dictating her ruling. Or, even worse, the [r]espondent wouldn't even have the opportunity to object because he received his decision by postal mail.'' Citing the performance metrics for immigration judges, commenters were concerned that immigration judges would have ''little incentive'' to take the time to develop the record in cases ''where there is no possibility that the case could be remanded for failure to do so.''

Commenters also disagreed with proposed 8 CFR 1003.1(d)(3)(iv)(D)(*3*), which requires the BIA to first determine whether additional factfinding would ''alter the outcome of the case.'' Commenters alleged that making such determination constituted factfinding on the part of the BIA, contradicting the general opposition to factfinding by the BIA.

Commenters disagreed with the clearly erroneous standard in proposed 8 CFR 1003.1(d)(3)(iv)(D)(*5*). Commenters explained that it should not make a difference whether an immigration judge's findings were erroneous if an alien should have been granted asylum in the first instance. Other commenters voiced general support for the current system, which they explained required the BIA to determine whether an immigration judge made a clearly erroneous factual finding that prejudiced the alien. One commenter alleged that, under the rule, the BIA would be forced to issue ''poor decisions based on incomplete facts and conjecture.''

Response: Again, as an initial point, the Department notes that the assertions of many commenters reflect either an unsubstantiated, tendentious interpretation of the rule or a fundamental misunderstanding of the procedures of adversarial civil proceedings, including immigration proceedings. Except for issues related to identity, law enforcement, or security investigations or examinations, which are required by other regulations or statutes,[30] the changes in the rule regarding factfinding apply to both

[30] Most applications cannot be granted in immigration proceedings—at the BIA or otherwise—without the completion and clearance of identity, law enforcement, or security investigations or examinations. 8 CFR 1003.47. A similar statutory restriction applies specifically to asylum applications. INA 208(d)(5)(A)(i), 8 U.S.C. 1158(d)(5)(A)(i).

parties equally. Thus, both DHS and an alien must comply with the rule's provisions in order to seek a remand for factfinding.

Because the parties themselves are responsible for meeting any applicable burdens of proof before the immigration judge, 8 CFR 1240.8, and because the Board acts a neutral arbiter between the parties—rather than as an advocate for one party over the other—there is generally no reason for the Board to remand a case on its own for further factfinding unless a question of jurisdiction has arisen that requires such factfinding. To do otherwise, the Board would, in essence, be acting on behalf of a party in order to advance that party's arguments, which is inappropriate. 8 CFR 1003.1(d)(1) (''The Board shall resolve the questions before it in a manner that is timely, *impartial,* and consistent with the Act and regulations.'' (emphasis added)); 5 CFR 2635.101(b)(8) (''Employees [of the federal government] shall act impartially and not give preferential treatment to any private organization or individual.''); *BIA Ethics and Professionalism Guide* at sec. V (''A Board Member shall act impartially and shall not give preferential treatment to any organization or individual when adjudicating the merits of a particular case.''). In other words, it is not the Board's role to correct deficiencies in a party's case or to provide a second or additional opportunity for a party to do so. It is the Board's role to ''review . . . administrative adjudications under the Act . . . . [R]esolve the questions before it in a manner that is timely, impartial, and consistent with the Act and regulations . . . . [And] provide clear and uniform guidance to the [DHS], the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations.'' 8 CFR 1003.1(d)(1). The final rule recognizes the Board's appropriate role, and to the extent that commenters suggest the Board should employ procedures in resolving appeals that favor one party over the other, the Department declines to adopt such a suggestion to avoid compromising the Board's impartiality.

The rule reflects several well-established principles that commenters did not persuasively challenge or address. First, it requires that the party seeking remand for factfinding on an issue to have preserved that issue below. Issues not preserved in front of an immigration judge are generally waived. *See Matter of Edwards,* 20 I&N Dec. 191, 196 n.4 (BIA 1990) (noting that an issue not preserved in front of the immigration judge is waived). Thus, it is both inefficient and inconsistent with existing case law to remand a case for further factfinding on issue that has already been waived on appeal. Commenters did not explain why EOIR should allow the Board to remand cases for further factfinding on issues that have already been waived, and the Department is unaware of any logical or persuasive basis to do so.

Second, the rule requires the party seeking remand, if it bore the burden of proof below, to have attempted to adduce the additional facts before the immigration judge. There is no logical reason for a party to choose not to attempt to adduce facts sufficient to meet its burden of proof before an immigration judge, and this requirement merely recognizes both the inefficiency and the gamesmanship that would follow if parties were relieved of an obligation to attempt to bring out facts to meet a burden of proof before an immigration judge. Again, commenters did not explain why parties—including both aliens and DHS—should be relieved of that burden, particularly since they, presumably, should already have attempted to meet it. 8 CFR 1240.8.

Third, the rule requires that the additional factfinding alter the outcome or disposition of the case. To do otherwise would be to remand a case for no purpose since the remand would not affect the outcome or disposition of the case. In short, it would be a remand for no reason. The Department is unaware of any need to remand a case for no reason, and commenters did not provide one.

Fourth, and relatedly, the rule requires that the additional factfinding would not be cumulative of the evidence already presented or contained in the record. Again, to do otherwise would largely be purposeless. The Department is unaware of any reason to remand a case for factfinding that is cumulative or already present in the record, and commenters did not advance one.

Fifth, the rule requires, *inter alia,* that the immigration judge's factual findings were clearly erroneous. The Board already reviews immigration judge factual findings under a clearly erroneous standard, and the rule does not change that standard. *Id.* § 1003.1(d)(3)(i). Rather, the rule recognizes that additional factfinding in cases in which an immigration judge's factual findings are not clearly erroneous could mean only one of two possibilities. It could mean that a party failed to meet its burden of proof but the Board believes—for some unknown or unstated reason—that the party warrants another chance to meet that burden to bring out additional facts. Such a decision would effectively convert the Board into an advocate for the party seeking a remand, and in that case, the Board would be abdicating its role as an impartial or neutral arbiter. *See id.* 1003.1(d)(1); 5 CFR 2635.101(b)(8); *BIA Ethics and Professionalism Guide* at sec. V. Commenters did not offer persuasive reasons for the Board to abandon its need for impartiality, and to the extent that commenters alleged multiple reasons for not adopting the rule, the Department finds that the need for the Board to remain an impartial body is more compelling than those reasons.

Alternatively, additional factfinding in cases in which an immigration judge's factual findings are not clearly erroneous could mean that the immigration judge made an error of law which will necessitate additional factfinding on remand. For example, an immigration judge may err as a matter of law in failing to sufficiently develop the record for a pro se respondent, which would inherently require further factfinding. Although that interpretation would be based on a legal determination and the rule does not restrict the Board's ability to remand a case due to a legal error, the Department recognizes that some cases of legal error may require additional factfinding on remand. The Department did not intend the rule to prohibit factfinding on remand when the remand is based on a legal error—subject to other requirements—and the final rule clarifies that point to avoid confusion. 8 CFR 1003.1(d)(3)(iv)(D)(*5*).

Contrary to commenters' contentions, the rule did not ''categorically restrict'' the BIA from exercising discretion to determine whether additional facts may be adduced. For example, the BIA may exercise discretion to determine that additional facts not reasonably subject to dispute may be administratively noticed. The rule did, however, clarify the extent to which the BIA may engage in factfinding on appeal and the circumstances in which the BIA may remand for further factfinding, consistent with applicable law and regulations. 85 FR at 52500–01.

The rule cited various data, *see id.* at 52492, to demonstrate the significant increase in cases and related challenges, which the Department believes would be unsustainable under the BIA system pre-dating this rule and thus prompted the Department's decision to review the BIA's regulations in order to address and reduce unwarranted delays in the

appeals process and ensure efficient use of resources.[31]

Contrary to commenters' claims, the Department maintains that it explained in the NPRM how proposed changes to the BIA's factfinding abilities would increase efficiency and consistency. For example, in support of the administrative notice provisions, the Department explained that there was no operational or legal reason to remand a case for factfinding if the record already contained evidence of undisputed facts. *Id.* at 52501. Thus, the Department clarified that the BIA could rely on such facts without remanding the case, thereby reducing an unwarranted delay. Overall, the proposed changes were made ''to more clearly delineate the circumstances in which the BIA may engage in factfinding on appeal.'' *Id.* Clarifying such circumstances inherently facilitates a more efficient and consistent process because adjudicators need not spend time determining, for example, whether factfinding is appropriate or whether previous adjudicators otherwise engaged in factfinding in similar circumstances.

The Department promulgated this rule to reduce unwarranted delays and ensure efficient use of resources, given the significant increase in pending cases in the immigration courts that has led to an increase in appeals. *See id.* at 52492. In no way are these changes intended for the purpose of harming or quickly removing pro se individuals. To the contrary, EOIR's Office of Policy (OP) seeks to increase access to information and raise the level of representation for individuals in hearings before immigration courts and the BIA. In addition, EOIR has developed a thorough electronic resource for individuals in proceedings. EOIR, *Immigration Court Online Resource, available at https://icor.eoir.justice.gov/en/* (last visited Nov. 27, 2020); *see also EOIR Launches Resources to Increase Information and Representation,* Oct. 1, 2020, *https://www.justice.gov/eoir/pr/eoir-launches-resources-increase-information-and-representation.* In short, EOIR's OP, the private bar, and other non-governmental organizations all may assist individuals with their immigration proceedings,[32] which include providing information which may assist individuals in preserving issues or attempting to adduce additional facts before the immigration judge.

Regarding the possible impact of the rule on pro se aliens, as noted previously, the Department first reiterates that most aliens—*i.e.,* 86 percent, *Representation Rates, supra*—whose cases are considered by the Board have representation. For those who do not, there are multiple avenues they may pursue to obtain representation. For example, the Department maintains a BIA Pro Bono Project in which ''EOIR assists in identifying potentially meritorious cases based upon criteria determined by the partnering volunteer groups.'' *BIA Pro Bono Project, supra.* Further, immigration judges have a duty to develop the record in cases involving pro se aliens, which will ensure that such aliens attempt to adduce relevant facts to meet their burdens of proof and reduce the likelihood that aliens inadvertently waive an issue.[33] *See Mendoza-Garcia,* 918 F.3d at 504.

To be sure, BIA procedures are not excused for pro se respondents, just as they are not excused generally for pro se civil litigants. *See, e.g., McNeil,* 508 U.S. at 113 (''[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.''); *Edwards,* 59 F.3d at 8–9 (rejecting a pro se alien litigant's arguments for being excused from Federal court procedural requirements due to his pro se status). Moreover, issues not raised below may be deemed waived even for pro se individuals. *See, e.g., Tannenbaum* v. *United States,* 148 F.3d 1262, 1263 (11th Cir. 1998) (''*Pro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed. But, issues not raised below are normally deemed waived.'' (internal citations omitted)). However, those standards have existed for years and exist independently of the rule, and nothing in the rule alters or affects their applicability.

The Department has fully considered the possible impacts of this rule on the relatively small pro se population of aliens with cases before the Board. However, the rule neither singles such aliens out for particular treatment under the Board's procedures, nor does it restrict or alter any of the avenues noted above that may assist pro se aliens. Further, commenters' concerns related to pro se aliens and these provisions are based almost entirely on a speculative, unfounded belief that immigration judges will disregard their duty to develop the record in pro se cases. The Department declines to accept such a view of immigration judges as either incompetent or unethical and declines to accept commenters' suggestions on that basis. *Chem. Found., Inc.,* 272 U.S. at 14–15 (''The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.''). Finally, weighing the complete lack of necessity—and corresponding inefficiency—of factfinding remands where the facts are either irrelevant to the disposition of the case or cumulative to facts already in the record, the importance of maintaining the Board's impartiality, the duty of immigration judges to develop the record in cases of pro se aliens, the size of the pro se population with cases before the BIA, and the well-established avenues of assistance for pro se aliens, the Department finds, as a matter of policy, that the clarity and efficiency added by factfinding provisions in the rule far outweigh the speculative and unfounded concerns raised by commenters, particularly since many commenters misapprehended that the rule applies to both DHS and respondents.

Although commenters provided examples of challenges individuals would face in complying with the regulatory provisions at proposed 8 CFR 1003.1(d)(3)(iv)(D)(*1*) and (*2*), the Department finds the examples unpersuasive or inapposite. The commenters' examples do not demonstrate a bar to preserving issues or adducing additional facts for use on appeal. Indeed, some commenters'

[31] To the extent that commenters asserted that the Department provided no data regarding the BIA's factfinding procedures, the Department notes that granular data on how many BIA remands for factfinding that do not affect the outcome of cases and that are for factfinding that is cumulative to facts already found in the record is not available and is likely untraceable due to the inherently fact-specific nature of each case and the somewhat counter-factual of such data. Moreover, commenters did not suggest that such data was available or could be obtained, nor did they even suggest how to calculate or measure the ''inappropriateness'' or ''incorrectness'' of a remand that would be necessary to track such data. As discussed, the remaining parts of the rule follow from well-established legal principles (*e.g.,* waiver, burden of proof, and standard of review for factfinding) and are not intended to turn on data. Overall, the Department reiterates that the rule explained how restricting the BIA's factfinding capabilities would increase efficiency and consistency.

[32] The Department notes that individuals in removal proceedings before an immigration judge and the BIA have the ''privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as [the alien] shall choose.'' INA 292, 8 U.S.C. 1362; *see also* INA 240(b)(4)(A), 8 U.S.C. 1229a(b)(4)(A); 8 CFR 1240.10(a)(1).

[33] Whether a pro se alien knowingly waived an issue may also be a relevant consideration in appropriate cases. *See Matter of Samai,* 17 I&N Dec. 242 (BIA 1980) (objection to improper notice raised for the first time on appeal by a previously unrepresented respondent could still be considered by the Board).

examples assume that issues can only be preserved or additional facts be adduced for use on appeal during an immigration judge's issuance of a decision, which is inaccurate. Throughout the course of proceedings, individuals may raise evidentiary or factfinding issues as the record is developed. *See generally* 8 CFR 1240.10 (explaining the course of the hearing, during which an alien may, for example, examine and make objections to evidence against him and present evidence on his behalf); *see also* 8 CFR 1240.9 (detailing the contents of the record, including ''testimony, exhibits, applications, proffers, and requests, the immigration judge's decision, and all written orders, motions, appeals, briefs, and other papers filed in the proceedings''). Moreover, if a party objects to an immigration judge's exclusion of evidence from the record, the regulations provide that an affected party may submit a brief. *Id.* 1240.9. Accordingly, numerous avenues exist through which individuals may comply with the proposed provisions at 8 CFR 1003.1(d)(3)(iv)(D)(*1*) and (*2*).

The Department reiterates that immigration judges and the BIA will continue to exercise independent judgment and discretion to adjudicate cases before them in accordance with applicable law and regulations. *See Id.* § 1003.1(d)(1)(ii), 1003.10(b), 1240.1(a). Circuit courts have held that under section 240(b)(1) of the Act, 8 U.S.C. 1229a(b)(1), immigration judges have an obligation to develop the record. *See, e.g., Yang* v. *McElroy,* 277 F.3d 158, 162 (2d Cir. 2002); *Mekhoukh* v. *Ashcroft,* 358 F.3d 118, 130 (1st Cir. 2004); *Mendoza-Garcia,* 918 F.3d at 504. The Department rejects any speculative contention—rooted in a tacit assertion that immigration judges are either unethical or incompetent—that immigration judges would simply shirk their obligation, including developing the record, in favor of completing more cases.

The Department disagrees that the BIA's determination in accordance with proposed 8 CFR 1003.1(d)(3)(iv)(D)(*3*), constitutes factfinding on the part of the BIA. Whether ''additional factfinding would alter the outcome or disposition of the case'' is well within the BIA's proper scope of review under 8 CFR 1003.1(d)(3) and inherent in the BIA's responsibility to decide appeals.

Because the BIA generally cannot consider new evidence on appeal or engage in further factfinding, 8 CFR 1003.1(d)(3)(iv), subject to some exceptions, the rule sought to clearly establish limitations on the BIA's ability to remand for further factfinding. As explained in the NPRM, the INA contains few details in regard to the appeals process; thus, EOIR's regulations govern specific procedural requirements for appeals. 85 FR at 52493. Consequently, in accordance with its statutory authority under section 103(g)(2) of the Act, 8 U.S.C. 1103(g)(2), to promulgate regulations, the Department determined that it would condition remand on a determination that either the immigration judge's factual findings were clearly erroneous or that remand is warranted following de novo review.

As the Department explained in the NPRM, the current system for adjudicating appeals does not always operate in an effective and efficient manner. As explained in the NPRM, the Department believed it was necessary to reevaluate its regulations governing the BIA, as it routinely does, *see id.* at 52494. As a result, the Department determined that the current system could be amended in various ways to reduce unwarranted delays and ensure efficient use of resources, given the significant increase in pending cases in the immigration courts that has led to an increase in appeals. *See id.* Moreover, changes made by this rulemaking will best position the Department to address the growing caseload and related challenges. *Id.* at 52492–93.

The Department strongly disagrees with commenters that the rule would force the BIA to issue ''poor decisions based on incomplete facts and conjecture.'' Again, this comment suggests that Board members are incompetent and cannot perform their functions fairly and efficiently, a suggestion the Department categorically rejects. The Department is confident that the BIA will continue to competently resolve issues in a manner that is timely, impartial, and consistent with applicable law and regulations. *See* 8 CFR 1003.1(d)(1). BIA members exercise independent judgment and discretion and ''may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.'' *Id.* § 1003.1(d)(1)(ii).

d. BIA Affirmance on Any Basis Supported by the Record (8 CFR 1003.1(d)(3)(v))

Comment: Commenters expressed concerns about new paragraph 8 CFR 1003.1(d)(3)(v) that would enable the BIA to affirm the underlying decision of the immigration judge or DHS on ''any basis'' supported by the record, including a ''basis supported by facts that are not reasonably subject to dispute'' or ''undisputed facts.''

Commenters argued that this change creates inefficiencies instead of efficiencies for a variety of reasons. For example, commenters expressed a belief that this provision will inevitably require respondents before the BIA to litigate every possible issue that could be raised by the record in order to preserve their arguments for future appeals, regardless of the particular rulings by the IJ. Commenters noted that this in turn creates inefficiencies as opposed to efficiencies in BIA procedures. In addition, commenters stated that this provision will in effect lead to a full second adjudication of every case by the BIA instead of the BIA only analyzing the specific issues posed by the parties. Citing *SEC* v. *Chenery Corp.,* 318 U.S. 80 (1943), commenters argued that respondents should not have to guess at what bases the BIA might have for its decisions.

Commenters disputed the Department's citation to *Helvering* v. *Gowran,* 302 U.S. 238, 245 (1937) in support of the change, explaining that the Supreme Court in that case provided the parties with an opportunity to establish additional facts that would affect the result under the new theory first presented at the Court of Appeals.

Commenters expressed concern that this provision will inevitably lead to the BIA engaging in impermissible fact-finding and that the rule is insufficiently clear as to what is a ''disputed'' or undisputed fact.

Commenters stated that this change is internally inconsistent with other provisions of the rule because it allows the BIA to affirm a decision based on arguments not raised in the proceedings below but prohibits the BIA from similarly remanding based on arguments not raised below.

Response: As an initial point, few commenters acknowledged that this standard is analogous to the one employed by Federal appellate courts reviewing Federal trial court decisions and is, thus, a well-established principle of appellate review. *See, e.g., Keyes* v. *School Dist. No. 1,* 521 F.2d 465, 472–73 (10th Cir. 1975) (''An appellate court will affirm the rulings of the lower court on any ground that finds support in the record, even where the lower court reached its conclusions from a different or even erroneous course of reasoning.''). Relatedly, few, if any, commenters offered an explanation or rationale for why that appellate principle would be inappropriate to apply to Board review of immigration judge decisions, particularly since Federal appellate courts handle cases of

pro se litigants and complex records from trial courts below just as the Board does. Further, few, if any, commenters acknowledged that the Board already possesses the authority to base its decision on a review of the record as a whole even if a party has not raised an issue. *See, e.g., Ghassan* v. *INS,* 972 F.2d 631, 635 (5th Cir. 1992) (''First, he argues that the BIA should not have disregarded the IJ's finding, because the INS did not challenge that finding in its brief. We disagree. . . . In the instant case, the BIA based its decision upon the administrative record as a whole. There was no procedural impropriety.''). To the extent that commenters failed to engage with a principal foundation for this provision of the rule, the Department finds their comments unpersuasive. *See Home Box Office,* 567 F.2d at 35 n.58 (''Moreover, comments which themselves are purely speculative and do not disclose the factual or policy basis on which they rest require no response. There must be some basis for thinking a position taken in opposition to the agency is true.'').

As the Department also explained in the proposed rule, 85 FR at 52501 n.23, clarifying that the BIA may affirm the decision of the immigration judge or DHS on any basis supported by the record is consistent with long standing principles of judicial review. *See, e.g., Chenery Corp.,* 318 U.S. at 88 (describing the principle that a reviewing court must affirm the result of the lower court if the result is correct, even if the lower court relied upon a wrong ground or wrong reason as ''settled rule'') (citing *Helvering,* 302 U.S. at 245)). Indeed, as the Supreme Court explained, it would be wasteful for an appellate body to have to return a case to the lower court based on grounds already in the record and within the power of the BIA to formulate. *Id.*

The Department emphasizes, however, that the BIA may only affirm a decision on a basis that is supported by the record as developed by the immigration judge or any facts not reasonably subject to dispute and of which the BIA takes administrative notice. 8 CFR 1003.1(d)(3)(iv). Accordingly, despite commenters' unsupported predictions, the rule would not enable the BIA to engage in de novo factfinding as a way to affirm the underlying immigration judge or DHS decision. *Cf. Chenery Corp.,* 318 U.S. at 88 (''[I]t is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury.''). Because the BIA's review is limited to the record in this manner, the Department disagrees with the commenters' speculation that the BIA review will be less efficient because it would become an alleged second complete adjudication. Instead—just as in Federal appellate courts—this provision only creates efficiencies by making it clear that the BIA does not have to turn a blind eye to undisputed facts that are clear from the record that relate to the correctness of the underlying decision.

In addition, the Department finds unpersuasive commenters' concerns that aliens must address all possible issues in their briefing or other arguments or else risk ceding a future argument on appeal to Federal court due to failure to exhaust the issue. The Department already expects an appealing party to address all relevant issues on appeal; otherwise, the party risks summary dismissal of the appeal, 8 CFR 1003.1(d)(2)(i)(A) (authorizing summary dismissal when a party does not specify the reasons for appeal on the Notice of Appeal), waiver of the issue before the Board, *see Matter of Cervantes,* 22 I&N Dec. 560, 561 n.1 (BIA 1999) (expressly declining to address an issue not raised by party on appeal), and potentially dismissal of a petition for review due to a failure to exhaust an issue before the Board, *see, e.g., Sola* v. *Holder,* 720 F.3d 1134, 1135 (9th Cir. 2013) (''A petitioner's failure to raise an issue before the BIA generally constitutes a failure to exhaust, thus depriving this court of jurisdiction to consider the issue.''). The rule imposes no additional consequences for a party who fails to raise issues on appeal to the BIA beyond those that already exist, and a party choosing to address some issues but not others on appeal does so at its own risk. Consequently, the Department does not see why a party would choose not to raise an issue on appeal, even under the current regulations, and rejects the assertion that the rule imposes a new requirement in this regard.

As a practical matter, the Department is also unaware of how such a scenario posited by commenters would occur. For example, an alien appealing an adverse decision by an immigration judge regarding an application for relief or protection will have necessarily argued to the immigration judge all of the elements required to grant such an application; otherwise, the alien will have waived issues not argued anyway. Further, even if the immigration judge denied the application on one basis—and did not address others—and even if the Board affirmed the denial on another basis, the alien will not be deemed to have failed to exhaust the issue even if the alien did not include the issue in the Notice of Appeal. *See, e.g., Abebe* v. *Gonzales,* 432 F.3d 1037, 1040–41 (9th Cir. 2005) (stating that when the BIA reviews the entire record, considers issues argued before an immigration judge but not raised by an alien in a Notice of Appeal, and issues its decision based on such issues after reviewing the entire record, alien is not barred from raising the issue in a petition for review due to exhaustion). In short, commenters' concerns are unfounded, and the Department declines to credit them accordingly.

e. Changes to BIA Procedures for Identity, Law Enforcement, or Security Investigations or Examinations (8 CFR 1003.1(d)(6))

Comment: Commenters expressed concern regarding the rule's proposed changes to the BIA procedures for identity, law enforcement, or security investigations or examinations. *See* 8 CFR 1003.1(d)(6)(ii) and (iii); *see also* 82 FR at 52499.

At least one commenter stated that the changes conflict with the Department's reasoning for the rule's amendments regarding administrative closure.[34] For example, the commenter stated that the BIA does not have the regulatory authority to place a case on hold indefinitely.

Other commenters expressed due-process related and other concerns about the rule's procedures for communications between the BIA and DHS and the alien regarding the status of background checks and to allow the BIA to deem an application abandoned if DHS alleges that an alien failed to comply with its biometrics instructions. *See* 8 CFR 1003.1(d)(6)(ii) and (iii). Specifically, one commenter stated the procedures fail to protect respondents' due process rights because they require the BIA to deem an application abandoned and accordingly deny relief if DHS states that the respondent failed to comply with its instructions but do not provide adequate opportunity for the alien to contest that they did not receive notice from DHS about the requirements or to otherwise establish good cause for failing to comply. To illustrate this risk, the commenter cited a hypothetical that ''the BIA could deem an otherwise approvable application abandoned because DHS reports to the BIA that the applicant failed to timely comply with biometrics, but where DHS had inadvertently sent the biometrics

[34] For further discussion of administrative closure, *see* section II.C.3.b above.

instructions to the wrong address.'' The commenter also noted that due to recent changes by DHS to the biometrics procedures,[35] new individuals, including children under the age of 14, will be subject to biometrics requirements for the first time, increasing the likelihood of removal orders for respondents who otherwise would qualify for relief from removal. Another commenter expressed concern that although the alien's deadline to comply begins to run from the date the BIA sends out a notice to the alien that DHS will be providing further information, DHS in turn has no deadline to contact the alien.

Another commenter also raised issues of disparate treatment, stating that, while respondents would be barred from submitting new evidence on appeal that would likely change the result of the case, the Department would be expressly permitted to submit new evidence that is the result of ''identity, law enforcement, or security investigations.'' *See* 8 CFR 1003.1(d)(6)(ii).

Response: Neither the BIA nor an immigration judge may grant an alien most forms of relief or protection unless DHS has certified that the alien's identity, law enforcement, or security investigations have been completed and are current. *See* 8 CFR 1003.1(d)(6)(i), 1003.47(g); *see also* INA 208(d)(5)(A)(i), 8 U.S.C. 1158(d)(5)(A)(i). When the Department first implemented the background check procedures in 2005,[36] the Department provided the BIA with two options in cases where the identity, law enforcement, or security investigations or examinations have not been completed or are no longer current: remand to the immigration judge with instructions or place the case on hold until the investigations or examinations are completed or updated. 8 CFR 1003.1(d)(6)(ii)(A) and (B).

At the time, the Department explained that the expectation was that the BIA and DHS would be able to make greater use of the procedure for holding pending appeals without the need to resort to a remand. 70 FR at 4748. Contrary to this prediction, however, it has become common practice for the BIA to remand cases to the immigration judge rather than holding the case for the completion of or updates to the required investigations and examinations. *See, e.g., Matter of S–A–K– and H–A–H–* 24 I&N Dec. 464, 466 (BIA 2008) (order sustaining appeal and remanding the case to the immigration judge for DHS to complete or update background checks). Because this practice creates unnecessary delays in the resolution of cases given the overburdened resources and size of the caseload at the immigration court level, the Department proposed to remove the option at 8 CFR 1003.1(d)(6)(ii)(A) for the BIA to remand cases for the completion or update of the checks and investigations and proposed procedural changes in those cases that remain subject to BIA holds under the amended 8 CFR 1003.1(d)(6)(ii).

This procedure, which has existed since 2005, does not conflict with the rule's changes regarding administrative closure. First, when the BIA places a case on hold for the completion of or updates to the required identity, law enforcement, or security investigations or examinations, the hold is not ''indefinite.'' Instead, the hold is at most 180 days. *See* 8 CFR 1003.1(d)(6)(iii) (instructing the BIA to remand the case to the immigration judge for further proceedings under 8 CFR 1003.47(h) if DHS fails to report the result of the investigations or examinations within 180 days). Second, even to the extent that the BIA hold process may be erroneously compared to an administrative closure, such practice would be an example of an administrative closure that is authorized by a regulation promulgated by the Department of Justice. *See* 8 CFR 1003.1(d)(1)(ii); *see also Matter of Castro-Tum,* 27 I&N Dec. at 283 (holding that immigration judges only have the authority to grant administrative closure if a regulation or settlement agreement has expressly conferred such authority).

In addition, the Department disagrees that the instructions in the proposed rule for the BIA regarding when to deem an application abandoned for failure to comply with biometrics requirements violate due process. As the commenter noted, during the respondent's initial hearing, the immigration judge must ''specify for the record when the respondent receives the biometrics notice and instructions and the consequences for failing to comply with the requirements.'' 8 CFR 1003.47(d). Accordingly, respondents before the BIA have already been generally informed about the biometrics process and have fulfilled the requirements at least once and understand how to comply with the requirements for any needed identity, law enforcement, or security investigations or examinations. Moreover, the Board's notice to the alien will also be part of the record so that it is clear when the alien was served with the notice.

Nevertheless, the Department has included two changes from the proposed rule in this section to account for the commenters' concerns. First, this rule contains an additional requirement that, if DHS is unable to independently update any required identity, law enforcement, or security investigations, DHS shall provide a notice to the alien with appropriate instructions, as DHS does before the immigration courts under 8 CFR 1003.47(d), and simultaneously serve a copy of the notice with the BIA. Second, while the NPRM would have begun the alien's 90-day timeline for compliance with the biometrics update procedures at the time the Board provided notice to the alien, the final rule aligns the 90-day time period to begin running at the time DHS submits the notice to the alien in situations in which DHS is unable to independently update any required checks. The Department agrees with the commenters' concerns that without these changes, the provisions of the proposed rule could have resulted in situations where the alien is unable to effectively comply with the biometrics requirements due to possible delays by DHS or lack of sufficient notice.

Finally, commenters' concerns about alleged disparate treatment between DHS and aliens are unpersuasive. The rule does not generally allow any party to file a motion to remand based on new evidence pertaining to an issue that was not raised below. Rather, DHS may submit limited evidence solely with respect to information yielded from completed identity, law enforcement, or security investigations or based on the alien's failure to comply with biometrics requirements, 8 CFR 1003.1(d)(6)(iii), at which time the alien would also have the opportunity to file evidence in response. Accordingly, the alien would not be prejudiced by remands for such issues.

Further, such a requirement is fully consistent with existing law, *e.g.,* 8 CFR 1003.47 and INA 208(d)(5)(A)(i), 8 U.S.C. 1158(d)(5)(A)(i). To the extent that commenters disagree with those longstanding and well-established provisions, those concerns are beyond the scope of this rule.

f. BIA Authority To Issue Final Orders (8 CFR 1003.1(d)(7)(i))

Comment: One commenter stated that the rule's focus on the BIA's ability to issue orders of removal in the first instance without a similar focus on the BIA's ability to grant relief in the first instance would result in an unfair process that favors DHS over aliens in

[35] Collection and Use of Biometrics by U.S. Citizenship and Immigration Services, 85 FR 56338 (Sept. 11, 2020).

[36] Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals, 70 FR 4743 (Jan. 31, 2005).

proceedings. Another commenter speculated that allowing the BIA to issue orders of removal without a remand to the immigration judge would impede respondents' ability to ultimately seek a petition for review in Federal court.

Response: First, the commenter who stated that the rule is focused on enabling the BIA to issue a removal order misconstrues the Department's amendment regarding the BIA's authority to issue final orders. The rule amends 8 CFR 1003.1(d)(7)(i) to clarify that the BIA has the authority to issue, *inter alia,* both final orders of removal and orders granting relief from removal. Accordingly, the commenter is incorrect that these amendments favor either party to proceedings before the BIA.

Second, without further explanation, the Department is unable to further respond to the commenter's speculation that the BIA issuing a removal order would impede a respondent's ability to seek a petition for review in Federal court. An alien who receives an order of removal, whether from the BIA or the immigration judge, may file a petition for review subject to the requirements of section 242 of the Act, 8 U.S.C. 1252, and nothing in this rule affects that statutory provision.

g. BIA Remands Changes (1003.1(d)(7)(ii) and (iii))

i. Issues With Respect to Limitations on BIA's Authority To Remand

Comment: Numerous commenters expressed concern about limiting the BIA's authority to remand cases. For example, commenters were concerned that the rule would shift more authority to the immigration judge, while tying the hands of BIA members who observed errors and that the rule would provide the BIA with no choice but to affirm an immigration judge's denial despite concerns that the record was not sufficiently developed. Another commenter stated that the BIA is the consummate authority on immigration law and that they have enough expertise and experience to make determinations on their own without being limited by the rule. Some commenters suggested that the BIA should be permitted to remand cases to the immigration court for any purpose.

Commenters stated that the proposed changes have no basis in the law, depart from agency practice, violate the right to present evidence on one's own behalf, and in many cases, would result in orders of removal that were issued notwithstanding meritorious defenses and dispositive collateral challenges in criminal matters. One commenter stated that prohibiting motions to remand would prejudice respondents with cases that were delayed through no fault of their own.

Commenters objected to the rule on the basis that it would not allow the BIA to remand cases where there has been a change in the law. At least one commenter specifically objected to the BIA's limited remand authority in asylum cases, where, the commenter stated, eligibility rules are in a constant state of flux, and individuals should be permitted to seek remand for cases that were denied based on rules that are under litigation. The commenter further specified that the UNHCR has recommended that appellate bodies look to both facts and law using updated information and take any such new and relevant information into consideration. The commenter listed, as an example, asylum seekers who were denied asylum under the third-country transit bar, which was later vacated by a Federal court, and alleged that such individuals may now be eligible for asylum. *See CAIR Coal. et al.* v. *Trump,* No. 19–2117, 2020 WL 3542481 (D.D.C. June 30, 2020). The commenter stated that, in this case, the immigration judge may not have fully developed the record below because the third-country bar analysis would not require evaluation of all bases for asylum. The commenter asserted that such records should be remanded to the immigration judge for further fact finding.

At least one commenter stated that the rule does not account for legal issues that arise during the hearing itself, such as the immigration judge conducting the hearing in an unfair manner, which the commenter states, would necessarily not be included in briefing that had been drafted before the hearing.

Commenters alleged that the rule would unfairly disadvantage individuals who are unrepresented, unfamiliar with the law, and non-English speaking.

One commenter objected to the NPRM's statement that a party seeking to introduce new evidence in proceedings should file a motion to reopen. 85 FR at 52500. The commenter stated that a motion to reopen while an appeal is pending at the BIA does not make sense because an order is not final until the BIA resolves the appeal under 8 CFR 1241.1(a).

One commenter suggested that it would be unfair for EOIR to require that the respondent's counsel fully brief every issue before the hearing and not to require the same of DHS's counsel.

Response: As noted elsewhere, to the extent that commenters erroneously believe this rule applies only to respondents and not to DHS, they are mistaken. Further, to the extent that commenters assert the BIA should be allowed unfettered discretion to remand cases for any purpose, such a suggestion is inconsistent with the Board's limited, and regulatorily defined, authority. Additionally, as discussed, *supra,* the rule does not preclude the Board from remanding a case in which the immigration judge committed an error of law by insufficiently developing the record. To the extent that commenters misconstrue the rule or suggest changes to the rule that are inconsistent with the Board's authority, the Department declines to accept those suggestions.

Commenters are incorrect that this rule has no basis in the law, departs from agency practice, violates the right to present evidence on one's own behalf, and could result in orders of removal that were issued notwithstanding meritorious defenses and dispositive collateral challenges in criminal matters. As noted in the NPRM, the Supreme Court has recognized that ''the BIA is simply a regulatory creature of the Attorney General, to which he has delegated much of his authority under the applicable statutes.'' 85 FR at 52492 n.1 (quoting *Doherty,* 502 U.S. at 327). Although there is a reference to the BIA in section 101(a)(47)(B) of the Act, 8 U.S.C. 1101(a)(47)(B), that reference occurs only in the context of establishing the finality of an order of deportation or removal after the BIA has affirmed the order or the time allowed for appeal to the BIA has expired. It does not address the scope of the BIA's authority or its procedures. Accordingly, the Department is well within its authority to limit the scope of remands to the immigration courts, as it doing now in order to improve efficiency.

At the same time, the Department recognizes the BIA's expertise in appellate immigration adjudications. Indeed, one purpose for this rulemaking is to better empower the BIA to make final decisions where possible, as the Department recognizes it is capable of doing. To that end, the Department agrees with commenters who noted the Board's expertise and experience, and it notes that this provision fully effectuates that expertise and experience by allowing the Board to render final decisions in certain circumstances.

Further, nothing in the rule precludes a respondent from submitting evidence on his or her own behalf during the course of removal proceedings before the immigration judge, although the rule does, within its authority, limit the BIA's authority to remand a decision

back to the immigration judge on the basis of new evidence at the administrative-appeals stage. 8 CFR 1003.1(d)(3)(iv)(D), (d)(3)(7)(ii). The Department notes that motions to remand are an administrative, adjudicatorily-created concept, not rooted in statute, which was later codified by the regulations. Further, as the NPRM explained, the BIA has treated new evidence submitted on appeal inconsistently, despite both case law and regulations addressing such situations. 85 FR at 52500–01. The concerns raised by commenters do not outweigh the need for uniform and consistent treatment to ensure that all aliens who obtain allegedly new evidence and wish to submit it after an immigration judge has rendered a decision are treated in a similar fashion.

Moreover, the INA explicitly provides a statutory avenue to address new evidence: A motion to reopen. *See* INA 240(c)(7), 8 U.S.C. 1229a(c)(7).[37] While the changes require that a party comply with the statutory requirements for a motion to reopen in order to submit such evidence, the rule does not impact motions to reopen. To the contrary, the rule recognizes that motions to remand are generally considered analogous to motions to reopen or reconsider and that due to the inconsistent treatment of allegedly new evidence on appeal through the lens of a motion to remand, it is both more efficient and more likely to promote uniformity and consistency—and also more likely to reduce gamesmanship on appeal—to simply rely on the established motion to reopen procedure. Thus, because the sole statutorily created process to consider new evidence is still available, the Department finds that aliens' rights regarding the submission of new evidence, including evidence of criminal-related issues, remain intact. *Cf. Sankoh,* 539 F.3d at 466 (''As we have held many times, however, administrative notice does not violate the alien's due process rights because an alien can challenge any factual finding through a motion to reopen.'' (citing *Kaczmarczyk* v. *INS,* 933 F.2d 588, 594 (7th Cir. 1991))). Additionally, to the extent that the Board makes an error of law or fact in its decision, the rule does not affect the ability of a party to file a motion to reconsider. 8 CFR 1003.2(b). In short, the rule does not alter the availability of established mechanisms for addressing new evidence or new issues; instead, it simply eliminates an inconsistently applied and confusing procedural avenue that is redundant given those clearer, established mechanisms.

For reasons stated, *supra,* the Department rejects the assertion that the rule would have a singular effect on aliens who are unrepresented, unfamiliar with the law, and non-English speaking. These concerns are speculative, unsupported by evidence, and contrary to decades of experience adjudicating appeals in immigration cases. Such aliens already participate in BIA procedures under existing regulations—and have done so for many years—including through the submission of motions to reopen, and nothing in the rule treats them in a categorically different manner. Further, commenters did not explain why such aliens would be able to file a motion to remand but not a motion to reopen nor how such aliens would be able to comprehend the BIA's confusing and inconsistent standards for new evidence, 85 FR at 52500–01, if they were retained. To the extent that commenters' concerns are, thus, unfounded or internally inconsistent, the Department declines to incorporate them into this final rule.

With respect to commenter concerns that the BIA would be unable to remand a decision even where presented with superseding or intervening case law, including litigation surrounding regulations or precedential decisions that were the basis for denying relief, the Department rejects such comments because they are based on either a deliberately obtuse or wholly incorrect reading of the rule. Nothing in the rule prohibits the BIA from remanding a case when an immigration judge has made an error of law, a legal question of jurisdiction has arisen, or an alien is no longer removable, subject to other requirements. 8 CFR 1003.1(d)(7)(ii). Thus, to the extent that superseding or intervening law caused the immigration judge to make an error of law, raised a question of jurisdiction, or caused an alien to no longer be removable, the Board can still remand on those bases under this final rule.

If the superseding or intervening legal development did not raise a question of jurisdiction, cause the immigration judge's decision to be an error of law, or affect an alien's removability, then the BIA may not remand the case on that basis; however, commenters did not persuasively argue why an irrelevant change in law should form the basis for a remand. To the extent that commenters focus solely on changes in law related to applications for relief or protection, the Department believes that the majority of superseding intervening law would be relevant to legal arguments that had already been presented below, thus mooting commenter concerns for the vast majority of cases.[38] In the rare case in which intervening law categorically established an alien's eligibility for relief on a basis that the alien did not address below and the intervening law did not state how it should be applied to pending cases,[39] an alien remains eligible to file a motion to reopen to have that claim considered. *See* INA 240(c)(7), 8 U.S.C. 1229a(c)(7).

The Department disagrees that requiring the alien to utilize statutory-based methods for presenting new evidence after an immigration judge has rendered a decision, rather than motions to remand, would lead to delays or conflict with the purpose of the rule. As discussed in the NPRM, the BIA's treatment of new evidence on appeal is confusing and inconsistently applied. 85 FR at 52500–01. An additional principal concern of the rule is to reduce unnecessary remands and ensure the BIA is able to move forward independently with adjudicating as many appeals as possible. As noted in the NPRM, *id.* at 52501, motions to remand created confusion, inconsistent results, gamesmanship, and an operational burden on the immigration judge, who has already used significant judicial resources during the underlying

[37] The Department notes that at least one commenter appears to have misunderstood the procedural posture at which a respondent would file a motion to reopen, expressing concern that it would not be sensible for the alien to file a motion to reopen while removal proceedings were still pending. The Department clarifies that, as contemplated by the statute, an alien would file a motion to reopen to submit new evidence after proceedings have concluded. Otherwise, there is no removal order or proceeding to, in fact, reopen.

[38] The Department also notes that in the asylum context, which appears to the principal area of concern for commenters, superseding or intervening law that indisputably affects an alien's claim will likely be rare because each asylum application is adjudicated based on its own facts and evidentiary support. In the asylum context, case law does not establish categorical bases for granting or denying asylum claims. *See, e.g., SER.L.* v. *Att'y Gen.,* 894 F.3d 535, 556 (3d Cir. 2018) (''Consequently, it does not follow that because the BIA has accepted that one society recognizes a particular group as distinct that all societies must be seen as recognizing such a group. . . . Thus, as a matter of logic, it is invalid to assert that proof in one context is proof in all contexts.''). Consequently, intervening case law that categorically renders an alien eligible for relief in the asylum context—but does not affect the alien's removability—will be rare.

[39] The Department notes that statutory changes providing opportunities for relief typically include provisions regarding application of the changes to existing cases, and those changes would be applicable on their own terms. *See, e.g.,* EOIR, *Policy Memorandum 20–06: Section 7611 of the National Defense Authorization Act of 2020, Public Law 116–92* (Jan. 13, 2020), available at *https://www.justice.gov/eoir/page/file/1234156/download* (explaining the application of the availability of a new statutory form of relief for certain Liberian nationals to cases before EOIR, including cases at the BIA).

proceeding. After reviewing commenters' concerns, weighing alternatives, including retaining the status quo, and assessing the significance of the operational burdens imposed by motions to remand, the availability of more uniform treatment of new evidence than currently exists, and the importance of encouraging the presentation of all available and probative evidence at the trial level, the Department has determined that the burden of potential motions to reopen based on new evidence—which are also already routinely filed independently of the rule and have generally increased in recent years, EOIR, *Adjudication Statistics: Motions,* Oct. 13, 2020, *available at https://www.justice.gov/eoir/page/file/1060896/download*—is ultimately less than the burden of addressing motions to remand through unclear and inconsistent practices, including practices that create downstream burdens on immigration judges due to improper remands or gamesmanship by aliens who have received unfavorable decisions from immigration judges and merely seek a second bite at the apple with the concomitant delay in the resolution of proceedings that such a request entails.

Commenters are incorrect that BIA members would not have the authority to remand in instances where they observe unjust or incorrect immigration judge decisions. The rule generally authorizes the BIA to remand a case where, applying the appropriate standard of review, it has identified an error of law or fact. 8 CFR 1003.1(d)(7)(ii). The regulation specifies some limitations to this general authority in order to ensure that remands are only ordered where legally appropriate to ensure the fair disposition of the case, but none of these exceptions would prevent the BIA from ordering a remand, in an appropriate case, where the immigration judge has committed reversible error on a dispositive issue in the case.

The first limitation states that the BIA cannot remand a case where it has not first specified the standard of review that it applied and identified the specific error or errors made by the adjudicator below in order to ensure that the BIA's order to remand is based upon the correct legal standards and provides the immigration judge below and the parties with clarity over the basis for a finding of reversible error. *See* 8 CFR 1003.1(d)(7)(ii)(A). To the extent commenters objected to this provision, they did not persuasively explain why it is inappropriate to require an appellate body to specify the standard of review it employed when remanding a case, and the Department is unaware of any such reason. Such specification assists the parties, the immigration judge, and potentially a Federal court, and commenters did not persuasively explain why it should not be a part of a BIA remand decision.

The second limitation provides that the BIA cannot remand based upon a ''totality of the circumstances'' standard, which, as noted in the NPRM, is not a standard authorized by the governing law and regulations. *See* 8 CFR 1003.1(d)(7)(ii)(B). The Department discusses comments on this provision in more detail, *infra.*

Third, the BIA may not remand a decision based upon a legal argument that was not presented below, unless it pertains to jurisdiction or a material change in fact or law underlying a removability ground that arose after the date of the immigration judge's decision and where substantial evidence indicates that change vitiated all grounds of removability applicable to the alien. *See* 8 CFR 1003.1(d)(7)(ii)(C). Such a limitation is consistent with long-standing requirements that appealing parties must have preserved the issue for appeal below. *Matter of J–Y–C–,* 24 I&N Dec. at 261 n.1 (''Because the respondent failed to raise this claim below, it is not appropriate for us to consider it for the first time on appeal.''); *Matter of Edwards,* 20 I&N Dec. at 196 n.4 (''We note in passing, however, that because the respondent did not object to the entry of this document into evidence at the hearing below, it is not appropriate for him to object on appeal.''). This is also consistent with other appellate court standards, which are instructive. *See Arsdi* v. *Holder,* 659 F.3d 925, 928 (9th Cir. 2011) (''As we have often reiterated, it is a well-known axiom of administrative law that if a petitioner wishes to preserve an issue for appeal, he must first raise it in the proper administrative forum.'') (internal quotations omitted). Again, commenters did not explain why the Department should abandoned these well-established principles, and the Department is unaware of any persuasive reason for doing so.

Fourth, the BIA may not remand a decision through an exercise of *sua sponte* authority, for reasons discussed below at Part II.C.3.k. *See* 8 CFR 1003.1(d)(7)(ii)(D).

Fifth, the BIA may not remand a decision solely to consider a request for voluntary departure or failure to issue advisals following a grant of voluntary departure where other parts of this rulemaking authorize the BIA to issue final decisions in such matters. *See* 8 CFR 1003.1(d)(7)(ii)(E), (d)(7)(iv). The Department further discusses this provision, *infra.*

Sixth, the BIA may generally not remand the case for further factfinding unless the following criteria are met: the party seeking remand preserved the issue below; the party seeking remand, if it bore the initial burden of proof, attempted to adduce the additional facts below, additional factfinding would alter the outcome or disposition of the case, the additional factfinding would not be cumulative of the evidence already presented or contained in the record; and either the immigration judge's factual findings were clearly erroneous or remand to DHS is warranted following de novo review. 8 CFR 1003.1(d)(3)(iv)(D). The Department addresses commenters' concerns on this provision in more detail, *supra.*

The Department disagrees with commenters' concerns that limiting the BIA's authority to order remands to exclude issues that were not raised below, with specified exceptions, would not permit parties to request a remand based on legal issues that arose during a hearing, such as the immigration judge conducting the hearing in an unfair manner. Commenters did not explain why such an example would not be raised on appeal in the normal course, and existing waiver principles independent of this rule would currently preclude its consideration if it were not raised on appeal. In short, if a party believes that the immigration judge's decision should be vacated on the basis that the immigration judge conducted the hearing in an unfair manner, it is unclear why the party would not be able to raise that issue when filing his or her appeal, as the facts upon which the party based his or her decision would have clearly been available to the party at that time. *See* 8 CFR 1003.3(b) (''The party taking the appeal must identify the reasons for the appeal in the Notice of Appeal (Form EOIR–26 or Form EOIR–29) or in any attachments thereto, in order to avoid summary dismissal pursuant to § 1003.1(d)(2)(i). The statement must specifically identify the findings of fact, the conclusions of law, or both, that are being challenged.'').

Comment: Commenters were opposed to the rule's prohibition on the BIA remanding cases based on the ''totality of the circumstances.'' 8 CFR 1003.1(d)(7)(ii)(B).

One commenter noted that the ''totality of the circumstances'' standard inherently includes clearly erroneous findings of fact or prejudicial errors of law. Specifically, the commenter stated,

that on a record where no findings of fact were clearly erroneous, and if no errors of law occurred, then a totality of the circumstances review would never permit remand.

Commenters asserted that the Department did not consider relevant precedential case law from the Supreme Court and Federal courts of appeals which, the commenter claims, impose a ''totality of the circumstances'' standard in a variety of circumstances, many of which are applicable to immigration removal proceedings. For example, one commenter cites *Jobe* v. *INS,* which stated that legislative history of that provision of the Act reflected Congress's concern with fairness and required the Attorney General to ''look at the totality of circumstances to determine whether the alien could not reasonably have expected to appear'' 212 F.3d 674 (1st Cir. 2000) (quoting H.R. Conf. Rep. 101–955 (1990)) (withdrawn at request of court). The commenter noted that the BIA has previously recognized that the statute's legislative history requires an adjudicator to evaluate the totality of the circumstances to resolve this issue, citing *Matter of W–F–,* 21 I&N Dec. 503, 509 (BIA 1996). The commenter also stated that the rule was contrary to decades of past precedent, citing, *inter alia, Matter of Miranda-Cordiero,* 27 I&N Dec. 551, 554 (BIA 2019); *Matter of W–F–,* 21 I&N Dec. at 509; *Jobe,* 212 F.3d 674; and *Alrefae* v. *Chertoff,* 471 F.3d 353, 360–61 (2d Cir. 2006) (Sotomayor, J.).

At least one commenter noted that the rule mentioned that there is no statutory or regulatory basis for the totality of the circumstances standard but failed to acknowledge that statutes and regulations are not the only types of law applicable in removal proceedings or other proceedings reviewed by the BIA. Accordingly, the commenter stated, the Department's failure to consider other sources of law, many of which utilize the ''totality of the circumstances'' standard of review, renders the rule's allegation—that remands justified by review of a totality of the circumstances are without merit—highly questionable.

Another commenter further stated that the totality of the circumstances standard was particularly important for the BIA's review of in absentia motions, in order to resolve whether exceptional circumstances exist pursuant to section 240(b)(5)(C)(i) of the Act, 8 U.S.C. 1229a(b)(5)(C)(i). The commenter also disagreed with the Department's position that there was no statutory or regulatory basis for the ''totality of the circumstances'' standard.

One commenter criticized the Department for proposing such a rule change where it did not allege that the ''totality of the circumstances'' standard had resulted in incorrect or unfair case outcomes. Another commenter stated that the ''totality of the circumstances'' standard should be maintained because decisions should not be permitted on a single factor or on some factors, without taking into account the totality of the circumstances because it would allow adjudicators to pick the facts that they wish to use to make a decision that could be based upon pre-existing prejudices, which would violate fairness and justice. A commenter stated that, without the totality of the circumstances standard, parties could not provide details that were not apparent in the initial case, either through misinterpretation or misunderstanding, or through recently obtained documents.

Response: As an initial point, the Department notes that many, if not all, commenters confused an appellate standard of review with a trial-level determination of ''totality of the circumstances.'' Neither the INA nor applicable regulations has ever authorized a ''totality of the circumstances'' standard of review by the BIA. Prior to 2002, the BIA reviewed all aspects of immigration judge decisions de novo. Regulatory changes in 2002 authorized the Board to review immigration judge factual findings for clear error and all other aspects of such decisions de novo. 8 CFR 1003.1(d)(3); *Matter of S–H–,* 23 I&N Dec. 462 (BIA 2002); *See* 67 FR at 54902. Accordingly, the BIA has never been authorized to review decisions based on the ''totality of the circumstances,'' and the rule merely codifies that principle.

Further, the Department is unaware of any appellate court—and commenters did not provide an example—employing a ''totality of the circumstances'' standard of review for questions of law, fact, discretion, judgment or other appellate issues similar to those considered by the BIA. 8 CFR 1003.1(d)(3). The Department agrees that ''totality of the circumstances'' may be a relevant trial-level consideration in various situations and that an appellate body may review an underlying determination by the trial entity of the ''totality of the circumstances''; however, that is not the same as using ''totality of the circumstances'' as a standard for appellate review. *See, e.g., Cousin* v. *Sundquist,* 145 F.3d 818, 832 (6th Cir. 1998) (''We therefore undertake *de novo* review of the district court's analysis of the totality of the circumstances[.]'').

To the commenter's point about the BIA's review of in absentia motions and the totality of the circumstances standard, the Department notes again that the commenter misapprehends a distinction between the legal standard that an adjudicator should apply in making determinations about whether an individual has been properly ordered removed in absentia and the standard for review of an appeal. Although the question of whether ''exceptional circumstances'' have been established for purposes of considering a motion to reopen an in absentia removal order may involve a consideration of the totality of the circumstances, that question is distinct from the standard of review employed by the BIA in reviewing the immigration judge's resolution of such a question on appeal. In other words, the BIA should evaluate the immigration judge's decision under the appropriate standard of review, but that standard is not one of ''totality of the circumstances.'' More specifically, assuming arguendo that an individual seeking remand on the basis that the immigration judge wrongly applied a totality of the circumstances standard, the motion to remand would not be, itself, based on a totality of the circumstances standard, but rather based on the immigration judge's alleged error of law in applying that standard.[40]

Although the Department recognizes that the BIA may have suggested or intimated that it was using such a standard of review in individual cases in the past, its lack of clarity clearly supports the change in this rule. Whether the Board previously failed to apply a correct or appropriate standard of review when remanding a case based on the totality of the circumstances or whether it merely was unclear about the standard it was actually applying, the rule ensures that all parties are now aware that there is no such standard of review and that the Board will be clearer in the future on this issue. Contrary to commenters' suggestions, neither the lack of clarity nor the potential to apply an incorrect standard

[40] This distinction is best illustrated by the Board's decision in *Matter of Miranda-Cordiero,* 27 I&N Dec. at 554 which was cited by at least one commenter. In that decision, the Board noted that ''[w]hether proceedings should be reopened sua sponte is a discretionary determination to be made based on the totality of circumstances presented in each case,'' but it did not apply or purport to apply such a standard on appellate review. *Matter of Miranda-Cordiero,* 27 I&N Dec. at 554–55. Rather, it appropriately applied a de novo standard of review to that question of discretion, consistent with 8 CFR 1003.1(d)(3)(ii). *Id.* at 555 (''*Upon our de novo review,* we find that the respondent's case does not present an exceptional situation that warrants the exercise of discretion to reopen sua sponte, regardless of the availability of a provisional waiver.'' (emphasis added)).

of review are persuasive reasons to continue the Board's occasional prior practice on this issue in perpetuity. Rather, the Department believes it is important to reiterate the BIA's commitment to adhering to regulatory standards in order to ensure consistent adjudication of similarly situated cases.

Commenters' suggestions that, without a ''totality of the circumstances'' standard of review, adjudicators would specifically select facts that would allow them to deny remands for otherwise meritorious cases is both contrary to the existing regulations—which do not permit such a standard—and unsupported by any evidence. Members of the BIA will consider whether remand for any of the permitted purposes would be appropriate after an impartial examination of the record and applying the correct standard of review, without reference to a regulatory atextual—and almost wholly subjective—totality of the circumstances standard of review. *See* 8 CFR 1003.1(d)(1) (''The Board shall resolve the questions before it in a manner that is timely, impartial, and consistent with the Act and regulations.''). Indeed, the Department believes that the nebulous and vague ''totality of the circumstances'' standard that the BIA may have previously applied is itself ripe for exactly the kind of unfair ''cherry picking'' that the commenter fears.

Regarding commenters' discussion of case law and the totality of the circumstances standard, the Department first notes that the BIA and Federal appellate courts do not necessarily employ parallel standards of review. *Compare Sandoval-Loffredo* v. *Gonzales,* 414 F.3d 892, 895 (8th Cir. 2005) (applying ''deferential substantial evidence standard'' to review agency findings of fact), *with, e.g.,* 8 CFR 1003.1(d)(3)(i) (establishing a clear error standard for reviewing immigration judge findings of fact). Nevertheless, as discussed, *supra,* the Department is unaware of any Federal appellate court that uses a ''totality of the circumstances'' standard of review, and commenters did not provide any such examples.

The Department disagrees with commenter concerns regarding whether the ''totality of the circumstances'' standard has resulted in incorrect or unfair case outcomes. Regardless of whether this putative standard of review, which is not authorized by statute or regulation, results in ''incorrect'' or ''unfair'' case outcomes, which are subjective determinations made by commenters, the Department is issuing this rule to make clear that there is no existing statutory or regulatory basis for applying this standard of review even though the BIA, arguably, may have utilized it in the past without authority. 85 FR at 52501. In short, the risk of continued confusion over whether the Board applied the correct standard of review—and whether there exists a standard of review outside of the regulatory text that is applied only as the BIA subjectively sees fit in individual cases—significantly outweighs commenters' concerns that it should remain as a nebulous quasi-equitable authority whose provenance is unknown and whose application approaches an *ad hoc* basis. Nonetheless, in light of the confusion evidenced by commenters, the Department in this final rule is making clear that the Board cannot remand a case following a totality of the circumstances standard of review, though an immigration judge's consideration of the totality of the circumstances may be a relevant subject for review under an appropriate standard.

Finally, to the extent that commenters objected to the specific prohibition on the Board's ability to remand cases in the ''totality of circumstances'' solely because they perceived such remands as being beneficial only to respondents, the Department finds that an unpersuasive basis for declining to issue this rule. Rather, those comments support the Department's concern about the inappropriate use of such a putative standard of review and its decision to codify the inapplicability of such a standard to the extent that it has been applied in a manner that benefits one party over the other and, thus, raises questions regarding the Board's impartiality. *See* 8 CFR 1003.1(d)(1); 5 CFR 2635.101(b)(8); *BIA Ethics and Professionalism Guide* at sec. V.

i. Issues With Respect to Limiting Scope of Remand to Immigration Court

Comment: Commenters also raised concerns regarding the Department's proposed changes that would limit the scope of a remand to the immigration court. For example, commenters suggested, the rule would unfairly impact individuals who had been subject to ineffective assistance of counsel before the immigration court but whose cases had been wrongly decided for other reasons. Such individuals, the commenter suggested, should not be limited to their prior, poorly developed record on remand when they might be represented by new counsel. One commenter suggested that limiting the scope of a remand does not improve efficiency because once the case is back before the immigration judge, he or she may take new evidence and engage in fact finding to resolve issues that may later have to be addressed in a motion to reopen.

Commenters also suggested that an individual should not be bound to the record before the immigration judge where a new avenue of relief had become available in the intervening period of time when he or she was waiting for their new individual hearing. One commenter stated that they opposed what they characterized as the Department's attempt to force immigration judges to improperly issue removal orders for the purposes of eliminating confusion for immigration judges. The commenter suggested that this rule would harm both respondents and immigration judges.

Commenters stated that the rule change arbitrarily precluded the immigration judge from considering new facts or law and would not improve efficiency because it would force litigation of such issues to be contemplated upon a separate motion to reopen, after the conclusion of proceedings, when it could be more efficiently addressed on remand. The commenter also suggested that there would be increased litigation about the constitutionality of the rule which would also decrease efficiency and increase inconsistent outcomes. Another commenter stated that issues that could have previously been resolved with a ''simple remand'' and straightforward adjudication in immigration court would now require the BIA to produce a transcripts, order briefing, and review briefing by both sides before rendering a decision.

Response: The Department disagrees with commenter concerns regarding limiting the scope of remand to the immigration court. The rule is intended to alleviate confusion for immigration judges regarding the scope of a remand. ''[E]ven where the [BIA] clearly intends a remand to be for a limited purpose[,]'' an immigration judge interpreting the remand as a ''general remand'' would allow consideration, litigation, or relitigation, of the myriad of issues that had either already been addressed or were unrelated to the initial proceedings. *See* 85 FR at 52502.

Commenters did not explain why an immigration judge should not be bound by the intent of a Board remand nor why the Board should not adopt the same principle used by Federal appellate courts distinguishing between general and limited remands. *See, e.g., United States* v. *Campbell,* 168 F.3d 263, 265 (6th Cir. 1999) (''Remands, however, can be either general or limited in scope.

Limited remands explicitly outline the issues to be addressed by the district court and create a narrow framework within which the district court must operate. General remands, in contrast, give district courts authority to address all matters as long as remaining consistent with the remand.'' (internal citations omitted)). As the NPRM explained, all Board remands are currently de facto general remands, even when the intent of the remand is clearly limited. 85 FR at 52496; *see Bermudez-Ariza* v. *Sessions,* 893 F.3d 685, 688–89 (9th Cir. 2018) (''We think it likely that the BIA limited the scope of remand to a specific purpose in this case by stating that it was remanding 'for further consideration of the respondent's claim under the Convention Against Torture.' That said, the BIA's remand order nowhere mentioned jurisdiction, much less expressly retained it. Thus, irrespective of whether the BIA qualified or limited the scope of remand, the IJ had jurisdiction to reconsider his earlier decisions under 8 CFR 1003.23.''). However, the Department sees no basis to retain such an anomalous system or to continue to preclude the BIA from exercising its appellate authority to issue limited-scope remands.

Commenters did not explain why such an inefficient limitation—and one that encourages the re-litigation of issues already addressed by an immigration judge and the Board—should be retained. Requiring every remand to constitute a general remand both increases inefficiency—by requiring the parties to potentially re-argue issues previously addressed—and undermines finality by allowing a second chance to argue and appeal issues to the Board that the Board has already ruled upon once.

Additionally, it is not appropriate for the immigration court to, without explicit directive, expand the scope of its decision beyond that which is desired by its reviewing court. *Cf.* 8 CFR 1003.1(d)(1) (''The Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it.''). The Department notes that, should a respondent disagree with the immigration judge's determinations made on remand, he or she may appeal that determination to the BIA. Thus, the respondent would not be prejudiced by limiting the scope of the remand to issues as directed by the appellate body. To the extent that new relief becomes available in the intervening time while a case is being rescheduled before the immigration court on remand, the respondent may file a motion to reconsider the scope of the BIA's remand decision. Alternatively, the respondent may file a motion to reopen or reconsider with the immigration judge after the judge enters a new decision following the remand. The Department further notes that such issues may generally be appealed to the Federal circuit courts of appeals.

Commenters are correct that aliens would submit motions to reopen after the BIA's adjudications, but the Department disagrees that this procedure would lead to delays or conflict with the purpose of the rule. Instead, one of the main animating purposes of the rule is to reduce unnecessary and inefficient remands and to ensure the BIA is able to move forward independently with as many appeals as possible, and maintaining a general remand rule erodes both of those goals.

The Department disagrees with the commenter's concerns that limiting the scope of remand would unfairly impact individuals who have been subject to ineffective assistance of counsel. As an initial point, the commenter did not explain how such a claim would arise in either a general or limited remand situation, as claims of ineffective assistance of counsel on direct appeal are relatively rare; nevertheless, such claims could be considered by the Board as with any other appellate argument. Moreover, individuals who have been subjected to ineffective assistance of counsel may pursue reopening of their proceedings pursuant to *Matter of Lozada,* 19 I&N Dec. 637 (BIA 1988). In short, nothing in this final rule affects an alien's ability to raise claims of ineffective assistance of counsel through established channels.

The Department agrees with commenters that administrative appellate review is an important part of removal proceedings; however, the Department believes that at least some commenters have mischaracterized the role of administrative appeals as maintaining ''court[] checks and balances and separation of powers.'' Rather, the BIA exists to review immigration court decisions for accuracy and adherence to the law, as well as providing guidance to adjudicators. *See* 8 CFR 1003.1(d)(1). This role is unrelated to the concepts of checks and balances and separation of powers as they exist between separate, coequal branches of government.

To the extent that commenters objected to the codification of the Board's authority to issue limited remands solely because they perceived such remands as being beneficial only to respondents, the Department finds that an unpersuasive basis for declining to issue this rule. First, to reiterate, the rule applies to both parties, and general remands may benefit or hinder either party. It is just as likely that DHS may acquire additional evidence or submit additional arguments following a general remand as the respondent would. Consequently, the Department focuses on the efficiency aspects of eliminating the current ''only general remands'' principle, rather than its use to obtain any specific results. Second, to the extent that there is a misperception that the general remand rule aids only aliens, those comments support the Department's decision to authorize the Board to issue both limited and general remands in order to ensure that the Board remains impartial in its treatment of both parties. *See* 8 CFR 1003.1(d)(1); 5 CFR 2635.101(b)(8); *BIA Ethics and Professionalism Guide* at sec. V.

Overall, after weighing the potential burdens and commenters' concerns, as well as the Board's position as an impartial appellate body, the Department has concluded that the benefits of expressly allowing the Board to issue limited remands, including increased efficiency and better alignment with the Board's status as an appellate authority, outweigh concerns raised by commenters that parties should continue to be able to raise all issues again on remand, even if they have previously been litigated.

h. New Evidence on Appeal (8 CFR 1003.1(d)(7)(v))

Comment: Numerous commenters expressed general concerns about the amendments at 8 CFR 1003.1(d)(7)(v) regarding the BIA's consideration of new evidence on appeal. For example, at least one commenter characterized the change as ''banning the submission of new evidence.'' Other commenters expressed that the changes were a ''blatant power grab'' and offensive to the constitution, principles of basic decency, and fundamental fairness. Commenters explained that motions to reopen are inadequate substitutes for motions to remand for consideration of new evidence due to the strict time and number limitations that apply. *See* INA 240(c)(7)(C)(i), 8 U.S.C. 1229a(c)(7)(C)(i).

Commenters stated that motions to remand on account of new evidence are critical to protecting aliens' due process rights in immigration proceedings and that, by banning motions to remand for new evidence, the rule would violate aliens' rights at section 240(b)(4)(B) of the Act, 8 U.S.C. 1229a(b)(4)(B), to present evidence on their behalf. Commenters explained that these

motions to remand allow aliens to account for situations when evidence that is material was formerly unavailable. Commenters noted that new evidence may be necessary for consideration due to intervening changes in the law.

Similarly, commenters disagreed with the Department's characterization of the basis for these changes as gamesmanship by the parties, noting that it frequently takes time for an alien to obtain evidence from other sources. Commenters also noted that the Department did not provide concrete evidence or citations in support of these characterizations. *See* 85 FR at 52501.

In general, commenters expressed concern that this provision would allow the BIA to remand a case when there is derogatory information about an alien as a result of the identity, law enforcement, or security investigations or examinations but prevent aliens from seeking a remand for new and favorable evidence. This difference, according to commenters, gives ''the appearance of impropriety and favoritism toward one party in the beginning.'' Another commenter alleged that such an appearance ''damages the public trust in the neutral adjudication process.'' Extending the allegations, a commenter claimed that these changes resulted in the decision makers no longer being neutral or unbiased, a constitutional requirement, according to the commenter, that was established in *Mathews* v. *Eldridge,* 424 U.S. 319 (1976). Commenters noted that allowing remands due to information uncovered in the investigations without restrictions conflicts with the Department's efficiency-based justification for the rule.

Commenters similarly stated that the rule favors DHS because all three exceptions to remands for consideration of new evidence at 8 CFR 1003.1(d)(7)(v)(B) relate to types of evidence more likely to benefit DHS's case or arguments than the alien's.

Other commenters warned that this change would increase the backlog at the immigration courts, the BIA, and the circuit courts. For example, at least one commenter argued that the change would lead to unnecessary delays by requiring the BIA to affirm a removal order that would be subsequently reopened since the BIA could not grant a remand to account for new evidence while the case is still pending. Similarly, commenters stated that forcing cases to first have a removal order before evidence could be considered with a motion to reopen unnecessarily starts the removal process and creates complications.

Other commenters voiced concern that pro se aliens who improperly label their motion to the BIA as a motion to remand rather than a motion to reopen will have their motions dismissed and their new evidence would be ''foreclosed from consideration.'' Another commenter echoed this concern and noted that the government, which will always be represented by counsel, would not be required to meet the same motion formalities as aliens in order for the BIA to remand due to derogatory information.

Concerned about refoulement, a commenter stated that the Department should not make it more difficult for asylum seekers, who often have limited access to evidence due to harms from abusers or traffickers or post-traumatic stresses, to submit whatever evidence they are able to procure. Similarly, at least one commenter noted the difficulties faced by children in proceedings.

Commenters described a range of situations when they believe the rule would prevent aliens from submitting new evidence that is relevant or needed. Examples include when an alien has been approved for a U-visa but has not actually received it and when an immigration judge unreasonably limited the record and the alien needs to establish that the immigration judge abused her discretion in a prejudicial manner.

Response: The Department has addressed many of these comments regarding the submission of new evidence on appeal, *supra,* and incorporates and reiterates its previous response here. Further, the Department notes that the rule does not ban the submission or consideration of new evidence following the completion of immigration court proceedings. Instead, the changes require that a party comply with the statutory requirements for a motion to reopen to submit such evidence.[41] A motion to remand, which is an administratively created concept[42] that was later codified into the regulations, was never imagined as part of the statutory scheme. However, the statutory scheme of the INA included an avenue to address new evidence—a motion to reopen—and the NPRM does not impact motions to reopen. Because the sole statutorily created process to consider new evidence is still available, the Department finds that aliens' due process rights regarding the submission of new evidence remain intact.

Commenters mischaracterize the Department's basis for these changes. While the Department noted that the procedures and availability of motions to remand create opportunities for gamesmanship, such possible gamesmanship was not alone the reason for the changes. 85 FR at 52501. Instead, as the Department noted, such motions have resulted in inconsistent applications of the law, particularly given the general prohibition on the BIA's consideration of new evidence on appeal. 85 FR at 52500–01. Further, prohibiting the BIA from considering new evidence on appeal is in keeping with the immigration judge's authority to manage the filing of applications and collection of relevant documents. Under 8 CFR 1003.31(c), a party who fails to file an application or document within the time set by the immigration judge is deemed to have waived the opportunity to file that application or document.

Further, commenters are incorrect that the rule demonstrates bias or particular aid to DHS. The NPRM contains three exceptions: New evidence that (1) is the result of identity, law enforcement, or security investigations or examination; (2) pertains to an alien's removability under the provisions of 8 U.S.C. 1182 and 1227; or (3) calls into question an aspect of the jurisdiction of the immigration courts. These are the three situations in which the Department determined that the need for remand ''overrides any other consideration because the new evidence calls into question the availability or scope of proceedings in the first instance.'' 85 FR at 52501.

Only the first basis applies solely to DHS, and as the Department has discussed, *supra,* that basis is consistent with statutes and regulations that are beyond the scope of this rule. 8 CFR 1003.47; INA 208(d)(5)(A)(i), 8 U.S.C. 1158(d)(5)(A)(i). The second and third bases apply equally to both parties and allow, for example, a respondent to submit new evidence of United States citizenship (which would call into question the jurisdiction of the proceedings) or new evidence that suggests the respondent is no longer removable. Both parties have vested interests in ensuring that removal proceedings do not occur in circumstances when a respondent is not amenable to removal, and the Department accordingly disagrees with

[41] The Department recognizes commenters' concerns that motions to reopen are limited by statute to certain time and number requirements. *See* INA 240(c)(7)(C)(i), 8 U.S.C. 1229a(c)(7)(C)(i). Such limitations are the product of congressional judgment and otherwise outside the Department's authority to set or amend. Nevertheless, the Department also recognizes that equitable tolling, which commenters generally did not acknowledge, may also be available in certain circumstances to ameliorate time limitations.

[42] *See Matter of Coelho,* 20 I&N Dec. 464, 470–71 (BIA 1992).

commenters that these circumstances are in any way one-sided or beneficial solely or primarily to DHS.

Further, it is a mischaracterization to isolate the first exception, remands for evidence that is the result of the alien's identity, law enforcement, or security investigations or examinations, as particular evidence that the provision is biased in favor of the government. As discussed in the NPRM, by statute, no alien may be granted asylum ''until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum.'' INA 208(d)(5)(A)(i), 8 U.S.C. 1158(d)(5)(A)(i). As such, the BIA must be able to remand on account of unfavorable findings resulting from identity and security investigations or the BIA would not be complying with the statutory requirements, and aliens would not have an opportunity to present relevant evidence in response.

Commenters are correct that aliens may submit motions to reopen after the BIA's adjudication, but the Department disagrees that this procedure, compared with the submission of new evidence on appeal, would lead to delays or conflict with the purpose of the rule. As discussed in the NPRM, 85 FR at 52500–01, and reiterated, *supra,* the BIA's inconsistent treatment of new evidence submitted on appeal warrants a change in the regulations, and commenters suggestions to the contrary are unpersuasive. After weighing the relevant equities—including the need for clarity and consistency, the availability of alternatives such as motions to reopen, the burden of immigration judges caused by improper consideration of new evidence on appeal, and the importance of encouraging parties to submit all available and probative evidence at the trial level—the Department decided that the benefits of the rule outweigh the concerns raised by commenters, particularly due to the availability of motions to reopen.[43]

As to the commenters' concerns regarding the risk of unrepresented aliens submitting improperly titled motions, the issue is not novel, and the BIA is familiar in handling such matters.[44] The BIA reviews each submission for its substance. In addition, EOIR provides reference materials to the public regarding procedures before EOIR, which provide pro se aliens with assistance when engaging in self-representation. *See generally BIA Practice Manual; see also* EOIR, *Immigration Court Online Resource, supra;* EOIR, *Self-Help Materials* (Aug. 1, 2019), *available at https://www.justice.gov/eoir/self-help-materials.* Thus, the Department does not find that mistitled or mischaracterized motions will be an undue burden on the BIA or present a particular risk that aliens' opportunity to have new evidence considered will be denied due to formalities.

The Department finds that the various scenarios when motions to remand for consideration of new evidence would be used do not compel reconsideration of the rule. The three exceptions provide safeguards that allow for the consideration of evidence when it calls into question the availability or scope of proceedings, and motions to reopen remain the appropriate recourse for aliens with newly discovered or previously unavailable evidence. Similarly, a motion to reopen provides the proper avenue for newly acquired evidence for asylum seekers or others concerned about refoulement; thus, aliens in that situation are not ''arbitrarily blocked'' from presenting such evidence.

i. BIA Timelines (8 CFR 1003.1(e)(1), (8))

i. Issues With Respect to Screening Panel Deadlines

Comment: Commenters expressed concern that the rule's 14-day timeframe for the BIA to conduct its initial screening for summary dismissal and 30-day timeframe for the BIA to issue a decision would lead to erroneous dismissals in light of the number of cases pending before the BIA. Specifically, the commenters stated that BIA staff conducting the initial screening would not know whether the case could be summarily dismissed until after they have screened the case, and that the ''mandatory adjudicatory timeframes'' would pressure screeners to review cases quickly rather than accurately. Another commenter stated that the ''screening panel'' consisted of only one BIA member, who would not have sufficient time to meaningfully review the appeal. Commenters similarly expressed concern that the rule's requirement that a single BIA member decide whether to issue a single-member decision or refer the case for three-member review will cause BIA members to emphasize speed over fairness in reviewing case records, which could result in erroneous denials. The commenters suggested that these timelines were arbitrary. One commenter stated that it supported extending the existing regulatory deadlines, rather than shortening them.

One commenter cited several Ninth Circuit cases that determined that the BIA had erred in its summary dismissal of an appeal. *See, e.g., Vargas-Garcia* v. *INS,* 287 F.3d 882, 885–86 (9th Cir. 2002) (holding that the BIA Notice of Appeal form was inadequate for an unrepresented respondent given the BIA's standards of specificity and lack of notice in summarily dismissing the appeal); *Casas Chavez* v. *INS,* 300 F.3d 1088, 1090 & n.2 (9th Cir. 2002) (holding that the notice of the reasons for appeal sought by the summary dismissal regulation can be met either in the Notice of Appeal or in the brief and ''there is an underlying assumption in the regulation that both requirements need not be satisfied as long as sufficient notice is conveyed to the BIA'' and reasoning that ''[i]f this were not true, the constitutionality of the regulation would be called into question on the basis of denial of due process. . . . In the context of deportation proceedings, due process requires that aliens who seek to appeal be given a fair opportunity to present their cases.'') (internal citations and quotations omitted);

Response: Most, if not all, of the commenters' concerns appear to be based on a tacit assertion that either Board members are incompetent and cannot screen an incoming case within two weeks or Board members are incompetent or unethical and will issue summary dismissal orders for reasons unrelated to the merits or the law. The Department categorically rejects those assertions and any comments based on such presumptions. *Chem. Found., Inc.,* 272 U.S. at 14–15 (''The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'').

There is no evidence—and commenters did not provide any—that establishing a 14-day timeframe within which the BIA must conduct its initial screening for summary dismissal and 30-day timeframe for issuing a decision

[43] To the extent commenters are concerned about removal pending a motion to reopen given these changes, the Department notes that aliens may seek stays of removal from DHS or, as appropriate, the BIA. 8 CFR 241.6 and 1241.6.

[44] Nevertheless, the Department reiterates that approximately 86 percent of aliens are represented upon appeal. EOIR Workload and Adjudication Statistics, *Current Representation Rates,* Oct. 13, 2020, available at *https://www.justice.gov/eoir/page/file/1062991/download.*

will result in erroneous denials. The BIA has already established such internal requirements by policy, *see* PM 20–01 at 2 without any known degradation in the quality of its screening or issuance of summary dismissals.

Contrary to the suggestion of at least one commenter, the screening panel is comprised of multiple Board members, not just one, and the panel consists of a ''sufficient number of Board members'' to carry out screening functions. 8 CFR 1003.1(e). The rule does not alter the existence or composition of the screening panel. Further, commenters did not provide any evidence—and the Department is unaware of any—that the screening panel is insufficient to carry out its functions under the rule.

As noted in the NPRM, 85 FR at 52507, the regulations currently direct the BIA to screen and ''promptly'' identify cases subject to summary dismissal, 8 CFR 1003.1(d)(2)(ii), and few commenters acknowledged that promptness requirement nor explained why an undefined promptness requirement is preferable to a clear one set at 30 days. These regulatory timelines will both improve efficiency at the BIA, so that there is more time for BIA members and staff to devote to cases involving more substantive, dispositive issues. They will also benefit the parties by offering more expedient resolution of appeals amenable to summary dismissal allowing more time to be devoted to meritorious cases. The Department believes that 14 and 30 days are ample periods of time to both screen and issue decisions, respectively, on such limited matters, and these timelines will not negatively affect the quality or accuracy of such adjudications.

Finally, the Department notes the commenter's citation to cases regarding incorrect usage of the BIA's summary dismissal procedures. The BIA may dismiss an appeal summarily without reaching its merits in the following circumstances: Failure to adequately inform the BIA of the specific reasons for the appeal on either the Notice of Appeal (Form EOIR–26) or any brief or attachment; failure to file a brief if the appealing party has indicated that a brief or statement would be filed; the appeal is based on a finding of fact or conclusion of law that has already been conceded by the appealing party; the appeal is from an order granting the relief requested; the appeal is filed for an improper purpose; the appeal does not fall within the BIA's jurisdiction; the appeal is untimely; the appeal is barred by an affirmative waiver of the right of appeal; the appeal fails to meet essential statutory or regulatory requirements; or the appeal is expressly prohibited by statute or regulation. *See* 8 CFR 1003.1(d)(2)(i). The cases identified by commenters, however, are inapposite to this rule, which does not amend the circumstances under 8 CFR 1003.1(d)(2)(i) when the BIA may summarily dismiss a case.

ii. Issues With Respect to Other Appeals

Comment: One commenter asserted that the changes to the BIA's timelines were designed to codify an October 2019 EOIR policy memo, but the commenter stated that the Department did not point to any increased efficiency or productivity since those new case-management procedures were implemented. Other commenters similarly criticized the Department for not adequately explaining how its objectives to achieve higher consistency, efficiency, and quality of decisions would be furthered by limiting BIA discretion to manage its own caseload. Commenters likened their concerns with the new timelines to concerns with the BIA's procedures for affirmances without opinion.

Commenters stated that the rule would lead the BIA to issue rushed, not quality, decisions. For example, commenters stated that BIA decisions would be inconsistent since achieving consistency requires reviewing previous decisions and understanding important distinctions between different cases. Commenters stated that decisions made without sufficient consideration of the facts and law would be more likely to be overturned for errors, which decreases efficiency.

The commenters also stated that this rule would incentivize BIA members to decide and deny cases themselves rather than determine that a case requires three-member review, which is required to reverse an immigration judge's decision, because it is faster for a single member to affirm an immigration judge's decision.

Commenters criticized that the Department did not explain why the BIA would benefit from such adjudication timelines when other courts can issue rulings only when they are prepared to do so.

One commenter stated that the time period proposed for EOIR adjudicators is much less than many other administrative tribunals. The commenter listed, as examples, the Board of Veterans Appeals, which the commenter alleged took an average of 247 days to decide an appeal in FY 2017, and the Social Security Administration Appeals Council, which the commenter alleged had an average processing time for an appeal of 364 days in FY 2016.

Response: Again, many, if not all, of the commenters' concerns appear to be based on a tacit underlying assertion that Board members are either incompetent or unethical and, thus, cannot or will not perform their duties properly in a timely manner, notwithstanding the longstanding regulatory directive for them to ''resolve the questions before [them] in a manner that is timely, impartial, and consistent with the Act and regulations.'' 8 CFR 1003.1(d)(1). The Department categorically rejects those assertions and any comments based on such presumptions. *Chem. Found., Inc.,* 272 U.S. at 14–15 (''The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'').

Although aspects of PM 20–01 informed this rule, it was not the sole consideration nor the basis of authority for the rulemaking. The Attorney General is statutorily authorized to issue regulations to carry out his authority in the INA. INA 103(g)(2), 8 U.S.C. 1101(g)(2). Further, the Director exercises delegated authority from the Attorney General to ensure the ''efficient disposition of all pending cases, including the power, in his discretion, to set priorities or time frames for the resolution of cases.'' 8 CFR 1003.0(b)(1)(i). Additionally, the Director may ''[e]valuate the performance of the Board of Immigration Appeals . . . and take corrective action where needed[.]'' *Id.* § 1003.0(a)(1)(iv).

The Department notes that this rulemaking, and other recent rulemakings, designed to improve efficiencies at the BIA, in addition to the measures outlined in the policy memorandum, to the extent that they are not included in the rulemaking will work in conjunction to improve efficiencies at the BIA. *See, e.g.,* Organization of the Executive Office for Immigration Review, 84 FR 44537 (Aug. 26, 2019); 85 FR 18105. The Department also notes that the Board has already demonstrated improved efficiency by completing over 40,000 cases in the first full fiscal year (FY) after PM 20–01 was issued, which was its highest completion total since FY 2008. EOIR, *Adjudication Statistics: All Appeals Filed, Completed, and Pending,* Oct. 13, 2020, *available at https://www.justice.gov/eoir/page/file/1248506/download.*

Contrary to commenters' assertions, this rule does not encourage any

particular result of an appellate adjudication; rather, the outcome of an appeal remains wholly dependent on the merits of the appeal and the applicable law. This rule does not encourage the denial of appeals or the issuance of legally deficient decisions, and the Department again rejects the insinuation that its adjudicators would abdicate their duties or are too incompetent to perform them correctly. Further, this provision regarding the BIA's timelines are intended to improve efficiency and encourage the timeliness of appeals, not to affect the disposition of appeals. The NPRM clearly states that ''this delegation of authority to the Director does not change the applicable law that the Board or the Director must apply in deciding each appeal[.]'' 85 FR at 52508. BIA members are directed by regulation to ''exercise independent judgment and discretion in considering and determining the cases coming before the [BIA.]'' 8 CFR 1003.1(d)(1)(ii). Such determinations must be made in accordance with applicable statutes, regulations, and binding case law. Additionally, BIA members receive ''comprehensive, continuing training,'' administered by the Director, in order to promote adjudicative quality. *Id.* § 1003.0(b)(1)(vi), (vii). Furthermore, BIA members, who are adjudicators within EOIR, were hired to serve EOIR's mission to adjudicate cases in a fair, expeditious, and uniform manner. *See* EOIR, *About the Office,* Aug. 14, 2018, *available at https://www.justice.gov/eoir/about-office.* The Department rejects commenters' insinuations that BIA members would act outside of that mission by affirming an immigration judge's decision solely to dispose of an appeal more expediently due to the timelines.[45] The Department disagrees with commenters' concerns that, given the number of cases pending before the BIA, it would not be possible for BIA members to adjudicate appeals within the given timeframes or other allegations that the 335-day time period is insufficient. As noted in the NPRM, most appeals are already decided within the given parameters. 85 FR at 52508. Accordingly, commenters' comparisons to other courts or administrative bodies with different processing timelines and averages are inapposite, though the Department notes that the BIA's timeline falls between the two examples given, which actually supports the rule.

For such cases that are atypical, and for which it would be appropriate for the BIA to devote additional time to completing adjudication, the regulations provide for an extension of the adjudication time period. 8 CFR 1003.1(e)(8)(ii) (''[I]n exigent circumstances . . . in those cases where the panel is unable to issue a decision within the established time limits, as extended, the Chairman shall either assign the case to himself or a Vice Chairman for final decision within 14 days or shall refer the case to the Director for decision.''); 1003.1(d)(6)(ii)(B) (allowing BIA to place a case on hold while it awaits the completion or updating of all identity, law enforcement, or security investigations or examinations); 1003.1(e)(8)(iii) (permitting BIA Chief Appellate Immigration Judge to hold a case pending a decision by the U.S. Supreme Court or a U.S. Court of Appeals, in anticipation of a BIA *en banc* decision, or in anticipation of an amendment to the regulations). Therefore, as noted in the NPRM, the Department expects few, if any, appeals to not be resolved within the regulatory time frames. 85 FR at 52508. In short, commenters simply did not persuasively explain why it would be neither feasible nor desirable for the BIA to adjudicate cases within 11 months, subject to certain exceptions contained in the rule.

iii. Issues With Respect to Referral to the Director

Comment: Commenters also expressed a range of disagreements with the rule's procedures for the referral of appeals that have been pending for more than 335 days[46] to the Director. The commenters asserted that this would promote the denial of appeals. The commenters also expressed concerns that this would consolidate final decision-making authority with one allegedly politically appointed person, the Director, whom, the commenters alleged, would not have the necessary information or knowledge of the case to issue a decision. Commenters alleged that the Director's decision in referred cases would be made based on the rules, without taking the appropriate time to evaluate the case.

Further, commenters objected that the rule would undermine the perception of neutrality, politicize the appellate process and violate substantive Due Process by allowing the Director, a political appointee, rather than a career adjudicator to adjudicate hundreds or thousands of cases. One commenter asserted that it is not the role of the Director to adjudicate decisions, and that the position is a non-adjudicatory position that is meant to run EOIR operations and does not have expertise, training, or impartiality necessary to decide cases. The commenter stated that, as an executive position, the Director would make decisions based on the priorities of the executive branch rather than the requirements of the law.

Numerous commenters opposed the 335-day period before referrals because it is not much longer than the 323-day median case appeal time period.

One commenter criticized the rulemaking because the Department did not address how the Director would have time to personally write decisions or, alternatively, who would write them under the Director's name. The commenter further criticized that the NPRM did not discuss what kind of training and oversight such individuals would receive or what metrics they would use.

Some commenters offered anecdotal evidence about appeals that were pending for more than 335 days and noted that such delays have become even increasingly common in light of the COVID–19 epidemic. One commenter stated that every non-detained BIA appeal filed under the current administration had been pending for well over 335 days, and that, accordingly, the rule would result in the Director issuing decisions for every respondent.

One commenter asserted that referring decisions to the Director would undermine rule's efficiency purpose because it would introduce a third level

[45] Because an alien may appeal a BIA decision to Federal court, this asserted behavior would not be efficient or rational—and, thus, would be unlikely to occur, contrary to commenters' allegations—because improper adjudications will simply lead to more cases being remanded from Federal court. Moreover, although commenters did not acknowledge it, the Department is cognizant that DHS cannot petition a Federal court for review of a BIA decision. Thus, if BIA adjudicators were to ignore their ethical obligations, disregard the law and evidence in each case, and adjudicate cases based solely on regulatory timelines in the manner alleged by commenters, they would actually have an incentive to rule in favor of aliens—contrary to the assertions of commenters—because there is little likelihood of a subsequent reversal. Thus, if commenters were correct about an asserted relationship between efficiency and outcomes, then that relationship would logically favor aliens, which is, paradoxically, a result favored by most commenters opposing the rule. Nevertheless, the Department reiterates that the improved efficiency created by the rule is outcome-neutral, and it expects that all Board members will carry out their duties in an impartial and professional manner consistent with the regulations. *See* 8 CFR 1003.1(d)(1); 5 CFR 2635.101(b)(8); *BIA Ethics and Professionalism Guide* at sec. V.

[46] Numerous comments refer to a 355 day deadline which appears to be a typographical error, as the time period set forth in the NPRM was 335 days, and there is no discussion of a 355 day time period in the NPRM. *See* 8 CFR 1003.1(e)(8)(v) (proposed). The Department has reviewed and addressed such comments for substance as if they had correctly stated that there was a 335 day deadline.

of administrative review. Instead, commenters asserted that it would be more efficient to allow the BIA member or BIA panel that has already reviewed the case and the record to make the ultimate disposition in the case.

At least one commenter alleged that the rule would result in increased appeals to the Federal courts.

Commenters asserted that it would not be possible for the BIA to adequately review the number of pending BIA cases in the given timeframe to avoid referrals to the EOIR Director. For example, commenters stated, based on DOJ statistics, that there were over 70,000 cases pending before the BIA at the end of FY 2019, and that for a 23-member BIA, each BIA member would have to complete 3,043 cases per year to comply with the 335-day deadline.

Commenters also raised concerns with imposing quotas on judicial processes, and stated that the same concerns apply to both BIA adjudicators and immigration judges.

Response: As an initial point, the Director is not a political appointee. A political appointee is a full-time, non-career presidential or vice-presidential appointee, a non-career Senior Executive Service (''SES'') (or other similar system) appointee, or an appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policy-making character (Schedule C and other positions excepted under comparable criteria) in an executive agency. *See, e.g.,* E.O. 13770, sec. 2(b) (Jan. 28, 2017) (''Ethics Commitments by Executive Branch Appointees''); *see also* Edward 'Ted' Kaufman and Michael Leavitt Presidential Transitions Improvements Act of 2015, Public Law 114–136, sec. 4(a)(4), (5), Mar. 18, 2016, 130 Stat. 301. No employee currently at EOIR, including the Director, falls within these categories. *See* Organization of the Executive Office for Immigration Review, 85 FR 69465, 69467 (Nov. 3, 2020) (''In short, all of EOIR's federal employees, including the Director and the Assistant Director for Policy, are career employees chosen through merit-based processes, and none of EOIR's employees are political appointees.'').

EOIR has no Schedule C positions or positions requiring appointment by the President or Vice President. The Director is a career appointee within the SES. SES positions are specifically designed to ''provide for an executive system which is guided by the public interest and free from improper political interference.'' 5 U.S.C. 3131(13). Although the Director and Deputy Director are general SES positions, they have traditionally been filled only by career appointees, and the incumbent Director serves through a career appointment. In short, all of EOIR's Federal employees, including the Director, are career employees chosen through merit-based processes, and contrary to commenters' assertions, none of EOIR's employees, including the Director, are political appointees.[47]

Similarly, some commenters objected to the NPRM by asserting that the Director is merely an administrator with no adjudicatory role and no subject matter expertise regarding immigration law. Longstanding regulations make clear, however, that the Director must have significant subject matter expertise in order to issue instructions and policy, including regarding the implementation of new legal authorities. *See* 8 CFR 1003.0(b)(1)(i). The position of Director requires a significant amount of subject-matter expertise regarding immigration laws. The Director is charged with, *inter alia,* directing and supervising each EOIR component in the execution of its duties under the Act, which include adjudicating cases; evaluating the performance of the adjudicatory components and taking corrective action as necessary; providing for performance appraisals for adjudicators, including a process for reporting adjudications that reflect poor decisional quality; ''[a]dminister[ing] an examination for newly appointed immigration judges and Board members with respect to their familiarity with key principles of immigration law before they begin to adjudicate matters, and evaluat[ing] the temperament and skills of each new immigration judge or Board member within 2 years of appointment''; and, ''[p]rovid[ing] for comprehensive, continuing training and support for Board members, immigration judges, and EOIR staff in order to promote the quality and consistency of adjudications.'' *Id.* § 1003.0(b)(1). Each of these responsibilities necessarily requires some manner of subject-matter expertise to carry out effectively.

Moreover, the Director was given explicit adjudicatory review authority involving recognition and accreditation (''R&A'') cases in January 2017, well before the NPRM was promulgated. *See* Recognition of Organizations and Accreditation of Non-Attorney Representatives, 81 FR 92346, 92357 (Dec. 19, 2016) (''Additionally, the final rule provides that organizations whose requests for reconsideration are denied may seek administrative review by the Director of EOIR. *See* final rule at 8 CFR 1292.18. This provision responds to concerns that [the Office of Legal Access Programs (''OLAP'')] would be the sole decision-maker regarding recognition and accreditation and that another entity should be able to review OLAP's decisions.''). In short, existing regulations already require some level of subject-matter knowledge by the Director and provide for the Director to have an adjudicatory role in addition to administrative duties. *See, e.g., Matter of Bay Area Legal Services,* 27 I&N Dec. 837 (Dir. 2020) (decision by the Director in R&A proceedings). Accordingly, to the extent that commenters' objections to this provision are based on an inaccurate understanding of the Director position, the Department finds those objections unsupported and unpersuasive.

Further, the Director, like members of the BIA, exercises independent judgment and discretion in accordance with the statutes and regulations to decide any case before him for a final decision pursuant to 8 CFR 1003.1(e)(8)(v) due to the BIA's failure in that case to meet the established timelines. *See* 8 CFR 1003.0(c) (''When acting under authority [to adjudicate cases], the Director shall exercise independent judgment and discretion in considering and determining the cases and may take any action consistent with the Director's's authority as is appropriate and necessary for the disposition of the case.''); *cf.* 8 CFR 1003.1(d)(1)(ii) (''Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board[.]''). Further, the Director's decisions are subject to review by the Attorney General, either at the Director's or Attorney General's request. *Id.* § 1003.1(e)(8)(v). And as the final

[47] Most, if not all, of the comments opposing the NPRM because the Director is an alleged political appointee assume that any employee appointed to an agency position by an agency head, such as the Attorney General, is necessarily a political appointee. By statute, regulation, policy, or to comply with the Appointments Clause of the Constitution, approximately 545 positions at EOIR currently require appointment by the Attorney General, including Board members, immigration judges, and administrative law judges. The fact that the Attorney General, who is a political appointee, appoints an individual to a position does not convert that position to a political position. Moreover, even if the Director position were filled by a political appointment, that fact alone would not render the individual a biased adjudicator incapable of adjudicating cases under the regulations. *Cf. Matter of L-E-A-,* 27 I&N Dec. at 585 (rejecting arguments that the Attorney General is a biased adjudicator of immigration cases in the absence of any personal interest in the case or public statements about the case). After all, the functions of EOIR are vested in the Attorney General, who is a political appointee, and the INA specifically provides that determinations in immigration proceedings are subject to the Attorney General's review. 28 U.S.C. 503, 509, 510; INA 103(g), 8 U.S.C. 1103(g).

agency decision, such decisions would be subject to further review in Federal court. INA 242, 8 U.S.C. 1252. Thus, the Director's authority on such cases would not necessarily be ''final'' to any extent greater than BIA's authority is ''final.''

Regarding the commenters' concerns about the lack of information in the rule regarding the particular support staff or other internal procedures that the EOIR Director would utilize for issuing decisions referred under the rule, the Department notes that such details regarding internal staffing models are not generally the topic of regulations. Nevertheless, the regulations do make clear that the Director may employ sufficient staff as needed to carry out EOIR's functions, 8 CFR 1003.0(a) (''EOIR shall include . . . such . . . staff as the Attorney General or the Director may provide.''); 28 CFR 0.115(a) (same), just as they make clear that the Director is integral to ensuring the Board itself has sufficient staff, 8 CFR 1003.1(a)(6) (''There shall also be attached to the Board such number of attorneys and other employees as the Deputy Attorney General, upon recommendation of the Director, shall from time to time direct.'').

The Department further notes that it is not uncommon for someone other than the adjudicator to prepare a decision draft for the adjudicator's review and signature and that EOIR has, for many years, hired judicial law clerks to assist with drafting decisions. *See* Dept. of Justice, *Honors Program Participating Components,* Aug. 25, 2020, *available at https://www.justice.gov/legal-careers/honors-program-participating-components* (''EOIR Honors Program hires serve 2 year judicial clerkships . . . .''). It is a common practice for both BIA and immigration court adjudicators to have supporting staff prepare decision drafts. Such decisions are still ultimately issued by the adjudicator, which in the case of untimely adjudications that have been referred is the Director—not the staff who prepared the draft. Moreover, the Department notes that the Director has the power to ''[p]rovide for comprehensive, continuing training and support for Board members, immigration judges, and EOIR staff in order to promote the quality and consistency of adjudications[,]'' including adjudications that are referred to him. *See* 8 CFR 1003.0(b)(1)(vii).

Contrary to the commenters' concerns, the proposed changes would not undermine due process. The essence of due process in an immigration proceeding is notice and an opportunity to be heard. *LaChance,* 522 U.S. at 266 (''The core of due process is the right to notice and a meaningful opportunity to be heard.''). Nothing in the rule eliminates notice of charges of removability against an alien, INA 239(a)(1), 8 U.S.C. 1229(a)(1), or the opportunity for the alien to make his or her case to an immigration judge, INA 240(a)(1), 8 U.S.C. 1229a(a)(1), or on appeal, 8 CFR 1003.38. Further, although due process requires a fair tribunal, *In re Murchison,* 349 U.S. 133, 136 (1955), generalized, ad hominem allegations of bias or impropriety are insufficient to ''overcome a presumption of honesty and integrity in those serving as adjudicators.'' *Withrow* v. *Larkin,* 421 U.S. 35, 47 (1975). Commenters identified no reason—other than ad hominem dislike, crude suppositions, and unfounded, tendentious accusations of bias—why it would be inappropriate for a career, non-political SES official with no pecuniary or personal interest in the outcome of immigration proceedings and with both subject-matter expertise and adjudicatory experience, such as the Director, to adjudicate appeals in limited, specific circumstances. *Cf. Matter of L-E-A-,* 27 I&N Dec. 581, 585 (A.G. 2019) (rejecting arguments that the Attorney General is a biased adjudicator of immigration cases in the absence of any personal interest in the case or public statements about the case).

Additionally, the Department notes that the Attorney General oversees EOIR and has statutory authority to, among other responsibilities, review administrative determinations in immigration proceedings; delegate authority; and perform other actions necessary to carry out the Attorney General's authority over EOIR. INA 103(g), 8 U.S.C. 1103(g). Over time, the Attorney General has promulgated regulations pursuant to this statutory authority that reflect the full range of his authority and oversight in section 103(g) of the Act, 8 U.S.C. 1103(g). Among many examples, in 8 CFR 1003.1(h), the Attorney General codified the authority to review BIA decisions, and in 8 CFR 1003.0(a), the Attorney General delegated authority to the Director to head EOIR. Despite this delegated authority, EOIR remains subject to the Attorney General's oversight, and it is reasonable and proper that the Attorney General continue to exercise that oversight by way of such delegations of administrative review.

In accordance with 8 CFR 1003.0(a), the Director, who is appointed by the Attorney General, exercises delegated authority from the Attorney General related to oversight and supervision of EOIR. *See also* INA 103(g)(1), 8 U.S.C. 1103(g)(1); 28 CFR 0.115(a). The Director may only act in accordance with the statutes and regulations and within the authority delegated to him by the Attorney General; put differently, the statute and regulations provide the Attorney General with the authority to act, and the Attorney General, in turn, determines the extent of the Director's authority. The Attorney General, by regulation, provides a list of the Director's authority and responsibilities at 8 CFR 1003.0(b), which includes the authority to ''[e]xercise such other authorities as the Attorney General may provide.'' 8 CFR 1003.0(b)(1)(ix). Such delegation supersedes the restrictions related to adjudication outlined in 8 CFR 1003.0(c) due to that paragraph's deference to 8 CFR 1003.0(b).

The Director's authority provided in the rule to adjudicate BIA cases that have otherwise not been timely adjudicated constitutes ''such other authorities'' provided to the Director by the Attorney General, based on the powers to delegate and conduct administrative review under section103(g) of the Act, 8 U.S.C. 1103(g). *See* 8 CFR 1003.0(c), 1003.1(e)(8). To reiterate, the Attorney General's authority to review administrative determinations does not violate due process; thus, the proper delegation of that authority to the Director pursuant to statute and pre-existing regulations does not violate due process—specifically in light of the fact that those decisions ultimately remain subject to the Attorney General's review under 8 CFR 1003.1(e)(8). To the extent that commenters are concerned about such an appearance, the Department emphasizes the clear, direct intent of Congress in statutorily authorizing such delegations, and the Attorney General is acting within the bounds of his statutory authority by issuing the rule. INA 103(g)(2), 8 U.S.C. 1103(g)(2); *see also Chevron* v. *Nat. Res. Def. Council,* 467 U.S. 837, 842 (1984). In issuing the rule, the Attorney General properly delegates adjudicatory authority to the Director to review certain administrative decisions that are otherwise untimely. 8 CFR 1003.1(e)(8). This delegation aligns with the Attorney General's longstanding authority to issue regulations and delegate that authority, in line with principles of due process.

The Department disagrees that these procedures would introduce inefficiency or a third level of review. Under this rulemaking, the Director would not review appeals that the BIA had adjudicated in a timely fashion. Rather, the Director will, acting with the same authority as a BIA adjudicator would have, issue decisions on appeals

that have been pending for longer than the prescribed regulatory period. *Id.* § 1003.1(e).

Commenters are also incorrect that the referral of appeals that have not been timely decided could be characterized as an improper consolidation of power under one individual. Cases would be referred to the Director only where the BIA has taken more than 335 days to adjudicate an appeal, in order to ensure timely disposition of a case. As noted by the NPRM, ''absent a regulatory basis for delay, there is no reason for a typical appeal to take more than 335 days to adjudicate—including time for transcription, briefing, and adherence to the exiting 90- or 180- day time frames for decision.'' 85 FR at 52508. Moreover, commenters did not explain why aliens with meritorious appeals should have to wait more than 335 days for a decision, and the Department is unaware of any reason for doing so. To the contrary, allowing the Director to adjudicate appeals which have languished for almost a year without adjudication will help ensure that aliens with meritorious claims receive the decision they warrant in a timely manner.

Additionally, for such cases that are atypical, and for which it would be appropriate for the BIA to devote additional time to completing adjudication, the regulations provide for an extension of the adjudication time period. 8 CFR 1003.1(e)(8)(ii) (''[I]n exigent circumstances . . . in those cases where the panel is unable to issue a decision within the established time limits, as extended, the Chairman shall either assign the case to himself or a Vice Chairman for final decision within 14 days or shall refer the case to the Director for decision.''); 1003.1(d)(6)(ii)(B) (allowing BIA to place a case on hold while it awaits the completion or updating of all identity, law enforcement, or security investigations or examinations); 1003.1(e)(8)(iii) (permitting BIA Chairman to hold a case pending a decision by the U.S. Supreme Court or a U.S. Court of Appeals, in anticipation of a BIA *en banc* decision, or in anticipation of an amendment to the regulations). The Attorney General has delegated decision-making authority to the Director pursuant to 8 CFR 1003.1(e)(8)(ii), subject to possible further review by the Attorney General. The Director may only adjudicate cases that have surpassed the articulated deadlines, and the rule is clear that the Director's scope of review is limited to only a narrow subset of EOIR cases.

Nevertheless, the Department recognizes commenters' concerns regarding the potential volume of cases that could conceivably be subject to referral, as well as the interaction between the referral procedures and other changes to the rule. To that end, the final rule adds four further exceptions to 8 CFR 1003.1(e)(8)(v) in which cases would not be referred. Cases on hold pursuant to 8 CFR 1003.1(d)(6)(ii) to await the results of identity, law enforcement, or security investigations or examinations will not be subject to referral if the hold causes the appeal to remain pending beyond 335 days. Cases whose adjudication has been deferred by the Director pursuant to 8 CFR 1003.0(b)(1)(ii) will not be subject to referral if the deferral causes the appeal to remain pending beyond 335 days. Cases remanded by the Director under 8 CFR 1003.1(k) will not be subject to referral if the case remains pending beyond 335 days after the referral. Cases that have been administratively closed pursuant to a regulation promulgated by the Department of Justice or a previous judicially approved settlement that expressly authorizes such an action will not be subject to referral if the administrative closure occurred prior to the elapse of 335 days and causes the appeal to remain pending beyond 335 days.

These changes, which are incorporated through a stylistic restructuring of 8 CFR 1003.1(e)(8)(v) for clarity, recognize additional situations in which a case may appropriately remain pending beyond 335 days without adjudication or when referral back to the Director would be incongruent because the Director had remanded the case immediately prior to the referral. They also recognize, in response to commenters' concerns, that the Director may defer adjudication of BIA cases, consistent with authority under 8 CFR 1003.0(b)(1)(ii), in order to avoid needing to have those cases referred to himself. In short, although most commenters' concerns are inaccurate, unfounded, or hyperbolic, the Department recognizes that the BIA should exercise default appellate adjudicatory authority in immigration cases and that referral of cases to the Director should be the exception, rather than the rule.

Finally, in response to comments about the clarity and scope of the NPRM's changes to the BIA's case management procedures, the final rule also makes edits to eliminate confusion over the scope of 8 CFR 1003.1(e). As both the title of that paragraph (''Case management system'') and its general introductory language (''The Chairman shall establish a case management system to screen all *cases* and to manage the Board's caseload.'') make clear, the provisions of the paragraph apply to ''cases.'' 8 CFR 1003.1(e) (emphasis added). In turn, ''the term *case* means any proceeding arising under any immigration or naturalization law.'' 8 CFR 1001.1(g). At the Board, cases may be initiated in one of three ways: the filing of a Notice of Appeal, the filing of a motion directly with the Board (*e.g.,* a motion to reconsider or a motion to reopen), or the receipt of a remand from a Federal court, the Attorney General, or—under this rule—the Director. In other words, the Board adjudicates multiple types of cases, not just appeals. Although the existing language of 8 CFR 1003.1(e) is clear that it applies to all types of cases at the Board, regardless of how they are initiated, the inconsistent, subsequent use of ''appeals'' throughout that paragraph creates confusion as to its scope since appeals are not the only type of case the Board considers. *See, e.g.,* 8 CFR 1003.1(e)(3) (in describing the Board's merits review process, using ''case'' in the first sentence, ''case'' and ''appeal'' in the second sentence, and ''appeal'' in the third sentence, all is describing a unitary process). To avoid continued confusion and to ensure that the scope of the other changes in the final rule regarding the Board's case management process are clear, the final rule makes edits to 8 CFR 1003.1(e) to ensure that it is clearly applicable to all cases before the Board, not solely cases arising through appeals.[48]

iv. Other Issues

Comment: One commenter objected to the rule's limitation of the Board Chairman's authority to hold a decision in anticipation of a pending decision by a U.S. Court of Appeals or an amendment to the regulations. The commenter stated that such a change was not necessary and irrational because the Board Chairman's existing authority to place cases on hold is permissive. The commenter stated that the proposed change would eliminate the Board Chairman's discretion to hold cases when changes to the case law or regulations would benefit immigrants. The commenter stated that making the Board Chairman's determination to hold a case subject to the concurrence by the Director was intended to enhance the Director's influence over appellate

[48] For similar reasons, the final rule also makes changes to 8 CFR 1003.1(d)(3)(iv) to clarify that 8 CFR 1003.1(d)(3)(iv)(A) applies to all cases at the Board, whereas 8 CFR 1003.1(d)(3)(iv)(D) applies only to direct appeals of immigration judge decisions. None of these changes effect any substantive alteration of the applicable regulations governing the BIA's functioning.

decision making and ensure that cases are held only when it would further the administration's political agenda, and not in the administration of justice.

Response: The Department disagrees with this comment and finds it unpersuasive for several reasons. First, the regulatory process is unpredictable, and both the timing and final substance of any given regulation cannot be predicted with sufficient accuracy to warrant holding adjudications for future regulations. Similarly, there is no reliable method of predicting how long an adjudication at a circuit court of appeals will take or when, precisely, a circuit court will render a decision.[49] Moreover, the proliferation of immigration litigation in recent years has increased the likelihood both that a circuit court panel's decision may not be the last word on the issue—due to the possibility of rehearing *en banc* or a petition for certiorari filed with the Supreme Court—and that multiple circuits may reach different conclusions. Thus, there is little reason to place cases on hold to await an individual circuit court decision since the timing of that decision is unknown, it may not be the final decision, and it may conflict with other circuit courts causing the Board to pause some cases but not others even though the cases raise the same issues.

Additionally, requiring the Director to concur with the BIA Chairman about whether to hold cases is not irregular, and the Department rejects the insinuation that the concurrence process would be used for nefarious, political, or otherwise inappropriate ends. The Chairman is, by regulation, generally subject to the supervision of the Director. 8 CFR 1003.1(a)(2); 28 CFR 0.115(a). As explained above, the Director is not a political appointee, and the Director's decisions regarding EOIR procedures, including whether an appeal is of such a nature so as to warrant further delay in adjudication, will be made in accordance with his general supervisory authority. Moreover, both the Director and the Board Chairman already possess longstanding authority to defer adjudication of Board cases, 8 CFR 1003.0(b)(1)(ii) and 1003.1(a)(2)(i)(C), and there is no evidence either has used that authority inappropriately. Accordingly, there is no basis to expect that they would apply the hold authority in 8 CFR 1003.1(e)(8)(iii) inappropriately.

[49] In contrast, the term of the Supreme Court is well-established, and decisions for a particular term are ordinarily expected by the end of June.

Comment: One commenter asserted that the NPRM improperly characterized the BIA's decreased efficiency as paradoxical. Rather, the commenter asserted, this resulted from ''massive changes that the current administration has wrought in immigration proceedings.'' The commenter stated that there have been constant and repeated changes to the law, as well as national, regional, and local injunctions of such changes, making it difficult to keep track of the current law and causing appeals adjudications to take longer as adjudicators research the current state of the law. Another commenter offered as a specific example, the Attorney General's decision in *Matter of Castro-Tum,* 27 I&N Dec. 271, which, the commenter alleged, added 330,211 previously completed cases back on to the pending caseload.

One commenter asserted, without providing further detail, that the Department's claim about the length of time that it takes to adjudicate most appeals is ''patently false'' and a factual misrepresentation.

Commenters also raised concerns with imposing quotas on judicial processes, and stated that the same concerns apply to both BIA adjudicators and immigration judges.

At least one commenter asserted that the Department had failed to consider other alternatives to improving efficiencies and offered alternative suggestions to the timeline-related changes. For example, at least one commenter suggested the preparation of reports concerning longstanding cases, akin to the reports submitted to Congress concerning district court motions and cases that have been pending adjudication for a long time. This alternative, the commenter suggested, would explain why specific cases required longer-than-usual adjudication times. The commenter also proposed, as another alternative, recommended timelines that required brief explanations when such timelines were exceeded. The commenter proposed a third alternative where, as part of the initial screening, the BIA could subcategorize cases assigned to single BIA members or three-member panels based upon their apparent complexity, with different timelines assigned to each subcategory.

At least one commenter expressed support for the 30-day interlocutory appeal timeline but asserted that the rule would be meaningless without an enforcement method. The commenter suggested that the Department consider adding a privately enforceable cause of action against the BIA if it failed to adjudicate appeals in the timespan proposed in the rule. The commenter stated that, if expediency of adjudications was the administration's priority, subjecting adjudicators to such lawsuits would give adjudicators the extra incentive to meet applicable deadlines.

Commenters suggested that survivors of gender-based violence, children, and detained individuals without representation might be particularly negatively impacted by the rule's timelines.

One commenter compared criticism from the BIA's practice of issuing affirmances without opinion (''AWOs'') to the NPRM because ''[e]ncouraging even quicker and more opaque decision-making from an overworked, under-resourced, and now highly politicized appellate body'' was both arbitrary and capricious and result in legally erroneous, and possibly biased, decision making.

Response: With respect to criticism of the rule pertaining to the Department setting new regulatory case-management procedures, the Department maintains that it has acted with the appropriate authority do so. Case management procedures have been in place regarding Board adjudications for many years, including 90-day and 180-day timelines for the adjudication of appeals, and the Department's authority to maintain such procedures is not seriously subject to question. As discussed in the NPRM, 85 FR at 52493, the case-management procedures also respond to concerns raised by the Department's Office of the Inspector General (''OIG'') regarding how EOIR manages the timely adjudication of cases at the BIA.

Nor were the Department's decisions about the timelines arbitrary. Rather, they were based on experience and consideration of the average amount of time that it has taken the BIA to adjudicate appeals. *See* 85 FR at 52508 n.38. Moreover, as noted *supra,* commenters have not seriously questioned why it is impossible or improper to expect the BIA to be able to complete a case within 11 months. To the contrary, the cases of delayed adjudication cited by commenters provide support for the rule's timeline, and the Department agrees that the provisions of this final rule will respond to commenters' concerns about any excessive delays in case adjudications.

The Department shares a commenter's concern regarding the Board's decreased efficiency. To the extent that the Board's efficiency decreased even as its number of adjudicators increased or held steady prior to FY 2020, the Department does find that paradoxical. Nevertheless,

regardless of the precise basis for the Board's decreased efficiency, the Department believes it must be addressed and that the NPRM sets forth well-supported ways of doing so.

Regarding the commenter who asserted that the decision in *Matter of Castro-Tum* added 330,211 previously completed cases back to the pending caseload, the Department notes first that an administratively closed cases is not a completed case. Thus, the assertion that the cases mentioned were ''completed'' is erroneous. *See Matter of Lopez-Barrios,* 20 I&N Dec. 203, 204 (BIA 1990) (''[A]dministrative closing is merely an administrative convenience. . . . However, it does not result in a final order.''); *Hernandez-Serrano,* 2020 WL 6883420 at *3 (''Administrative closure typically is not an action taken '[i]n deciding' a case before an IJ; instead, as shown above, it is typically a decision not to decide the case. Nor is administrative closure typically an action 'necessary for the disposition' of an immigration case. Administrative closure is not itself a 'disposition' of a case, as Hernandez-Serrano concedes in this appeal.''). Second, the Department notes that cases that have been administratively closed remain pending even while they are closed; thus, those cases never went away and, accordingly, were not added by *Matter of Castro-Tum.*

The Department is unable to respond to the commenter who alleged that the median time to complete an appeal represented by the Department was false without providing further detail. The Department maintains that its calculation was accurate. Further, most commenters, who have experience practicing before the Board and are familiar with its timelines, did not dispute the idea that, on average, the Board takes, roughly, just over 10 months to adjudicate cases.

The rule does not impose any ''quotas'' on Board members, nor does it establish any type of case completion goal for BIA members. To the extent that commenters believe that the 90-day and 180-day timelines establish a quota, those timeframes have existed for many years, and the rule does not alter them, though it harmonizes when they begin in response to criticism and confusion over the years, including by the Department's OIG, 85 FR at 52493.

Regarding proposed alternatives, the Department finds that preparing a report would not address issues with the Board's efficiency. To the contrary the regulations already require the Board Chairman to prepare a report ''assessing the timeliness of the disposition of cases by each Board member on an annual basis,'' 8 CFR 1003.1(e)(8)(v), and that existing requirement, which does not appear to have been followed with any diligence prior to 2019, has not aided the Board's efficiency. Similarly, explanations for why timelines have been exceeded are useful for understanding why cases may move at different speeds, and the regulations already contemplate situations in which case processing may be delayed due to specific explanations. *See id.* § 1003.1(e)(8)(i)–(iii). Explanations themselves, however, do not ensure that cases are processed in a timely and fair manner, which is the Board's goal. Finally, the commenter's suggestion of subcategorization is already built into the screening process and the differential timelines for single-member versus panel decisions. Although the Department appreciates the commenter's suggestions and has fully considered them, it believes they are either already contemplated by the regulations or would not otherwise improve the efficiency of the Board's adjudications.

The Department appreciates one commenter's support for a 30-day interlocutory appeal timeline but notes that it does not possess the legal authority to establish a cause of action in Federal court to ensure that timeline is met.

Although commenters suggested that survivors of gender-based violence, children, and detained individuals without representation might be particularly negatively impacted by the rule's timelines, they did not explain how or why that would be the case. The timelines are not case-specific and do not depend on the facts of any particular case. The Department has explained, *supra,* that the rule would not have a deleterious impact on individuals without representation, and there is no basis to believe that the rule will apply differently to children or survivors of violence. To the extent that commenters are concerned about cases of detained aliens, existing regulations already prioritize such cases, 8 CFR 1003.1(e) (prioritizing ''cases or custody appeals involving detained aliens''), and the Department maintains a longstanding goal developed pursuant to the Government Performance and Results Act, Public Law 103–62, Aug. 3, 1993, 107 Stat. 285, of completing 90 percent of detained appeals within 150 days of filing. PM 20–01 at 6. In short, the rule has no impact on the efficiency of adjudicating appeals of detained aliens, as such cases are already adjudicated expeditiously in the normal course under existing principles.

Commenter criticisms of AWOs, comparison with other agency adjudication timelines, which involve completely different factors for consideration, and concerns over ''flooding'' the circuit courts of appeals, are outside of the scope of this rulemaking, although the Department reiterates that it does not believe that this rulemaking would encourage speed over quality of decisions, but rather believes that it strikes an appropriate balance. The Department acknowledges commenter anecdotes about appeals that have been pending for longer than the 335-day regulatory period for various stated reasons and notes that stating a median, by definition, will include cases that have been pending for longer. Nevertheless, the Department acknowledges that these anecdotes further support the Department's efforts to resolve cases more expeditiously through this rule.

j. Immigration Judge Quality Assurance Certification (8 CFR 1003.1(k))

Comment: Some commenters expressed concern regarding the establishment of new quality assurance procedures that allow immigration judges to certify cases, in certain limited circumstances, to the Director. 8 CFR 1003.1(k).

Commenters opined the quality assurance procedures would undermine the BIA in a variety of manners. For example, at least one commenter stated that quality assurance certifications undermine the BIA's integrity by dispossessing it of its full appellate authority. Other commenters stated that the procedures will erode a fundamental purpose of the BIA: National consistency. Commenters further opined that the NPRM would undermine the adversarial nature of BIA proceedings. Others claimed that the procedures would remove discretion from the BIA, which the commenter likened to other changes by the Department that the commenter felt have removed discretion from immigration judges. Commenters further alleged that the rule would have a chilling effect on the BIA as it would heighten their concerns about job security over fairness and impartiality.

At least one commenter expressed a belief that quality assurance certifications are not needed because every opinion the commenter received from the BIA was ''highly professional [and] based on the Board members' evaluation of the law and the facts of the particular case.'' Another commenter opined that there were easier ways to change a typographical error.

According to commenters, the bases for the quality assurance certifications

are so broad that an immigration judge who simply disagrees with the BIA's decision—or the decision's impact on the immigration judge's performance metrics—can certify the case to the Director. *See id.* § 1003.1(k)(1)(i)–(iv).

Commenters expressed concerns regarding the appropriateness of the Director receiving such quality assurance certifications and the Director's ability to appropriately respond to and manage the certifications he would receive. For example, commenters predicted that the Director could receive thousands of cases from the BIA due to other changes in the rule as well as the cases certified from immigration judges. Due to the caseload, a commenter claimed that the Director would simply ''rubber stamp denials.'' Commenters described the position of the Director as managerial and non-adjudicatory and accordingly opined that the individual appointed to it does not necessarily possess the ''expertise, training, or impartiality necessary to decide cases.'' Others expressed concern about the Director's role reviewing and responding to quality assurance certifications due to the commenters' perception that the Director is a political appointee or otherwise is politically motivated. Some commenters alleged that the Director is not subject to the same the ethics and professionalism guidelines applicable to BIA members and the decisions of the Director cannot be remedied through EOIR's procedure for addressing complaints against EOIR adjudicators.

Other commenters requested that the neutral arbiter be other experts in immigration law or another body.

Other commenters worried that regardless of the Director's decision, it would be unreviewable by any adjudicator, while another commenter claimed that appeals would flood the circuit courts.

Commenters claimed that the Department mischaracterized HALLEX I–3–6–10. For example, one commenter stated that the cited section allows for clarity but not for Administrative Law Judges to ''protest'' or question decisions on their cases in the same manner immigration judges would be allowed to do for BIA decisions.

Other commenters were concerned with procedural issues. Some commenters claimed that the parties and the BIA should receive notice that the immigration judge certified a case. Commenters requested that parties be allowed to object to certification and file briefs accordingly and noted that the non-moving party has a chance to respond in the current scheme to address BIA errors. At least one commenter expressed concern about the implications on the immigration judge's posture in the proceedings and claimed that immigration judges who issue certifications would have to recuse themselves in case of remand because the certification is in effect an appeal by the judge that equates the judges to an advocate in the proceedings.

Other commenters expressed concern that the certification procedures curtail aliens' due process rights.

Commenters opined that the quality assurance certifications, when combined with the restriction on the BIA considering new evidence, will result in numerous certifications because the BIA will fail to consider a material factor pertinent to the issue(s) before the immigration judge.

Some commenters claimed that the rule would increase inefficiency because, in order for the case to be resolved, the Director must refer the case to a different adjudicator.

Response: As an initial point, the Department notes that many of the same commenters who criticized other parts of this final rule because it would allegedly allow the BIA to deny meritorious appeals for inappropriate reasons also criticized this provision by claiming it would undermine the professionalism and expertise of the BIA in deciding cases. To the extent that commenters inconsistently asserted that the BIA is both unprofessional and professional—depending solely on which view allowed the commenter to oppose a particular provision of this final rule—the Department finds such tendentious criticism insufficient to warrant changes to the final rule.

Further, any implication that these quality assurance certifications divests the BIA of its appellate jurisdiction and role in the immigration system is incorrect. The new procedures at 8 CFR 1003.1(k) do not create a higher secondary appellate review body. Rather, they provide a quality control measure to ensure that the BIA's decisions consistently provide appropriate and sufficient direction to immigration judges. The distinction is evident in the certification process and the actions available to the Director. Cases may only be certified to the Director if they fall within limited, and specifically delineated, circumstances: (1) The BIA decision contains a typographical or clerical error affecting the outcome of the case; (2) the BIA decision is clearly contrary to a provision of the INA, any other immigration law or statute, any applicable regulation, or a published, binding decision; (3) the BIA decision is vague, ambiguous, internally inconsistent, or otherwise did not resolve the basis for the appeal; or (4) a material factor pertinent to the issue(s) before the immigration judge was clearly not considered in the BIA decision. 8 CFR 1003.1(k)(1)(i)–(iv). These narrow situations are all tailored to quality control—not to express disagreement with the BIA's well-founded legal analysis, which is how another layer of appellate review would function.

Further, the Director only has a limited number of options available upon certification. The Director may: (1) Dismiss the certification and return the case to the immigration judge; (2) remand the case back to the BIA for further proceedings; (3) refer the case to the Attorney General; (4) or issue a precedent decision that does not include an order of removal, a request for voluntary departure, or the grant or denial of an application for relief or protection from removal. *Id.* § 1003.1(k)(3). Thus, the quality assurance procedures do not vest the Director with any final adjudicatory power of cases that have been certified, and the Director must return the case to either the BIA or the immigration judge in order for the case to be resolved. Accordingly, commenters are incorrect that the rule creates an additional level of appellate review.

The Department appreciates the commenter's compliments that the decisions that they have received from the BIA have been faithful to the law and highly professional, though it notes that other commenters insinuated that the BIA's decisions are not always faithful to the law. Regardless, the Department cannot rely on anecdotal evidence to maintain quality control in all cases in the context of the ever-growing BIA with a mounting caseload, *see* 85 FR at 52492; EOIR, *Adjudication Statistics: Case Appeals Filed, Completed, and Pending,* Oct. 23, 2019, *available at https://www.justice.gov/eoir/page/file/1198906/download,* and the Department is aware of examples from immigration judges raising questions about the quality or accuracy of BIA decisions. The Department believes that the rule creates a clear and efficient mechanism to ensure that the commenter's remarks that the BIA's decisions are accurate and dispositive are, and remain, true. The Department does not believe that a quality control process that is aimed toward full and accurate decisions would have any other substantial impact that to cause increased attention to the accuracy and completeness of decisions. Overall, the Department finds that the certification process as laid out in the rule will, in

a timely manner, ensure that BIA decisions are accurate and dispositive, which is the purpose of the changes.

In regards to commenters' allegations that immigration judges could simply certify cases with which they disagree, particularly for political or other personal reasons, the Department specifically reiterates that merely disagreeing with decisions or objecting to specific legal interpretations is not a basis for certification. 85 FR at 52503. Some commenters worried that the bases for certification are so broad that an immigration judge could solely object to a particular legal interpretation and still certify the case by sweeping it into one of the four criteria, specifically that the decision is ''vague.'' To this, the Department notes that vagueness is included in the criteria in order to address a specific problem: Immigration judges receiving orders that are confusing and need additional clarification or explanation. *See* 85 FR at 52496. ''Vagueness'' is not so broad as to contain within it a myriad of legal objections to specific legal interpretations; certainly, it cannot be stretched to contain personal or political objections to such legal interpretations.

Moreover, although few commenters acknowledged it, immigration judges already possess the authority to certify a case to the BIA following a remand and the issuance of another decision, 8 CFR 1003.7, and some immigration judges have used that procedure in order to seek clarification of the BIA's decision. That indirect process, however, is both burdensome to the parties, who must wait until the immigration judge issues another decision (even if the immigration judge considers the Board's decision unclear or vague), and inefficient in that it results in a case being sent back to the same body which remanded it in the first instance without further clarification. The Department's quality assurance process will ensure clearer and more timely resolution of disagreements, within four narrow categories, between immigration judges and the BIA by a neutral third-party who supervises each.

As far as the authority of the Director, the Attorney General is authorized to decide the Director's authority. INA 103(g)(1), 8 U.S.C. 1103(g)(1); 28 CFR 0.115(a). Reviewing certified cases falls within the ''such other authorities'' provided to the Director by the Attorney General, based on the powers to delegate and conduct administrative review under INA 103(g) (8 U.S.C. 1103(g)). *See* 8 CFR 1003.0(b)(1)(ix) and (c), 1003.1(e)(8)(ii). This delegation supersedes the restrictions related to adjudication outlined in 8 CFR 1003.0(c) due to that paragraph's deference to 8 CFR 1003.0(b).

Moreover, the Director is responsible for the supervision of the immigration judges and the BIA members and already possesses the authority to ensure that adjudications are conducted in a timely manner. *See id.* § 1003.0(b)(1)(ii). Accordingly, the Director is in a well-positioned to address errors made by the BIA and to remedy them in a timely manner. The Director is also in a direct position to implement changes to address repeat errors. Because the delegation of authority is proper, the process requires notice, and the process involves a neutral decisionmaker who lacks authority to issue a final order, it does not violate due process.

In response to commenters concerns that the delegation of authority, even if proper, will appear improper, the Department responds that Congress' intent is clear and explicit in statutorily authorizing such delegations, and the Attorney General is acting within the bounds of his statutory authority when by issuing the rule. INA 103(g)(2), 8 U.S.C. 1103(g)(2); *see also Chevron,* 467 U.S. at 842. In issuing the rule, the Attorney General properly delegates the Director the authority to review certified cases from the immigration judges. This delegation aligns with the Attorney General's longstanding authority to issue regulations and delegate that authority, in line with principles of due process.

Regarding commenters concerns about perceived political influence or politicization of the Director position, the Department reiterates its response to similar concerns raised and discussed, *supra.* The Department again notes that the Director is a career appointee, who is selected based on merit, independent of any political influence, and a member of the SES. The position requires a significant amount of subject-matter expertise regarding immigration laws as demonstrated by various duties of the Director: ''[a]dminister an examination for newly-appointed immigration judges and Board members with respect to their familiarity with key principles of immigration law before they begin to adjudicate matters, . . . [p]rovide for comprehensive, continuing training and support for Board members, immigration judges, and EOIR staff[, and] [i]mplement a process for receiving, evaluating, and responding to complaints of inappropriate conduct by EOIR adjudicators.'' 8 CFR 1003.0(b)(1)(vi)–(viii). Additionally, reviewing certified cases would require no more expertise than administratively reviewing certain types of decisions in recognition and accreditation cases, which the Director has been tasked with the authority to do since 2017 with no noted objection at that time. *See id.* § 1292.18(a). Further, the Director is held to the same professionalism and ethical standards as all Department employees. In short, commenters' concerns appear to be rooted in either a personal dislike for the incumbent Director or disagreement with the overall policies of the Department, rather than any specific or genuine concern about the Director position itself.

In response to commenters' concerns over the workload for the Director that quality assurance certifications may cause, the Director may utilize all appropriate support staff to assist with his responsibility. Nevertheless, because of the narrow scope of issues subject to certification and the procedural requirements which will dissuade filing frivolous or meritless certifications—particularly because immigration judges already have generally full dockets of cases to adjudicate—the Department expects that these procedures will be employed infrequently. Accordingly, although the Department appreciates commenters' concerns about the Director's workload, the rule already anticipates and limits the number of cases expected to be subject to this process.

In regards to the reviewability of the Director's decision, the Department notes first that the Director's decision is not final and that, regardless of what action the Director does take, the ultimate, underlying final EOIR administrative decision may be appealed to the circuit court. *See* INA 242, 8 U.S.C. 1252.

Regarding commenters' accusations of the mischaracterization of HALLEX I–3–6–10, the Department notes that it referenced Social Security's protest criteria for decisions by administrative law judges or its administrative appeals body, the Appeals Council, in the context of explaining the narrow set of criteria for certification set out in the rule. 85 FR at 52502 (''These criteria are used in similar circumstances at other adjudicatory agencies.'') The Department was not attempting to claim that the two processes exactly mirror one another, nor was it attempting to claim that it structured the certification procedure to directly mimic the Social Security Administration. The Department believes although the two procedures are not identical, the degree of similarity—as well as the underlying purpose, *i.e.,* to ensure correct, quality

decisions by adjudicators—is enough to warrant analogy.

Regarding commenters' requests that the various parties should receive notice at the time of certification, the Department notes that the rule, in fact, requires the immigration judge to provide notice of certification to both parties. 8 CFR 1003.1(k)(2)(iii). However, the Department disagrees with commenters' argument that the parties should have opportunities for objections and additional briefing at the time of certification, particularly because the case was likely already briefed to the Board prior to the certification to the Director. The certification procedures allow immigration judges to quickly determine a potential error by the BIA and to timely seek a remedy to that error, all without placing an additional burden on the parties. The Department determined that the current incomplete and piecemeal system of various parties filing various motions or appeals was cumbersome, time consuming, and may not fully address the error. 85 FR at 52502. Adding time for objections and briefs, as suggested by some commenters, would morph the process in the rule into a portion of what it was created to avoid: A cumbersome and time consuming process. Moreover, regardless of whether the Director returns the case to the immigration judge or to the Board, the parties will have an opportunity to raise appropriate arguments or issues before a final decision is rendered. Nevertheless, the Department recognizes that in discrete cases, additional briefing or filings may be helpful to the Director in reviewing a certified case. Accordingly, the final rule provides that the Director, in his or her discretion, may request additional briefs or filings from the parties when reviewing a certified case through the quality-control process.

Additionally, the Department rejects any claim that the immigration judges are acting as advocates and would thus have to recuse themselves. Again, this assertion suggests that immigration judges will behave unethically or partially in violation of regulations and their code of conduct. 8 CFR 1003.10 (''In all cases, immigration judges shall seek to resolve the questions before them in a timely and *impartial* manner consistent with the Act and regulations.'') (emphasis added)); 5 CFR 2635.101(b)(8) (''Employees [of the federal government] shall act impartially and not give preferential treatment to any private organization or individual.''); *IJ Ethics and Professionalism Guide* at sec. V (''An Immigration Judge shall act impartially and shall not give preferential treatment to any organization or individual when adjudicating the merits of a particular case.''); *see also Chem. Found., Inc.,* 272 U.S. at 14–15 (''The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.''). The Department categorically rejects this suggestion.

In the context of the quality assurance process, the immigration judge is flagging an issue and relaying it to the Director for examination. While the immigration judge is required to ''specify the regulatory basis for the certification and summarize the underlying procedural, factual, or legal basis,'' this is necessary to relay the immigration judge's determination of error by the BIA to the Director in order to both qualify for certification and to expedite the process. Moreover, this process is substantively similar to the existing certification process utilized by immigration judges for many years, 8 CFR 1003.7. Commenters did not provide any evidence that this existing process has raised questions about immigration judges becoming advocates, and the Department is unaware of any.

Regarding commenters' concerns about the Department not supporting the rule with data, the Department notes that such quality assurance issues are not subject to tracking or amenable to particular data points. For instance, commenters did not indicate how the Department would measure the ''correctness'' of Board remand decisions in order to calculate the data they sought, and the Department is unaware of any metric for measuring the ''correctness'' or ''appropriateness'' of remand decisions by an appellate court.[50] Further, since no quality assurance system is currently in place, there is no baseline for data to provide. Moreover, even without specific further data, the Department is still well within its authority to create a certification process that ensures the quality of BIA decisions. 8 CFR 1003.0(b)(1)(ii).

Commenters are incorrect that the quality assurance certification procedures are incompatible with the restriction on the BIA's consideration of new evidence. In order for a case to be certified, the BIA decision must have clearly not considered ''a material factor pertinent to the issue(s) before the immigration judge.'' *Id.* § 1003.1(k)(1)(iv). The only such material factors would be those that were already before the judge and, accordingly, not new evidence before the BIA only at the appeal. Thus, no new evidence that the BIA was barred from considering based on the regulations would amount to a ''material factor'' before an immigration judge.

As to a commenter's assertion that there must be an easier way to correct typographical errors, the Department notes that the certification process involves more than just typographical errors. The quality assurance provisions are designed to address wider examples of quality concerns at the BIA level, of which typographical errors are just one kind.[51]

Further, while the Department appreciates commenters suggestions for other methods to meet the Department's quality assurance goals, such as suggestions that the Department make BIA decisions public,[52] increase three-member panel decisions, or increase the number of detailed and reasoned precedential decisions, the Department finds that they would not provide an efficient and accurate process to ensure that BIA decisions are dispositive and accurate. Instead, such suggestions represent a continuation of the status quo rather than the real introduction of new procedures for immigration judges to bring issues to the forefront for consideration. Moreover, commenters did not explain how increased three-member panel decisions or an increased number of precedential decisions, both actions by the BIA, would improve quality in each individual BIA adjudication or how such actions

[50] Whether the result of a case is ''correct''—*e.g.,* whether an application or appeal should have been granted or denied—is often solely based on the narrative seeking to be advanced by the evaluator, and there is no accepted way of determining whether an adjudicator's decision is normatively ''correct.'' *See* Barry C. Edwards, *Why Appeals Courts Rarely Reverse Lower Courts: An Experimental Study to Explore Affirmation Bias,* 68 Emory L.J. On. 1035, 1046 (2019) (''Given a sample of . . . court cases, no researcher could practically determine what the courts got 'right' and what they got 'wrong.' There is no reliable method of coding how cases ''should'' have been decided and, thus, no reliable way of assessing whether the [decision] rate is 'too high' using observational data.'').

[51] Further to the commenter's point, the Department notes that because the BIA retains *sua sponte* authority to reconsider a decision to correct a typographical error under this rule, 8 CFR 1003.2, situations in which an immigration judge may use this quality assurance process on that basis alone should be extremely rare.

[52] The Department notes that this suggestion suffers from an additional infirmity. Due to privacy restrictions and confidentiality regulations, *e.g.,* 8 CFR 1208.6, the Department cannot simply make all BIA decisions public without redactions, and the requirement for redactions would necessarily inhibit the ability to determine whether those decisions were of appropriate quality. Further, the Department notes that many BIA decisions are already available through commercial databases, but that availability has not ensured that the Board issues a quality or correct decision in every case.

address immigration judge concerns about the quality of BIA decisions.

Finally, to the extent that most, if not all, commenters focused on how this process would affect cases of aliens, the Department reiterates that it would affect both parties equally. Moreover, many commenters appear to not have recognized that the process is primarily designed for EOIR's adjudicators and to improve quality decisionmaking at both the trial and appellate levels, rather than being a process designed to favor one party over another.

k. Removal of *Sua Sponte* Motion To Reopen Authority (8 CFR 1003.2(a), 1003.23(b)(1))

i. Due Process Concerns

Comment: Commenters opposed the rule's removal of the BIA and immigration judge's authority to *sua sponte* reopen proceedings. Commenters alleged that the Department failed to consider due process and explained that *sua sponte* authority was a ''vital tool'' for ''curing errors and injustices'' that may have occurred during removal proceedings. Further, commenters explained that even if a BIA member saw good reason to reopen a case, such as in the case of an untimely or number-barred motion to reopen, the member would be unable to do so without the *sua sponte* authority.

Response: As an initial point, the Department notes that several courts have acknowledged that *sua sponte* reopening (or the lack thereof) cannot implicate due process rights because it is entirely discretionary, so there is no liberty interest in it that would implicate any of an alien's rights in proceedings. *See, e.g., Mejia* v. *Whitaker,* 913 F.3d 482, 490 (5th Cir. 2019); *Gyamfi* v. *Whitaker,* 913 F.3d 168 (1st Cir. 2019); *Salgado-Toribio* v. *Holder,* 713 F.3d 1267, 1271 (10th Cir. 2013); *see also Matter of G-D-,* 22 I&N Dec. 1132, 1137 (BIA 1999) (''We see no procedural due process concerns arising from our discretionary decision declining to exercise our independent reopening powers on behalf of the respondent. The respondent's right to a full and fair hearing on his asylum claim has not been compromised.'').

As explained in the NPRM, *sua sponte* authority is entirely a creature of regulation based on a delegation of authority from the Attorney General. 8 CFR 1003.2(a), 1003.23(b)(1); *see also* 85 FR at 52504. It is also not the only tool available to address possible errors in immigration proceedings; thus, removal of *sua sponte* authority, in and of itself, does not constitute a violation of due process.

In addition, commenters confuse *sua sponte* authority with motions to reopen. Filing a motion to reopen, regardless of whether it is time or number-barred as commenters describe, does not invite the BIA to exercise *sua sponte* authority; it requests the BIA to reopen a proceeding in response to the motion. *See Malukas* v. *Barr,* 940 F.3d 968, 969 (7th Cir. 2019) (''Reopening in response to a motion is not *sua sponte;* it is a response to the motion and thus subject to the time-and-number limits.''). Thus the rule's removal of *sua sponte* authority does not itself preclude the BIA from reopening a case in accordance with applicable law. *See, e.g.,* 8 CFR 1003.2(c)(3)(iii), 1003.23(b)(4)(iv). Rather, it ensures that reopening occurs in meritorious situations authorized by statute or regulation, rather than through the BIA's subjective and largely unchecked view of what constitutes an exceptional circumstance. Accordingly, contrary to commenters' assertions, the rule promotes fairness due to ''the lack of a meaningful standard to guide a decision whether to order reopening or reconsideration of cases through the use of *sua sponte* authority, the lack of a definition of 'exceptional situations' for purposes of exercising *sua sponte* authority, the resulting potential for inconsistent application or even abuse of this authority, the inherent problems in exercising *sua sponte* authority based on a procedurally improper motion or request, and the strong interest in finality'' by withdrawing an authority subject to inconsistent and potentially abusive usage. 85 FR at 52505.

Further, as discussed in the NPRM, the Department recognizes that the BIA has, in the past, exercised what it termed ''*sua sponte* authority'' in response to a motion and, arguably, contrary to law. 85 FR at 52504 n.31 (''Despite this case law to the contrary, the Board has sometimes granted motions using what it erroneously labels as 'sua sponte' authority.''). To the extent that the commenters oppose the change in this practice—particularly based on the perception that it favors aliens—the Department has acknowledged that the rule would no longer provide an avenue for the Board to use its *sua sponte* authority to grant a motion to use such authority. Indeed, one of the reasons stated for the rule was ''the inherent problems in exercising *sua sponte* authority based on a procedurally improper motion or request.'' *Id.* at 52505. The rule seeks to end the practice of the Board taking allegedly *sua sponte* action in response to a motion and to thereby reduce the incentive for filing such procedurally improper motions. *Id.*

In short, the rule returns the focus on motions to reopen to the merits of the motions themselves and the applicable law, rather than the BIA's subjective and inconsistent invocation of its *sua sponte* authority. Finally, as discussed, *supra,* and noted in the NPRM, the Supreme Court has recognized that ''the BIA is simply a regulatory creature of the Attorney General, to which he has delegated much of his authority under the applicable statutes.'' *Id.* at 52492 n.1 (quoting *Doherty,* 502 U.S. at 327 (1992)). Accordingly, to the extent that the Attorney General can delegate authority to the BIA, he can also unquestionably remove that delegation. The removal of such authority, which is solely the Attorney General's to delegate, does not violate due process.

Comment: Similarly, commenters were concerned that the rule would foreclose reopening the cases of respondents who later became eligible for relief, providing some of the following examples: An approved immediate immigrant relative petition, an approved application for SIJ status, an approved application for U visa status, or derivative asylum status through a spouse or parent. Commenters noted that these applications typically take years to adjudicate. Commenters were also concerned that the rule would deny protection to the most vulnerable populations in immigration proceedings, such as by foreclosing reopening the cases of respondents who were victims of fraud or ineffective assistance of counsel, non-English speakers or others with language barriers, and children who failed to appear for their hearings by no fault of their own. One commenter further described the effects on unaccompanied alien children (''UAC'') generally, explaining that *sua sponte* authority was an important safeguard to protect children because critical details and information in children's cases typically emerge over time.

At least one commenter alleged that the Department purposefully promulgated these provisions as an ''attack'' on asylum seekers and migrants.

As with other provisions of the rule, commenters explained that the Department should not remove the *sua sponte* authority because ''fairness is more important than finality'' or quick removals.

Response: As an initial point, the Department notes that many of its responses to comments regarding the withdrawal of the BIA's certification authority discussed, *supra,* are equally

applicable to comments regarding the withdrawal of *sua sponte* reopening authority. On balance, the inconsistent application of such authority, even with a well-established standard, and the existence of equally functional alternatives, particularly as equitable tolling has advanced as a doctrine to extend filing deadlines for motions to reopen, militate in favor of removing the Attorney General's delegation of such authority.

The Department did not promulgate this rule as an attack on anyone. As discussed herein, the rule applies equally to DHS and respondents, it applies to all types of cases (not just asylum cases), and it addresses significant issues of inconsistent adjudications and efficiency, among others. Commenters generalized policy disagreements with the rule do not effectively engage with its provisions and, thus, do not provide a useful basis for the Department to respond.

In general, commenters' concerns that respondents will be unable to reopen their cases without the BIA's *sua sponte* authority are based on an erroneous understanding or assumption that respondents are entitled to such a reopening. The Department emphasizes that the vehicle by which such respondents should seek reopening is a motion to reopen. *See Malukas,* 940 F.3d at 969 (''Reopening in response to a motion is not *sua sponte;* it is a response to the motion and thus subject to the time-and-number limits.''). The Attorney General has already determined that *sua sponte* authority may not be used to circumvent timing and numerical limits, *see Doherty,* 502 U.S. at 323; *INS* v. *Abudu,* 485 U.S. 94, 107 (1988). Further, Congress included such limitations to promote finality in proceedings. *Matter of Monges-Garcia,* 25 I&N Dec. 246, 250 (BIA 2010) (explaining that, by requiring the Department to promulgate motion time and number limits by regulation as part of the Immigration Act of 1990, ''Congress clearly intended that the time and number limitations on motions would further the statute's purpose of bringing finality to immigration proceedings'').

Nevertheless, aliens who reach agreement with DHS regarding the validity of their changed claim may jointly file a motion to reopen with DHS regardless of the amount of time that has passed since the underlying final order. 8 CFR 1003.2(c)(3)(iii), 1003.23(b)(4)(iv). The rule does not affect that pre-existing exception to the time and number limitations on motions to reopen. In addition, the deadline for filing a motion to reopen by aliens who have been the victim of fraud, ineffective assistance of counsel, and other harms may be subject to equitable tolling. *Salazar-Gonzalez* v. *Lynch,* 798 F.3d 917, 920 (9th Cir. 2015) (stating that the deadline for filing a motion to reopen is subject to equitable tolling).

Regarding commenters' concerns for UAC, the Department has considered whether there would be any specific impacts of the rule on UAC in particular—as distinguished from other categories of aliens—but has identified none. As discussed, *supra,* there is no right to a motion to reopen *sua sponte* for any classification of aliens, many aliens (not just UAC) are subject to remote visa priority dates, and many aliens (not just UAC) may become putatively eligible for relief well after their immigration proceedings have concluded. Commenters also did not identify any specific impacts on UAC that would not also fall on the general population of aliens in immigration proceedings. Moreover, even if the rule did have particular impacts on UAC, the Department finds that those impacts are far outweighed by the benefits provided the rule, namely more consistent application of the law, more efficient adjudication of cases, and a more appropriate emphasis on the importance of finality in immigration proceedings.

The Department further emphasizes that safeguards for UAC seeking asylum remain in place under provisions on motions to reopen that are premised on changed country conditions, *see* INA 240(c)(7)(C)(ii), 8 U.S.C. 1229a(c)(7)(C)(ii); 8 CFR 1003.2(c)(3)(ii), 1003.23(b)(4)(i). Further, nothing in the rule singles out UAC for adverse treatment, and available avenues for untimely motions to reopen—*e.g.,* joint motions and motions based on equitable tolling—continue to exist independent of the rule. The law does not guarantee UAC a right to *sua sponte* reopening, just as it does not guarantee any particular alien such a right for the reasons stated in this rule, and commenters did not point to any provision claiming such a right. For similar reasons, commenters' allegation that the generally applicable provision is specifically targeted at asylum-seekers, is without merit. The withdrawal of *sua sponte* authority applies to all cases and all parties, and it is well within the Attorney General's authority to withdraw a delegation of authority that he alone has provided.

Underlying many of the comments on this provision is a tacit claim that an alien who establishes eligibility for relief long after immigration proceedings have concluded—*e.g.,* aliens whose visa numbers become current or who obtain the potential for derivative status—should be granted reopening *sua sponte* as a matter of right and that, accordingly, the rule will deprive such aliens of a ''right'' to reopen their cases and obtain relief from removal. This view, however, is unsupported by law in multiple ways and, thus, unpersuasive.

First, as discussed, *supra,* there is no right to reopening of a removal proceeding, and the Board may even deny a motion to reopen when the alien establishes a prima facie claim for relief. 8 CFR 1003.2(a) (''The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.''). Second, as also discussed, *supra,* a motion to reopen *sua sponte* is an ''oxymoron'' and represents an improper filing that should ordinarily be rejected. Third, Board case law makes clear that untimely motions to reopen to pursue adjustment of status should ordinarily be denied, indicating that it ordinarily would not exercise *sua sponte* reopening authority in such situations either. *See Matter of Yauri,* 25 I&N Dec. 103, 105 (BIA 2009) (''We emphasize that untimely motions to reopen to pursue an application for adjustment of status, even for cases that do not involve an 'arriving alien,' do not fall within any of the statutory or regulatory exceptions to the time limits for motions to reopen before the Board and *will ordinarily be denied*.'' (emphasis added)); *cf. Vithlani* v. *Att'y Gen.,* 823 F. App'x 104, 105–06 (11th Cir. Aug. 10, 2020) (''The BIA denied the motion [to reopen based on asserted eligibility for adjustment of status], finding that it was untimely and number-barred, and that it did not demonstrate an exceptional situation warranting sua sponte reopening. The BIA later also denied her motion to reconsider, stating that becoming eligible for adjustment of status was not an exceptional situation warranting the grant of an untimely motion to reopen. In 2019, Vithlani . . . . sought sua sponte reopening, again seeking to apply for adjustment of status. . . . The IJ denied Vithlani's motion to reopen . . . . stat[ing] that becoming eligible to adjust status was not uncommon. . . . [and finding] that the motion did not demonstrate an exceptional situation to warrant sua sponte reopening.'').

The Department emphasizes that, as stated throughout this final rule, the changes to Board procedures are intended to promote consistency and efficiency in proceedings. To the extent that commenters assert as a policy matter that the Board should retain *sua sponte* authority solely as a vehicle for aliens to file motions seeking to evade

the usual time and number limitations and possibly delay removal, *cf. Doherty,* 502 U.S. at 323 (''[A]s a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.''), or that the Department should not seek to correct the inconsistent and potentially inappropriate usage of that authority, the Department finds such policy arguments unpersuasive for the reasons given in the NPRM and this final rule.

Further, commenters are incorrect that the respondents whom they alleged would be unable to reopen their cases if the BIA can no longer exercise *sua sponte* authority. As discussed in the NPRM, 85 FR at 52504–05 and *supra,* those respondents are not truly requesting that the BIA exercise *sua sponte* authority; in actuality, they seek a response to their filed motion. *See Salazar-Marroquin* v. *Barr,* 969 F.3d 814, 816 n.1 (7th Cir. 2020) (''Describing the motion as seeking a '*sua sponte'* reopening is a common but unfortunate misnomer and even an oxymoron. Board action on a motion would not be *sua sponte.*''). Nothing in the rule prohibits the BIA from adjudicating motions to reopen filed by aliens in accordance with well-established principles of law.

Further, the Attorney General has already determined that *sua sponte* authority may not be used to circumvent timing and numerical limits. *Matter of J-J-,* 21 I&N Dec. 976, 984 (BIA 1997). Thus, to the extent that commenters assert *sua sponte* authority has been used to circumvent those limits previously, the BIA's prior failure to follow the law in individual cases is not a compelling or persuasive reason to retain such authority. To the contrary, it would further reinforce the Department's decision to remove the delegation of such authority. Additionally, contrary to commenters' concerns, regulations at 8 CFR 1003.2(c)(3), 1003.23(b)(4)(iv), 214.11(d)(9)(ii), and 214.14(c)(5)(i)—in addition to the ability to file a joint motion to reopen, 8 CFR 1003.2(c)(3)(iii)—would continue to provide exceptions to the time and numerical limits in appropriate cases, and none of those are affected by this rulemaking. Similarly, the availability of equitable tolling in particular cases, which many commenters did not acknowledge, would also allow aliens the ability to evade strict adherence to statutory time limitations.

Other than highlighting its incorrect usage to evade time and number limitations contrary to *Matter of J-J-,* commenters did not explain how the withdrawal of *sua sponte* authority would affect any discrete populations, particularly when those populations could not file a putative motion to reopen *sua sponte* in the first instance. As a delegation of procedural authority, *sua sponte* reopening authority does not apply differently to different types of cases; accordingly, its withdrawal will not affect any specific populations.

Finally, to the extent commenters alleged that the withdrawal of *sua sponte* authority would impact aliens with in absentia removal orders, the Department notes there is already no time limit on such motions if they are based on a lack of notice. INA 240(b)(5)(C)(ii), 8 U.S.C. 1229a(b)(5)(C)(ii). Thus, the withdrawal of *sua sponte* authority would not affect the ability of an alien to file a motion to reopen an in absentia removal order based on a lack of notice. Similarly, an alien who fails to appear due to exceptional circumstances may file a motion to reopen any resulting in absentia removal order within 180 days. INA 240(b)(5)(C)(i), 8 U.S.C. 1229a(b)(5)(C)(i). Commenters did not explain why an alien who failed to appear due to exceptional circumstances would wait longer than 180 days to file such a motion, and the Department declines to speculate as to such reasons. Nevertheless, the Department notes that even in that unlikely situation, an alien may seek to have the 180-day deadline equitably tolled. In short, the withdrawal of *sua sponte* reopening authority has no impact on existing and well-established avenues for aliens to reopen in absentia removal orders.

ii. Limited Current Use and Abuse of Authority

Comment: Commenters generally opposed the Department's removal of *sua sponte* authority, stating that the Department did not provide any specific examples of abuse in the rule and that immigration judges or BIA members do not need much time to consider requests to reopen.

Commenters explained that immigration judges and BIA members currently use *sua sponte* authority sparingly and only for the most compelling cases. Accordingly, the commenter believes that the authority is neither abused by adjudicators nor evidence of finality issues as the rule suggested.

Commenters stated further that there was no reason to believe that adjudicators could not properly apply the appropriate standards for *sua sponte* reopening.

Response: As the Departments explained in the NPRM, use of *sua sponte* authority facilitates inconsistent application and possible abuse, due to the lack of a meaningful standard to evaluate the use of *sua sponte* authority, *see* 85 FR at 52505 (collecting cases); the lack of a definition for ''exceptional circumstances'' required to exercise such authority; and, the problems resulting from a procedurally improper motion or request. Contrary to commenters' assertions, the Department did provide examples of cases in which *sua sponte* authority appears to have been improperly used. *Id.* Considering all of those reasons together, the Department determined that use of *sua sponte* authority severely undermines finality in immigration proceedings, *see* 85 FR at 52493, in which there lies a strong public interest in bringing litigation to a close, consistent with providing a fair opportunity to the parties to develop and present their cases. *See Abudu,* 485 U.S. at 107.

Comment: Commenters alleged that immigration judges and the BIA ''frequently have unfettered discretion in deciding when to order removal proceedings.'' Accordingly, the commenters explained that removing *sua sponte* authority due to concerns of abuse of such authority was ''laughable.''

The commenters further explained that removing such authority would exacerbate the backlog because BIA members would be unable to remand a case to further develop the facts, which another commenter asserted would conflict with Congress and the Attorney General's trust in the BIA and immigration judges ''to intervene in cases where fundamental fairness and the interests of justice so warrant.'' Similarly, commenters alleged that the Department failed to explain in the rule why speed in this context was not favored, given that *sua sponte* action would be faster than waiting for a motion to reopen. Commenters explained that removing such authority would increase the number of appeals and the BIA's workload.

Response: The Department does not have ''unfettered discretion'' in regard to removal proceedings. As an initial matter, EOIR's jurisdiction in proceedings is bound by the INA and the regulations. *See, e.g.,* INA 240, 8 U.S.C. 1229a. Second, immigration judges exercise independent judgement and discretion in applying applicable law and regulations. *See* 8 CFR 1003.10(b), 1240.1(a). Likewise, BIA members resolve issues before them in a manner that is timely, impartial, and consistent with applicable law and regulations, in an exercise of their independent judgment and discretion. *See* 8 CFR 1003.1(d)(1) introductory

text, (d)(1)(ii). Nevertheless, the authority of immigration judges and Board members to reopen cases is circumscribed by law, and neither class of adjudicator possesses free-floating authority to reopen cases in contravention of established law or in the absence of clear legal authority.

The Department's decision to withdraw *sua sponte* authority would not exacerbate the backlog, and the Department finds this particular comment somewhat illogical. By definition, *sua sponte* authority to reopen a case would apply only to cases that are already administratively final and, thus, not part of the pending caseload. In fact, also by definition, the continued use of *sua sponte* authority would necessarily increase the pending caseload because it would allow the Board to reopen proceedings even in cases in which there was otherwise no legal basis to do so. Similarly, there is no basis to believe that withdrawing *sua sponte* reopening authority would increase the number of appeals to the Board because, again, that authority would only be used for a case that is already final and, thus, not subject to further appeal.

The commenter's concern about speed is also misplaced. The Department's withdrawal of *sua sponte* authority does not indicate that the Department favored speed in this context. Rather, the Department explained the multitude of reasons, considered together, that prompted its decision. *See generally* 85 FR at 52505–06. These reasons invoke concerns over finality and consistency, which are distinct from speed. Further, regardless of whether *sua sponte* reopening or a motion to reopen is ''faster'' to adjudicate in the abstract—a question for which the Department does not believe an appropriate metric exists—the need to manage the inappropriate and inconsistent use of *sua sponte* reopening authority would outweigh whatever marginal ''speed'' benefits may be obtained from its usage. In other words, the expediency of the usage of *sua sponte* authority does not outweigh the need to ensure its correct and consistent application.

iii. Standard of Review

Comment: Commenters disagreed with the rule's assertion that Federal circuit courts had no meaningful standard of review with which to review an exercise of *sua sponte* authority. Rather, the commenters, citing *Lenis* v. *United States,* 525 F.3d 1291, 1292 (11th Cir. 2008), explained that the Federal circuit courts declined to review because they lacked jurisdiction.

Commenters nevertheless disagreed that the Department was unable to check inconsistencies or abuses that may result from the exercise of *sua sponte* because they asserted that the Attorney General could review BIA decisions regarding whether to exercise *sua sponte* authority instead.

Response: The Department agrees with the commenters that the court in *Lenis* declined to review for lack of jurisdiction; however, that court explained that it lacked such jurisdiction under 5 U.S.C. 701(a)(2), which prohibits judicial review of decisions ''committed to agency discretion.'' *Lenis,* 525 F.3d at 1293. The court explained this exception was extremely narrow, applicable only where ''statutes are drawn in such broad terms that in a given case there is no law to apply.'' *Id.* (quoting *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 410 (1971)). The court explained that:

> [n]either the statute nor the regulation at issue today provides any ''meaningful standard against which to judge the agency's exercise of discretion.'' Indeed, no statute expressly authorizes the BIA to reopen cases *sua sponte;* rather, the regulation at issue derives from a statute that grants general authority over immigration and nationalization matters to the Attorney General, and sets no standard for the Attorney General's decision-making in this context.

Id. Accordingly, that case supports the Department's position that no meaningful standard exists, which prompted, in part, the Department's decision to withdraw this authority.

Further, as discussed, *supra,* regarding the Board's certification authority, precedential decisions, including by the Attorney General, *e.g., Matter of J-J-,* 21 I&N Dec. at 984, have been ineffective at checking inconsistent or abusive usages of *sua sponte* authority. Thus, the Department finds that further Attorney General review of such authority would not necessarily address the concerns regarding its use. Moreover, the current—and comparatively inefficient—case-by-case nature of determining ''exceptional circumstances,'' the inconsistent application of that standard and its consideration through an open-ended and largely subjective lens by Board members and immigration judges, and the lack of an effective and efficient corrective measure for addressing improper reopenings under that authority (*e.g.,* in response to a motion or to cure filing defects or circumvent regulations), all make the subject of *sua sponte* reopening authority both ripe for rulemaking and, ultimately, withdrawal of such authority. *See Lopez* v. *Davis,* 531 U.S. 230, 244 (2001) (observing that ''a single rulemaking proceeding'' may allow an agency to more ''fairly and efficiently'' address an issue than would ''case-by-case decisionmaking''); *Marin-Rodriguez* v. *Holder,* 612 F.3d 591, 593 (7th Cir. 2010) (''An agency may exercise discretion categorically, by regulation, and is not limited to making discretionary decisions one case at a time under open-ended standards.'').

Comment: Commenters explained that, under *Ekimian* v. *INS,* 303 F.3d 1153, 1158 (9th Cir. 2002), *sua sponte* decisions are not reviewable simply as a result of their discretionary nature, which the commenter alleged was not a reasonable or sufficient justification to retract the authority since other discretionary matters were not so scrutinized.

Response: Sua sponte authority is distinct from other discretionary forms of relief. As aptly explained in *Lenis, sua sponte* authority is subject to an exception prohibiting judicial review, 5 U.S.C. 701(a)(2), because the statute from which it derives is ''drawn in such broad terms that in a given case there is no law to apply.'' 525 F.3d at 1293 (quoting *Citizens to Preserve Overton Park, Inc.,* 401 U.S. at 410). Other forms of discretionary relief, such as asylum, do not meet this exception. Accordingly, the commenters' comparison of *sua sponte* authority to any other discretionary form of relief is incorrect; moreover, the Department did not justify withdrawing *sua sponte* authority based solely on its discretionary nature, though that nature has contributed to inconsistent application.

Comment: Commenters explained that the Department's citations to circuit court decisions upholding the denial of a request for *sua sponte* reopening does not support the Department's concern that the *sua sponte* authority is being abused; instead, the commenters contend that those cases demonstrate that immigration judges and the BIA are applying the BIA's precedents limiting the use of that authority to truly exceptional situations. Commenters further explained that courts have only limited jurisdiction to review the BIA's decision not to use its *sua sponte* authority to reopen a case based on legal or constitutional errors. Accordingly, the commenters asserted that the BIA's decision on *sua sponte* authority is generally final and thus does not contribute to inefficiencies in the immigration courts or the BIA.

Response: The Department's reference to circuit court decisions in the NPRM, 85 FR at 52505, was not meant to

demonstrate abuse of the authority. Instead, the Department collected cases to underscore the fact that, generally, ''no meaningful standards exist to evaluate the BIA's decision not to reopen or reconsider a case based on *sua sponte* authority.'' *Id.* Moreover, commenters did not acknowledge that DHS lacks authority to appeal BIA decisions to Federal court; accordingly, there necessarily will be few circuit court decisions holding that the BIA abused its *sua sponte* authority in reopening a case in which reopening inured to the benefit of the alien.[53]

Commenters are correct that some courts have held that there is jurisdiction to review the BIA's denial of a motion to reopen *sua sponte* for constitutional or legal error. However, the Department's finality and consistency concerns still stand—absent the rule, *sua sponte* authority may still be exercised by either immigration judges or the BIA in an inconsistent or inappropriate manner, which undermines the importance of decisional finality. Moreover, the acknowledged lack of meaningful standards invites inconsistent application which is at odds with both decisional finality and principle of treating similar cases in a similar manner. Given all of these issues and understanding commenters' concerns, the Department maintains that withdrawing *sua sponte* authority, on balance, represents an appropriate course of action.

iv. Obligations Under International and Domestic Law and Treaties

Comment: Various commenters stated that removing *sua sponte* authority violated the United States' obligations under international law, specifically the American Declaration, to ''protect and preserve the rights of individuals (both U.S. citizens and noncitizens) to establish a family.'' Commenters explained that ''refugee law'' provides for a '' 'refugee sur place,' meaning that something has changed to create a fear of return to the country of origin.'' Commenters stated that *sua sponte* authority allowed for reopening such cases and other related circumstances. Commenters explained that *sua sponte* authority facilitates compliance with the UN Protocol and Convention Relating to the Status of Refugees, the UN Convention Against Torture (CAT), and the TVPRA because adjudicators may reopen cases in which newly discovered or previously unavailable material evidence relevant to a persecution claim is discovered more than 90 days after a decision becomes administratively final. Accordingly, the commenters alleged that refoulement would increasingly occur. Commenters also explained that removing *sua sponte* authority conflicted with UNHCR guidelines that provide that an applicant should ''not be prohibited from presented new evidence at the appeals stage.'' Commenters reasoned that *sua sponte* authority may be an alien's only way to present new evidence on appeal, thus, removal of such authority would conflict with the UNHCR guidelines.

Response: As an initial point, as discussed, *supra,* an alien has no right to file a ''motion to reopen *sua sponte,*'' and such a motion is an ''oxymoron.'' *See Malukas,* 940 F.3d at 970. To the extent that commenters assert that the withdrawal of *sua sponte* authority infringes upon such a right, they are simply mistaken as a matter of law. Further, no domestic law or international convention enshrines a right to *sua sponte* reopening, and the withdrawal of such authority, which exists solely through a delegation from the Attorney General, does not contravene any binding body of law.

Further, because the rule does not foreclose other mechanisms that may be used as exceptions to time and number limits, as discussed, *supra,* withdrawal of *sua sponte* authority does not constitute denial of protection for particular populations, nor does it contradict the United States' obligations under international and domestic law and various treaties. The United States continues to fulfill its obligations under international and domestic law, including the 1967 Protocol, the CAT, the TVPRA, and any other applicable treaties. This rulemaking does not violate those obligations. Moreover, this rule does not affect the ability of aliens to file a motion to reopen to apply for asylum or statutory withholding of removal based on changed country conditions and supported with new, material evidence. INA 240(c)(7)(C)(ii), 8 U.S.C. 1229a(c)(7)(C)(ii). Further, the Department continues to provide all aliens, including refugees and children, a meaningful opportunity to resolve their claims, in accordance with applicable law, regulations, and obligations under international law. In short, this rule does nothing to restrict an alien's ability to seek asylum, statutory withholding of removal, or other protections as permitted by statute and regulation.

v. Alternatives to *Sua Sponte* Authority

Comment: Commenters disagreed with the rule's assertion that a joint motion to reopen was a viable alternative to *sua sponte* authority because, as commenters explained, DHS and immigrants are ''rarely in agreement'' in regard to motions to reopen. The commenters explained that the joint motion process places ultimate authority to reopen or reconsider a case on DHS, which is not the case with *sua sponte* requests; thus, the joint motion was not an equitable alternative.

Commenters explained that removing *sua sponte* reopening while at the same time removing the BIA's ability to remand a case for consideration of new evidence presented by the respondent, instead instructing the respondent to file a motion to reopen, was particularly ''harsh.'' Further, commenters averred that the Department could not claim there were ''sufficient avenues available'' to present claims for relief when the Department had both restricted the BIA's ability to remand a case and had eliminated *sua sponte* reopening.

Commenters explained that although the rule mentions the ability to toll the time and number limitations on motions to reopen, equitable tolling and the Department's procedures for motions to reopen are difficult for lawyers, much less pro se parties, to understand. Accordingly, commenters claimed that equitable tolling and motions to reopen were not viable avenues for relief.

Commenters suggested that instead of removing *sua sponte* authority, the Department should define ''exceptional circumstances.'' The commenters explained that this would preserve the flexibility associated with *sua sponte* action while also providing the circuit courts with a meaningful standard of review to review *sua sponte* reopening or reconsideration. Commenters explained that although exercising *sua sponte* authority should be rare, it was ''worthy of consideration,'' especially in cases where DHS does not oppose the motion to reopen. Commenters suggested that the BIA and the immigration judges could reject ''improper invitations'' to invoke *sua sponte* authority, rather than remove the authority altogether. One commenter

[53] Consistent with the general tenor of comments focusing only on the rule's alleged impact on aliens, commenters also failed to acknowledge that the Board has exercised *sua sponte* authority in response to motions filed by DHS. *See, e.g., Chehazeh* v. *Att'y Gen.,* 666 F.3d 118, 124 (3d Cir. 2012). In such circumstances at least one circuit court has questioned whether the Board's decision to exercise *sua sponte* authority was an abuse of that authority. *Id.* at 140 (''The BIA has plainly stated that its *sua sponte* authority is not designed to 'circumvent the regulations.' *Matter of J-J-,* 21 I&N Dec. at 984. That authority may, of course, have the effect of circumventing the regulations when an exceptional situation calls for it, but wherever the line between an unexceptional situation and an exceptional situation lies, we wonder whether—on this record—this case is near it.'').

explained that the rule's failure to consider these alternatives renders the rule arbitrary and capricious in violation of the APA.

Response: The Department maintains that the rule does not disturb various viable alternatives to *sua sponte* authority. Indeed, the Department reiterates that respondents have no right to an adjudicator's *sua sponte* exercise of authority and that a motion to reopen *sua sponte* is an ''oxymoron.'' *See Malukas,* 940 F.3d at 970. Although the contours of such alternatives may differ to some extent from *sua sponte* authority, the alternatives noted remain viable alternatives for aliens, both with and without representation. 85 FR at 52505–06. Aliens may seek a motion to reopen under well-established statutory and regulatory procedures, including to submit a new application for relief or protection. They may seek a joint motion with DHS. They may seek equitable tolling of time limitations, as appropriate, based on case law. The rule itself codifies new exceptions to time and number limitations for motions to reopen. 8 CFR 1003.1(c)(3)(v). Thus, there remain multiple, significant avenues for an alien to have his or her case reopened as appropriate.

Regarding commenters' assertion that removing *sua sponte* reopening while at the same time removing the BIA's ability to remand a case for consideration of new evidence presented by the respondent, instead instructing the respondent to file a motion to reopen, was particularly ''harsh,'' the Department again reiterates both that an alien has no right to *sua sponte* reopening and that the concept of a motion to reopen *sua sponte* is an oxymoron. Thus, the withdrawal of the delegation of the BIA's *sua sponte* reopening authority is not ''harsh''—regardless of any other changes—because there is no right to the exercise of such authority in the first instance. Moreover, as discussed, *supra,* multiple avenues remain for an alien to have his or her case reopened as appropriate. Further, an alien who wished to submit additional evidence during the pendency of an appeal would presumably be able to submit that evidence with a motion to reopen within the applicable time period for such a motion and, thus, would have no need to avail himself of the BIA's *sua sponte* authority. In short, the Department disagrees with commenters that it changes are ''harsh'' and further notes that any alleged ''harshness'' is outweighed by the benefits provided by the rule discussed herein.

The rule does not affect the alien's ability to argue for equitable tolling of a time limit or to seek a joint motion with DHS. The alleged difficulty of arguments for equitable tolling is belied by the frequency with which it has been argued before the BIA and Federal courts, and every Federal court to have considered the issue has found it to be applicable to deadlines for motions to reopen. *See, e.g., Avila-Santoyo* v. *U.S. Att'y Gen.,* 713 F.3d 1357, 1364 (11th Cir. 2013) (per curiam) (collecting cases). Furthermore, one commenter's suggestion that *sua sponte* authority should be used when DHS does not oppose a motion to reopen—though, as noted, *supra, sua sponte* authority is not exercised in response to a motion—actually suggests that a joint motion with DHS would be a viable alternative, at least in the case identified by the commenter.

The Department also considered the alternatives advanced by commenters. As discussed elsewhere, a standard for ''exceptional circumstances'' has existed since 1997, *Matter of J-J-,* 21 I&N Dec. at 984, but that standard has not prevented inconsistent or improper usage of *sua sponte* authority. Thus, the Department does not believe that further elaboration of that standard would address the concern. Because *sua sponte* authority is not properly exercised in response to a motion or ''invitation,'' 85 FR at 52504–05, the Department does not see how limiting the use of such authority to only ''proper'' invitations would be appropriate, even if it could devise a workable and consistently applied distinction between ''proper'' and ''improper'' invitations. Similarly, situations in which DHS does not oppose a motion to reopen are not appropriate for the exercise of *sua sponte* authority because such authority is not exercised in response to a motion. *Id.* Rather, such situations appear amenable to a joint motion which the rule does not alter. 8 CFR 1003.2(c)(3)(iii). In short, the Department has considered commenters' concerns about the available alternatives to the exercise of *sua sponte* authority, but finds them unpersuasive or legally inapposite for the reasons given.

Finally, to the extent that commenters' concerns are based on a belief that *sua sponte* authority should be retained because it allows aliens to file motions to reopen *sua sponte* in order to circumvent time and number bars to motions to reopen, the Department reiterates that the exercise of *sua sponte* authority is not proper in response to a motion and that its use to circumvent regulatory or statutory deadlines contravenes established case law and, accordingly, supports the Department's decision to withdraw that authority.

vi. Other Concerns

Comment: Commenters alleged that although the Department addressed the use of *sua sponte* authority in precedential decisions, the Department failed to address whether the BIA's use of *sua sponte* authority in non-precedential decisions forms the vast majority of its docket. The commenters claimed that EOIR was in the ''better position'' to address this issue but that it failed to analyze the issue.

Response: The extent to which *sua sponte* authority is used in non-precedential decisions did not and would not affect the Department's conclusion that such authority is no longer appropriate. As described in the NPRM, the Department withdrew *sua sponte* authority for several reasons: ''the exceptional nature of a situation required to invoke *sua sponte* authority in the first instance, the general lack of use of genuine *sua sponte* authority since 2002, and the availability of multiple other avenues to reopen or reconsider cases and to alleviate the hardships imposed by time and number deadlines.'' 85 FR at 52506. Although the Department noted the extremely limited use of *sua sponte* authority in precedential decisions, the Department did not withdraw *sua sponte* authority based on that consideration alone. The Department's conclusion, was multi-faceted, and regardless of the nature of cases in which *sua sponte* authority is exercised, the Department has determined that it is appropriate to withdraw *sua sponte* authority because, *inter alia,* there are multiple viable alternatives for both parties, its use undermines efficiency by encouraging improper motions, and its potentially inconsistent and borderline *ad hoc* usage is both inappropriate and inefficient to the extent that it is used to reopen cases contrary to law.

Comment: Without further explanation, one commenter alleged that removing *sua sponte* authority would violate principles of ''equal protection under the law for all.'' Also without further explanation, a commenter stated that limiting *sua sponte* motions to reopen would continue the family separation policy. One commenter disagreed with the rule, stating that its fixation on the phrase *sua sponte* ''converts an important issue of fairness and justice into a debate over semantics.'' Commenters explained that removing *sua sponte* authority violated the APA because Congress did not enact limits on such authority, thereby

infringing on congressional authority to create laws.

Response: The Department disagrees with commenters that these provisions generally violate equal protection. The Department continues to equally apply applicable law and regulations to all aliens in proceedings before the agency. In addition, the Department rejects allegations, which contained no further explanation, that the rule furthers any family separation ''policy.'' To the extent the commenter was referring to the prosecution of criminal aliens along the southwest border in late spring 2018 which involved the separation of alien criminal defendants from their families while those defendants were being prosecuted—consistent with the treatment of most criminal defendants subject to arrest in the United States—there is no identifiable linkage between this rule and that situation.

As previously explained, *sua sponte* authority is a product of regulation; Congress has not statutorily established this authority. Accordingly, withdrawing this authority does not violate the APA or infringe on congressional authority. To the contrary, preventing the Attorney General from withdrawing authority that is his alone to delegate in the first instance would infringe upon his statutory authority. INA 103(g), 8 U.S.C. 1103(g). Further, courts afford broad deference to an agency's policy changes. ''Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.'' *Encino Motor Cars* v. *Navarro,* 136 S. Ct. 2117, 2125 (2016) (citing *Nat'l Cable & Telecomm. Assn.* v. *Brand X internet Services,* 545 U.S. 967, 981–982 (2005)). The Department provided an extensive discussion in the NPRM, supplemented by this final rule, to explain its reasoning for withdrawing *sua sponte* authority. 85 FR at 52504–06. This discussion did not ''fixate'' on semantics or any one reason to justify withdrawing *sua sponte* authority. Rather, the Department provided a fulsome discussion, supplemented by this final rule, of the many reasons that, considered together, prompted withdrawal of *sua sponte* authority.[54]

l. DHS Motions To Reopen Time and Number Limitations (8 CFR 1003.2(c)(3)(vii))

Comment: Commenters expressed concern that the NPRM's proposed changes regarding the time and number limitation for DHS motions to reopen before the BIA are unfair and would create different rules for the government and for aliens in proceedings, noting that both aliens and the government at times have good cause to file motions to reopen that exceed the normal time and number limitations. Commenters were concerned that the change would give DHS favorable or preferential treatment. Commenters noted that allowing DHS to file motions to reopen without regard to any time or number limitations would prevent aliens who have been in proceedings from ever feeling confident that the decision in their case is final. At least one commenter stated the Department should restrict DHS's ability to file motions to reopen before the BIA and create parity between the parties rather than have the same unequal procedures before both the immigration courts and the BIA.

Response: In 1996, Congress amended the INA and provided specific restrictions regarding motions to reopen filed by aliens in proceedings. *See* INA 240(c)(7), 8 U.S.C. 1229a(c)(7). The INA restricts aliens to file one motion to reopen proceedings within 90 days of the date of the entry of a final order of removal, subject to time and number exceptions based on lack of notice and when the motion to reopen is premised on changed country conditions in support of an application for asylum. *Id.* Notably, however, Congress did not provide any similar restriction on motions to reopen filed by the government. Accordingly, the Department previously removed the time and number limitation on motions to reopen filed by the government as part of the regulatory changes implemented following the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (''IIRIRA''), Public Law 104–208, Sept. 30, 1996, 108 Stat. 1796. *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 10312, 10321 (Mar. 6, 1997) (explaining, in response to public comments that the same limitations on motions to reopen should apply to all parties, that ''IIRIRA specifically mandates that '[a]n alien may only file one motion to reopen' in removal proceedings. Congress has imposed limits on motions to reopen, where none existed by statute before, and specifically imposed those limits on the alien only.'').[55]

Here, the rule's amendment to 8 CFR 1003.2(c)(3)(vii) regarding motions to reopen filed by DHS similarly aligns the BIA's regulations with the INA's limitation only on alien-filed motions to reopen. By ensuring that EOIR's regulations provide clarity for the public regarding the requirements and restrictions set out by Congress in the INA, commenters are incorrect that the Department is providing DHS with any favorable or preferential treatment.

To the extent that commenters are concerned that aliens will be unable to have confidence that their cases will be subject to an infinite number of motions to reopen for an indefinite amount of time, the Department first emphasizes that any motion to reopen filed by DHS is not automatically granted by the BIA. Instead, like all motions to reopen, DHS must ''state the new facts that will be proven at a hearing to be held if the motion is granted,'' support the motion with ''affidavits or other evidentiary material,'' and demonstrate that the ''evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing.'' 8 CFR 1003.2(c)(1). As with all motions and appeals, the BIA considers the merits of each motion to reopen individually. Moreover, DHS has possessed the authority to file motions to reopen at the immigration court level without being subject to the general time and number bars since 1997, and there is no evidence that it has engaged in a practice of filing infinite motions over an indefinite period. Accordingly, the Department finds that commenters' concerns are overstated, if not wholly unfounded, in light of the applicable regulatory requirements and DHS's practice before the immigration courts.

Finally, apart from being statutorily atextual and ahistorical regarding DHS practice, commenters' suggestion that the rule provides DHS with preferable treatment fails to acknowledge the various exceptions to time and number limitations afforded motions to reopen filed by aliens. First, there is not a limitation when the motion to reopen is

[54] The text of 8 CFR 1003.2(a) in the NPRM inadvertently removed the phrase ''or reconsider'' from the first sentence of that paragraph. This final rule reinserts that phrase to ensure that parties and the BIA are clear that the Board can reconsider a decision *sua sponte* in order to correct a typographical error or defect in service.

[55] Notably, although the regulatory changes in 1997 only explicitly codified the exception to the time and number limitations filed by the government in removal proceedings before the immigration court, commenters at the time understood the changes to apply to motions to reopen filed by the government before the BIA and the immigration courts. *See* 62 FR at 10321 (''A number of commenters pointed out that §§ 3.2(d) and 3.23(b) subject all parties to time and numerical limits for motions to reopen in deportation and exclusion proceedings, but apply those limits only to aliens in removal proceedings.'').

for the purpose of applying or reapplying for asylum or withholding of removal based on changed country conditions ''if such evidence is material and was not available and could not have been discovered or presented at the previous hearing.'' 8 CFR 1003.2(c)(3)(ii). Second, as discussed, *supra,* aliens may rely on equitable tolling in certain circumstances to avoid a strict application of the time deadlines for motions to reopen. Third, the rule itself provides a new avenue for aliens to file a motion to reopen when a ''material change in fact or law . . . vitiates all grounds of removability applicable to the alien.'' 8 CFR 1003.2(c)(3)(v). In short, the rule retains significant options for aliens to file motions to reopen which offset the unsupported allegations of allegedly favorable treatment, even if such treatment were not rooted in statutory text.

m. Briefing Schedule Changes (8 CFR 1003.3(c))

i. General Concerns

Comment: Commenters raised concerns with the rule's changes to the briefing schedule process, claiming that the changes favor speed over fairness and that the limited time savings does not sufficiently outweigh the disadvantages to the parties.

Response: The Department expects the Board to adjudicate cases fairly and efficiently, 8 CFR 1003.1(d)(1) (noting that Board members will resolve cases in both a ''*timely*'' and ''*impartial*'' manner (emphasis added)), and does not view ''speed'' and ''fairness'' as mutually exclusive objectives. Consequently, the rule not favor one goal over the other, and commenters' suggestion amounts to a false dichotomy that cases cannot be handled both fairly and efficiently.

As explained in the NPRM, due to the growing BIA caseload, the Department finds it necessary to implement these briefing schedule reforms to ensure that appeals are adjudicated in a timely manner. 85 FR at 52492–93. In doing so, the Department disagrees with commenters' unsubstantiated alleged potential difficulties caused by the briefing schedule changes outweigh the benefits of more prompt adjudication. Further discussion of commenters concerns with specific briefing-related changes follows below.

ii. Simultaneous Briefing

Comment: Regarding the rule's change to require simultaneous briefing in all cases, commenters noted that almost every appellate adjudication system in the United States uses sequential briefing in order to allow the parties to respond to each other's arguments. By contrast, commenters claimed that under this rule, the non-appealing party will not receive sufficient notice of which arguments to focus on in their brief, as the appealing party may include multiple issues in the Notice of Appeal but only brief a few of those issues. Commenters allege that this will result in briefs with cursory coverage of every topic rather than focused arguments on the few key issues raised in the appellant's brief. Commenters stated this would be particularly problematic in cases with difficult legal issues, such as unaccompanied children or gender-based asylum claims. Commenters also claimed that simultaneous briefing would require the BIA to expend additional effort in reviewing the appeal record, as the parties would no longer be vetting each other's arguments through sequential briefing and instead may focus on different issues. Commenters further argued that non-detained cases have larger administrative records due to non-detained persons generally having greater relief eligibility and do not invoke the same liberty interests as detained cases, which makes simultaneous briefings less appropriate. Commenters also noted that briefing every potential issue would also inevitably conflict with the BIA's page limit requirements.[56] As a result, one commenter recommended changing all briefing, including detained cases, to non-simultaneous sequential briefing.

Response: Commenters generally failed to engage the specific reasons put forth by the Department—both in the NPRM and previously when it proposed simultaneous briefing in 2002, 85 FR at 52498–99—for adopting simultaneous briefing in all cases or to acknowledge that a change to simultaneous briefing falls principally on DHS because the vast majority of Board appeals are filed by respondents whose initial brief timing as an appellant is unchanged by this rule.[57] To the extent that commenters simply disagree as a policy matter that Board cases should be completed in a timely manner, *see* 8 CFR 1003.1(d); *cf. Doherty,* 502 U.S. at 323 (''as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States''), or that the Department should take measures, consistent with due process, to ensure the timely completion of such cases, the Department finds such policy disagreements unpersuasive for the reasons given in the NPRM and this final rule.

The BIA has used simultaneous briefing for detained appeals for nearly 20 years,[58] with no apparent issues for the parties or the BIA.[59] Conforming non-detained appeals to the same simultaneous briefing schedules will provide consistency across all appeals while helping to more efficiently process the growing appeals caseload. As such, the Department disagrees with commenters requesting that all appeal move to non-simultaneous briefing.

Commenters' suggestion that the non-appealing party will not receive sufficient notice of which arguments to focus on in their brief because the appealing party may include multiple issues in the Notice of Appeal but only brief a few of those issues is both conjectural and illogical, as party who fails to raise an issue in a brief risks having that issue deemed waived. Thus, the Department would expect that all issues raised in the Notice of Appeal will be briefed.

The Department also disagrees with commenters that the non-appealing party will have difficulty drafting a simultaneous brief without first having the appealing party's brief to review. To reiterate, this system already occurs in the context of appeals of detained cases, and commenters did not explain why that system has not experienced the problems alleged to necessarily result

[56] *See BIA Practice Manual* at Ch. 3.3(c)(iii) (limiting briefs to 25 pages absent a motion to increase the page limit).

[57] In FY 2019, respondents filed 50,129 appeals from immigration judge decisions, compared to 5,636 appeals filed by DHS and 116 cases in which both parties filed an appeal. Preliminary data from FY 2020 paints a similar picture: Respondents filed 45,117 appeals from immigration judge decisions, compared to 5,965 appeals filed by DHS and 117 cases in which both parties filed an appeal. Because the appellant filed the initial brief under the prior regulation, in approximately 90 percent of appeals in FY 2019 and approximately 88 percent of appeals in FY 2020, the change to simultaneous briefing would have had no impact on the timing of the brief filed by a respondent.

[58] 67 FR 54878.

[59] In an analogous situation, EOIR's Office of the Chief Administrative Hearing Officer (OCAHO) also utilizes a simultaneous 21-day briefing schedule for cases reviewed by the CAHO following the decision of an administrative law judge. 28 CFR 68.54(b)(1) (''In any case in which administrative review has been requested or ordered pursuant to paragraph (a) of this section, the parties may file briefs or other written statements within twenty-one (21) days of the date of entry of the Administrative Law Judge's order.''). OCAHO cases under the provisions of INA 274A and 274C, 8 U.S.C. 1324a and 1324c, involve violations of worksite enforcement laws, including violations related to completion of Form I–9, and document fraud, and they are just as complex or involved as cases in immigration court, if not more so. Yet, the Department is unaware of any challenge to OCAHO's simultaneous 21-day briefing schedule for administrative reviews or any reason why it is not an appropriate model or analogy for such a schedule before the BIA.

from utilizing the same system for non-detained cases on appeal. Further, as explained in the NPRM, the appealing party must identify the reasons for the appeal in the Notice of Appeal (Form EOIR–26 or Form EOIR–29) or in any accompanying attachments. 8 CFR 1003.3(b). In doing so, the appealing party must already comply with the following well-established requirements which are unaltered by the final rule:

- The party taking the appeal must identify the reasons for the appeal in the Notice of Appeal (Form EOIR–26 or Form EOIR–29) or in any attachments thereto, in order to avoid summary dismissal pursuant to § 1003.1(d)(2)(i).
- The statement must specifically identify the findings of fact, the conclusions of law, or both, that are being challenged.
- If a question of law is presented, supporting authority must be cited.
- If the dispute is over the findings of fact, the specific facts contested must be identified.
- Where the appeal concerns discretionary relief, the appellant must state whether the alleged error relates to statutory grounds of eligibility or to the exercise of discretion and must identify the specific factual and legal finding or findings that are being challenged.

Id.

Commenters did not generally address why this information, which should already be contained in the Notice of Appeal, is insufficient to apprise the opposing party of the issues on appeal.[60] *See also BIA Practice Manual* at Ch. 4.4(b)(iv)(D) (''The statement of appeal is not limited to the space on the form but may be continued on additional sheets of paper . . . Parties are advised that vague generalities, generic recitations of the law, and general assertions of Immigration Judge error are unlikely to apprise the Board of the reasons for appeal.''). As a result, the Department believes these statements provide the non-appealing party with ample information to draft a simultaneous brief in non-detained cases, just as it has in detained cases for many years.

Finally, the Department also has no concerns that appellees will be unable to follow the page limit requirements for briefs, and such concerns are unsupported by any evidence and wholly speculative. Moreover, increases are available by motion at the BIA's discretion. *See BIA Practice Manual* at Ch. 3.3(c)(iii).

iii. Briefing Extensions

Comment: Commenters were also concerned about the shortened timeframe for briefing extensions, explaining that by the time a filer receives a response as to whether or not the extension is granted, the 14 days would be nearly expired. Moreover, commenters were concerned with limiting the briefing extension to a single 14-day period, noting that there may be issues that prevent filing within the 14-day extension period, including serious medical issues or a death in the family.

Commenters were also concerned that the shortened briefing extension timeframe would lead to less legal representation before the BIA. Commenters stated that if newly retained counsel, including pro bono counsel, cannot receive a reasonable extension to review the record and prepare a brief, it is unlikely the counsel would accept representation in order prevent the possibility of providing ineffective representation. As a result, commenters were concerned that this rule would make pursuing appeals even more difficult for pro se respondents.

One commenter stated that requiring the BIA to make individualized good cause determinations for briefing extensions would create a significant burden for the BIA.

Commenters also raised issues with the NPRM's reference to preventing ''gamesmanship'' as a reason to shorten the briefing extension time period, stating that the Department did not provide support for this claim.

Commenters claimed that the shortened briefing schedule changes would also create institutional bias against women, such as due to timing issues surrounding child birth and child care responsibilities.

Another commenter stated that shortening the briefing extension period during the COVID–19 pandemic was improper.

Response: As an initial matter, the Department notes that underlying most commenter objections was a tacit suggestion that there is an entitlement to briefing extensions and that they should be granted by the Board as a matter of right. That view is incorrect. Briefing extensions are generally disfavored, as parties, including newly retained counsel, should be completing their briefs in the original allotted time, particularly in cases where the briefing period only begins once transcripts are complete. *See BIA Practice Manual* at Ch. 4.7(c)(i), (''In the interest of fairness and the efficient use of administrative resources, extension requests are not favored.''). Further, there is no entitlement to a briefing extension, and to the extent that commenters opposed the NPRM because they believe parties have a right to an extension—*e.g.,* for newly retained counsel—they are mistaken. *Id.* at ch. 4.7(c) (''The Board has the authority to set briefing deadlines and to extend them. The filing of an extension request does not automatically extend the filing deadline, nor can the filing party assume that a request will be granted. Until such time as the Board affirmatively grants an extension request, the existing deadline stands.'').

Additionally, few commenters acknowledged that notwithstanding the existing language of 8 CFR 1003.3(c)(1), the Board's longstanding policy has been to limit briefing extensions to 21 days. *BIA Practice Manual* at Ch. 4.7(c)(i). Nor did commenters generally acknowledge that the Board already possesses the authority to shorten the overall briefing period to less than 21 days. 8 CFR 1003.3(c)(1). Consequently, the final rule merely codifies timelines that the Board itself could choose to adopt, and commenters did not persuasively explain why it would preferable for the Board to adopt those changes through policy or case-by-case adjudication rather than through rulemaking. *See Lopez,* 531 U.S. at 244 (observing that ''a single rulemaking proceeding'' may allow an agency to more ''fairly and efficiently'' address an issue than would ''case-by-case decisionmaking''); *Marin-Rodriguez,* 612 F.3d at 593 (''An agency may exercise discretion categorically, by regulation, and is not limited to making discretionary decisions one case at a time under open-ended standards.'').

To the extent that commenters assert as a policy matter that the Board should always grant a briefing extension for a maximum amount of time because such extensions inherently delay adjudication in the case to the benefit of aliens, *cf. Doherty,* 502 U.S. at 323 (''as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States''), or that the Department should not take measures, consistent with due process, to ensure the timely completion of cases, the Department finds such policy disagreements unpersuasive for the reasons given in the NPRM and this final rule. Moreover, few, if any, commenters acknowledged that this rule applies equally to DHS, which will also have to comply with the timelines, or that this rule will benefit aliens with meritorious claims for relief

[60] Commenters did not challenge 8 CFR 1003.3(b), which has been in effect for many years, or suggest that its requirements were inappropriate. To the extent that commenters assert that parties do not comply with this regulatory requirement, such regulatory noncompliance is not a persuasive basis to adopt commenters' objections. The Department expects both parties to comply with all regulatory requirements regarding appeals adjudicated at the Board.

or protection by allowing them to receive a decision sooner. To the extent that commenters did not fully assess the implication of the rule—and, thus, provided comments without a complete foundation—the Department finds those comments unpersuasive.

The briefing extension time period in this rule is sufficient for parties to file their briefs, and commenters have not persuasively explained why a total of up to 35 days is an insufficient amount of time to file a brief. Moreover, few commenters acknowledged that the BIA can ask for supplemental briefing if it finds that the briefs submitted are inadequate, which allows an additional opportunity for parties to submit arguments if the BIA believes such additional argument is necessary. The Board, rather than the parties, is ultimately in the best position to determine whether briefing is sufficient in a particular case, and this rule does not restrict the Board's ability to request supplemental briefing if it believes such briefing is helpful. 8 CFR 1003.3(c)(1). In short, the procedures and time provided by this rule are sufficient to ensure that the Board receives appropriate information through briefing in order to aid its adjudication. Further, as noted in the NPRM, 85 FR at 52498–99, the parties need not wait until a briefing schedule is actually issued to begin drafting the brief, and they can use any extension to complete the brief, as appropriate.

The Departments disagree with commenters' supposition that shortened briefing extension time periods will lead to less representation at the BIA. As an initial point, commenters did not explain why a respondent would wait until a briefing schedule has been issued or a brief is due before retaining representation. The Department expects that most aliens whose cases are on appeal will obtain representation as quickly as possible, especially in the cases in which the respondent files the Notice of Appeal. Commenters did not explain what incentive an alien would have to wait until an appeal has been pending for a notable length of time before engaging representation, and the Department is aware of none. Moreover, in any litigation, newly retained counsel takes a client as he or she finds him, and as discussed above, there is no entitlement to a briefing extension in any circumstance, even for newly retained counsel. Consequently, the same concerns advanced by commenters already exist under the present system—*i.e.,* a new representative may be unsuccessful at obtaining an extension of the briefing schedule—and are unaltered by the rule.[61]

Further, the Department's BIA Pro Bono Project is not tied to the issuance of a briefing schedule. The Department reviews cases for referral through that Project upon the filing of a Notice of Appeal, not upon the issuance of a briefing schedule. Moreover, under current practice, pro bono volunteers who accept a case typically receive a copy of the alien's file before a briefing schedule is issued and, like all representatives, may request an extension if appropriate. Consequently, there is no evidence that shortening the length of a briefing extension, which is already a disfavored practice and not guaranteed to any representative, will have any negative impact on representation before the BIA, particularly pro bono representation.

Regarding commenters' concerns with requiring the BIA to make individualized good cause determinations for briefing extensions, commenters are incorrect that this requirement will significantly burden the BIA. Indeed, such good cause determinations are already incorporated into the regulations, 8 CFR 1003.3(c)(1), and, thus, also into the current BIA practice. Accordingly, the final rule does alter the need for the Board to find good cause in order to grant a briefing extension.

With regards to ''gamesmanship,'' the Department notes that the shortened briefing extension period may help to reduce any possible future gamesmanship attributable to last-minute extension requests in two respects. First, in the Board's experience, it is not uncommon to receive a briefing extension request filed just before or on the date a brief is due, suggesting that many extension requests are merely last-minute delay tactics rather than genuine representations of unforeseen circumstances preventing adherence to the original schedule. Second, such last-minute requests often occur after the opposing party has already served its brief, as a party submitting a brief by mail will often do so several days in advance of the deadline to ensure that it is timely received. In such situations, if the extension request is granted, the party who sought the extension would then have at least a full 21 days to review the opposing party's brief and tailor its arguments accordingly in filing an initial brief.

The Department acknowledges that eliminating briefing extensions altogether would also eliminate these risks of dilatory tactics and gamesmanship. However, after considering that alternative, the Department does not believe it is necessary at the present time. Although the final rule will not end either dilatory tactics or gamesmanship, shortening the period for a briefing extension will reduce both the incentive to engage in such tactics and the impact on both the BIA's efficiency and the opposing party when such tactics are employed.[62]

In response to comments about COVID–19, the Department recognizes the challenges caused by the pandemic. However, those challenges are largely inapplicable to the BIA which has maintained generally regular operations during the COVID–19 outbreak because it typically receives briefs by mail or expedited courier service, and it began accepting briefs by email during the pandemic until after it was cleared to enter Phase Two of the Department's plan for returning to normal operations.[63] Moreover, the BIA is scheduled to adopt ECAS in early 2021. Consequently, these challenges do not warrant maintaining the regulatory maximum length for a briefing extension, particularly since the BIA has shortened that length already by policy—which has remained in effect during the COVID–19 outbreak—with no noted adverse effects or challenges.

Lastly, in response to one commenter, the briefing extension changes do not and are not intended to reflect any bias or adverse treatment toward women. To the extent that the commenter suggests that women are incapable of addressing both childbirth or childcare[64] concerns and professional obligations as a representative, the Department categorically rejects such a suggestion.

[61] The Department reiterates that approximately 86 percent of aliens are represented upon appeal under the existing system which is largely condified in this rule. EOIR, *Adjudication Statistics: Current Representation Rates,* Oct. 13, 2020, *available at https://www.justice.gov/eoir/page/file/1062991/download.* Thus, there is even less basis to assert that this rule will increase the number of pro se cases before the Board.

[62] Although the Department is aware of anecdotal examples of gamesmanship and dilatory tactics occurring, it did not state that such activity occurs in every case. Rather, one of the principles animating this provision of the rule, as well as the provision related to simultaneous briefing, is to ensure that the risk of such activity occurring is reduced and, concomitantly, ensuring that the BIA's regulations provide for as efficient and orderly an appeals system as possible. 85 FR at 52498.

[63] The BIA holds oral argument infrequently and has not held any oral argument sessions since before March 2020.

[64] The Department notes, contrary to the commenter's suggestion, that men may also have childcare responsibilities. Nevertheless, the rule imposes no burden on any caregiver any greater than that which already exists for any representative caring for another individual.

Female attorneys routinely practice before the Board without any particular difficulties—as they do before all types of courts and administrative agencies. Nothing in the rule singles out any particular gender nor suggests that certain genders are inherently incapable of compliance with generally applicable and established procedural rules for representation before a tribunal.

Finally, the Department notes that as the Board received briefs from both parties in fewer than half of the cases in which it issued briefing schedules in FY 2019—and received no brief from either party in approximately 18 percent of such cases—the impact of changes to briefing procedures, including a change to simultaneous briefing and the reduction in the maximum time allowable for a briefing extension, is far less than what many commenters speculated based on supposition and unsubstantiated anecdotes.[65] 85 FR at 52498. The Department has considered the issues and concerns raised by commenters but finds them ultimately unpersuasive for the reasons noted. In short, weighing the need for additional operational efficiency, the ability of the Board to request additional briefing in any case if it believes such briefing is necessary, the importance of reducing opportunities for gamesmanship, the actual number of briefs filed and the party identity of most appeals, and the largely speculative or anecdotal issues raised by commenters, the Department finds that, on balance, the benefits of the changes in the final rule significantly outweigh the purported drawbacks.

iv. Reply Briefs

Comment: Commenters raised concerns that the rule would, in practice, prohibit the filing of reply briefs. Commenters stated that the parties would have much less than 14 days to file a reply brief because the time period would be shortened by the length of time required to request and have the BIA grant leave to file the reply brief and by the amount of time it takes the opposing parties' brief to be served by mail, which commenters stated routinely takes approximately five days to receive. Commenters also noted that the Department should take into account the fact that the BIA does not have electronic filing, which would allow the parties to immediately receive opposing briefs and grants of leave to file reply briefs.

Response: The Departments first note that reply briefs are generally disfavored. *See BIA Practice Manual* at Ch. 4.6(h) (explaining that the BIA ''does not normally accept briefs outside the time set in the briefing schedule'' such as reply briefs, but that the BIA may accept reply briefs in limited circumstances). Further, there is no right to file a reply brief, and the Board must accept it through the granting of a motion. *Id.* Most significantly, ''[t]he Board will not suspend or delay adjudication of the appeal in anticipation of, or in response to, the filing of a reply brief.'' *Id.* Commenters did not persuasively explain why shortening the time to file a brief that is already disfavored, not guaranteed to be accepted, and does not suspend the adjudication of an appeal would have any additional impact on such briefs beyond those already established. Moreover, parties that are allowed to file reply briefs should not require significant time to file such briefs as all issues should have already been covered in the Notice of Appeal and the initial simultaneous briefs; thus, any reply briefs should only be clarifications on existing issues. In short, the rule does not prohibit the submission of reply briefs, but its shortened submission timeline recognizes both their already-disfavored status and the reality of the likelihood that they will have a substantive impact on the adjudication of the case.

The Department again notes that EOIR is currently in the process of a staggered nationwide deployment of the EOIR Court & Appeals System (''ECAS''), which will allow registered attorneys and accredited representatives to view electronic records of proceeding and electronically file against them. *See* EOIR Electronic Filing Pilot Program, 83 FR 29575 (June 25, 2018); EOIR, *EOIR Launches Electronic Filing Pilot Program* (July 19, 2018), *available at https://www.justice.gov/eoir/pr/eoir-launches-electronic-filing-pilot-program.* Once ECAS is deployed at the BIA, which is expected in early 2021, registered attorneys and accredited representatives will be able to immediately view and download documents for cases with electronic records of proceeding, which will mitigate commenters' concerns about mail service and its potential effect on briefing schedule timing.

n. Changes to Immigration Judge Transcript Review Process and Forwarding of Record (8 CFR 1003.5)

Comment: At least one commenter opposed the rule's transcript review provisions, stating that immigration judges are best positioned to determine the accuracy of a transcript of a decision. Technology and human error, the commenter alleged, result in routine transcription errors, which the commenter asserted required correction by the immigration judge.

Moreover commenters pointed to the following common transcription errors: Punctuation errors, which can drastically change the meaning of a sentence; mis-transcribed legal language, which can also change the meaning of a sentence; and, errors in names, locations, and other issues. Commenters disagreed with the BIA's need to ''guess'' what the immigration judge said or listen to the audio decision to determine what the transcriber incorrectly typed, and the commenter alleged that without the immigration judge's approval of the ultimate decision and transcript, the BIA would have ''no idea if what was transcribed is what was actually ultimately decided by the immigration judge.'' Commenters explained that the rule lacked any mechanism for the BIA to return the case to the immigration judge to clarify confusion resulting from a hastily made decision. Further, commenters alleged that sending a case back to the immigration judge after a briefing schedule has been issued would result in adjudication delays. The commenter predicted that a significant increase in remands from the Federal courts would result.

Commenters alleged that the current 14-day time period in which an immigration judge must review the transcript and make corrections is too short, given that, as the commenter alleged, it takes more than a year to get a copy of the transcript. The commenter suggested that hiring more transcribers with appropriate training to produce transcriptions in a timely manner or procuring new technology to produce transcriptions with fewer errors would increase efficiency more so than the provisions of the rule.

Other commenters opposed elimination of the 14-day review process because they stated that it sacrificed quality in favor of speed, risking the possibility that errors that could have been corrected at an early stage in the appeal process absent the rule would now require a remand and further delay. The commenters alleged

[65] Preliminary data from FY 2020 indicates that the Board set a briefing schedule in approximately 30,000 cases; the respondent filed a brief in roughly 21,000 cases (69 percent), and DHS filed a brief in roughly 11,500 cases (38 percent). In approximately 5200 cases (17 percent), neither party filed a brief. As noted in the NPRM, 85 FR at 52498, n.15, these numbers treat the filing of a motion to summarily affirm the decision below as the filing of a brief and do not exclude cases in which a party indicated on the Notice of Appeal that it did not intend to file a separate brief.

that subsequent efficiencies to be gained were minimal.

Response: The Department appreciates a commenter's supportive suggestion—and tacit support for additional resources—to hire more transcribers and obtain new technology to improve the quality and timeliness of transcript production. Transcription at the Board may occasionally become an issue, *e.g.,* PM 20–01 at 3 & n.6, and the Department is always looking for additional ways in which to make the process more efficient and accurate. To that end, the Department, through this rulemaking, adopts the NPRM's provisions on this issue without change because it believes such provisions properly balance efficiency in the transcription review process while facilitating the development and distribution of accurate transcripts. Nevertheless, further changes to internal transcription technologies or contracts are outside the scope of this rule.

Regarding other commenters' statements, in general, they did not explain precisely which errors immigration judge review would be able to correct. Immigration judges should not make substantive corrections to a transcript, 85 FR at 52508–09, and there is no operational or legal need for an immigration judge to correct minor typographical errors.[66] To the extent that commenters identified examples of substantive errors, those are generally not the type immigration judges should correct, particularly since the parties are not able to argue whether they are genuinely errors before the immigration judge makes an edit. *Id.; see also Mamedov* v. *Ashcroft,* 387 F.3d 918, 920 (7th Cir. 2004) (''[I]n general it is a bad practice for a judge to continue working on his opinion after the case has entered the appellate process . . . .'').

Many commenters also did not appear to appreciate the distinction in the existing regulation that immigration judges review only the transcript of their decision, not the entire transcript of proceedings. 8 CFR 1003.5(a) (2019). Thus, many potential issues identified by commenters regarding errors in the full transcript of proceedings are inapposite to the change made by this rule.

Additionally, an immigration judge's primary role is to adjudicate cases expeditiously and impartially, not to review transcripts for errors. As explained in the NPRM, the Department uses ''reliable digital audio recording technology,'' 85 FR at 52508, and maintains a procedure through which parties may address defective or inaccurate transcripts, including the errors cited by commenters. *See BIA Practice Manual* at Ch. 4.2(f)(iii) (instructing parties that believe a transcript contains an error that is significant to their argument or the appeal to identify such defect in briefing). Moreover, pursuant to 8 CFR 1003.1(e)(2), the BIA may also remedy defective transcripts through a remand for clarification or correction. Accordingly, the BIA need not ''guess,'' as commenters alleged, at what the transcript said or what the decision held.

Further, the NPRM did not neglect to provide or overlook the need for a mechanism through which defective or inaccurate transcripts could be addressed. The BIA Practice Manual already provides such process; thus, concerns that litigation would proliferate based on the absence of such processes are purely speculative and unfounded. Despite this speculation, the Department reiterates the importance of accurate transcripts and will continue to have procedures, as described in the BIA Practice Manual and 8 CFR 1003.1(e)(2), available to ensure that end.

Circuit courts have affirmed EOIR's current procedures through which parties may address defective or inaccurate transcripts in accordance with the BIA Practice Manual and regulations, and courts have criticized the practice of immigration judge-review of a transcript following the filing of an appeal. *See Witjaksono* v. *Holder,* 573 F.3d 968, 976 (10th Cir. 2009); *Mamedov,* 387 F.3d at 920. Practically, removing the immigration judge-review period will eliminate the possibility that a transcript is incorrectly or inadvertently amended after the decision has been issued. *See* 85 FR at 52508. Given these safeguards and circuit court considerations, the Department disagrees with commenters that immigration judges should continue to use scarce judicial resources to review transcripts of their decisions.

The Department disagrees that the rule sacrifices quality for speed. As noted, *supra,* immigration judges should not make substantive corrections, and there is no operational need for them to make minor typographical corrections. Consequently, the current regulation serves little, if any, purpose and certainly not one that promotes either quality or speed. Moreover, given the quality of EOIR's audio recording technology systems and the protections to ensure accuracy set out in the BIA Practice Manual and available remands to address defective transcripts, the Department finds removing the inefficiencies resulting from the immigration judge-review period will not affect the quality of transcriptions.

Comment: At least one commenter stated that the Department should not end the practice of forwarding physical records to the BIA until ECAS is fully implemented nationwide.

Response: The rule amends 8 CFR 1003.5(a) in relevant part to provide that the immigration court shall promptly forward the record of proceeding to the BIA, ''unless the Board already has access to the record of proceeding in electronic format.'' Accordingly, this change does not end the practice of immigration courts forwarding the record of proceeding, but instead provides the immigration courts and the BIA with flexibilities as ECAS is implemented. It is illogical to require the immigration court to create a physical record of an otherwise electronic record simply for the purposes of sending it to the BIA in case of an appeal if the BIA has the capability of accessing the record electronically.

o. BIA Authority To Grant Voluntary Departure in the First Instance (8 CFR 1003.1(d)(7)(iv), 1240.26(k))

Comment: Commenters raised concerns about the rule's changes requiring the BIA to adjudicate voluntary departure requests rather than remand them back to the immigration courts, explaining that the changes raised significant due process and fairness concerns.

Commenters were concerned about allowing the BIA to adjudicate voluntary departure requests without allowing aliens to submit evidence to the BIA supporting their request. For example, commenters stated that required travel documents filed with the

[66] Since 1993, immigration judges have been prohibited from correcting any part of a transcript other than minor typographical errors. EOIR, *Operating Policies and Procedures Memorandum 93–1: Immigration Judge Decisions and Immigration Judge Orders* at 2 (May 6, 1993), *available at https://www.justice.gov/sites/default/files/eoir/legacy/2002/07/31/93-1.pdf* (''The 'clean-up' of an oral decision must be limited to the review of the transcript for corrections in punctuation, grammar and syntax.''). There is no need, however, for an immigration judge to correct such minor errors, and commenters did not identify one. Moreover, there is also no consistent practice among immigration judges in reviewing transcripts of decisions. Some review for style and substance, whereas others review only for substance; some review with the record of proceedings at hand, whereas others do not. Inconsistent practices breed inefficiency and risk inadvertent errors. Thus, ''there is simply no reason to retain the requirement that immigration judges continue to review transcripts, and removing this requirement will also eliminate the possibility of the transcript being amended incorrectly, even inadvertently, after a decision has been rendered.'' 85 FR at 52508–09.

immigration court may have expired by the time the case reaches the BIA. Similarly, commenters stated that the alien may not have submitted all necessary evidence before the immigration court, particularly in cases where the immigration judge grants relief and does not reach the merits of an alternative voluntary departure request. Commenters also raised concerns that the BIA would not have a sufficient record on which to determine which conditions would be necessary to ensure the alien's timely departure from the United States. In addition, commenters were concerned that the BIA will not have the immigration judge's ability to view the alien's credibility, which may go towards the voluntary departure determination.

Separately, commenters claimed the rule did not provide an ability to challenge any BIA denial of voluntary departure under the rule. Commenters also stated that there was no mechanism to remedy an improperly served voluntary departure grant from the BIA, which would prevent the alien from being able to comply with the voluntary departure requirements and conditions and, in turn, result in an alternate order of removal.

Commenters were concerned about the requirement that the voluntary departure bond must be posted within five business days, which commenters argued was too short due to the mail delivery time.

Commenters were concerned that the rule only requires the conditions and consequences to be provided in writing to the alien, rather than in person like the voluntary departure regulations for the immigration courts. Commenters explained that many aliens would have difficulty understanding an English-language voluntary departure order, which could result in significant adverse consequences if they were unable to comply with the order's requirements or conditions.

Commenters noted that, in cases where an immigration judge grants another form of relief or protection, and DHS appeals the decision to the BIA, the rule would prevent the BIA from alternatively considering the alien's voluntary departure request because, as written, the rule requires the immigration judge to have denied the voluntary departure request and the alien to have appealed that denial. However, in granting another form of relief or protection, the immigration judge would not have reached voluntary departure.

One commenter requested clarification on the rule's change allowing the BIA to grant voluntary departure. First, the commenter asked if noncitizens can apply for voluntary departure in the first instance with the BIA. Second, the commenter questioned whether the rule conflicts with existing regulations prohibiting the BIA from making findings of fact. Similarly, another commenter raised concerns about cases where DHS opposes a voluntary departure grant and whether such cases require a merits hearing and fact-finding before an immigration judge.

Lastly, a commenter raised concerns that this authority would shift the workload of adjudicating voluntary departure requests from immigration courts to the BIA.

Response: In general, most commenters' concerns on this issue reflected a misunderstanding of immigration court procedures and relevant law. An alien who seeks voluntary departure as a form of relief from removal must apply for it in the first instance before the immigration judge; otherwise, the alien's opportunity to seek such relief will be deemed waived, both by the immigration judge and by the Board on appeal. 8 CFR 1003.31(c); *Matter of J–Y–C–,* 24 I&N Dec. at 261 n.1 (''Because the respondent failed to raise this claim below, it is not appropriate for us to consider it for the first time on appeal''); *Matter of Edwards,* 20 I&N Dec. at 196 n.4 (''We note in passing, however, that because the respondent did not object to the entry of this document into evidence at the hearing below, it is not appropriate for him to object on appeal.''). Thus, the alien will have necessarily already raised the issue to the immigration judge and, particularly for requests for voluntary departure under section 240B(b) of the Act,[67] introduced evidence or a proffer of evidence regarding the alien's eligibility for voluntary departure.

Similarly, if the alien appeals the immigration judge's decision, the alien must raise the issue of voluntary departure eligibility on appeal; otherwise, it would be waived. *See Matter of Cervantes,* 22 I&N Dec. at 561 n.1 (expressly declining to address an issue not raised by party on appeal). Thus, for the Board to even consider an alien's eligibility for voluntary departure, the alien must have already raised the issue with the immigration judge—and with the Board if appealing the immigration judge's adverse decision—and the record must already contain evidence—or at least a proffer of evidence—of the alien's eligibility.

Assuming that an alien did not waive the issue by failing to raise it with the immigration judge, there are no operational impediments to the Board making its own voluntary departure determination. The requirements for such relief under either 8 CFR 1240.26(b) or (c) are straightforward and involve determinations that the Board routinely already makes, *e.g.,* whether an alien has been convicted of an aggravated felony, has good moral character, and is not deportable on national security grounds. Further, the Board routinely reviews credibility determinations made by immigration judges and is well-prepared in assessing the credibility of an alien's assertion or proffer on appeal that he or she possesses ''the means to depart the United States and . . . the intention do so.'' 8 CFR 1240.26(c)(1)(iv).[68]

Most significantly, the Board already routinely reviews immigration judge decisions about voluntary departure on appeal and possesses the authority to reinstate an immigration judge's grant of such relief. 8 CFR 1240.26(c)(3)(ii). It further already provides advisals, which are required to be in writing, related to voluntary departure if it does reinstate that relief. *E.g.,* 8 CFR 1240.26(i) (''The Board shall advise the alien of the condition provided in this paragraph in writing if it reinstates the immigration judge's grant of voluntary departure.''). In short, the Board already serves as a de facto adjudicator of requests for voluntary departure, and commenters did not identify a particular, realistic scenario in which the Board would be unable to discern from the record whether an alien was eligible for voluntary departure and warranted a grant of such relief as a matter of discretion, especially in cases in which an alien maintains on appeal—and, thus, necessarily asserts eligibility

[67] Because voluntary departure pursuant to INA 240B(a), 8 U.S.C. 1229c(a), requires that the alien waives appeal of all issues, 8 CFR 1240.26(b)(1)(i)(D), the Board is unlikely to see many appeals related to that provision. Nevertheless, an alien who appeals the denial of a request for voluntary departure under INA 240B(a), 8 U.S.C. 1229c(a), will have necessarily raised that issue to the immigration judge. Similarly, by definition, in cases in which DHS appeals a grant of voluntary departure under INA 240B(a), 8 U.S.C. 1229c(a), the alien will have raised the issue and offered evidence of eligibility before the immigration judge.

[68] In a case in which DHS appeals an immigration judge's decision granting another form of relief, that the alien applied for and the immigration judge adjudicated such relief necessarily means that the alien was seeking voluntary departure under INA 240B(b) at the conclusion of proceedings. Therefore, the record below will contain evidence regarding the alien's eligibility for voluntary departure—or else the alien would have waived the issue before the immigration judge—allowing the Board to make a determination on that application on appeal.

through reference to evidence already in the record—that he or she warrants voluntary departure.

The purpose of the changes to allow the Board to grant voluntary departure are to increase operational efficiency by allowing the BIA to grant voluntary departure rather than first requiring remand to the immigration court. With regard to the ability of aliens to submit evidence in support of their voluntary departure requests, the Department notes that the alien must submit all relevant voluntary departure evidence to the immigration court. The BIA will then adjudicate the voluntary departure request like any other appeal by reviewing the record developed at the immigration court. *See* 8 CFR 1003.1(d)(7)(iv) (requiring the BIA to adjudicate voluntary departure requests ''based on the record''). Likewise, the BIA will only impose necessary conditions to ensure the alien's timely departure based on the record on appeal. *See* 8 CFR 1240.26(k)(4).

Responding to a commenter's concerns about the inability to challenge a BIA denial of voluntary departure, the Department first notes that existing statutory provisions already preclude appeals of voluntary departure decisions to Federal court, and this rule does not—and could not—change those provisions. INA 242(a)(2)(B)(i), 8 U.S.C. 1252(a)(2)(B)(i) (stripping jurisdiction to review most discretionary determinations in immigration proceedings, including voluntary departure under INA 240B, 8 U.S.C. 1229c); *see also* INA 240B(f), 8 U.S.C. 1229c(f) (precluding judicial review of denials of voluntary departure under INA 240B(b), 8 U.S.C. 1229c(b)). Moreover, cases in which aliens seek only voluntary departure before an immigration judge—and not another form of relief such as asylum, which is commonly appealed to Federal court—require the waiver of appeal and are, thus, unlikely to be appealed to the Board in the first instance. 8 CFR 1240.26(b)(1)(i)(D). Further, where the Board has denied voluntary departure aliens are not prevented from filing motions to reopen or reconsider if applicable. *See generally* 8 CFR 1003.2; *cf.* 8 CFR 1240.26(e)(1) (providing that such a motion prior to the expiration of the voluntary departure period terminates a ''grant of voluntary departure''). In short, the rule has no impact on an alien's existing ability to challenge the denial of a request for voluntary departure through an appeal to Federal court or a motion to reopen, and commenters' concerns on those points are, accordingly, unpersuasive.

With regards to commenter's concerns about being able to post a voluntary departure bond within five days of the BIA's decision, the Department notes that the five-day requirement remains unchanged from the existing regulations regarding the immigration courts. *See* 8 CFR 1240.26(c)(3)(i). It further notes that immigration judges may issue voluntary departure orders in written decisions that are mailed to aliens, and it is unaware of any noted problems with that process. Moreover, once ECAS is deployed to the BIA, registered attorneys and accredited representatives will be able to immediately view and download documents for cases with electronic records of proceeding, which will mitigate commenters' concerns about mail service and its potential effect on complying with voluntary departure requirements. *See generally* EOIR, *EOIR Courts & Appeals System (ECAS)—Online Filing* (Oct. 5, 2020), *available at https://www.justice.gov/eoir/ECAS.*

Nevertheless, in recognition of the fact that Board orders are generally served by mail—unlike orders of immigration judges which are more often served in person—the final rule states that aliens will have ten business days, rather than five, to post a voluntary departure bond if the Board's order of voluntary departure was served by mail. Further, as the Board is currently transitioning to an electronic filing system and expects to fully deploy that system within the next year, the final rule retains a period of five business days to post a voluntary departure bond if the Board's order was served electronically.

In response to commenters' concerns about aliens being unable to understand English-language voluntary departure orders, the Department first notes that all orders, decisions, and notices issued by EOIR—including written decisions issued by an immigration judge granting voluntary departure—are in English and, likewise, all documents filed with EOIR must be in English or accompanied by an English-language translation. *See, e.g.,* 8 CFR 1003.3(a)(3), 1003.33. Moreover, the Department does not believe that an English-language voluntary departure order, which is already used in thousands of cases every year with no noted concerns, raises any due process issues, as a reasonable recipient would be on notice that further inquiry is required. *See Ojeda-Calderon* v. *Holder,* 726 F.3d 669, 675 (5th Cir. 2013) (citing *Nazarova* v. *INS,* 171 F.3d 478, 483 (7th Cir. 1999) (explaining that due process does not require notices to be in a language the alien can understand)). Additionally, the Department notes that under longstanding practice, a BIA order reinstating voluntary departure—which is, in all material parts, an order granting voluntary departure—is already issued in English with appropriate warnings. Commenters raised no particular issues with this existing process, and the Department is unaware of any.

In response to commenters' concerns about cases in which DHS appeals a separate grant of relief or protection, the Department is making edits from the NPRM to clarify the Board's procedure in that situation. Although cases in which an alien made multiple applications for relief or protection (including voluntary departure), an immigration judge granted at least one application but did not address the request for voluntary departure, DHS appealed the immigration judge's decision, the BIA determined that the immigration judge's decision was in error and that the alien's application(s) should be denied, and the BIA found a basis to deny all other applications submitted by the respondent without needing to remand the case, leaving only the request for voluntary departure unadjudicated, should be uncommon, the Department nevertheless makes clarifying edits to 8 CFR 1240.26(k)(2) and (3) [69] to indicate that the BIA may grant voluntary departure in cases in which DHS appeals provided that the alien requested voluntary departure from the immigration judge and is otherwise eligible.

In response to at least one commenter's concern regarding the expiration of an alien's travel documents, the Department notes that current regulations do not require the presentation of an unexpired travel document in every case. *See, e.g.,* 8 CFR 1240.26(b)(3)(i) (presentation of a travel document for voluntary departure is not required when ''[a] travel document is not necessary to return to [the alien's] native country or to which country the alien is departing . . . [or] [t]he document is already in the possession of the [DHS].'') Moreover, ''[i]f such documentation is not immediately available to the alien, but the immigration judge is satisfied that the alien is making diligent efforts to secure it, voluntary departure may be granted for a period not to exceed 120 days, subject to the condition that the alien within 60 days must secure such

[69] The Department also notes that 8 CFR 1240.26(k)(2) and (3) were duplicative in the NPRM and has further edited the provisions to remove the duplication since they apply to both types of voluntary departure under INA 240B, 8 U.S.C. 1229c.

documentation and present it to [DHS].'' 8 CFR 1240.26(b)(3)(ii). The rule adopts those provisions by reference and, thus, already addresses this concern to some extent. Nevertheless, the Department is making changes to the final rule to make clear that if the record does not contain evidence of travel documentation sufficient to assure lawful entry into the country to which the alien is departing—and the alien otherwise has both asserted a request for voluntary departure and established eligibility under the other requirements—the Board may nevertheless grant voluntary for a period not to exceed 120 days, subject to the condition that the alien within 60 days must secure such documentation.

In response to one commenter's question, the Department notes that respondents cannot apply for voluntary departure in the first instance with the BIA because they would have waived that opportunity on appeal by not raising it before the immigration judge below. 8 CFR 1003.31(c); *Matter of J–Y–C–,* 24 I&N Dec. at 261 n.1 (''Because the respondent failed to raise this claim below, it is not appropriate for us to consider it for the first time on appeal''); *Matter of Edwards,* 20 I&N Dec. at 196 n.4 (''We note in passing, however, that because the respondent did not object to the entry of this document into evidence at the hearing below, it is not appropriate for him to object on appeal.'').

In addition, the rule does not conflict with 8 CFR 1003.1(d)(3)(iv), which generally prohibits the BIA from engaging in fact finding. As explained in the NPRM, the rule does not allow the BIA to engage in additional fact finding if granting voluntary departure, but rather the grant ''would continue to be a legal determination based upon the facts as found by the immigration judge during the course of the underlying proceedings . . . .'' *See* 85 FR at 52500. Similarly, in cases where DHS opposed voluntary departure at the immigration court, the record will contain evidence of all necessary facts, or else the application would have been deemed waived or abandoned.

In response to concerns about BIA workload, the Department notes that immigration judges will continue to adjudicate voluntary departure requests in the first instance. This rule merely gives the BIA the authority to grant voluntary departure if certain requirements are met, rather than inefficiently remanding the case back to the immigration judge solely to grant voluntary departure. Moreover, as noted, *supra,* as the BIA already reviews appeals related to voluntary departure requests and possesses the authority to reinstate voluntary departure, which is the functional equivalent of granting it, simply authorizing the BIA to grant voluntary departure rather than remanding a case back to an immigration judge to take the same action imposes minimal operational burden on the Board but reduces operational inefficiency for EOIR as a whole.

4. Administrative Procedure Act: Sufficiency of 30-Day Comment Period

Comment: Many commenters objected to the Department's allowance of a 30-day comment period instead of a 60-day or longer period. Commenters cited Executive Order 12866 and stated that a 60-day comment period is the standard period of time that should be provided for a complex rule like the NPRM. Commenters also stated that the 30-day comment period is insufficient in the context of the COVID–19 pandemic, which, commenters explained, has strained commenters' ability to prepare comments due to unique childcare, work-life, and academic difficulties. In addition, commenters stated that there was insufficient time to prepare responses to this rule due to other items that were published or released during the comment period, such as the Department's NPRM related to asylum procedures that the Department published in the final days of the comment period [70] and the Attorney General's decision in *Matter of A–C–A–A–,* 28 I&N Dec. 84 (A.G. 2020). Similarly, commenters cited an NPRM that the Department jointly published with DHS in June [71] as an example of the complexity of recent rulemaking for which commenters need adequate time to prepare responses. Some commenters stated that there is no need for urgency and a short comment period given recent drops in asylum seekers at the border. Commenters argued that the Department should withdraw the rule and republish it with a longer period for public comment.

Response: As an initial point, the Department notes that a far more sweeping regulatory change to the BIA's procedures also had only a 30-day comment period, 67 FR at 54879, but that there is no evidence that period was insufficient. Further, commenters did not suggest or indicate what additional issues the comment period precluded them from addressing; to the contrary, the comments received reflect both a breadth and a level of detail which suggests that the period was more than sufficient. *Cf. City of Waukesha* v. *EPA,* 320 F.3d 228, 246 (D.C. Cir. 2003) (''In [showing prejudice] in the context of a violation of notice-and-comment requirements, petitioners may be required to demonstrate that, had proper notice been provided, they would have submitted additional, different comments that could have invalidated the rationale for the revised rule.''). Additionally, to the extent that commenters referred to other proposed rulemakings as a basis for asserting the comment period should have been longer, their comparisons are inapposite. No other proposed rulemaking cited by commenters addressed a small, discrete set of procedures which are already well-established and with which aliens and practitioners have been quite familiar with for decades. In short, the Department acknowledges and has reviewed commenters' concerns about the 30-day comment period, but those comments are unavailing for all of the reasons given herein.

The Department believes the 30-day comment period was sufficient to allow for meaningful public input, as evidenced by the 1,284 public comments received, including numerous detailed comments from interested organizations.[72] The APA does not require a specific comment period length, *see generally* 5 U.S.C. 553(b)–(c), and although Executive Order 12866 recommends a comment period of at least 60 days, a 60-day period is not required. Instead, Federal courts have presumed 30 days to be a reasonable comment period length. For example, the D.C. Circuit has stated that ''[w]hen substantial rule changes are proposed, a 30-day comment period is generally the shortest time period sufficient for interested persons to meaningfully review a proposed rule and provide informed comment.'' *Nat'l Lifeline Ass'n* v. *Fed. Commc'ns Comm'n,* 921 F.3d 1102, 1117 (D.C. Cir. 2019) (citing *Petry* v. *Block,* 737 F.2d 1193, 1201 (D.C. Cir. 1984)).

Further, litigation has mainly focused on the reasonableness of comment

[70] Procedures for Asylum and Withholding of Removal, 85 FR 59692 (Sept. 23, 2020).

[71] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 36264 (June 15, 2020).

[72] The Department notes for comparison that the most significant regulatory change to the BIA's case management process had a 30-day comment period, and the Department received comments from 68 commenters. 67 FR at 54879. Although commenters objected to the 30-day period then as they do now, there is no evidence either then or now that such a window is insufficient. To the contrary, the significant increase in comments regarding a less comprehensive change to the BIA's case management process during a comment period of identical length strongly suggests that the 30-day period was appropriate.

periods shorter than 30 days, often in the face of exigent circumstances. *See, e.g., N. Carolina Growers' Ass'n, Inc.* v. *United Farm Workers,* 702 F.3d 755, 770 (4th Cir. 2012) (analyzing the sufficiency of a 10-day comment period); *Florida Power & Light Co.* v. *United States,* 846 F.2d 765, 772 (D.C. Cir. 1988) (15-day comment period); *Northwest Airlines, Inc.* v. *Goldschmidt,* 645 F.2d 1309, 1321 (8th Cir. 1981) (7-day comment period). Here, the significant number of detailed public comments is evidence that the 30-day period was sufficient for the public to meaningfully review and provide informed comment. *See, e.g., Little Sisters of the Poor Saints Peter and Paul Home,* 140 S. Ct. at 2385 (''The object [of notice and comment], in short, is one of fair notice.'' (citation omitted)).

The Department also believes that the COVID–19 pandemic has no effect on the sufficiency of the 30-day comment period. Employers around the country have adopted telework flexibilities to the greatest extent possible, and the Department believes that interested parties can use the available technological tools to prepare their comments and submit them electronically. Indeed, nearly every comment was received in this manner. Further, some of the issues identified by commenters—*e.g.,* childcare—would apply regardless of the length of the comment period and would effectively preclude rulemaking by the Department for the duration of the COVID–19 outbreak. The Department finds no basis to suspend all rulemaking while the COVID–19 outbreak is ongoing.

The Department acknowledges that particular commenters may have faced individual personal circumstances which created challenges to commenting, but that assertion is true of every rulemaking. Further, there is no evidence of a systemic inability of commenters to provide comments based on personal circumstances, and commenters' assertions appear to reflect a desire to slow the rulemaking due to policy disagreements rather than an actual inability to comment on the rule.[73]

Overall, based on the breadth and detail of the comments received, the Department's prior experience with a 30-day comment period for a much more sweeping change to BIA procedures, the rule's codification of established law with which practitioners and aliens are already familiar, the discrete and clear nature of the issues presented in the NPRM, the electronic receipt of most comments, and the essential nature of legal services even during the outbreak of COVID–19, the Department maintains that a 30-day comment period was ample for the public to comment on this rule. In short, none of the circumstances alleged by commenters appears to have actually limited the public's ability to meaningfully engage in the notice and comment period, and all available evidence provided by commenters indicates that the comment period was sufficient.

5. Concerns With Regulatory Requirements

Comment: Commenters generally expressed concern that the Department did not comply with Executive Orders 12866 and 13563 because the Departments did not adequately consider the costs and possible alternatives to the provisions in the rule due to the significance of many of the rule's provisions.

For example, one commenter asserted that removing the ability to reopen or reconsider cases via *sua sponte* authority constitutes ''significant regulatory action'' that would trigger a cost and benefits analysis, as required by Executive Order 13563. The commenter stated that the Department should have conducted a cost and benefits analysis for alternatives to the rule, including preserving the current system and defining ''exceptional circumstances.'' The commenter predicted that the costs would be lower and the benefits higher if the Departments simply defined ''exceptional circumstances'' rather than entirely remove *sua sponte* authority.''

Similarly, commenters claimed that the rule does not comply with Executive Orders 12866 and 13563 because EOIR did not assess the costs and benefits of available alternatives to prohibiting the general use of administrative closure, including better tracking of administratively closed cases or regulatory changes requiring the parties to notify the court when ancillary relief is adjudicated. Commenters also noted that EOIR did not weigh the costs of unnecessary removal orders that the administrative closure prohibition will cause and the effect on applicants and their families or the costs from the rule's effects on eligibility for unlawful presence waivers before DHS. Similarly, commenters stated that EOIR should consider the reliance interests of adjustment of status applicants who were relying on a grant of administrative closure in order to apply for a provisional unlawful presence waiver. Likewise, a commenter stated that EOIR should consider the effect on legal representation agreements since the rule would render agreements to pursue administrative closure in order to apply for provisional unlawful presence waivers moot. The commenter also claimed that the rule violates Executive Order 13563's requirement to harmonize rules because it contravenes 8 CFR 212.7(e)(4)(iii).

Response: As an initial point, the Department has addressed many of these comments, *supra,* particularly regarding proposed alternatives, and it reiterates and incorporates those discussions by reference here. Additionally, commenters assume or conjecture, without evidence, that cases which are administratively closed would otherwise necessarily result in removal orders. As each case is adjudicated on its own merits in accordance with the evidence and applicable law, the Department declines to accept such a sweeping unsubstantiated generalization and finds comments based on such a generalization unpersuasive accordingly.

The Department agrees with the commenter that the NPRM constitutes a ''significant regulatory action.'' 85 FR at 52509. The Department drafted the rule consistent with the principles of Executive Orders 12866 and 13563 and submitted the rule to the Office of Management and Budget. *Id.* Nevertheless, because the Department believes associated costs will be

[73] The Department also notes that several portions of the rule, *e.g.,* the changes to 8 CFR 1003.1(e)(8) and (k), reflect either internal delegations of authority and assignment of responsibility or matters of agency management, personnel, organization, procedure, or practice, making those portions a rule exempt from any period of notice and comment under the APA. 5 U.S.C. 553(a)(2), (b)(A). An internal delegation of administrative authority does not adversely affect members of the public and involves an agency management decision that is exempt from the notice-and-comment rulemaking procedures of the APA. *See United States* v. *Saunders,* 951 F.2d 1065, 1068 (9th Cir. 1991) (delegations of authority have ''no legal impact on, or significance for, the general public,'' and ''simply effect[] a shifting of responsibilities wholly internal to the Treasury Department''); *Lonsdale* v. *United States,* 919 F.2d 1440, 1446 (10th Cir. 1990) (''APA does not require publication of [rules] which internally delegate authority to enforce the Internal Revenue laws''); *United States* v. *Goodman,* 605 F.2d 870, 887–88 (5th Cir. 1979) (unpublished delegation of authority from Attorney General to Acting Administrator of the Drug Enforcement Agency did not violate APA); *Hogg* v. *United States,* 428 F.2d 274, 280 (6th Cir. 1970) (where taxpayer would not be adversely affected by the internal delegations of authority from the Attorney General, APA does not require publication). Thus, to the extent that commenters complained about the sufficiency of the comment period regarding those provisions not subject to the APA's notice-and-comment requirements, such complaints are also unavailing because commenters were not entitled to a comment period in the first instance.

negligible, if any, the Department determined that no numeric cost benefit analysis was necessary. As most of the rule is directed at internal case processing, it would substantially improve the quality and efficiency of the BIA appellate procedure while not imposing new costs on the public.[74]

In response to administrative closure-related concerns regarding compliance with Executive Orders 12866 and 13563, the Departments have weighed the relevant costs and benefits of the rule's administrative closure change in accordance with Executive Orders 12866 and 13563. The Department does not believe that the administrative closure changes will have a significant impact on the public, as most immigration courts—all but those in Arlington, Baltimore, Charlotte, and Chicago [75]—currently follow either *Matter of Castro-Tum* itself or an applicable Federal court decisioning affirming it, *e.g., Hernandez-Serrano,* 2020 WL 6883420 at *5 (''In summary, therefore, we agree with the Attorney General that §§ 1003.10 and 1003.1(d) do not delegate to IJs or the Board 'the general authority to suspend indefinitely immigration proceedings by administrative closure.' '' (quoting *Matter of Castro-Tum,* 27 I&N Dec. at 272)). Therefore, the effect of this rule would simply codify the existing limitations on immigration judges' general authority to grant administrative closure. For those courts that are not bound by *Matter of Castro-Tum,* the Department disagrees that the change will result in unnecessary removal orders, as immigration judges are tasked with resolving the proceedings before them, including determining removability and issuing removal orders if required. *See, e.g.,* 8 CFR 1003.10(b) (''In all cases, immigration judges shall seek to resolve the questions before them in a timely and impartial manner consistent with the Act and regulations.''). The Department cannot credit commenters' counter-factual speculation as to the likely outcomes of cases that have been administratively closed, for as the Department discussed, *supra,* aliens have opposed administrative closure in individual cases because it interfered with their ability to obtain relief.

As the Department asserted, free-floating authority to unilaterally administratively close cases is in significant tension with existing law, including regulations and longstanding Board case law. 85 FR at 52503–05. To the extent that commenters suggested the Department should consider alternatives to the rule that retain that tension with existing law, the Department finds those suggestions unpersuasive. *See Hernandez-Serrano,* 2020 WL 6883420 at *1, *4 (''A regulation delegating to immigration judges authority to take certain actions '[i]n deciding the individual cases before them' does not delegate to them general authority not to decide those cases at all. Yet in more than 400,000 cases in which an alien was charged with being subject to deportation or (after April 1, 1997) removal, immigration judges or the Board of Immigration Appeals have invoked such a regulation to close cases administratively—meaning the case was removed from the IJ's docket without further proceedings absent some persuasive reason to reopen it. As of October 2018, more than 350,000 of those cases had not been reopened. An adjudicatory default on that scale strikes directly at the rule of law. . . . [N]o one—neither Hernandez-Serrano, nor the two circuit courts that have rejected the Attorney General's decision in *Castro-Tum*—has explained how a general authority to close cases administratively can itself be lawful while leading to such facially unlawful results.'').

Further, in addition to not resolving the legal issues raised by the view that immigration judges and Board members possess some intrinsic, freestanding authority to administratively close cases, commenters' proposed alternatives suffer from other infirmities or do not otherwise address the problem identified. For example, commenters did not explain why additional tracking of administratively closed cases and a requirement that parties notify the court of a situational change would effectively resolve the legal or policy issues presented. In fact, the Department already tracks administratively closed cases, EOIR, *Adjudication Statistics: Administratively Closed Cases* [hereinafter *Administratively Closed Cases*], Oct. 13, 2020, *available at https://www.justice.gov/eoir/page/file/1061521/download,* and the parties should already be notifying an immigration court or the Board if the basis for an order of administrative closure changes; [76] yet, those items have not resolved the problems with administrative closure identified in the NPRM.

The question of unlawful presence waivers was already addressed by *Matter of Castro-Tum,* 27 I&N Dec. at 278 n.3, 287 n.9, and this final rule does not impact such waivers accordingly. Moreover, the regulation identified by commenters, 8 CFR 212.7(e)(4)(iii), has no analogue in chapter V of title 8, and that regulation is not binding on the Department. Further, such a waiver is both ''provisional'' and ''discretionary,'' 8 CFR 212.7(e)(2)(i), and like administrative closure itself, an alien has no right to such a waiver. Further, although aliens in removal proceedings (unless administratively closed) and aliens with administratively final orders of removal are barred from obtaining the waiver, 8 CFR 212.7(e)(4)(iii) and (iv), an alien with an administratively final order of voluntary departure is not, and by definition, aliens must voluntarily depart the United States in order to receive the benefit of such a waiver. Although the Department has considered the link between such waivers and administrative closure—just as the Attorney General did in *Matter of Castro-Tum*—that link is too attenuated to outweigh the significant legal and policy concerns raised by the Department regarding administrative closure.[77]

[74] The Department notes that a prior, more comprehensive revision of the BIA's case management process did not contain a numeric cost-benefit analysis of the type suggested by commenters. 67 FR at 54900. Moreover, commenters did not identify what metrics would be appropriate to use to measure, for example, whether the BIA granted a motion to reopen *sua sponte* in contravention of *Matter of J–J–* or the predictive outcome of a case that has been administratively closed. The Department is unaware of any established measures of adherence to the law by adjudicators or for case processing questions that turn on the specific facts of each case. In the absence of such measures—and granular data which could be utilized to fulfill them—the Department asserts that its qualitative assessment of the costs and benefits of the rule in the NPRM and in the final rule, in concert with the rule's review by OMB, satisfies the requirements of the relevant Executive Orders.

[75] The Department notes that *Matter of Castro-Tum* did not incorporate all of the legal arguments presented in the NPRM regarding whether immigration judges and Board members have free-floating authority to defer adjudication of cases. *E.g.,* 85 FR at 52503 (discussing tension created by interpreting 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) to allow free-floating authority to administratively close cases with references in those provisions to the ''disposition'' of cases and with the provisions of 8 CFR 1003.1(a)(2)(i)(C) and 1003.9(b)(3) which assign authority to defer case adjudications to the Board Chairman and the Chief Immigration Judge rather than to all Board members and all immigration judges). Thus, circuit court decisions abrogating *Matter of Castro-Tum* did not necessarily address those arguments. Accordingly, independent of *Matter of Castro-Tum,* immigration judges and Board members may still come to the conclusion that they generally lack free-floating authority to administratively close cases.

[76] As representatives are officers of an immigration court and have professional responsibility obligations of candor toward the immigration court, parties with representation should already be notifying an immigration court of a relevant change that would affect the grant of administrative closure.

[77] For similar reasons, the Department finds that this rule does not violate Executive Order 13563 regarding harmonization. To the contrary, the final

Similarly, concerns about putative reliance interests are misplaced. First, as discussed, *infra,* the rule applies, in general, only prospectively, so it does not disturb cases that have already been administratively closed. Second, and relatedly, all changes in the law may impact matters of attorney strategy in interactions with clients, but that is an insufficient basis to decline to change the law.[78] To find otherwise would effectively preclude any law from ever being changed. Third, nothing in the rule prohibits a practitioner from seeking administrative closure; rather, it more clearly delineates the situations in which administrative closure is legally authorized. Fourth, a representative may not ethically guarantee any result in a particular case; thus, to the extent commenters suggest that the final rule restricts or interferes with an attorney's ability to guarantee an alien both a grant of administrative closure and the approval of a provisional waiver, the Department finds such a suggestion unavailing. *See* Model Rules Prof'l Conduct R. 7.1 cmt. 3 (2020) (''A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case.''), cmt. 4 (''It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.'') (quoting r. 8.4(c)), and r.8.4(e) (''It is professional misconduct for a lawyer to . . . state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law'').

In short, the Department appropriately considered potential alternatives as well as the relevant interests and alleged costs in issuing the final rule regarding administrative closure. On balance, however, the alternatives are either unavailing or would not resolve the issues identified by the Department, and the concerns raised by commenters are far outweighed by both the significant legal and policy issues raised by the Department in the NPRM regarding administrative closure and the increased efficiency and consistency that a formal clarification of its use will provide.

With regards to the costs to persons in removal proceedings who may no longer be eligible to obtain a provisional unlawful presence waiver without administrative closure, the Department believes that the strong interest in the efficient adjudication of cases and the legal and policy issues identified in the NPRM outweigh the potential inability of these persons to obtain provisional unlawful presence waivers, something to which they are not entitled to in the first instance. The Department notes that these persons may still apply for an unlawful presence waiver from outside the United States, and that DHS may choose, as a matter of policy, to amend their regulations to remove the administrative closure requirement for persons in removal proceedings applying for a provisional waiver. Moreover, as *Matter of Castro-Tum* was issued in 2018, aliens and their representatives in jurisdictions following *Castro-Tum* should not be currently relying on the expectation of administrative closure to pursue provisional unlawful presence waivers.

The Department also disagrees that the general prohibition on administrative closure does not harmonize with DHS regulations regarding provisional unlawful presence waivers. The Department considered the interplay of EOIR and DHS's regulations and, due to the strong equities in favor of limiting administrative closure, decided to continue with a general prohibition on administrative closure in immigration proceedings before EOIR. DHS chose to limit the eligibility for provisional unlawful presence waivers as a matter of policy, and DHS may choose to update their more specific regulations accordingly as a result of this rule.

In sum, the Department's analysis fully complied with all relevant Executive Orders, and OMB has appropriately reviewed the rule.[79]

Comment: At least one commenter stated that the Department failed to adequately consider the costs of the rule on small entities, particularly immigration practitioners, under the Regulatory Flexibility Act (RFA). The commenter predicted that the rule would have a variety of effects of the finances of these practitioners, such as the need for additional appeals in Federal courts or limits on the number of cases a practitioner can ethically accept due to shortened filing deadlines.

Response: As the Department stated in the proposed rule, this rule ''does not limit the fees [practitioners] may charge, or the number of cases a representative may ethically accept under the rules of professional responsibility.'' 85 FR at 52509. Moreover, the comments assume, without evidence, that the rule will lead only to adverse outcomes for aliens and, thus, more appeals to Federal court. As noted, *supra,* that unsubstantiated generalization presumes that cases will be adjudicated either unethically or incompetently, and the Department declines to engage in such unfounded conjecture. As also noted, *supra,* the change in filing deadlines falls principally on DHS, and commenters neither acknowledged that point nor explained why a change in filing deadlines that affects few non-government practitioners would have a widespread effect of limiting many practitioners' caseloads. Additionally, although the shortened filing deadlines may change when a particular brief is due to the BIA, the Department disagrees with the commenter's speculation that it would change the overall amount of time required to prepare that brief or related filings, which is determined by the relative complexity of the case.

The rule sets no limits on how many cases an ethical and competent attorney may accept, all courts set filing deadlines, and all ethical and competent attorneys will adjust their practices as needed accordingly. Contrary to an implicit assertion by commenters, the intent of the Board's current practices is not to provide or ensure a minimum level of employment for practitioners; rather, the intent is to provide a fair and efficient system for adjudicating appeals. Consequently, any effects on employment of practitioners due to changes in those procedures are both minimal and incidental or ancillary at most; moreover, to the extent that an ancillary effect would be the provision

rule promotes regulatory harmonization because it establishes consistency—and eliminates superfluousness—with the authority of the Board Chairman and the Chief Immigration Judge to defer case adjudications as established in 8 CFR 1003.1(a)(2)(i)(C) and 8 CFR 1003.9(b)(3). As discussed, *supra,* it also harmonizes briefing schedules between detained and non-detained appeals and harmonizes the starting point for the adjudicatory deadlines for appeals heard by single BIA members and by three-member panels. In short, the rule promotes harmonization of regulatory requirements in multiple ways.

[78] Furthermore, as *Matter of Castro-Tum* was issued in 2018, aliens and their representatives in jurisdictions following *Castro-Tum* should not be currently relying on the expectation of administrative closure to pursue provisional unlawful presence waivers.

[79] The Department notes that in formulating the NPRM, it also considered other alternatives as well to promote more efficient BIA processing of appeals. For example, the BIA reviewed prior suggestions to charge respondents filing and transcript fees more commensurate with the actual costs of the proceedings or to make all appeals to the BIA discretionary. 67 FR at 54900. Although the Department may revisit those proposals in the future, they were not incorporated into the NPRM and are not being included in the final rule accordingly.

of representation by a larger cohort of practitioners, as logically intimated by commenters who claim that the rule will limit cases handled by individual practitioners, commenters did not explain why such an effect is necessarily unwelcome. In short, despite commenters' unfounded speculation, the Department finds that further analysis under the RFA is not warranted.

The Department has reviewed this rule in accordance with the RFA, 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, tit. II, Mar. 29, 1996, 110 Stat. 847, and has determined that this rule would not have a significant economic impact on a substantial number of small entities. The rule will not economically impact representatives of aliens in immigration proceedings. It does not limit the fees they may charge or the number of cases a representative may ethically accept under the rules of professional responsibility.

Moreover, this determination is consistent with the Department's prior determination regarding much more sweeping changes to procedures before the Board. *See* 67 FR at 54900 (''The Attorney General, in accordance with 5 U.S.C. 605(b), has reviewed this rule and, by approving it, certifies that it affects only Departmental employees, aliens, or their representatives who appear in proceedings before the Board of Immigration Appeals, and carriers who appeal decisions of [DHS] officers. Therefore, this rule does not have a significant economic impact on a substantial number of small entities.''). The Department is unaware of any challenge to that determination regarding its 2002 rulemaking which significantly streamlined Board operations and made greater changes to Board procedures, including altering the Board's standard of review for credibility determinations, than this final rule. The Department thus believes that the experience of implementing that prior, broader rule also supports its conclusion that there is no evidence that this final will have a significant impact on small entities as contemplated by the RFA.

Additionally, the portions of the rule related to administrative closure would not regulate ''small entities'' as that term is defined in 5 U.S.C. 601(6). That portion of the rule applies to aliens in immigration proceedings, who are individuals, not entities. *See* 5 U.S.C. 601(6). Nothing in that portion of the rule in any fashion regulates the legal representatives of such individuals or the organizations by which those representatives are employed, and the Departments are unaware of cases in which the RFA's requirements have been applied to legal representatives of entities subject to its provisions, in addition to or in lieu of the entities themselves. *See* 5 U.S.C. 603(b)(3) (requiring that an RFA analysis include a description of and, if feasible, an estimate of the number of ''small entities'' to which the rule ''will apply''). To the contrary, case law indicates that indirect effects on entities not regulated by a proposed rule are not subject to an RFA analysis. *See, e.g., Mid-Tex Elec. Co-op, Inc.* v. *FERC,* 773 F.2d 327, 342–43 (D.C. Cir. 1985) (''[W]e conclude that an agency may properly certify that no regulatory flexibility analysis is necessary when it determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule . . . . Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy. That is a very broad and ambitious agenda, and we think that Congress is unlikely to have embarked on such a course without airing the matter.''); *Cement Kiln Recycling Coalition* v. *EPA,* 255 F.3d 855, 869 (D.C. Cir. 2001) (''Contrary to what [petitioner] supposes, application of the RFA does turn on whether particular entities are the 'targets' of a given rule. The statute requires that the agency conduct the relevant analysis or certify 'no impact' for those small businesses that are 'subject to' the regulation, that is, those to which the regulation 'will apply.'. . . The rule will doubtless have economic impacts in many sectors of the economy. But to require an agency to assess the impact on all of the nation's small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected.'' (citing *Mid-Tex,* 773 F.2d 327 at 343)); *see also White Eagle Co-op Ass'n* v. *Conner,* 553 F.3d 467, 480 (7th Cir. 2009) (''The rule that emerges from this line of cases is that small entities directly regulated by the proposed [rulemaking]—whose conduct is circumscribed or mandated—may bring a challenge to the RFA analysis or certification of an agency . . . . However, when the regulation reaches small entities only indirectly, they do not have standing to bring an RFA challenge.'').

Further, the Department has consistently maintained this position regarding immigration regulations aimed at aliens, rather than practitioners who represent aliens, including much broader and more sweeping rulemakings. *See, e.g.,* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 444, 453 (Jan. 3, 1997) (certifying that the rule would not have a significant impact on a substantial number of small entities because it ''affects only Federal government operations'' by revising the procedures for the ''examination, detention, and removal of aliens''). That conclusion was reiterated in the interim rule, 62 FR at 10328, which was adopted with no noted challenge or dispute. The parts of this final rule related to administrative closure are similar, in that they, too, affect only the operations of the Federal government. In short, the Department reiterates its determination that there is no evidence that this final will have a significant impact on small entities as contemplated by the RFA.

6. Miscellaneous

a. Retroactivity Concerns

Comment: Some commenters expressed concerns that the rule will have an impermissible retroactive effect. First, at least one commenter argued that making the provisions regarding changes to administrative closure and *sua sponte* reopening authority effective on the date of publication to pending cases would have impermissible retroactive effect because doing so would impair the rights that asylum applicants have under current law. Second, at least one other commenter noted that even making changes applicable only to new appellate filings fails to account for downstream effects of the rule that could influence a respondent's filings or other decisions before the immigration judge. Finally, at least one commenter stated that the Department has not sufficiently considered the costs to respondents of the retroactive elements of the rule.

Response: As noted, *supra,* the Department is clarifying the generally prospective temporal application of the rule. The provisions of the rule applicable to appellate procedures and internal case processing at the BIA apply only to appeals filed, motions to reopen or reconsider filed, or cases remanded to the Board by a Federal court on or after the effective date of the final rule. As the withdrawal of a delegation of authority by the Attorney General, the provisions of the rule related to the restrictions on *sua sponte*

reopening authority are effective for all cases, regardless of posture, on the effective date.[80] The provisions of the rule related to restrictions on the BIA's certification authority are effective for all cases in which an immigration judge issues a decision on or after the effective date. The provisions of the rule regarding administrative closure are applicable to all cases initiated by a charging document filed by DHS, reopened, or recalendared on or after the effective date.[81]

Commenters are incorrect that the rule's amendments regarding authority over administrative closure and *sua sponte* reopening authority would have impermissible retroactive effect. First, as noted *supra,* the change regarding administrative closure generally applies prospectively and merely codifies the status quo for all but four immigration courts nationwide. Second, there is no right to *sua sponte* reopening or even to file such a cognizable motion. There is similarly no right to administrative closure. Thus, these changes do not remove any ''vested rights'' from aliens. In addition, in the context of the changes regarding administrative closure, the Department emphasizes that the alien may continue to proceed with their relief applications before USCIS and seek continuances before EOIR, *see Matter of L–A–B–R–,* 27 I&N Dec. 405. Similarly, aliens may continue to utilize motions to reopen, including those filed as joint motions or those based on equitable tolling, in lieu of filing improper motions to reopen *sua sponte.*

Commenters broad and generalized concerns about alleged downstream effects are wholly speculative and do not account for either the case-by-case nature of adjudication or the fact-intensive nature of many cases. Hypothetical effects on procedural choices and tactical decisions related to an alien's claims in future cases, including those that have not even been filed or reopened, are not impositions on an alien's legal rights in a manner that has retroactivity concerns. Finally, as commenters' concerns about retroactivity of the rule are unfounded for the reasons given, their concerns about alleged costs imposed by such ''retroactivity'' are similarly unfounded.[82]

b. Creation of Independent Immigration Courts

Comment: Multiple commenters stated that the rule highlighted the need for the immigration courts and immigration judges to be ''independent'' and outside the Executive branch and political influence.

Response: These commenters' recommendations are both beyond the scope of this rulemaking and the Department's authority. Congress has provided for a system of administrative hearings for immigration cases, which the Departments believe should be maintained. *See generally* INA 240, 8 U.S.C. 1229a (laying out administrative procedures for removal proceedings); *cf. Strengthening and Reforming America's Immigration Court System: Hearing before the Subcomm. On Border Sec. & Immigration of the S. Comm. on the Judiciary,* 115th Cong. (2018) (written response to Questions for the Record of James McHenry, Director, Executive Office for Immigration Review) (''The financial costs and logistical hurdles to implementing an Article I immigration court system would be monumental and would likely delay pending cases even further.''). Only Congress has the authority to create a new Article I court or other changed framework for the adjudication of immigration cases. Finally, the Department reiterates that immigration judges and Board members already exercise ''independent judgment and discretion'' in deciding cases, 8 CFR 1003.1(d)(1)(ii) and 1003.10(b), and are prohibited from considering political influences in their decision-making, *BIA Ethics and Professionalism Guide* at sec. VIII (''A Board Member should not be swayed by partisan interests or public clamor.''), *IJ Ethics and Professionalism Guide* at sec. VIII (''An Immigration Judge should not be swayed by partisan interests or public clamor.''). Thus, contrary to commenters' assertions, immigration judges and Board members are already independent adjudicators who do not render decisions based on political influence or political interests. As commenters' claims are unfounded in law or practice—and beyond the scope of this rulemaking—the Department declines to address them further.

c. Transactional Records Access Clearinghouse (TRAC) Report

Comment: Several commenters objecting to the NPRM's provisions regarding administrative closure pointed to a press announcement and web page by TRAC, issued on September 10, 2020, during the comment period.[83] *See* TRAC, *What's New: The Life and Death of Administrative Closure,* Sept. 10, 2020, *available at https://trac.syr.edu/whatsnew/email.200910.html* (last visited Nov. 25, 2020), and TRAC, *The Life and Death of Administrative Closure,* Sept. 10, 2020, *available at https://trac.syr.edu/immigration/reports/623/* (last visited Nov. 25, 2020) (''TRAC Report''). Commenters asserted that TRAC's analysis undermined the Department's bases for the rule related to administrative closure.

Response: The Department has reviewed the TRAC Report referenced by commenters but finds it both unpersuasive as a basis for commenters' suggestions to revise the final rule and largely inapposite to the issue overall. As an initial point, the TRAC Report does not address any of the legal issues surrounding administrative closure raised by the NPRM. 85 FR at 52503–05. Thus, for example, it does not address the existing regulations' references to the ''disposition'' of a case, the superfluousness issue raised by existing regulations for the Board Chairman and the Chief Immigration Judge allowing them to defer adjudication of cases, or the propriety of authorizing an immigration judge or Board Member to infringe upon the prosecutorial discretion of DHS. Without engaging the Department's legal concerns, the utility and persuasiveness of the TRAC Report are inherently limited.

TRAC's broader claims regarding administrative closure, framed by commenters as a policy challenge to the

[80] As discussed, *supra,* neither party possesses a right to file a ''motion to reopen *sua sponte,*'' and such a motion is, in fact, an ''oxymoron.'' Thus, the restrictions on the use of that authority have no impact on the parties' ability to seek use of that authority, regardless of the current status of a case.

[81] To the extent that the rule merely codifies existing law or authority, however, nothing in the rule precludes adjudicators from applying that existing authority to pending cases independently of the generally prospective application of the rule. For example, the Department notes that independent of the final rule, the Attorney General's decision in *Matter of Castro-Tum,* 27 I&N Dec. 271, remains binding and applicable to all pending cases, except in the Fourth and Seventh Circuits. *See* INA 103(a)(1), 8 U.S.C. 1103(a)(1) (''[D]etermination and ruling by the Attorney General with respect to all questions of law [as to the INA and other laws relating to the immigration and naturalization of aliens] shall be controlling''); INA 103(g)(2), 8 U.S.C. 1103(g)(2) (''The Attorney General shall . . . review such administrative determinations in immigration proceedings . . . as the Attorney General determines to be necessary for carrying out [his authorities].''); 8 CFR 1003.1(g)(1) (''[D]ecisions of the Attorney General are binding on all officers and employees of DHS or immigration judges in the administration of the immigration laws of the United States.'').

[82] In addition, the Department notes that the commenter cited *INS* v. *St. Cyr,* 533 U.S. 289, 316 (2001) in support of the argument that the Department failed to consider costs, but the relevant discussion by the Supreme Court in that case is dicta surrounding the reasons that courts must first consider if Congress intended for legislative to have retroactive effect.

[83] Although several commenters cited the TRAC report, TRAC itself did not submit a comment on the NPRM and appears not to have taken a position on it.

Department's position, also provide little support for revising the rule. TRAC listed four conclusions it derived from data analysis on EOIR data [84] regarding administratively closed cases. Those conclusions, however, are of limited probative value and do not undermine the Department's foundations for the rule.

TRAC's first conclusion is that ''administrative closure has been routinely used by Immigration Judges to manage their growing caseloads as well as manage the unresolved overlapping of jurisdictions between the EOIR and other immigration agencies.'' TRAC Report, *supra.* No one, including the Department, has disputed that immigration judges previously used administrative closure. *See, e.g., Administratively Closed Cases.* There is no evidence, however, that it was used effectively to manage caseloads—in the sense of resolving cases more efficiently—or used to resolve issues of overlapping jurisdiction,[85] and TRAC does not provide evidence to the contrary. TRAC merely states the historical frequency of the usage of administrative closure, which is a statement not in dispute or of particular relevance to the rule.

Moreover, TRAC's conclusory observation that ''[a]dministrative closures have allowed judges to temporarily close cases and take them off their active docket either because judges wish to focus limited resources on higher priority removal cases or because jurisdictional issues were prolonging the case'' is doubtful for several reasons. *See Hernandez-Serrano,* 2020 WL 6883420 at *4 (''To the contrary, the regulations expressly limit their delegation to actions 'necessary *for the disposition'* of the case. And that more restricted delegation cannot support a decision *not* to decide the case for reasons of administrative 'convenience' or the 'efficient management of the resources of the immigration courts and the BIA.' '' (cleaned up, emphasis in original)). As both TRAC and the Department have noted, administratively closed cases are not ''temporarily'' closed in any realistic sense of the word; rather, they are taken off the docket for either at least three years (according to TRAC) or at least 10 years (*Administratively Closed Cases*). *See id.* at *1, *4 (''A regulation delegating to immigration judges authority to take certain actions '[i]n deciding the individual cases before them' does not delegate to them general authority not to decide those cases at all. Yet in more than 400,000 cases in which an alien was charged with being subject to deportation or (after April 1, 1997) removal, immigration judges or the Board of Immigration Appeals have invoked such a regulation to close cases administratively—meaning the case was removed from the IJ's docket without further proceedings absent some persuasive reason to reopen it. As of October 2018, more than 350,000 of those cases had not been reopened. An adjudicatory default on that scale strikes directly at the rule of law. . . . [N]o one. . . . has explained how a general authority to close cases administratively can itself be lawful while leading to such facially unlawful results.'').

Further, administrative closure does not resolve legal questions of jurisdiction, and even if it did, TRAC does not explain why prolonging a case through administrative closure would address the issue of cases already prolonged due to jurisdictional questions. Further, TRAC does not explain why it is appropriate for an immigration judge to choose which cases are a ''priority'' rather than DHS, who—unlike EOIR and immigration judges—is statutorily tasked by Congress with ''[e]stablishing national immigration enforcement policies and priorities.'' Homeland Security Act of 2002, Public Law 107–296, sec. 402(5), Nov. 25, 2002, 116 Stat. 2135, 2178 (codified at 6 U.S.C. 202(5)). For all of these reasons, TRAC's first conclusion, to the extent it is relied on by commenters, does not provide a persuasive basis for altering the rule.

TRAC's second conclusion, ''administrative closure has helped reduce the backlog,'' is patently incorrect, as both the Department and TRAC's own data establishes. TRAC Report, *supra.* As TRAC acknowledges, ''[a]dministrative closure does not terminate a case, it does not provide permanent relief from deportation, and it does not confer lawful status of any kind.'' TRAC Report, *supra; see also Matter of Amico,* 19 I&N Dec. 652, 654 n.1 (BIA 1988) (''The administrative closing of a case does not result in a final order.''); *Matter of Lopez-Barrios,* 20 I&N Dec. at 204 (''However, [administrative closure] does not result in a final order.''). Consequently, because administrative closure is not a disposition of a case and does not result in a final order, the case remains pending, albeit inactive. In other words, the removal of the case from an active docket does not make the case disappear; thus, administratively closed cases contribute to the overall tally of pending cases—colloquially called a ''backlog''—just as much as active cases do. Both TRAC's data and the Department's data, EOIR, *Adjudication Statistics: Active and Inactive Pending Cases,* Oct. 13, 2020, *available at https://www.justice.gov/eoir/page/file/1139516/download,* show that the pending caseload, including both active and inactive cases, has grown considerably in recent years.[86] This growth has occurred for reasons other than administrative closure, particularly since 2017. Nevertheless, the increase in the use of administrative closure beginning in FY 2012 did not reduce the overall pending caseload, contrary to the assertions of TRAC and commenters.

TRAC's third conclusion, ''data from the Immigration Courts show that immigrants who obtain administrative closure are likely to have followed legal requirements and obtain lawful status,'' is both arguable as an assertion of fact and, ultimately of little relevance to the rule. TRAC Report, *supra.* According to TRAC's data, only 16 percent of aliens were awarded relief after their cases were administratively closed, whereas 40 percent were ordered removed or received an order of voluntary departure.[87] *Id.* Those numbers belie the

[84] The Department does not know what analytics TRAC performed or the precise methods and definitions it employed. Accordingly, the Department cannot speak to the accuracy of TRAC's results. Even assuming the results are accurate, however, TRAC's assertions—and commenters' reliance on them—are unpersuasive for the reasons given.

[85] TRAC does not explain what it means by ''overlapping jurisdiction'' and does not elaborate further on the point in its Report.

[86] TRAC itself has issued reports since at least 2009 noting the annual growth in the pending caseload which it terms a backlog. TRAC Immigration Reports, *Immigration Courts, available at https://trac.syr.edu/phptools/reports/reports.php?layer=immigration&report_type=*report (last visited Nov. 24, 2020). *TRAC also noted this increase in the pending caseload even at the height of the use of a*dministrative closure between 2012 and 2018. *Compare* TRAC Immigration Reports, *Once Intended to Reduce Immigration Court Backlog, Prosecutorial Discretion Closures Continue Unabated* (Jan. 15, 2014), *available at https://trac.syr.edu/immigration/reports/339/* (last visited Nov. 25, 2020) (use of administrative closure was intended ''as a program to clear cases from the accumulated court backlog'') *with* TRAC Immigration Reports, *Immigration Court Backlog Keeps Rising* (May 15, 2015), *available at https://trac.syr.edu/immigration/reports/385/* (last visited Nov. 25, 2020) (caseload still increasing in 2015) *and* TRAC Immigration Reports, *Immigration Backlog Still Rising Despite New Judge Investitures* (July 19, 2016), *available at https://trac.syr.edu/immigration/reports/429/* (last visited Nov. 25, 2020) (caseload still increasing in 2016).

[87] TRAC reports that 44 percent of cases resulted in the termination of proceedings after being administratively closed, which TRAC intuits to mean there was no longer a valid ground to remove the alien. As terminations may result from different bases, however, it is not clear that every termination resulted from the vitiation of grounds of removal against an alien. Moreover, TRAC's analysis does not consider whether the terminations were proper under the law, which was recently clarified by the Attorney General. *See Matter of S-O-G- & F-D-B-,* 27 I&N Dec. 462, 468 (A.G. 2018) (''As discussed

assertion that aliens whose cases have been administratively closed are likely to obtain lawful status.[88] Moreover, whatever outcomes may or may not result following the administrative closure of a case, those outcomes, which are based on specific evidence in each case and applicable law and may cut both for and against the parties, do not effectively outweigh the concerns noted by the Department in issuing the rule.

TRAC's fourth conclusion, ''the EOIR significantly misrepresented the data it used to justify this rule,'' is simply wrong. TRAC Report, *supra.* TRAC bases its claim primarily on the fact that EOIR does not include administrative closure decisions as completed cases; however, TRAC itself acknowledges that administratively closed cases are not final and, thus, not complete. *Id.* (''Administrative closure does not terminate a case, it does not provide permanent relief from deportation, and it does not confer lawful status of any kind.''); *cf. Hernandez-Serrano,* 2020 WL 6883420 at *3 (''Administrative closure typically is not an action taken '[i]n deciding' a case before an IJ; instead, as shown above, it is typically a decision not to decide the case. Nor is administrative closure typically an action 'necessary for the disposition' of an immigration case. Administrative closure is not itself a 'disposition' of a case, as Hernandez-Serrano concedes in this appeal.''). Moreover, TRAC does not explain why an administratively closed case should be considered completed in light of longstanding BIA case law that such cases are not, in fact, completed. *See Matter of Amico,* 19 I&N Dec. at 654 n.1 (''The administrative closing of a case does not result in a final order.''); *Matter of Lopez-Barrios,* 20 I&N Dec. at 204 (''However, [administrative closure] does not result in a final order.'').

Similarly, TRAC asserts that EOIR that did not consider the average number of completed cases by immigration judges over time which TRAC asserts has declined in recent years. As an initial point, the Department notes that TRAC includes decisions of administrative closure as ''completions'' in its analysis which is contrary to both TRAC's own view and the relevant case law, as discussed above. Nevertheless, even if administratively closed cases were included as completed cases, TRAC's analysis presents an additional flaw.

The Department does not generally provide average, per-immigration judge completion numbers and did not rely on any such statistics in the rule. Further, TRAC's reliance on the raw number of immigration judges to calculate its own average—suggesting that per-immigration judge completions have declined from 737 to 657—illustrates the problem with calculating such an average. Immigration judges are hired throughout the year, they may be promoted at different times in the year, and they may retire, separate, or die during the year. Further, new immigration judges do not begin hearing full dockets of cases immediately upon hire, and immigration judges may also be off the bench for extended periods due to leave, military obligations, or disciplinary action. Thus, the number of immigration judges frequently fluctuates throughout the year and is not static. Consequently, using the snapshot number of immigration judges at the beginning or end of the fiscal year—as TRAC does—does not account for those changes, particularly for newly hired or supervisory immigration judges who are not hearing full or regular dockets. In other words, due to retirements, promotions, and new hires, the actual number of immigration judges who adjudicated cases during a fiscal year—and whose cases are included in the end-of-the-year completion totals—is necessarily different than the end-of-the-year total. TRAC's data does not appear to have controlled for immigration judges who were not or no longer hearing full dockets, including those not hearing full dockets but counted in EOIR's overall total and, thus, the Department finds its assertions unsupported.[89]

Additionally, even if TRAC's analysis were accurate, the implications of it for the rule are not apparent.[90] To the extent that TRAC asserts that immigration judge productivity has declined over time—at least until FY 2019—the Department generally agrees with that assertion, but its relevance to the rule is unclear. Although the Department acknowledges TRAC's tacit suggestion that the limitation of administrative closure by *Matter of Castro-Tum* in FY 2018 contributed to an increase in immigration judge productivity in FY 2019, the Department has not investigated that link explicitly. Moreover, the rule was proposed to address multiple legal and policy concerns with the use of administrative closure, to provide clearer delineation regarding the appropriateness of its usage, and to address inefficiency issues that it has wrought, particularly to the extent that it has contributed to docket churning and unnecessary delays in adjudicating cases. 85 FR at 52503–04. Thus, although decreased immigration judge productivity, which may result from multiple causes including the inappropriate use of administrative closure, may undermine the Department's ability to efficiently adjudicate cases, the rule was not promulgated solely to increase productivity.

In short, to the extent that commenters relied on the TRAC Report as a basis for opposing the rule, the Department finds that Report unpersuasive for the many reasons noted. Consequently, the Department also declines to accept the comments based on it.

III. Regulatory Requirements

A. Administrative Procedure Act

Portions of this final rule state a rule of agency organization, procedure, or practice and reflect matters of agency management or personnel, *e.g.,* the provisions of 8 CFR 1003.1(e)(8) and (k), because they reflect internal

above, however, immigration judges have no inherent authority to terminate removal proceedings even though a particular case may pose sympathetic circumstances.''). Accordingly, it is not clear that the data, even if it is accurate, supports the assertion that aliens whose cases have been terminated ''followed legal requirements and obtain[ed] lawful status.'' TRAC Immigration Reports, *The Life and Death of Administrative Closure* (Sept. 10, 2020) *available at https://trac.syr.edu/immigration/reports/623/* (last visited 11/25/2020).

[88] TRAC did not distinguish cases that would remain eligible for administrative closure under the final rule. Nevertheless, the Department notes that because an appropriate exercise of administrative closure under the rule includes regulations and settlement agreements that allow aliens to seek different types of relief from removal, *Matter of Castro-Tum,* 27 I&N Dec. at 276–78, the fact that only 16 percent of aliens overall obtain relief after their cases are administratively closed is further evidence that the impact of the rule is much less than commenters assert.

[89] In contrast, when the Department does calculate a per-immigration judge completion average, it controls for judges who did not hear regular dockets of cases throughout the fiscal year. *See, e.g.,* EOIR, *Executive Office for Immigration Review Announces Case Completion Numbers for Fiscal Year 2019,* Oct. 10, 2019, *available at https://www.justice.gov/opa/pr/executive-office-immigration-review-announces-case-completion-numbers-fiscal-year-2019* (''On average, immigration judges *who performed over the whole year* completed 708 cases each in FY19.'') (emphasis added)).

[90] The Department notes in passing two additional concerns about TRAC's analysis on this point. First, TRAC divides its analysis by Presidential administration even though the ability of an immigration judge to administratively close a case continued for over a year into the current administration. Second, TRAC does not acknowledge that even under its methodology, per-immigration judge case completions increased in FY 2019. Thus, it is not clear that its overall assertion—a clear decline in per-immigration judge productivity under the current administration—is even factually accurate.

management directives or delegations of authority by the Attorney General. Thus, those portions of the rule are exempt from the requirements for notice-and-comment rulemaking and a 30-day delay in effective date. 5 U.S.C. 553(a)(2), (b)(A). Nevertheless, rather than attempting to parse out different sections of the rule with different effective dates, the Department has elected to publish the entire final rule with a 30-day effective date under the APA. 5 U.S.C. 553(d).

B. Regulatory Flexibility Act

The Department has reviewed this rule in accordance with the RFA (5 U.S.C. 605(b)) and has determined that this rule will not have a significant economic impact on a substantial number of small entities. The Department's discussion of the RFA in section II.C.5, *supra,* in response to RFA-related comments received on the rule is incorporated in full herein by reference.

C. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year (adjusted annually for inflation), and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Executive Orders 12866, 13563, and 13771

Portions of this rule involve agency organization, management, or personnel matters and would, therefore, not be subject to review by the Office of Management and Budget (OMB) pursuant to section 3(d)(3) of Executive Order 12866. For similar reasons, those portions would not be subject to the requirements of Executive Orders 13563 or 13771. Nevertheless, rather than parse out individual provisions to determine whether OMB review is warranted for discrete provisions of the rule, the Department has determined that this rule, as a whole, is a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review. Accordingly, this rule has been submitted to OMB for review.

The Department certifies that this regulation has been drafted in accordance with the principles of Executive Orders 12866, 13563, and 13771. Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (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, reducing costs, harmonizing rules, and promoting flexibility.

As noted in the NPRM, 85 FR at 52509, the Department believes that the rule will help more efficiently adjudicate cases before the BIA allowing for a reduction in the number of cases pending before EOIR overall and an increase in the BIA adjudicating more appeals annually. The Department believes the costs to the public will be negligible, if any, because the basic briefing procedures will remain the same (and any notable changes fall principally on DHS rather than the public), because current BIA policy already disfavors multiple or lengthy briefing extension requests, because the use of administrative closure has already been restricted subsequent to the decision in *Matter of Castro-Tum,* 27 I&N Dec. 271, because no party has a right to *sua sponte* reopening authority and a motion to exercise such authority is already not cognizable under existing law, and because the BIA is generally already prohibited from considering new evidence on appeal. Further, the Department notes that the most significant regulatory change to the BIA's case management process—and a more comprehensive one than the one in the final rule—was promulgated without the type of numeric analysis commenters suggested is warranted with no noted concerns or challenges on that basis. 67 FR at 54900.

In short, the rule does not impose any new costs, and most, if not all, of the proposed rule is directed at internal case processing. Any changes contemplated by the rule would have little, if any, apparent impact on the public but would substantially improve both the quality and efficiency of BIA appellate adjudications. The Department has complied with the relevant Executive Orders.

The Department did find the rule to be a significant regulatory action and, as such, performed an analysis under Executive Order 13771. In applying Executive Order 13771, the Department determined that this final rule will substantially improve BIA appellate procedure with the result of negligible new costs to the public. As such, no budget implications will result from this final rule, and no balance is needed from the repeal of other regulations.

E. Executive Order 13132—Federalism

This rule will not have substantial direct effects on the states, on the relationship between the Federal government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section six of Executive Order 13132, it is determined that this rule would not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988—Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

This rule does not propose new ''collection[s] of information'' as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104–13, 109 Stat. 163 (codified at 44 U.S.C. 3501–3521) (''PRA''), and its implementing regulations, 5 CFR part 1320.

H. Congressional Review Act

This proposed rule is not a major rule as defined by section 804 of the Congressional Review Act. 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

List of Subjects

8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal services, Organization and functions (Government agencies).

8 CFR Part 1240

Administrative practice and procedure, Aliens.

Accordingly, for the reasons set forth in the preamble, and by the authority vested in the Director, Executive Office for Immigration Review, by the Attorney General Order Number 4910–2020, the Department amends 8 CFR parts 1003 and 1240 as follows:

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

■ 1. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

■ 2. Amend § 1003.1 by:
■ a. Revising paragraph (c), (d)(1)(ii), and (d)(3)(iv);
■ b. Adding paragraph (d)(3)(v);
■ c. Revising paragraph (d)(6)(ii), (iii), and (iv) and (d)(7);
■ d. In pargraph (e) introductory text:
■ i. Removing ''this paragraph'' and adding ''this paragraph (e)'' in its place; and
■ ii. Adding a sentence at the end of the paragraph;
■ e. Revising paragraphs (e)(1), (e)(8) introductory text, and (e)(8)(i) and (iii);
■ f. Removing and reserving paragraph (e)(8)(iv);
■ g. Adding five sentences at the end of paragraph (e)(8)(v) and adding paragraphs (e)(8)(v)(A) through (F); and
■ h. Adding paragraph (k).

The additions and revisions read as follows:

§ 1003.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals.

* * * * *

(c) *Jurisdiction by certification.* The Secretary, or any other duly authorized officer of DHS, or an immigration judge may in any case arising under paragraph (b) of this section certify such case to the Board for adjudication.

(d) * * *

(1) * * *

(ii) Subject to the governing standards set forth in paragraph (d)(1)(i) of this section, Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board, and a panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case. Nothing in this paragraph (d)(1)(ii) shall be construed as authorizing the Board to administratively close or otherwise defer adjudication of a case unless a regulation promulgated by the Department of Justice or a previous judicially approved settlement expressly authorizes such an action. Only the Director or Chief Appellate Immigration Judge may direct the deferral of adjudication of any case or cases by the Board.

* * * * *

(3) * * *

(iv)(A) The Board will not engage in factfinding in the course of deciding cases, except that the Board may take administrative notice of facts that are not reasonably subject to dispute, such as:

(*1*) Current events;

(*2*) The contents of official documents outside the record;

(*3*) Facts that can be accurately and readily determined from official government sources and whose accuracy is not disputed; or

(*4*) Undisputed facts contained in the record.

(B) If the Board intends to rely on an administratively noticed fact outside of the record, such as those indicated in paragraphs (d)(3)(iv)(A)(*1*) through (*3*) of this section, as the basis for reversing an immigration judge's grant of relief or protection from removal, it must provide notice to the parties of its intent and afford them an opportunity of not less than 14 days to respond to the notice.

(C) The Board shall not *sua sponte* remand a case for further factfinding unless the factfinding is necessary to determine whether the immigration judge had jurisdiction over the case.

(D) Except as provided in paragraph (d)(6)(iii) or (d)(7)(v)(B) of this section, the Board shall not remand a direct appeal from an immigration judge's decision for additional factfinding unless:

(*1*) The party seeking remand preserved the issue by presenting it before the immigration judge;

(*2*) The party seeking remand, if it bore the burden of proof before the immigration judge, attempted to adduce the additional facts before the immigration judge;

(*3*) The additional factfinding would alter the outcome or disposition of the case;

(*4*) The additional factfinding would not be cumulative of the evidence already presented or contained in the record; and

(*5*) One of the following circumstances is present in the case:

(*i*) The immigration judge's factual findings were clearly erroneous;

(*ii*) The immigration judge's factual findings were not clearly erroneous, but the immigration judge committed an error of law that requires additional factfinding on remand; or

(*iii*) Remand to DHS is warranted following de novo review.

(v) The Board may affirm the decision of the immigration judge or the Department of Homeland Security on any basis supported by the record, including a basis supported by facts that are not reasonably subject to dispute, such as undisputed facts in the record.

* * * * *

(6) * * *

(ii) Except as provided in paragraph (d)(6)(iv) of this section, if identity, law enforcement, or security investigations or examinations have not been completed or DHS reports that the results of prior investigations or examinations are no longer current under the standards established by DHS, and the completion of the investigations or examinations is necessary for the Board to complete its adjudication of the appeal, the Board will provide notice to both parties that, in order to complete adjudication of the appeal, the case is being placed on hold until such time as all identity, law enforcement, or security investigations or examinations are completed or updated and the results have been reported to the Board. Unless DHS advises the Board that such information is no longer necessary in the particular case, the Board's notice will notify the alien that DHS will contact the alien to take additional steps to complete or update the identity, law enforcement, or security investigations or examinations only if DHS is unable to independently update the necessary investigations or examinations. If DHS is unable to independently update the necessary investigations or examinations, DHS shall send the alien instructions that comply with the requirements of § 1003.47(d) regarding the necessary procedures and contemporaneously serve a copy of the instructions with the Board. The Board's notice will also advise the alien of the consequences for failing to comply with the requirements of this section. DHS is responsible for obtaining biometrics and other biographical information to complete or update the identity, law enforcement, or security investigations or examinations with respect to any alien in detention.

(iii) In any case placed on hold under paragraph (d)(6)(ii) of this section, DHS shall report to the Board promptly when the identity, law enforcement, or security investigations or examinations have been completed or updated. If a non-detained alien fails to comply with necessary procedures for collecting biometrics or other biographical information within 90 days of the DHS's instruction notice under paragraph

(d)(6)(ii) of this section, if applicable, the Board shall deem the application abandoned unless the alien shows good cause before the 90-day period has elapsed, in which case the alien should be given no more than an additional 30 days to comply with the procedures. If the Board deems an application abandoned under this section, it shall adjudicate the remainder of the appeal within 30 days and shall enter an order of removal or a grant of voluntary departure, as appropriate. If DHS obtains relevant information as a result of the identity, law enforcement, or security investigations or examinations, including civil or criminal investigations of immigration fraud, DHS may move the Board to remand the record to the immigration judge for consideration of whether, in view of the new information, any pending applications for immigration relief or protection should be denied, either on grounds of eligibility or, where applicable, as a matter of discretion. If DHS fails to report the results of timely completed or updated identity, law enforcement, or security investigations or examinations within 180 days of the Board's notice under paragraph (d)(6)(ii) of this section, the Board shall remand the case to the immigration judge for further proceedings under § 1003.47(h).

(iv) The Board is not required to hold a case pursuant to paragraph (d)(6)(ii) of this section if the Board decides to dismiss the respondent's appeal or deny the relief or protection sought.

* * * * *

(7) *Finality of decision*—(i) *In general.* The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. In adjudicating an appeal, the Board possesses authority to issue an order of removal, an order granting relief from removal, an order granting protection from removal combined with an order of removal as appropriate, an order granting voluntary departure with an alternate order of removal, and an order terminating or dismissing proceedings, provided that the issuance of any order is consistent with applicable law. The Board may affirm the decision of the immigration judge or DHS on any basis supported by the record. In no case shall the Board order a remand for an immigration judge to issue an order that the Board itself could issue.

(ii) *Remands.* In addition to the possibility of remands regarding information obtained as a result of the identity, law enforcement, or security investigations or examinations under paragraph (d)(6)(iii) of this section, after applying the appropriate standard of review on appeal, the Board may issue an order remanding a case to an immigration judge or DHS for further consideration based on an error of law or fact, subject to any applicable statutory or regulatory limitations, including paragraph (d)(3)(iv)(D) of this section and the following:

(A) The Board shall not remand a case for further action without identifying the standard of review it applied and the specific error or errors made by the adjudicator in paragraphs (d)(7)(ii)(B) through (E) of this section.

(B) The Board shall not remand a case based on the application of a ''totality of the circumstances'' standard of review.

(C) The Board shall not remand a case based on a legal argument not presented in paragraphs (d)(7)(ii)(D) through (E) of this section unless that argument pertains to an issue of jurisdiction over an application or the proceedings, or to a material change in fact or law underlying a removability ground or grounds specified in section 212 or 237 of the Act that occurred after the date of the immigration judge's decision, and substantial evidence indicates that change has vitiated all grounds of removability applicable to the alien.

(D) The Board shall not *sua sponte* remand a case unless the basis for such a remand is solely a question of jurisdiction over an application or the proceedings.

(E) The Board shall not remand a case to an immigration judge solely to consider or reconsider a request for voluntary departure nor solely due to the failure of the immigration judge to provide advisals following a grant of voluntary departure. In such situations, the Board shall follow the procedures in § 1240.26(k) of this chapter.

(iii) *Scope of the remand.* Where the Board remands a case to an immigration judge, it divests itself of jurisdiction of that case, unless the Board remands a case due to the court's failure to forward the administrative record in response to the Board's request. The Board may qualify or limit the scope or purpose of a remand order without retaining jurisdiction over the case following the remand. In any case in which the Board has qualified or limited the scope or purpose of the remand, the immigration judge shall not consider any issues outside the scope or purpose of that order, unless such an issue calls into question the immigration judge's continuing jurisdiction over the case.

(iv) *Voluntary departure.* The Board may issue an order of voluntary departure under section 240B of the Act, with an alternate order of removal, if the alien requested voluntary departure before an immigration judge, the alien's notice of appeal specified that the alien is appealing the immigration judge's denial of voluntary departure and identified the specific factual and legal findings that the alien is challenging, and the Board finds that the alien is otherwise eligible for voluntary departure, as provided in § 1240.26(k) of this chapter. In order to grant voluntary departure, the Board must find that all applicable statutory and regulatory criteria have been met, based on the record and within the scope of its review authority on appeal, and that the alien merits voluntary departure as a matter of discretion. If the Board does not grant the request for voluntary departure, it must deny the request.

(v) *New evidence on appeal.* (A) Subject to paragraph (d)(7)(v)(B), the Board shall not receive or review new evidence submitted on appeal, shall not remand a case for consideration of new evidence received on appeal, and shall not consider a motion to remand based on new evidence. A party seeking to submit new evidence shall file a motion to reopen in accordance with applicable law.

(B) Nothing in paragraph (d)(7)(v)(A) of this section shall preclude the Board from remanding a case based on new evidence or information obtained after the date of the immigration judge's decision as a result of identity, law enforcement, or security investigations or examinations, including civil or criminal investigations of immigration fraud, regardless of whether the investigations or examinations were conducted pursuant to § 1003.47(h) or paragraph (d)(6) of this section, nor from remanding a case to address a question of jurisdiction over an application or the proceedings or a question regarding a ground or grounds of removability specified in section 212 or 237 of the Act.

* * * * *

(e) * * * The provisions of this paragraph (e) shall apply to all cases before the Board, regardless of whether they were initiated by filing a Notice of Appeal, filing a motion, or receipt of a remand from Federal court, the Attorney General, or the Director.

(1) *Initial screening.* All cases shall be referred to the screening panel for review upon the filing of a Notice of Appeal or a motion or upon receipt of a remand from a Federal court, the Attorney General, or the Director. Screening panel review shall be completed within 14 days of the filing or receipt. Appeals subject to summary dismissal as provided in paragraph (d)(2) of this section, except for those

subject to summary dismissal as provided in paragraph (d)(2)(i)(E) of this section, shall be promptly dismissed no later than 30 days after the Notice of Appeal was filed. Unless referred for a three-member panel decision pursuant to paragraph (e)(6) of this section, an interlocutory appeal shall be adjudicated within 30 days of the filing of the appeal.

* * * * *

(8) *Timeliness.* The Board shall promptly enter orders of summary dismissal, or other miscellaneous dispositions, in appropriate cases consistent with paragraph (e)(1) of this section. In all other cases, the Board shall promptly order a transcript, if appropriate, within seven days after the screening panel completes its review and shall issue a briefing schedule within seven days after the transcript is provided. If no transcript may be ordered due to a lack of available funding or a lack of vendor capacity, the Chairman shall so certify that fact in writing to the Director. The Chairman shall also maintain a record of all such cases in which transcription cannot be ordered and provide that record to the Director. If no transcript is required, the Board shall issue a briefing schedule within seven days after the screening panel completes its review. The case shall be assigned to a single Board member for merits review under paragraph (e)(3) of this section within seven days of the completion of the record on appeal, including any briefs or motions. The single Board member shall then determine whether to adjudicate the appeal or to designate the case for decision by a three-member panel under paragraphs (e)(5) and (6) of this section within 14 days of being assigned the case. The single Board member or three-member panel to which the case is assigned shall issue a decision on the merits consistent with this section and with a priority for cases or custody appeals involving detained aliens.

(i) Except in exigent circumstances as determined by the Chairman, subject to concurrence by the Director, or as provided in paragraph (d)(6) of this section or as provided in §§ 1003.6(c) and 1003.19(i), the Board shall dispose of all cases assigned to a single Board member within 90 days of completion of the record, or within 180 days of completion of the record for all cases assigned to a three-member panel (including any additional opinion by a member of the panel).

* * * * *

(iii) In rare circumstances, when an impending decision by the United States Supreme Court or an impending *en banc* Board decision may substantially determine the outcome of a group of cases pending before the Board, the Chairman, subject to concurrence by the Director, may hold the cases until such decision is rendered, temporarily suspending the time limits described in this paragraph (e)(8). The length of such a hold shall not exceed 120 days.

* * * * *

(v) * * * The Chairman shall notify the Director of all cases in which an extension under paragraph (e)(8)(ii) of this section, a hold under paragraph (e)(8)(iii) of this section, or any other delay in meeting the requirements of paragraph (e)(8) of this section occurs. For any case still pending adjudication by the Board more than 335 days after the appeal was filed, the motion was filed, or the remand was received and not described in paragraphs (e)(8)(v)(A) through (E) of this section, the Chairman shall refer that case to the Director for decision. For a case referred to the Director under this paragraph (e)(8)(v), the Director shall exercise delegated authority from the Attorney General identical to that of the Board as described in this section, including the authority to issue a precedential decision and the authority to refer the case to the Attorney General for review, either on his own or at the direction of the Attorney General. The Director may not further delegate this authority. For purposes of this paragraph (e)(8)(v), the following categories of cases pending adjudication by the Board more than 335 days after the appeal was filed, the motion was filed, or the remand was received will not be referred by the Chairman to the Director:

(A) Cases subject to a hold under paragraph (d)(6)(ii) of this section;

(B) Cases subject to an extension under paragraph (e)(8)(ii) of this section;

(C) Cases subject to a hold under paragraph (e)(8)(iii) of this section;

(D) Cases whose adjudication has been deferred by the Director pursuant to § 1003.0(b)(1)(ii);

(E) Cases remanded by the Director under paragraph (k) of this section in which 335 days have elapsed following the remand; and,

(F) Cases that have been administratively closed prior to the elapse of 335 days after the appeal was filed pursuant to a regulation promulgated by the Department of Justice or a previous judicially approved settlement that expressly authorizes such an action and the administrative closure causes the pendency of the appeal to exceed 335 days.

* * * * *

(k) *Quality assurance certification.* (1) In any case in which the Board remands a case to an immigration judge or reopens and remands a case to an immigration judge, the immigration judge may forward that case by certification to the Director for further review only in the following circumstances:

(i) The Board decision contains a typographical or clerical error affecting the outcome of the case;

(ii) The Board decision is clearly contrary to a provision of the Act, any other immigration law or statute, any applicable regulation, or a published, binding precedent;

(iii) The Board decision is vague, ambiguous, internally inconsistent, or otherwise did not resolve the basis for the appeal; or

(iv) A material factor pertinent to the issue(s) before the immigration judge was clearly not considered in the decision.

(2) In order to certify a decision under paragraph (k)(1) of this section, an immigration judge must:

(i) Issue an order of certification within 30 days of the Board decision if the alien is not detained and within 15 days of the Board decision if the alien is detained;

(ii) In the order of certification, specify the regulatory basis for the certification and summarize the underlying procedural, factual, or legal basis; and

(iii) Provide notice of the certification to both parties.

(3) For a case certified to the Director under this paragraph (k), the Director shall exercise delegated authority from the Attorney General identical to that of the Board as described in this section, except as otherwise provided in this paragraph (k), including the authority to request briefing or additional filings from the parties at the sole discretion of the Director, the authority to issue a precedent decision, and the authority to refer the case to the Attorney General for review, either on the Director's own or at the direction of the Attorney General. For a case certified to the Director under this paragraph (k), the Director may dismiss the certification and return the case to the immigration judge or the Director may remand the case back to the Board for further proceedings. In a case certified to the Director under this paragraph (k), the Director may not issue an order of removal, grant a request for voluntary departure, or grant or deny an application for relief or protection from removal.

(4) The quality assurance certification process shall not be used as a basis solely to express disapproval of or disagreement with the outcome of a Board decision unless that decision is alleged to reflect an error described in paragraph (k)(1) of this section.

■ 3. Amend § 1003.2 by:

■ a. In paragraph (a), revising the first sentence and adding a sentence following the first sentence;

■ b. Revising paragraph (b)(1);

■ c. Removing the word ''or'' in paragraph (c)(3)(iii);

■ d. Removing the period at the end of paragraph (c)(3)(iv) and adding a semicolon in its place;

■ e. Adding paragraph (c)(3)(v), (vi), and (vii); and

■ f. Removing paragraph (c)(4).

The revision and additions read as follows:

§ 1003.2 Reopening or reconsideration before the Board of Immigration Appeals.

(a) *General.* The Board may at any time reopen or reconsider a case in which it has rendered a decision on its own motion solely in order to correct a ministerial mistake or typographical error in that decision or to reissue the decision to correct a defect in service. In all other cases, the Board may only reopen or reconsider any case in which it has rendered a decision solely pursuant to a motion filed by one or both parties. * * *

(b) * * *

(1) A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority.

* * * * *

(c) * * *

(3) * * *

(v) For which a three-member panel of the Board agrees that reopening is warranted when the following circumstances are present, provided that a respondent may file only one motion to reopen pursuant to this paragraph (c)(3):

(A) A material change in fact or law underlying a removability ground or grounds specified in section 212 or 237 of the Act that occurred after the entry of an administratively final order that vitiates all grounds of removability applicable to the alien; and

(B) The movant exercised diligence in pursuing the motion to reopen;

(vi) Filed based on specific allegations, supported by evidence, that the respondent is a United States citizen or national; or

(vii) Filed by DHS in removal proceedings pursuant to section 240 of the Act or in proceedings initiated pursuant to § 1208.2(c) of this chapter.

* * * * *

■ 4. Amend § 1003.3 by revising paragraphs (a)(2) and (c)(1) and (2) to read as follows:

§ 1003.3 Notice of appeal.

(a) * * *

(2) *Appeal from decision of a DHS officer.* A party affected by a decision of a DHS officer that may be appealed to the Board under this chapter shall be given notice of the opportunity to file an appeal. An appeal from a decision of a DHS officer shall be taken by filing a Notice of Appeal to the Board of Immigration Appeals from a Decision of a DHS Officer (Form EOIR–29) directly with DHS in accordance with the instructions in the decision of the DHS officer within 30 days of the service of the decision being appealed. An appeal is not properly filed until it is received at the appropriate DHS office, together with all required documents, and the fee provisions of § 1003.8 are satisfied.

* * * * *

(c) * * *

(1) *Appeal from decision of an immigration judge.* Briefs in support of or in opposition to an appeal from a decision of an immigration judge shall be filed directly with the Board. In those cases that are transcribed, the briefing schedule shall be set by the Board after the transcript is available. In all cases, the parties shall be provided 21 days in which to file simultaneous briefs unless a shorter period is specified by the Board. Reply briefs shall be permitted only by leave of the Board and only if filed within 14 days of the deadline for the initial briefs. The Board, upon written motion and a maximum of one time per case, may extend the period for filing a brief or, if permitted, a reply brief for up to 14 days for good cause shown. If an extension is granted, it is granted to both parties, and neither party may request a further extension. Nothing in this paragraph (c)(1) shall be construed as creating a right to a briefing extension for any party in any case, and the Board shall not adopt a policy of granting all extension requests without individualized consideration of good cause. In its discretion, the Board may consider a brief that has been filed out of time. In its discretion, the Board may request supplemental briefing from the parties after the expiration of the briefing deadline. All briefs, filings, and motions filed in conjunction with an appeal shall include proof of service on the opposing party.

(2) *Appeal from decision of a DHS officer.* Briefs in support of or in opposition to an appeal from a decision of a DHS officer shall be filed directly with DHS in accordance with the instructions in the decision of the DHS officer. The applicant or petitioner and DHS shall be provided 21 days in which to file a brief, unless a shorter period is specified by the DHS officer from whose decision the appeal is taken, and reply briefs shall be permitted only by leave of the Board and only if filed within 14 days of the deadline for the initial briefs. Upon written request of the alien and a maximum of one time per case, the DHS officer from whose decision the appeal is taken or the Board may extend the period for filing a brief for up to 14 days for good cause shown. After the forwarding of the record on appeal by the DHS officer the Board may, solely in its discretion, authorize the filing of supplemental briefs directly with the Board and may provide the parties up to a maximum of 14 days to simultaneously file such briefs. In its discretion, the Board may consider a brief that has been filed out of time. All briefs and other documents filed in conjunction with an appeal, unless filed by an alien directly with a DHS office, shall include proof of service on the opposing party.

* * * * *

■ 5. Revise § 1003.5 to read as follows:

§ 1003.5 Forwarding of record on appeal.

(a) *Appeal from decision of an immigration judge.* If an appeal is taken from a decision of an immigration judge, the record of proceeding shall be promptly forwarded to the Board upon the request or the order of the Board, unless the Board already has access to the record of proceeding in electronic format. The Director, in consultation with the Chairman and the Chief Immigration Judge, shall determine the most effective and expeditious way to transcribe proceedings before the immigration judges. The Chairman and the Chief Immigration Judge shall take such steps as necessary to reduce the time required to produce transcripts of those proceedings and to ensure their quality.

(b) *Appeal from decision of a DHS officer.* If an appeal is taken from a decision of a DHS officer, the record of proceeding shall be forwarded to the Board by the DHS officer promptly upon receipt of the briefs of the parties, or upon expiration of the time allowed for the submission of such briefs, unless the DHS officer reopens and approves the petition.

§ 1003.7 [Amended]

■ 6. Amend § 1003.7 by removing ''Service'' and ''the Service'' each place they appear and adding in their place the acronym ''DHS''.

■ 7. Amend § 1003.10(b) by:

■ a. Removing ''governing standards'' and adding ''governing standards set forth in paragraph (d) of this section'' in its place; and

■ b. Adding two sentences at the end of the paragraph.

The additions reads as follows:

§ 1003.10 Immigration judges.

* * * * *

(b) * * * Nothing in this paragraph (b) nor in any regulation contained in part 1240 of this chapter shall be construed as authorizing an immigration judge to administratively close or otherwise defer adjudication of a case unless a regulation promulgated by the Department of Justice or a previous judicially approved settlement expressly authorizes such an action. Only the Director or Chief Immigration Judge may direct the deferral of adjudication of any case or cases by an immigration judge.

* * * * *

■ 8. Amend § 1003.23 by:

■ a. In paragraph (b)(1) introductory text:

■ i. Revising the first sentence and adding a sentence following the first sentence; and

■ ii. Removing ''this paragraph'' and adding ''this paragraph (b)(1)'' in its place;

■ b. Adding paragraphs (b)(4)(v) and (vi).

The revision and additions read as follows:

§ 1003.23 Reopening or reconsideration before the Immigration Court.

* * * * *

(b) * * *

(1) *In general.* Unless jurisdiction is vested with the Board of Immigration Appeals, an immigration judge may at any time reopen a case in which he or she has rendered a decision on his or her own motion solely in order to correct a ministerial mistake or typographical error in that decision or to reissue the decision to correct a defect in service. Unless jurisdiction is vested with the Board of Immigration Appeals, in all other cases, an immigration judge may only reopen or reconsider any case in which he or she has rendered a decision solely pursuant to a motion filed by one or both parties. * * *

* * * * *

(4) * * *

(v) *Exceptions to time and numerical limitations.* The time and numerical limitations set forth in paragraph (b)(1) of this section shall not apply to a motion to reopen proceedings filed when each of the following circumstances is present, provided that a respondent may file only one motion to reopen pursuant to this paragraph (b)(4):

(A) A material change in fact or law underlying a removability ground or grounds specified in section 212 or 237 of the Act occurred after the entry of an administratively final order that vitiates all grounds of removability applicable to the alien; and

(B) The movant exercised diligence in pursuing the motion to reopen.

(vi) *Asserted United States citizenship or nationality.* The time limitations set forth in paragraph (b)(1) of this section shall not apply to a motion to reopen proceedings filed based on specific allegations, supported by evidence, that the respondent is a United States citizen or national.

PART 1240—PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES

■ 9. The authority citation for part 1240 continues to read as follows:

Authority: 8 U.S.C. 1103, 1158, 1182, 1186a, 1186b, 1225, 1226, 1227, 1228, 1229a, 1229b, 1229c, 1252 note, 1361, 1362; secs. 202 and 203, Pub. L. 105–100 (111 Stat. 2160, 2193); sec. 902, Pub. L. 105–277 (112 Stat. 2681).

■ 10. Amend § 1240.26 by:

■ a. Redesignating paragraph (j) as paragraph (l);

■ b. Adding a new reserved paragraph (j); and

■ c. Adding paragraph (k).

The addition reads as follows:

§ 1240.26 Voluntary departure—authority of the Executive Office for Immigration Review.

* * * * *

(k) *Authority of the Board to grant voluntary departure in the first instance.* The following procedures apply to any request for voluntary departure reviewed by the Board:

(1) The Board shall not remand a case to an immigration judge to reconsider a request for voluntary departure. If the Board first finds that an immigration judge incorrectly denied an alien's request for voluntary departure or failed to provide appropriate advisals, the Board shall consider the alien's request for voluntary departure de novo and, if warranted, may enter its own order of voluntary departure with an alternate order of removal.

(2) In cases which an alien has appealed an immigration judge's decision or in which DHS and the alien have both appealed an immigration judge's decision, the Board shall not grant voluntary departure under section 240B of the Act unless:

(i) The alien requested voluntary departure under that section before the immigration judge, the immigration judge denied the request, and the alien timely appealed;

(ii) The alien's notice of appeal specified that the alien is appealing the immigration judge's denial of voluntary departure and identified the specific factual and legal findings that the alien is challenging;

(iii) The Board finds that the immigration judge's decision was in error; and

(iv) The Board finds that the alien meets all applicable statutory and regulatory criteria for voluntary departure under that section.

(3) In cases in which DHS has appealed an immigration judge's decision, the Board shall not grant voluntary departure under section 240B of the Act unless:

(i) The alien requested voluntary departure under that section before the immigration judge and provided evidence or a proffer of evidence in support of the alien's request;

(ii) The immigration judge either granted the request or did not rule on it; and,

(iii) The Board finds that the alien meets all applicable statutory and regulatory criteria for voluntary departure under that section.

(4) The Board may impose such conditions as it deems necessary to ensure the alien's timely departure from the United States, if supported by the record on appeal and within the scope of the Board's authority on appeal. Unless otherwise indicated in this section, the Board shall advise the alien in writing of the conditions set by the Board, consistent with the conditions set forth in paragraphs (b), (c), (d), (e), (h), and (i) of this section (other than paragraph (c)(3)(ii) of this section), except that the Board shall advise the alien of the duty to post the bond with the ICE Field Office Director within 10 business days of the Board's order granting voluntary departure if that order was served by mail and shall advise the alien of the duty to post the bond with the ICE Field Office Director within five business days of the Board's order granting voluntary departure if that order was served electronically. If documentation sufficient to assure lawful entry into the country to which the alien is departing is not contained in the record, but the alien continues to assert a request for voluntary departure

under section 240B of the Act and the Board finds that the alien is otherwise eligible for voluntary departure under the Act, the Board may grant voluntary departure for a period not to exceed 120 days, subject to the condition that the alien within 60 days must secure such documentation and present it to DHS and the Board. If the Board imposes conditions beyond those specifically enumerated, the Board shall advise the alien in writing of such conditions. The alien may accept or decline the grant of voluntary departure and may manifest his or her declination either by written notice to the Board within five days of receipt of its decision, by failing to timely post any required bond, or by otherwise failing to comply with the Board's order. The grant of voluntary departure shall automatically terminate upon a filing by the alien of a motion to reopen or reconsider the Board's decision, or by filing a timely petition for review of the Board's decision. The alien may decline voluntary departure if he or she is unwilling to accept the amount of the bond or other conditions.

* * * * *

James R. McHenry III,

Director, Executive Office for Immigration Review, Department of Justice.

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Part IV

Department of Labor

Employee Benefits Security Administration

29 CFR Parts 2509 and 2550
Fiduciary Duties Regarding Proxy Voting and Shareholder Rights; Final Rule

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Parts 2509 and 2550

RIN 1210–AB91

Fiduciary Duties Regarding Proxy Voting and Shareholder Rights

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor (Department) is amending the ''Investment Duties'' regulation to address the application of the prudence and exclusive purpose duties under the Employee Retirement Income Security Act of 1974 (ERISA) to the exercise of shareholder rights, including proxy voting, the use of written proxy voting policies and guidelines, and the selection and monitoring of proxy advisory firms. This document also removes Interpretive Bulletin 2016–01 from the Code of Federal Regulations as it no longer represents the view of the Department regarding the proper interpretation of ERISA with respect to the exercise of shareholder rights by fiduciaries of ERISA-covered plans.

DATES: *Effective Date:* The final rule is effective on January 15, 2021.

Applicability Dates: See Section B.3(vi) of this document and § 2550.404a–1(g) of the final rule for compliance dates for § 2550.404a–1(e)(2)(ii)(D) and (E), (e)(2)(iv), (e)(4)(ii) of the final rule.

FOR FURTHER INFORMATION CONTACT: Jason A. DeWitt, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693–8500. This is not a toll-free number.

Customer Service Information: Individuals interested in obtaining information from the Department of Labor concerning ERISA and employee benefit plans may call the Employee Benefits Security Administration (EBSA) Toll-Free Hotline, at 1–866–444–EBSA (3272) or visit the Department of Labor's website (*www.dol.gov/agencies/ebsa*).

SUPPLEMENTARY INFORMATION:

A. Background and Purpose of Regulatory Action

Title I of the Employee Retirement Income Security Act of 1974 (ERISA) establishes minimum standards for the operation of private-sector employee benefit plans and includes fiduciary responsibility rules governing the conduct of plan fiduciaries.[1] In connection with proxy voting, the Department's longstanding position is that the fiduciary act of managing plan assets includes the management of voting rights (as well as other shareholder rights) appurtenant to shares of stock. In carrying out these duties, ERISA mandates that fiduciaries act ''prudently'' and ''solely in the interest'' and ''for the exclusive purpose'' of providing benefits to participants and their beneficiaries.[2]

This regulatory project was undertaken, in part, to confirm that, when exercising shareholder rights, ERISA plan fiduciaries may not subordinate the interests of plan participants and beneficiaries in receiving financial benefits under a plan to non-pecuniary objectives.[3] This duty of loyalty—a bedrock principle of ERISA, with deep roots in the common law of trusts—requires those serving as fiduciaries to act with a single-minded focus on the interests of beneficiaries. The duty of prudence prevents a fiduciary from choosing an investment alternative that is financially less beneficial than reasonably available alternatives. The Supreme Court has described the duty of loyalty as requiring that fiduciaries act with an ''eye single'' to the interests of participants and beneficiaries,[4] and appellate courts have described ERISA's fiduciary duties as ''the highest known to the law.'' [5] The subject of this rulemaking is how these ERISA fiduciary duties apply to the exercise of shareholder rights by ERISA-covered plans, as a result of the Department's belief that confusion exists among some fiduciaries and other stakeholders with respect to the exercise of shareholder rights, perhaps due in part to varied statements the Department has made on the consideration of non-pecuniary or non-financial factors over the years in sub-regulatory guidance on these activities.

The Department began interpreting the duties of prudence and loyalty and issuing sub-regulatory guidance in the area of proxy voting and the exercise of shareholder rights in the 1980s. The Department issued an opinion letter to Avon Products, Inc. in 1988 (the Avon Letter), in which the Department took the position that, while the fiduciary act of managing plan assets that are shares of corporate stock includes the voting of proxies appurtenant to those shares, the named fiduciary of a plan has a duty to monitor decisions made and actions taken by investment managers with regard to proxy voting.[6]

Subsequent to the Avon Letter, the Department issued additional guidance concerning fiduciary duties in the context of exercising shareholder rights. In 1994, the Department issued its first interpretive bulletin on proxy voting, Interpretive Bulletin 94–2 (IB 94–2).[7] IB 94–2 recognized that fiduciaries may engage in shareholder activities intended to monitor or influence corporate management in situations where the responsible fiduciary concludes that, after taking into account the costs involved, there is a reasonable expectation that such shareholder activities (by the plan alone or together with other shareholders) will enhance the value of the plan's investment in the corporation. The Department expected that increased shareholder engagement by pension funds—encouraged by the new interpretive bulletin—would improve corporate performance and help ensure companies treated their employees well.[8] However, the Department also reiterated its view that ERISA does not permit fiduciaries, in voting proxies or exercising other shareholder rights, to subordinate the

[1] Throughout this preamble, the Department's discussion of plan fiduciaries includes named fiduciaries under the plan, along with any persons that named fiduciaries have designated to carry out fiduciary responsibilities as permitted under ERISA section 405(c)(1). Similarly, references to proxy voting also encompass situations in which a fiduciary directly casts a vote in a matter (*e.g.,* voting in person at a shareholder meeting) rather than by proxy.

[2] ERISA section 404(a)(1). *See also* ERISA section 403(c)(1) (''[T]he assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries'').

[3] *Fifth Third Bancorp* v. *Dudenhoeffer,* 573 U.S. 409, 421 (2014) (the ''benefits'' to be pursued by ERISA fiduciaries as their ''exclusive purpose'' does not include ''nonpecuniary benefits'') (emphasis in original).

[4] *Pegram* v. *Herdrich,* 530 U.S. 211, 235 (2000) (quoting *Donovan* v. *Bierwirth,* 680 F.2d 263, 271 (2d Cir. 1982)).

[5] *See, e.g., Tibble* v. *Edison Int'l,* 843 F.3d 1187, 1197 (9th Cir. 2016).

[6] Letter to Helmuth Fandl, Chairman of the Retirement Board, Avon Products, Inc. 1988 WL 897696 (Feb. 23, 1988). Only a few commenters on the proposal mentioned the Avon Letter, either supporting the views taken in the letter as being consistent with other professional codes of ethics or asserting that the proposed rule reversed the intent of the Avon Letter by establishing a presumption that voting proxies is a cost to be minimized and not an asset to be prudently managed.

[7] 59 FR 38860 (July 29, 1994).

[8] *See* 1994 DOL Press Conference, at 2–4, 10, 15–16; *see also* Leslie Wayne, *U.S. Prodding Companies to Activism on Portfolios,* N.Y. Times (July 29, 1994), *www.nytimes.com/1994/07/29/business/us-prodding-companies-to-activism-on-portfolios.html* (quoting official stating that the Department is ''trying to encourage corporations to be activist owners,'' and that ''such activism is consistent with your fiduciary duty and we expect it will improve your corporate performance'').

economic interests of participants and beneficiaries to unrelated objectives.

In October 2008, the Department replaced IB 94–2 with Interpretive Bulletin 2008–02 (IB 2008–02).[9] The Department's intent was to update the guidance in IB 94–2 and to reflect interpretive positions issued by the Department after 1994 on shareholder engagement and socially-directed proxy voting initiatives. IB 2008–02 stated that fiduciaries' responsibility for managing proxies includes both deciding to vote or not to vote.[10] IB 2008–02 further stated that the fiduciary duties described at ERISA sections 404(a)(1)(A) and (B) require that in voting proxies the responsible fiduciary shall consider only those factors that relate to the economic value of the plan's investment and shall not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives. In addition, IB 2008–02 stated that votes shall only be cast in accordance with a plan's economic interests. IB 2008–02 explained that if the responsible fiduciary reasonably determines that the cost of voting (including the cost of research, if necessary, to determine how to vote) is likely to exceed the expected economic benefits of voting, the fiduciary has an obligation to refrain from voting.[11] The Department also reiterated in IB 2008–02 that any use of plan assets by a plan fiduciary to further political or social causes ''that have no connection to enhancing the economic value of the plan's investment'' through proxy voting or shareholder activism is a violation of ERISA's exclusive purpose and prudence requirements.[12]

In 2016, the Department issued Interpretive Bulletin 2016–01 (IB 2016–01), which reinstated the language of IB 94–2 with certain modifications.[13] IB 2016–01 reiterated and confirmed that ''in voting proxies, the responsible fiduciary [must] consider those factors that may affect the value of the plan's investment and not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives.'' [14] In further interpreting ERISA's duties, the Department has stated that it has rejected a construction of ERISA that would render the statute's tight limits on the use of plan assets illusory and that would permit plan fiduciaries to expend trust assets to promote myriad public policy preferences, including through shareholder engagement activities, voting proxies, or other investment policies.[15]

On September 4, 2020, the Department published in the **Federal Register** a proposed rule to amend the ''Investment Duties'' regulation at 29 CFR 2550.404a-1 (Investment Duties regulation) to address the prudence and loyalty duties under sections 404(a)(1)(A) and 404(a)(1)(B) of ERISA in the context of proxy voting and other exercises of shareholder rights by the responsible ERISA plan fiduciaries, the use of written proxy voting policies and guidelines, and the selection and monitoring of proxy advisory firms.[16] The Department explained its belief that addressing the application of ERISA fiduciary obligations with respect to exercise of shareholder rights, including proxy voting, through notice-and-comment regulatory action under the Administrative Procedure Act was appropriate and would benefit ERISA plan fiduciaries and plan participants.

This regulatory project also was initiated to respond to a number of other issues. The Department was concerned, for example, that the Avon Letter and subsequent sub-regulatory guidance from the Department has resulted in a misplaced belief among some stakeholders that fiduciaries must always and in every case vote proxies, subject to limited exceptions, in order to fulfill their obligations under ERISA.[17] Further, the Department was responding to significant changes in the way ERISA plans invest and changes in the investment world more broadly since the Department first issued guidance on these topics in 1988. Widespread shareholder activism and corporate takeovers at that time created an intense focus on shareholder voting by ERISA plans and confusion as to how fiduciary standards applied to such voting.

The Department described in the proposal a variety of changes in proxy voting policies and behavior, including an increase in the percentage of individual securities held by, and plan assets managed by, institutional investors, diminishing the scope of proxy voting rights and obligations attributable to individual securities held by ERISA plans.[18] At the same time, since the 1980s, the type of investments held by ERISA plans has changed, for example through the development and growth of exchange-traded funds, sector-based equity products, hedge funds, and passive investments. The proportion of ERISA plan assets held in alternative investments like hedge, private equity, and venture capital funds has grown significantly.[19] When issuing the proposed rule, the Department cited evidence that investors continue to add to the set of factors considered in their review and analysis of corporate practices.[20]

The Department also took note of the issues and concerns identified during the U.S. Securities and Exchange Commission's (SEC's) ongoing proxy reform initiative.[21] Pursuant to the 2019

[9] 73 FR 61731 (Oct. 17, 2008).

[10] Id. at 61732.

[11] Id.

[12] Id. at 61734.

[13] 81 FR 95879 (Dec. 29, 2016). In addition, the Department issued a Field Assistance Bulletin to provide guidance on IB 2016–01 on April 23, 2018. *See* FAB 2018–01, at *www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-01.pdf.*

[14] Id. at 95882.

[15] *See* id. at 95881.

[16] 85 FR 55219 (Sept. 4, 2020).

[17] *See, e.g.,* Barbara Novick, *Revised and Extended Remarks at Harvard Roundtable on Corporate Governance Keynote Address ''The Goldilocks Dilemma''* (Nov. 6, 2019), *www.blackrock.com/corporate/literature/publication/barbara-novick-remarks-harvard-roundtable-corporate-governance-the-goldilocks-dilemma-110619.pdf,* at 15 (Avon Letter indicated ''that asset managers should generally vote shares as part of their fiduciary duty''); *see* Former SEC Commissioner Daniel M. Gallagher, *Outsized Power & Influence: The Role of Proxy Advisers,* Washington Legal Foundation (Aug. 2014), *https://s3.us-east-2.amazonaws.com/washlegal-uploads/upload/legalstudies/workingpaper/GallagherWP8-14.pdf,* at 3; Business Roundtable Comment Letter on SEC Proposed Amendments to Rule 14a-8 (Feb. 3, 2020), *www.sec.gov/comments/s7–22–19/s72219–6742505–207780.*pdf, at 2–3 (''many institutional investors historically interpreted SEC and Department of Labor rules and guidance as requiring institutional investors to vote every share on every matter on a proxy'') (citing Gallagher); Manifest Information Services Ltd, *Response to ESMA Discussion Paper 'An Overview of the Proxy Advisory Industry: Considerations on Possible Policy Options'* (June 2012), *www.osc.gov.on.ca/documents/en/Securities-Category2-Comments/com_20120622_25–401_wilsons.pdf,* at 37 (comment letter from European proxy voting agency describing DOL proxy guidance as concerning ''duties of . . . fiduciaries . . . to vote the shares in companies held by their pension plans''); Charles M. Nathan, *The Future of Institutional Share Voting: Three Paradigms* (July 23, 2010), *https://corpgov.law.harvard.edu/2010/07/23/the-future-of-institutional-share-voting-three-paradigms/* (''the current system for voting portfolio securities by application of uniform voting policies . . . is perceived as successfully addressing the commonly understood fiduciary duty of institutional investors to vote all of their portfolio securities on all matters''). *See also* U.S. Department of Labor, Transcript of Press Conference on Corporate Activist Role in Pension Planning (July 28, 1994), at 15–16 (then-Secretary Robert Reich stating that IB 94–2 ''makes very clear that . . . pension fund managers, trustees, [and] fiduciaries have an obligation to vote proxies'' unless the costs ''substantially outweigh'' the benefits) (1994 DOL Press Conference).

[18] 85 FR 55219 at 55221–22 (Sept. 4, 2020).

[19] *See id.,* at 55222.

[20] Kosmas Papadopoulos, *The Long View: US Proxy Voting Trends on E&S Issues from 2000 to 2018,* Harvard Law School Forum on Corporate Governance (Jan. 31, 2019), *https://corpgov.law.harvard.edu/2019/01/31/the-long-view-us-proxy-voting-trends-on-es-issues-from-2000-to-2018,* (2019 ISS Proxy Voting Trends).

[21] *See, e.g.,* Commission Guidance Regarding Proxy Voting Responsibilities of Investment

Continued

SEC Guidance, where an investment adviser has the authority to vote on behalf of its client, the investment adviser, among other things, must have a reasonable understanding of the client's objectives and must make voting determinations that are in the best interest of the client. Under this guidance, for an investment adviser to form a reasonable belief that its voting determinations are in the best interest of the client, the investment adviser should conduct an investigation reasonably designed to ensure that the voting determination is not based on materially inaccurate or incomplete information. The 2019 SEC Guidance also provides that investment advisers that retain proxy advisory firms to provide voting recommendations or voting execution services should consider additional steps to evaluate whether the voting determinations are consistent with the investment adviser's voting policies and procedures, and in the client's best interest before the votes are cast. The 2019 SEC Guidance provides that investment advisers should consider whether the proxy advisory firm has the capacity and competency to adequately analyze the matters for which the investment adviser is responsible for voting. The 2019 SEC Guidance also explains that an investment adviser's decision regarding whether to retain a proxy advisory firm should also include a reasonable review of the proxy advisory firm's policies and procedures regarding how it identifies and addresses conflicts of interest. Further, as part of the investment adviser's ongoing compliance program, the investment adviser must, no less frequently than annually, review and document the adequacy of its voting policies and procedures.

The SEC also adopted regulatory amendments that, among other things, require proxy advisory firms that are engaged in a solicitation to provide specified disclosures, adopt written policies and procedures reasonably designed to ensure that proxy voting advice is made available to securities issuers, and provide proxy advisory firm clients with a mechanism by which the clients can reasonably be expected to become aware of a securities issuer's views about the proxy voting advice, so that the clients can take such views into account as they vote proxies.[22] The SEC issued supplemental guidance to assist investment advisers in assessing how to consider the additional information that may become more readily available to them as a result of these amendments, including in circumstances when the investment adviser uses a proxy advisory firm's electronic vote management system that ''pre-populates'' the adviser's proxies with suggested voting recommendations and/or for voting execution services.[23]

The proposal on proxy voting and shareholder rights provided the Department with a vehicle to coordinate many of the fiduciary concepts concerning investing according to the pecuniary interests of plans with the rules governing the use of plan resources on proxy voting and the exercise of other shareholder rights.[24] A more detailed discussion of the basis for the rulemaking and the evidence supporting the proposal can be found in the preamble to the Department's proposal.[25] As discussed throughout this preamble, the final rule reflects significant modifications to the proposal based on the public record and commenters' feedback. The Department continues to believe that enhancing the effectiveness and efficiency of the proxy voting process for ERISA plans is an important goal. This process will be improved to the extent ERISA plan fiduciaries better understand how to make informed decisions when executing shareholder rights in compliance with ERISA's obligations of prudence and loyalty—specifically that the execution of such rights must be conducted in a manner to ensure that plan resources are not inappropriately allocated. The Department also believes that this rule is necessary to modernize standards for ERISA plan fiduciaries in this context, for example to recognize that proxy voting advice businesses, such as proxy advisory firms, now play a more significant role in the proxy voting process. It is not the Department's intention to judge the value of any specific proposal to be voted upon, for example, or to take a position on the merits of any particular topic. Rather, the Department intends only to address the standards according to which plan fiduciaries must make such judgments, a goal that the Department believes is more appropriately advanced in light of revisions made in the final rule.

The Department invited interested persons to submit comments on the proposed rule, and in response received approximately 300 written comments from a variety of parties, including plan sponsors and fiduciaries, plan service and investment providers (including investment managers and proxy voting firms), and employee benefit plan and participant representatives. The Department also received approximately 6,700 submissions in response to petitions. The comments are available for review on the ''Public Comments'' page under the ''Laws and Regulations'' tab of the Department's Employee Benefits Security Administration website.[26]

B. Final Rule

After evaluating the full range of public comments and extensive record developed on the proposal, the final rule as described below amends the Investment Duties regulation to address the prudence and loyalty duties under sections 404(a)(1)(A) and 404(a)(1)(B) of ERISA in the context of proxy voting and other exercises of shareholder rights by responsible ERISA plan fiduciaries. The Department anticipates that actions taken by the SEC as part of its proxy reform initiative may result in changes in practices among investment advisers and proxy advisory firms that will help address some of the Department's concerns about ERISA fiduciaries properly discharging their duties with respect to proxy voting activities and appropriately selecting and overseeing proxy advisory firms. However, the Department continues to believe that notice-and-comment rulemaking in this area is appropriate, in part because the Department's existing sub-regulatory guidance may have created a perception that ERISA fiduciaries must vote proxies on every proposal. In the Department's view, a regulation in this area will address the misunderstanding that exists on the part of some stakeholders that ERISA fiduciaries are required to vote all proxies and, to the extent that proxies are voted, direct fiduciaries to act in a manner consistent with the economic interests of plans and plan participants that does not subordinate their interests to any non-pecuniary objectives or promote goals unrelated to the financial interests of participants and beneficiaries.

Some commenters complained that the 30-day comment period was too short given the complexity of issues involved, the magnitude of such changes to the current marketplace

Advisers, 84 FR 47420 (Sept. 10, 2019) (2019 SEC Guidance).

[22] *See* Exemptions from the Proxy Rules for Proxy Voting Advice, 85 FR 55082 (Sept. 3, 2020) (2020 SEC Proxy Voting Advice Amendments).

[23] *See* Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, 85 FR 55155 (Sept. 3, 2020) (2020 SEC Supplemental Guidance).

[24] 85 FR at 55219.

[25] *Id.,* beginning at 55221 and in the proposed regulatory impact analysis beginning at 55227.

[26] *See www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments.*

practices related to proxy voting and other exercises of shareholder rights, and the need to prepare supporting data. Many commenters requested an extension of the comment period and that the Department schedule a public hearing on the proposal and allow the public record to remain open for post-hearing comments from interested parties. The Department has considered these requests, but has determined that it is neither necessary nor appropriate to extend the public comment period, hold a public hearing, or withdraw or republish the proposed regulation. A substantial and comprehensive public comment record was developed on the proposal sufficient to substantiate promulgating a final rule. The scope and depth of the public record that has been developed itself belies arguments that a 30-day comment period was insufficient. In addition, most issues relevant to the proposal have been analyzed and reviewed by the Department and the public in the context of three separate Interpretive Bulletins issued in 1994, 2008, and 2016 and the public feedback that resulted. Finally, public hearings are not required under the Department's general rulemaking authority under section 505 of ERISA, nor under the Administrative Procedure Act's procedures for rulemaking at 5 U.S.C. 553(c). In this case, a public hearing is not necessary to supplement an already comprehensive public record.

Thus, this final rulemaking follows the notice-and-comment process required by the Administrative Procedure Act, and fulfills the Department's mission to protect, educate, and empower retirement investors. This rule is considered to be an Executive Order (E.O.) 13771 regulatory action. Details on the estimated costs of this rule can be found in the final rule's economic analysis. The Department has concluded that the additions to the Investment Duties regulation and the rule's improvements as compared to the Department's previous sub-regulatory guidance are appropriate and warranted. The final rule furthers the paramount goal of ERISA plans to provide a secure retirement for American workers. Accordingly, after consideration of the written comments received, the Department has determined to adopt the proposed regulation as modified and set forth below. As explained more fully below, the final regulation contains several important changes from the proposal in response to public comments.

1. General Public Comments and Adoption of a Principles-Based Approach

In response to the proposed rule, the Department received a considerable amount of support and opposition from interested parties.

Commenters supporting the rule argued that the proposed rule was essential because the Department's existing sub-regulatory guidance has created a perception that ERISA fiduciaries must vote proxies on every proposal. This rulemaking, according to some commenters, would provide certainty to plan fiduciaries and benefit ERISA plan participants, by ensuring that plan resources will be expended only on proxy research and voting matters that are necessary to protect the economic interests of plan participants. Commenters supporting the proposal endorsed the Department's view that these rights must be exercised with a singular focus in mind—the *economic* interests of ERISA plan participants and beneficiaries. They agreed that in a rapidly changing investment landscape, plan fiduciaries and asset managers should not be influenced by non-financial interests. For example, some commenters explained that it is the duty of ERISA fiduciaries to reject attempts to advance political or social objectives at the expense of investment returns, growth, and stability for individuals saving for retirement, the very population that the Department, through ERISA, has been charged to protect. As one commenter explained, ERISA fiduciary duties are predicated on trust law, and trusts must be managed to the advantage of formally named beneficiaries—in this case plan participants and their beneficiaries—and not to benefit corporate management or vague notions of societal good as determined by other parties. Some commenters argued that proxy advisory firms, which often assist with proxy voting, have an outsized influence on voting decisions and have ''taken sides'' politically and socially.

A number of commenters agreed in general with the Department's position on these issues, and some provided additional information substantiating the need for, and propriety of, the Department's proposed approach to managing proxy voting practices. Some further argued that, although exercising shareholder rights on the basis of environmental, social, or governance factors (commonly referred to as ''ESG'') may be welcomed by some private investors, proxy rights should be exercised only for financial matters that will help secure the retirement of plan participants in the case of ERISA-covered pension and other retirement savings plans because when fiduciaries exercise proxy rights for non-financial reasons they are more likely to incur additional, unnecessary risks for investors that may not produce corresponding economic value. A few commenters supported the Department's assertion that the amount of ESG shareholder proposals has increased since 1988, as more such proposals are being put forward by groups with objectives other than increasing shareholder returns. While some commenters agreed with ESG proponents on the importance of environmental protections, social and political issues, and transparency in corporate governance, they nevertheless expressed their concern that proxy advisory firms, in particular, seem to have increasing power to promote these goals without the knowledge and agreement of a corporation's ''real'' owners, the shareholders, which include ERISA plans. They agreed that the Department has appropriately undertaken in this rulemaking to improve fiduciary oversight of these firms. Finally, commenters supporting the rule also said that any increased costs associated with the rule would be manageable, or, according to some commenters, that the rule would ultimately decrease plan costs and compliance burdens.[27]

Other commenters, however, objected to the Department's proposed rulemaking and raised a variety of legal and practical concerns. Some commenters who objected to the proposal requested that the Department withdraw the rule entirely, propose a different rule that takes a more principles-based approach to this subject matter, or wait until the Department analyzes the impact of its rule concerning ''Financial Factors in Selecting Plan Investments.'' [28] Alternatively, they argued that the Department should wait until the SEC establishes a track record of experience with its new proxy advisor and shareholder proposal rules, so that the Department can better align its guidance with the SEC's rules. Additionally, some commenters expressed the view that a principles-based approach would be consistent with the Investment Advisers Act of 1940 (Advisers Act) and the SEC's Rule 206(4)–6 thereunder and might help to reduce burdens for

[27] One commenter suggested that the rule may especially benefit fiduciaries of small plans, for whom the cost and burden of voting all proxies may be an impediment to sponsoring a plan.

[28] *See* 85 FR 72846 (Nov. 13, 2020).

fiduciaries in reconciling the Department's rule with the SEC's regulatory regime for investment advisers.

Some commenters opposing the proposed rule claimed that the Department failed to establish that there is in fact a problem with fiduciaries' exercise of shareholder rights and argued that the proposal, if finalized, would upset decades of Departmental precedent. These commenters further said that the approach taken in the proposal represented a burdensome and costly solution to a perceived problem without ''real life'' examples of any plans or participants and beneficiaries that have been harmed.

The Department does not believe that it is necessary to establish specific evidence of fiduciary misunderstandings or injury to plans or to plan participants in order to issue a regulation addressing the application of ERISA's fiduciary duties to the exercise of shareholder rights. Under the Department's authority to administer ERISA, the Department may promulgate rules that are preemptive in nature and is not required to wait for widespread harm to occur. The Department can thereby guard against injuries to plans and plan participants and beneficiaries and ensure prospective protections.

Regardless, there are several reasons for this rulemaking. First, the Department is aware that some plan fiduciaries and other parties have incorporated, or have considered incorporating, non-pecuniary factors into their proxy voting decisions. Further, as documented in the proposal, there is a history of statements from stakeholders and others evidencing misunderstanding of the Department's sub-regulatory guidance.[29] Finally, commenters on the proposal confirmed that fiduciaries may be over-relying on proxy advisory firms as a result of such confusion, by implementing advisory firms' voting recommendations without attention to whether the firms' policies are consistent with the economic interests of the plan. This final rule confirms that such decisions on proxy voting and other exercises of shareholder rights must be made pursuant to the duties of loyalty and prudence mandated by ERISA.

Some commenters argued that unless a number of clarifications and changes were made in the final rule, for example with respect to documentation and other requirements, the rule would be costly to implement and its standards costly to execute. Some commenters opposing the proposed rule argued that, not only is the rule unnecessary, but it would create new confusion for fiduciaries as they implement their duties under ERISA. According to these commenters, the rule would undermine fiduciaries' ability to act in what they believe to be the long-term economic interest of their plans' participants, which is a core statutory duty of fiduciaries to such participants. A few commenters provided an example of a potential ''trap'' that the proposal would create for fiduciaries, in that the rule would cause fiduciaries to not vote on a proposal for fear of violating the rule, but then later discover that they should in fact have voted on the proposal, effectively creating a breach of fiduciary duties. They claimed that the proposal was an example of ''government overreach'' that could dangerously impact the efficiency of the U.S. capital markets and the stability of the global economy.[30] The opposing commenters also argued that the proposal, if finalized, would disenfranchise ERISA plans, and thereby plan participants, as investors, by reducing the power and value of their shareholder rights, including the right to vote proxies.[31] Instead, voting power would be concentrated in the hands of non-ERISA investors, such as hedge funds, foreign investors, and other activist investors whose motivations may be based on short-term profits and non-economic factors, as well as in the hands of corporate management, as a result of the proposal's provision that, in these commenters' view, includes deference to management views.

Commenters opposing the proposed rule stated that, in voting on proposals, investors, including ERISA plans, generally decide matters that will hold management accountable and materially impact the long-term economic value of corporations. Some commenters argued that the proposal failed to recognize the potential long-term performance and economic impact of shareholder proposals on topics such as board independence and accountability—including opportunities to change a company's board of directors, diversity, approval of auditing firms, executive compensation policies—from either an individual investment or a wider portfolio perspective. These commenters disagreed with what they viewed as the Department's conclusion that ESG shareholder activity generally has little bearing on the value of corporate shares. Rather, these commenters claimed that a growing body of evidence demonstrates an increasing link between ESG activity, including the impact of ESG issues on a corporation's brand and reputation, and a corporation's long-term value. According to commenters, ESG factors may not appear to be economic on their face, yet all are fundamental corporate matters that often are critical to how companies strategize and manage risk, therefore impacting financial outcomes. As to proxy advisory firms, commenters opposing the rule argued that these firms engage in a rigorous process when making recommendations about proxy voting and that ongoing technological advances continue to enhance proxy voting transparency and effectiveness.

The final rule reflects a number of modifications made by the Department in response to the public comments. As in the proposal, the final rule amends the Investment Duties regulation in regard to proxy voting and the exercise of shareholder rights. The most significant adjustment from the proposal results from changes to make the final rule a more principles-based approach in response to commenters. The Department is persuaded that the complexity involved in a determination of economic versus non-economic impact would be costly to implement, and believes the core structure of the proposal that focused on whether a

[29] 85 FR 55219, 55230 (Sept. 4, 2020).

[30] A number of commenters asserted that the proposal was a not-so-thinly-veiled, policy-based judgment against the value of ESG shareholder proposals. They argued that this judgment is not the Department's to make; rather, it is the role of plan fiduciaries to make such judgments, and ESG proposals are material to shareholder decision-making and an important part of the due diligence of fiduciaries in constructing long-term, diversified portfolios. The Department disagrees with these commenters. This rulemaking project, similar to the recently published final rule on ERISA fiduciaries' consideration of financial factors in investment decisions, recognizes, rather than ignores, the economic literature and fiduciary investment experience that show a particular ''E,'' ''S,'' or ''G'' consideration may present issues of material business risk or opportunities to a specific company that its officers and directors need to manage as part of the company's business plan and that qualified investment professionals would treat as economic considerations under generally accepted investment theories. However, the Department recognizes that other ''E,'' ''S,'' or ''G'' factors may be non-pecuniary and a fiduciary should not assume that combining ESG factors into a single rating, index, or score creates an amalgamated factor that is itself pecuniary. Rather, this final rule and the financial factors rule sought to make clear that, from a fiduciary perspective, the relevant question is not whether a factor under consideration is ''ESG,'' but whether it is a pecuniary factor relevant to the exercise of a shareholder right or to an evaluation of the investment or investment course of action. *See* 85 FR at 72857 (Nov. 13, 2020).

[31] One commenter further warned that the rule could result in voter suppression, not just disenfranchisement, by preventing shareholders from reaching a quorum, which the Department itself acknowledged in the proposal would result in economic detriment to ERISA plans' holdings. Some corporate bylaws, for example, require a supermajority for certain votes, which may be difficult to achieve if certain shareholders are discouraged from voting.

fiduciary has a prudent process for proxy voting and other exercises of shareholder rights is a more workable framework for achieving the objectives of the proposal. The final rule carries forward from the proposal a provision that requires plan fiduciaries, when deciding whether to exercise shareholder rights and when exercising such rights, including the voting of proxies, to carry out their duties prudently and solely in the interests of the plan participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying the reasonable expenses of administering the plan. Also similar to the proposal, but with some modifications in response to public comments, the final rule includes a list of principles that fiduciaries must comply with when making decisions on exercising shareholder rights, including proxy voting, in order to meet their prudence and loyalty duties under ERISA section 404(a)(1)(A) and (B), including duties to act solely in accordance with the economic interest of the plan and its participants and beneficiaries and not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to any non-pecuniary objective, or promote non-pecuniary benefits or goals unrelated to the financial interests of the plan's participants and beneficiaries. Finally, the final rule includes specific language to make clear that plan fiduciaries do not have an obligation to vote all proxies, as well as a safe harbor provision, modified from the proposal, pursuant to which plan fiduciaries may adopt proxy voting policies and parameters prudently designed to serve the plan's economic interest that provide optional means for satisfying their fiduciary responsibilities regarding determining whether to vote under ERISA sections 404(a)(1)(A) and 404(a)(1)(B).

2. Elimination of Paragraphs (e)(3)(i) and (ii) From the Proposal

The principles-based approach adopted in the final rule is reflected by the Department's elimination of paragraphs (e)(3)(i) and (ii) from the proposal. Paragraph (e)(3)(i) of the proposal provided that a plan fiduciary *must* vote any proxy where the fiduciary prudently determined that the matter being voted upon would have an economic impact on the plan after considering those factors described in paragraph (e)(2)(ii) of the proposal and taking into account the costs involved (including the cost of research, if necessary, to determine how to vote). Paragraph (e)(3)(ii) of the proposal provided that a plan fiduciary must *not* vote any proxy unless the fiduciary prudently determined that the matter being voted upon would have an economic impact on the plan after considering those factors described in paragraph (e)(2)(ii) of the proposal and taking into account the costs involved.

The Department received a number of comments suggesting removal of the requirements in paragraphs (e)(3)(i) and (ii). Commenters criticized these provisions of the proposal as requiring a fiduciary to undertake an economic impact analysis in advance of each issue that is the subject of a proxy vote in order to even consider voting. A commenter further noted that a fiduciary may not discover until after the analysis is performed that the cost involved in determining whether to vote outweighs the economic benefit to the plan. Another commenter characterized this as a ''high risk compliance dilemma'' that could not be resolved without expending funds on analysis and documentation, without knowing in advance whether the expenditure is allowable. Commenters further indicated that the proposal was unclear as to how to establish whether an economic basis would be strong enough to justify voting and that it can be difficult, if not impossible, to ascertain whether a matter will have a future economic impact. Commenters further stated that the criteria enumerated in paragraph (e)(2)(ii) of the proposal for determining the economic impact of a proxy vote were too narrow, which could result in potentially negative consequences to plans because paragraph (e)(3)(ii) of the proposal could prohibit fiduciaries from engaging in activities that would mitigate risk. For instance, a commenter stated that, in its experience, once an evaluation of a proxy matter has been done, a situation with ''no economic impact'' is more of a theoretical possibility than a reality. According to this commenter, either its research will show that the matter being voted on will strengthen the company if implemented, or that it will not. The commenter further explained that, at a base level, a matter that would strengthen or otherwise improve a company is likely to result in an economic benefit in connection with a plan's investment when considered in the long-term. If a matter would not result in a net positive to the company, the commenter believes a fiduciary should vote against the proposal, not decline to vote. The commenter cautioned that prohibiting fiduciaries from voting in circumstances where they otherwise would vote against a matter may have the unintended consequence of allowing more frivolous proxy matters to be approved, resulting in decreased corporate accountability. Commenters also raised practical issues with respect to an obligation to *not* vote. Some explained that failing to vote can have the effect of a ''no'' vote or a ''yes'' vote, depending on the circumstances. Another commenter stated that modern proxy voting processes do not allow a holder of securities subject to the proxy to vote on some but not all proposals.

Other commenters, however, supported paragraph (e)(3)(ii) of the proposal. They viewed the provision as an important clarification that plan fiduciaries are not required to vote all proxies, which could reduce diversion of plan resources by restricting voting activity only to those issues that offer an economic benefit to the plan.

The Department has decided not to include the requirements in paragraphs (e)(3)(i) and (ii) of the proposal in the final rule at this time. The Department recognizes the concerns expressed by commenters regarding potentially increased costs and liability exposure, as well as the difficulty in some circumstances of determining whether a matter would have an economic impact and the possibility that a fiduciary might prudently determine that there are risks to plan investments that could result from not voting even when the matter being voted upon itself would not have an economic impact. Instead, the Department has provided a specific provision in the final rule stating that plan fiduciaries are not required to vote all proxies.

3. Section-by-Section Overview of Final Rule

(i) Paragraph (e)(1)

Paragraph (e)(1) of the final rule, like the proposal, provides that the fiduciary duty to manage plan assets that are shares of stock includes the management of shareholder rights appurtenant to the shares, such as the right to vote proxies. Commenters raised a number of issues with respect to the general scope of fiduciaries' responsibilities and obligations under the rule as set forth in paragraph (e)(1) of the proposal.

Several commenters supported the Department's goal of making clear that plan fiduciaries are not obligated to vote all proxies, and suggested the rule could be improved by including that clear statement in the regulatory text in paragraph (e)(1). The Department was clear in the preamble to the proposed

rule that one objective of the proposal was to correct a misunderstanding among some fiduciaries and other stakeholders that ERISA requires every proxy to be voted. Thus, the Department agrees that it would be appropriate to include an explicit statement to that effect in the final rule. The Department, however, believes that the statement fits better in paragraph (e)(2) (regarding the principles that must be considered in deciding whether to exercise shareholder rights) and has added a statement to paragraph (e)(2)(ii) that the ERISA fiduciary duty to manage proxy voting and other shareholder rights does not require the voting of every proxy or the exercise of every shareholder right.

A commenter suggested that the rule should focus only on proxy voting, including the decision of whether to exercise voting rights, but should not extend to ''other shareholder rights.'' This commenter explained that other shareholder rights, such as inspecting an issuer's corporate record books and participating in corporate actions taken by the issuer, are substantively separate and distinct from proxy voting. Also, decisions on corporate actions such as stock splits, tender offers, exchange offers on bond issues, and mergers and acquisitions generally are not governed by proxy voting policies or undertaken with advice from proxy voting advisors. On this basis, the commenter recommended removing other shareholder rights from the rule. The Department is not persuaded to make the suggested change. The exercise of shareholder rights has been part of the Department's prior guidance since the first Interpretive Bulletin in 1994.[32] The Department believes that the exercise of shareholder rights to monitor or influence management, which may occur in lieu of, or in connection with, formal proxy proposals is just as much an issue of fiduciary management of the investment asset as proxy voting and accordingly should be covered by the final rule.

Commenters also requested clarifications related to plan investments in SEC-registered investment companies, such as mutual funds. Several commenters noted that the preamble to the proposal suggested that the rule would not apply to a mutual fund's exercise of shareholder rights with respect to the stock it holds, and requested that the Department provide confirmation. As previously explained, ERISA does not govern the management of the portfolio internal to an investment fund registered with the SEC, including such fund's exercise of its shareholder rights appurtenant to the portfolio of stocks it holds.[33] Accordingly, the final rule would not apply to such a fund's exercise of shareholder rights.

A commenter requested further clarification that the Department does not intend that plan fiduciaries apply the standards of the rule in reviewing, analyzing, or making a judgment on the proxy voting practices of the mutual funds in which the plan invests. This commenter explained that SEC-registered funds have the scale, internal expertise, and experience to analyze and vote proxies. According to the commenter, they also publicly report their proxy votes to the SEC, and must describe in their registration statements the policies and procedures that they use to determine how to vote proxies for their portfolio of securities. In the commenter's view, placing an obligation on plan fiduciaries to review and make judgments on the proxy voting practices of mutual funds in which they invest will substantially increase the administrative burden and costs for plans that invest in mutual funds. In contrast, another commenter suggested that the final rule should require fiduciaries to investigate a mutual fund's objectives in shareholder voting and engagement with portfolio companies and determine that the objectives are consistent with ERISA's loyalty requirement prior to deciding to invest in the fund or considering it as an option for participants. The commenter noted that since the issuance of the Avon Letter, plans increasingly invest in mutual funds or exchange-traded funds (ETFs) with stock voting authority residing in the funds. This commenter argued that nothing in the Avon Letter or subsequent guidance from the Department suggested that ERISA absolves a plan investment fiduciary of any fiduciary duty associated with the shareholder voting of shares that it owns indirectly through its share ownership in mutual funds and ETFs.

In response to these comments, the Department notes that the issue raised by these commenters is beyond the scope of this rulemaking. Rather, fiduciary responsibilities with respect to investment decisions are addressed in the other provisions of the Investment Duties regulation, as recently amended. Paragraph (c)(1) provides that, in general, a fiduciary's evaluation of an investment or investment course of action must be based only on pecuniary factors and that a fiduciary may not subordinate the interests of participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives and may not sacrifice investment return or take on additional investment risk to promote non-pecuniary benefits or goals. Furthermore, the weight given to any pecuniary factor by a fiduciary should appropriately reflect a prudent assessment of its impact on risk and return. Whether a particular fund's proxy voting activities would constitute a pecuniary factor and, if so, how much weight it should be given in an investment decision, are factual questions that should be resolved by the responsible fiduciary based on surrounding circumstances.

Some commenters requested clarification of whether the rule applies to plan fiduciaries in the exercise of shareholder rights with respect to mutual funds and ETFs (which are sometimes organized as corporate or similar entities) when the fund itself seeks a vote of its shareholders on fund matters. According to commenters, for a variety of reasons, SEC-registered funds often face more challenges than operating companies to achieve a quorum and obtain approval of their proxy matters. The commenters explained that this is due to major differences in shareholder bases (funds have more diffuse and retail-oriented shareholder bases), proxy voting behavior of those bases (institutional investors comprise a larger percentage of operating companies' shareholder bases and are far more likely to vote), legal obligations, and organizational differences.

Furthermore, according to commenters, funds also can have difficulty even identifying and reaching their shareholders when they invest through intermediaries, which severely limits a fund's ability to communicate with its shareholders to encourage voting. These factors contribute significantly to the costs and efforts required to seek and obtain necessary shareholder approvals for fund matters. Funds, and therefore fund shareholders, often bear the proxy costs associated with proxy campaigns, including costs associated with follow-up solicitations.

According to a commenter, the SEC has recognized these issues in recent years. The commenter, as well as others, expressed concern that the rule could create further difficulty for funds in carrying out their proxy campaigns and potentially result in imposing unnecessary costs on funds, particularly in connection with funds' ability to

[32] *See* 59 FR 38860, 38864 (July 29, 1994) (discussing activities to monitor or influence management by variety of means including by exercise of legal rights of a shareholder).

[33] 85 FR 55219, 55234 (Sept. 4, 2020).

achieve a timely quorum at their own shareholder meetings. Another commenter indicated that ERISA plan investors receive a variety of proxies that must be evaluated, not only in connection with shares of common stock held by the plan, but also from SEC-registered funds as well as bank collective trust funds and other collective funds in which plans invest. The commenter stated that the regulated community needs to be able to clearly identify those proxies that are subject to the rule and those that are not. The commenter requested that the rule itself provide that plan investments in such securities are not subject to the requirements of the rule.

In the proposal, the Department recognized that the proposed rule could impact the ability to achieve a quorum at shareholder meetings of funds.[34] The Department believes that the changes made to the final rule significantly eliminate any provisions of the proposal that might impede achieving a quorum for shareholder meetings, including those held by funds. Under the proposal, a fiduciary would have not been able to vote unless the fiduciary prudently concluded that the matter being voted upon would have an economic impact on the plan. The burden of determining whether a fiduciary must, or must not, vote under the proposal was likely to result in fiduciaries opting to refrain from voting under one of the permitted practices described in the proposal. The Department's removal of the ''vote/not vote'' determination from the final rule should eliminate any concerns with potential liability on a fiduciary associated with making an incorrect decision as to whether or not to cast a proxy vote. The safe harbors in the final rule are also sufficiently flexible to permit a fiduciary to adopt voting policies that would permit proxy voting for fund shares while refraining from voting other types of shares. Moreover, the Department continues to believe, as stated in the preamble to the proposal, that fiduciary proxy voting policies may consider the economic detriment to a plan's investment that might result from direct and indirect costs incurred related to delaying a shareholders' meeting.[35]

(ii) Paragraph (e)(2)

Paragraph (e)(2) of the proposal set forth the general responsibilities with respect to the exercise of shareholder rights under the regulation, and stated that when deciding whether to exercise shareholder rights and when exercising such rights, including the voting of proxies, fiduciaries must carry out their duties prudently and solely in the interests of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying the reasonable expenses of administering the plan pursuant to ERISA sections 403 and 404.

Paragraph (e)(2)(i)

A commenter noted that paragraph (e)(2)(i) of the proposal referenced ERISA sections 403 and 404, and because those two separate sections each carry separate responsibilities, suggested that each be designated as a separate clause in the final regulation because a fiduciary could breach or fulfill one but not the other. The Department recognizes the separate responsibilities under sections 403 and 404 of ERISA, but has decided to remove the reference to section 403 for paragraph (e)(2)(i) of the final rule. As explained in connection with recently adopted amendments to the Investment Duties regulation, the Department believes it is important that the regulation focus on section 404 of ERISA.[36] Although similar, and although actions taken in compliance with section 404 would likely satisfy similar obligations under section 403, the text of ERISA section 403 is not identical to ERISA section 404(a)(1)(A), and the Department is wary of possible inferences that compliance with the provisions of the final rule would also necessarily satisfy all the provisions of ERISA section 403. The Department also believes explicit reference to ERISA section 404 is not necessary because paragraph (e) is part of 29 CFR 2550.404a–1. As a result, paragraph (e)(2)(i) of the final rule provides that when deciding whether to exercise shareholder rights and when exercising such rights, including the voting of proxies, fiduciaries must carry out their duties prudently and solely in the interests of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying the reasonable expenses of administering the plan.

Activities that are intended to monitor or influence the management of corporations in which the plan owns stock can be consistent with a fiduciary's obligations under ERISA, if the responsible fiduciary concludes that such activities (by the plan alone or together with other shareholders) are appropriate after applying the considerations set forth in the final rule. However, the use of plan assets by fiduciaries to further policy-related or political issues, including ESG issues, through proxy resolutions would violate the prudence and exclusive purpose requirements of ERISA sections 404(a)(1)(A) and (B) and the final rule unless such activities are undertaken solely in accordance with the economic interests of the plan and its participants and beneficiaries. The mere fact that plans are shareholders in the corporations in which they invest does not itself provide a rationale for a fiduciary to spend plan assets to pursue, support, or oppose such proxy proposals. Moreover, the use of plan assets by fiduciaries to further policy or political issues through proxy resolutions that are not likely to enhance the economic value of the investment in a corporation would, in the view of the Department, violate the prudence and exclusive purpose requirements of ERISA sections 404(a)(1)(A) and (B) as well as the final rule. For example, with respect to proposals submitted by shareholders that request a corporation to incur costs, either directly or indirectly, without the proposal including a demonstrable expected economic return to the corporation, a fiduciary may, depending on the facts and circumstances, be obligated under ERISA and the final rule to vote against such proposals in order to protect the financial interests of the plan's participants and beneficiaries.[37] Similarly, in the Department's view, it would not be appropriate for plan fiduciaries, including appointed investment managers, to incur expenses to engage in direct negotiations with the board or management of publicly held companies with respect to which the plan is just one of many investors. Nor generally should plan fiduciaries fund advocacy, press, or mailing campaigns on shareholder resolutions, call special shareholder meetings, or initiate or actively sponsor proxy fights on environmental or social issues relating to such companies, unless the responsible plan fiduciary concludes that such activities (alone or together with other shareholders) are appropriate

[34] Id. at 55234.

[35] Id. at 55226.

[36] 85 FR 72846, (Nov. 13, 2020).

[37] The Department is not suggesting that a fiduciary must perform its own economic analysis, or incur expenses to obtain an analysis, to determine whether the proposal will economically benefit the corporation and its shareholders. For example, a fiduciary could prudently consider a credible economic analysis provided by the shareholder proponent.

after applying the considerations set forth in the final rule.[38]

Paragraph (e)(2)(ii)

Paragraph (e)(2)(ii) of the proposal set forth specific standards for fiduciaries to meet when deciding whether to exercise shareholder rights and when exercising shareholder rights. The requirements in paragraph (e)(2)(ii) of the proposal also served as the basis for a fiduciary's determination of whether a matter being voted upon would have an economic impact on a plan for purposes of compliance with paragraph (e)(3) of the proposal. Many commenters focused specifically on paragraphs (e)(2)(ii)(A) and (B) of the proposal, which required, in relevant part, that fiduciaries (A) consider only factors that they prudently determine will affect the economic value of the plan's investment based on a determination of risk and return over an appropriate investment horizon consistent with the plan's investment objectives and the funding policy of the plan, and (B) consider the likely impact on the investment performance of the plan based on such factors as the size of the plan's holdings in the issuer relative to the total investment assets of the plan, the plan's percentage ownership of the issuer, and the costs involved.

Some commenters argued that the specificity of the proposal did not comport with what they asserted was a congressional intent that eschewed a prescriptive approach to ERISA's duties of loyalty and prudence, or with the Department's own Investment Duties regulation. Commenters also noted the potential burdens that paragraph (e)(2)(ii) of the proposal would place on plan fiduciaries to evaluate and justify decisions for potentially large numbers of proxy proposals and to monitor an investment manager's or proxy advisory firm's voting policy for consistency with the regulation, which could result in increased costs that would ultimately be borne by plan participants. Commenters also stated that the provision's requirement to take into account plan-specific factors did not adequately recognize that investment managers do not have information on plan holdings they do not directly manage. Commenters further indicated that, with a focus on individual plans as opposed to investment managers responsible for pools of plan assets, paragraph (e)(2)(ii)(B) of the proposal failed to consider situations when several ERISA plans, particularly those with aligned objectives and liabilities, may together hold a significant stake in a company. In such cases, voting together could impact the investment and, as a result, each investor's portfolio. They argued that the proposal, in contrast, potentially would result in proxies being un-voted if each ''slice'' of the aggregate is too insignificant.

A commenter further suggested that an economic impact test, as described in the proposal, was ill-suited to the purpose and role of proxy voting. According to the commenter, many of the items on which corporate law permits shareholders to have a say—for example, the election of directors or ratification of auditors—are to mitigate risk and assure prophylactic measures are in place to avoid threats to their share of capital over the long term. The commenter questioned how a fiduciary would determine that voting against a company-proposed director for election to the board who was clearly unqualified and incompetent would have an economic impact on the plan. Another commenter explained that some votes, such as those supporting good corporate governance practices (*e.g.,* election of outside directors) may not have an immediate measurable economic effect, but still be in the interest of plan investors. Another commenter opined that a short-term economic impact will be easier to prove or disprove in terms of share price or other similarly rudimentary indicators, but questioned whether the rule should encourage fiduciaries to think only in terms of short-term economic gains. In this regard, several commenters requested that the Department confirm that a fiduciary may take into consideration the long-term nature of a plan's investment horizon. A commenter also suggested that the Department expand the criteria for voting to include issuer risk-based factors that ''promote long-term growth and maximize return on ERISA plan assets.'' Another commenter explained that proposals that encourage greater disclosure can result in enhancing shareholder value or serve in a prophylactic manner to prevent actions that might serve to diminish shareholder value. A commenter also criticized the proposal as focusing on the impact on individual plan investments. Commenters explained that modern portfolio theory focuses on the role that an investment plays in the context of an overall portfolio rather than on a stand-alone basis, and expressed the view that the roles that proxy voting and shareholder voices play in current portfolio risk management practices should be evaluated in the context of the long-term and portfolio-wide strategy, with consideration of the aggregate effects of shareholder votes and voices.

After considering these comments, the Department has modified paragraph (e)(2)(ii)(A) and (B). An important goal in proposing the rule was to ensure that in making proxy voting decisions, fiduciaries act for the exclusive purpose of financially benefitting plan participants and not subordinating the interests of the plan and its participants to goals and objectives unrelated to their financial interests. Recent amendments to the Investment Duties regulation, which applies generally to fiduciary decisions on investments and investment courses of action, were adopted for much the same purpose.

Paragraph (e)(2)(ii)(A) of the final rule requires that, when deciding whether to exercise shareholder rights and when exercising shareholder rights, a fiduciary must act solely in accordance with the economic interest of the plan and its participants and beneficiaries. The proposed requirement to prudently determine whether the economic value of the plan's investment will be affected based on a determination of risk and return over an appropriate investment horizon has not been included in the final rule in order to address commenter concerns that the impact of proxy voting may not be readily quantifiable and to reduce potential compliance costs. In the Department's view, the final rule provides sufficient flexibility for fiduciaries to consider longer-term consequences and potential economic impacts. Further, removal of the references to a plan's investment objectives and funding policy responds to concerns that investment managers responsible for only a portion of the plan assets may have limited access and visibility into those objectives and funding policies and such considerations may unnecessarily increase compliance costs without a commensurate benefit for the plan or its participants.

The Department, however, cautions fiduciaries from applying an overly expansive view as to what constitutes an economic interest for purposes of paragraph (e)(2)(ii)(A) of the final rule. As previously discussed, the costs incurred by a corporation to delay a shareholder meeting due to lack of a quorum is an example of a factor that can be appropriately considered as affecting the economic interest of the plan. However, vague or speculative

[38] Although the provision in the proposal also made reference to ''purposes of the plan,'' the language is not carried forward in the final provision as the Department believes it is unnecessary because the purposes of a plan would be encompassed by the financial interests of plan participants and beneficiaries.

notions that proxy voting may promote a theoretical benefit to the global economy that might redound, outside the plan, to the benefit of plan participants would not be considered an economic interest under the final rule.

Paragraph (e)(2)(ii)(B) of the proposal required consideration of the likely impact on the investment performance of the plan based on such factors as the size of the plan's holdings in the issuer relative to the total investment assets of the plan, and the plan's percentage ownership of the issuer. Similar to the changes made to paragraph (e)(2)(ii)(A) of the final rule, the Department has removed this language to address concerns that where portions of the portfolio are managed by different investment managers, a specific manager may not know the plan's overall aggregate exposure to a single issuer. Accordingly, paragraph (e)(2)(ii)(B) of the final rule has been revised only to require a fiduciary consider the impact of any costs involved. However, in the Department's view, where the plan's overall aggregate exposure to a single issuer is known, the relative size of an investment within a plan's overall portfolio and the plan's percentage ownership of the issuer, may still be relevant considerations in appropriate cases in deciding whether to vote or exercise other shareholder rights.

Several commenters requested further guidance or examples of costs that a fiduciary would be required to consider. In the view of the Department, for purposes of paragraph (e)(2)(ii)(B) of the final rule, the types of relevant costs would depend on the particular facts and circumstances. Such costs could include direct costs to the plan, including expenditures for organizing proxy materials; analyzing portfolio companies and the matters to be voted on; determining how the votes should be cast; and submitting proxy votes to be counted. If a plan can reduce the management or advisory fees it pays by reducing the number of proxies it votes on matters that have no economic consequence for the plan that also is a relevant cost consideration. In some cases, voting proxies may involve out-of-the-ordinary costs or unusual requirements, such as may be the case of voting proxies on shares of certain foreign corporations. Opportunity costs in connection with proxy voting could also be relevant, such as foregone earnings from recalling securities on loan or if, as a condition of submitting a proxy vote, the plan will be prohibited from selling the underlying shares until after the shareholder meeting.

Paragraph (e)(2)(ii)(C) of the proposal provided that a fiduciary must not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to any non-pecuniary objective, or sacrifice investment return or take on additional investment risk to promote goals unrelated to these financial interests of the plan's participants and beneficiaries or the purposes of the plan. A commenter took issue with this requirement, suggesting that it was inconsistent with some client expectations, as well as stewardship codes outside the United States that do not limit significant votes to economic impact to the portfolio. The Department disagrees and notes that the provision reflects the fundamental fiduciary duty of loyalty as set forth in ERISA section 404(a)(1)(A). The Department has modified the final rule in order to avoid suggesting that a fiduciary may exercise proxy voting and other shareholder rights with the goal of advancing non-pecuniary goals unrelated to the financial interests of the plan's participants and beneficiaries so long as it does not result in increased costs to the plan or a decrease in value of the investment. Thus, paragraph (e)(2)(ii)(C) of the final rule states that a fiduciary must not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to any non-pecuniary objective, or promote non-pecuniary benefits or goals unrelated to these financial interests of the plan's participants and beneficiaries.

Paragraph (e)(2)(ii)(D) of the proposal provided that a fiduciary must investigate material facts that form the basis for any particular proxy vote or other exercise of shareholder rights. The provision further stated that the fiduciary may not adopt a practice of following the recommendations of a proxy advisory firm or other service provider without appropriate supervision and a determination that the service provider's proxy voting guidelines are consistent with the economic interests of the plan and its participants and beneficiaries, as defined in paragraph (e)(2)(ii)(A) of the proposal.

A commenter suggested the provision's requirement to investigate material facts was overly broad, and explained that there may be instances when routine or recurring proxy votes, such as annual proxy votes on the same subject, may not require a separate and distinct investigation in order for a fiduciary to make a prudent determination. A commenter indicated that paragraph (e)(2)(ii)(D) is overly burdensome, and that issues are addressed in paragraphs (e)(2)(ii)(F) and (e)(2)(iii) (relating to selection of service providers and delegation to investment managers). The commenter recommended deletion of the provision.

On the other hand, another commenter suggested that the Department go further with the fiduciary requirement to investigate material facts by explicitly referencing review of the issuer response statements required by recently-adopted SEC proxy solicitation rules. The commenter indicated these filings may include significant, material information that could impact a voting decision (including decisions about whether to vote and how to vote) that by definition would not be considered by the proxy advisory firm in drafting its recommendation. Additionally, according to the commenter, recent SEC guidance on the proxy voting responsibilities of investment advisers encourages investment advisers to have policies and procedures in place to consider the information available to them about proxy advisory firms themselves under the SEC's new proxy solicitation rules (*e.g.,* disclosures of proxy advisory firm conflicts of interests) as well as any information that comes to light after they have received a proxy advisory firm's voting recommendations (*e.g.,* additional soliciting material setting forth an issuer's views on a recommendation). The supplemental guidance further states that, under certain circumstances, an investment adviser would likely need to consider such additional information from an issuer prior to exercising voting authority in order to demonstrate that it is voting in its client's best interest, and that it should disclose how its policies and procedures address the use of automated voting in cases where it becomes aware before the submission deadline for proxies that an issuer intends to file or has filed additional soliciting materials regarding a matter to be voted upon.

Several commenters raised a number of concerns in connection with paragraph (e)(2)(ii)(D) of the proposal about proxy advisory firms, including conflicts of interest resulting from business relationships with companies that are the subject of proxy recommendations, a ''one-size-fits-all'' approach to corporate governance that does not take into account differences in companies' business models, a lack of transparency in the process by which proxy advisory firm recommendations are developed, errors in proxy advisory firm reports and recommendations, proxy advisory firms' resistance to

engaging in a dialogue with issuers to correct errors and misunderstandings, automatic submission of votes for clients, cutting plan managers out of the decision-making process, and depriving issuers of a chance to correct the record or provide the market with additional information.

After considering the comments, the Department is modifying paragraph (e)(2)(ii)(D) by requiring a fiduciary to evaluate, rather than investigate, material facts. This change is to remove any implication that plan fiduciaries would be expected to conduct their own investigation of material facts, which was not intended by the Department. Instead, the intent of this provision was to ensure that in making informed proxy voting decisions, fiduciaries should consider information material to a matter that is known or that is available to and reasonably should be known by the fiduciary. In this regard, the Department notes that, as described by the commenter above, as a result of recent SEC actions, clients of proxy advisory firms may become aware of additional information from an issuer which is the subject of a voting recommendation.[39] An ERISA fiduciary would be expected to consider the relevance of such additional information if material. Paragraph (e)(2)(ii)(D) of the final rule thus provides that a fiduciary must evaluate material facts that form the basis for any particular proxy vote or other exercise of shareholder rights.

Some commenters also suggested that the Department strengthen the rule by including specific regulatory text that generally disallows ''robovoting,'' a term some commenters describe as automatic voting mechanisms relying on proxy advisors. A commenter questioned whether robovoting is consistent with ERISA's stringent standards. Another commenter suggested that robovoting is an abridgment of fiduciary responsibility. Some commenters also suggested that the Department should prohibit robovoting for significant, contested, and controversial proxy votes. Commenters also suggested that the Department consider placing conditions on the use of robovoting, such as allowing robovoting only if a company that is the subject of a proxy advisory firm's recommendations has not submitted a response to the recommendation.

The Department intended that the provisions in paragraph (e)(2)(ii)(D) of the proposal address the sort of concerns raised by these comments and provide appropriate guidelines for ERISA fiduciaries. The provision in the proposal stated, in relevant part, that a fiduciary may not adopt a practice of following the recommendations of a proxy advisory firm or other service provider without appropriate supervision and a determination that the service provider's proxy voting guidelines are consistent with the economic interests of the plan and its participants and beneficiaries as defined in paragraph (e)(2)(ii)(A) of the proposal. The Department does not dispute that proxy advisory firms can play a role in providing information to fiduciaries and economizing investors' ability to exercise shareholder rights and proxy voting. However, public comments submitted in connection with the proposal, and recent SEC actions in this area described above, highlight aspects of the proxy advisory firms' recommendations and services that can be problematic in a variety of ways. For example, the Department acknowledges some commenters noted that many ERISA plans rely on proxy advisory firms' pre-population and automatic submission mechanisms for proxy votes, which can provide a cost-effective way to exercise their shareholder voting rights in cases where the proxy advisor has processes which assure that its voting recommendations conform to the obligations that plan managers hold as fiduciaries. However, adopting such a practice for all proxy votes effectively outsources their fiduciary decision-making authority. Rather, as the Department noted in the preamble to the proposed rule, ''certain proposals may require a more detailed or particularized voting analysis.'' [40]

In light of other changes in paragraph (e)(2) intended to adopt a more principles-based approach in the final rule, the Department has concluded that it would be better to address these proxy advisory firm issues in a separate paragraph in the final rule, which is described under paragraph (e)(2)(iv).

Paragraph (e)(2)(ii)(E) of the proposal required a fiduciary to maintain records on proxy voting activities and other exercises of shareholder rights, including records that demonstrate the basis for particular proxy votes and exercises of shareholder rights. Recognizing that ERISA's prudence obligation carries with it a requirement to maintain records and document fiduciaries' decisions, most commenters did not seriously object to the proposal's general obligation to maintain records on proxy voting activities and other exercises of shareholder rights. Commenters did, however, express concern that the proposal included particularized recordkeeping mandates that were both unnecessary and costly. One commenter suggested an alternative that fiduciaries must make prudent efforts to maintain accurate records that include proxy voting activities and, where authority is delegated, require the same of that person. Other commenters complained that the requirement to maintain specific records demonstrating the basis for particular votes was unnecessary and costly. Some commenters observed that such a level of recordkeeping would exceed that required for other potentially more impactful investment decisions. Another noted that the provision appeared to require a level of recordkeeping greater than described in current guidance, and complained that the Department did not adequately explain the reason for this change. The commenter noted that the Department stated in 2011 that there was no basis to impose more onerous documentation requirements that treat proxy voting differently from other fiduciary activities.[41] Some commenters requested general clarification on the types of documents that would be necessary to demonstrate the basis for a vote. A commenter suggested a specific clarification that proxy voting activity that is consistent with an applicable proxy voting policy does not require additional explanation or documentation. Further, as discussed below, commenters expressed concern that the requirement in paragraph (e)(2)(ii)(E) of the proposal to maintain documents demonstrating the basis for particular votes, as well as a similar requirement in paragraph (e)(2)(iii) of the proposal (relating to delegation of responsibilities to investment managers), suggested that the proposal would create new and heightened monitoring obligations for fiduciaries

[39] 2020 SEC Supplemental Guidance, 85 FR at 55155–57. Fiduciaries may retain proxy advisory firms and other service providers, subject to any applicable requirements of paragraphs (e)(2)(ii)(F) and (e)(2)(iii) and (iv), as part of satisfying the fiduciaries' obligations to evaluate material facts.

[40] 85 FR at 55224. The SEC 2019 Guidance for Investment Advisers similarly cautioned that a higher degree of analysis ''may be necessary or appropriate'' for certain types of matters, including corporate events such as mergers and acquisitions, or matters that are ''highly contested or controversial.'' *Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers,* 84 FR 47420, 47423–24 (Sept. 10, 2019). Release Nos. IA–5325; IC–33605, *available at www.govinfo.gov/content/pkg/FR-2019–09-10/pdf/2019-18342.pdf.*

[41] *See* Dep't of Labor Office of Inspector Gen. Report No. 09–11–001–12–121 (March 31, 2011). The commenter cited the EBSA response to OIG conclusion that EBSA does not have adequate assurances that fiduciaries or third parties voted proxies solely for the economic benefit of plans.

that delegate responsibilities to investment managers.

It has long been the view of the Department that compliance with the duty to monitor necessitates proper documentation of the activities that are subject to monitoring. However, the Department agrees that a less prescriptive approach to recordkeeping obligations is appropriate. The Department is retaining the general recordkeeping requirement, but is removing the requirement to maintain documents that would be necessary to demonstrate the basis for a vote to avoid any inferences related to responsibilities in monitoring investment managers, which are addressed in paragraph (e)(2)(iii) of the final rule. Thus, paragraph (e)(2)(ii)(E) of the final rule requires fiduciaries to maintain records on proxy voting activities and other exercises of shareholder rights. In general, the extent of the documentation needed to satisfy the monitoring obligation will depend on individual circumstances, including the subject of the proxy voting and its potential economic impact on the plan's investment. For fiduciaries that are SEC-registered investment advisers, the Department intends that the recordkeeping obligations under paragraph (e)(2)(ii)(E) be applied in a manner that aligns to similar proxy voting recordkeeping obligations under the Advisers Act.[42]

Paragraph (e)(2)(ii)(F) of the proposal required that fiduciaries exercise prudence and diligence in the selection and monitoring of persons, if any, selected to advise or otherwise assist with exercises of shareholder rights, such as providing research and analysis, recommendations regarding proxy votes, administrative services with voting proxies, and recordkeeping and reporting services.

Various commenters supported the Department's effort to better regulate proxy advisory firms and the proxy advisory process and suggested additional steps the Department should take in a final rule. Some suggested mandating disclosure of fees paid by investment managers to proxy voting advisors, prohibiting proxy advisory firms from consulting with companies when they also make recommendations on voting issues for that company, and establishing a baseline disclosure standard to which all proxy voting advice businesses must adhere. Others suggested placing specific conditions on a fiduciary's ability to rely on a proxy advisory firm's voting recommendation, such as requiring the proxy advisory firm to demonstrate that it had researched and analyzed evidence that would support a conclusion contrary to the proxy advisory firm's conclusion. A commenter suggested that the Department should make more specific reference to proxy advisory firm conflict of interest disclosures required by the recently amended SEC proxy solicitation rules. According to the commenter, the SEC rules require that proxy advisory firms provide specific, prominent disclosures of their conflicts of interest and of any policies and procedures designed to mitigate said conflicts. Additionally, these disclosures must be specific to the company on which the proxy advisory firm is issuing a report. The commenter recommended that the fiduciaries should be required to review a proxy advisory firm's conflicts disclosure, and that the Department should caution ERISA fiduciaries against relying on a proxy advisory firm's recommendations if the disclosures reveal a conflict with respect to an issuer that calls into question the firm's ability to provide objective advice. Another commenter suggested that the Department should wait until implementation of the SEC's new regulations to determine if any further action is necessary, and that the Department's approach to regulating fiduciary use of proxy advisory firms should align with the approach taken by the SEC so that SEC-registered investment advisers are subject to a consistent standard regarding their use of proxy advisory firms. On the other hand, some commenters criticized the Department's focus on proxy advisory firms as being based on unsupported allegations of proxy advisory firm critics, without the Department either substantiating those criticisms or noting the self-interest of the persons making those allegations.

After considering the public comments, the Department is adopting paragraph (e)(2)(ii)(F) in the final rule unmodified. It provides that fiduciaries must exercise prudence and diligence in the selection and monitoring of persons, if any, selected to advise or otherwise assist with exercises of shareholder rights, such as providing research and analysis, recommendations regarding proxy votes, administrative services with voting proxies, and recordkeeping and reporting services. The provision is essentially a restatement of the general fiduciary obligations that apply to the selection and monitoring of plan service providers, articulated in the context of fiduciary and other service providers that advise or assist with exercises of shareholder rights. Thus, as a general matter, fiduciaries will be expected to assess the qualifications of the provider, the quality of services offered, and the reasonableness of fees charged in light of the services provided. The process also must avoid self-dealing, conflicts of interest or other improper influence. In considering any proxy recommendation, fiduciaries should assure that they are fully informed of potential conflicts of proxy advisory firms and the steps such firms have taken to address them. Furthermore, to the extent applicable, fiduciaries will be expected to review the proxy voting policies and/or proxy voting guidelines and the implementing activities of the person being selected. If a fiduciary determines that the recommendations and other activities of such person are not being carried out in a manner consistent with those policies and/or guidelines, then the fiduciary will be expected to take appropriate action in response.

A commenter suggested deleting the list of services related to proxy voting. The commenter explained that the list is incomplete, and that codifying it might create confusion as to the types of services that may be necessary or appropriate for a particular voting activity. The Department does not believe it necessary to modify the provision as it is clear that the provision is not attempting to limit in any way the types of services that a plan or plan fiduciary may utilize in connection with exercising shareholder rights. Also, although the Department agrees that it would be important for a fiduciary to consider the proxy advisory conflict of interest disclosure required under recent SEC guidance, and that a fiduciary should consider whether potential conflicts may affect the quality of services to be provided, the Department does not believe it appropriate to expressly require review of such disclosure in paragraph (e)(2)(ii)(F) of the final rule because the provision could become outdated as disclosure obligations change over time. Rather, the Department believes that a general principles-based provision is adequate and would require ERISA fiduciaries to review disclosures of conflicts of interest required by SEC rules or guidance.

Paragraph (e)(2)(iii)

Paragraph (e)(2)(iii) of the proposal required that, where the authority to vote proxies or exercise shareholder rights has been delegated to an investment manager pursuant to ERISA section 403(a)(2), or a proxy voting firm or other person performs advisory services as to the voting of proxies, a responsible plan fiduciary must require

[42] *See infra* note 43 and accompanying text.

such investment manager or proxy advisory firm to document the rationale for proxy voting decisions or recommendations sufficient to demonstrate that the decision or recommendation was based on the expected economic benefit to the plan, and that the decision or recommendation was based solely on the interests of participants and beneficiaries in obtaining financial benefits under the plan. The preamble explained that the proposal required fiduciaries to require documentation of the rationale for proxy-voting decisions so that fiduciaries can periodically monitor those decisions.

Commenters expressed concern that paragraph (e)(2)(iii) of the proposal appeared to require a delegating fiduciary to, in effect, peer over the shoulder of an investment manager and supervise each voting decision to confirm the voting decision was made based on the economic impact on the plan. Commenters noted that such a monitoring obligation for proxy voting would be higher than for other fiduciary activities, and would be inconsistent with ERISA's general rules and prior Department guidance related to delegation of fiduciary responsibilities. Commenters asked for clarification that fiduciaries would not be required to monitor every proxy vote or second-guess other fiduciaries' specific proxy voting decisions, unless the fiduciary knows or should know the designated fiduciary is violating ERISA with their proxy voting procedures.

Another commenter recommended removal of the requirement that a fiduciary require its investment managers and proxy advisory firms to document each voting decision along with the rationale for each decision, indicating that it would create unmanageable liability risk for fiduciaries by suggesting an obligation to review every voting decision made. Commenters indicated that the documentation requirement would be costly for investment managers, believing they would need to justify and communicate their decisions regarding the benefit of each proxy agenda item to each plan client. Another commenter suggested industry practice is that, when votes are exercised in accordance with approved proxy voting guidelines generally, only votes contrary to approved guidelines warrant specific documentation. Other commenters, however, believed documentation would be beneficial in protecting plan interests and suggested that further access to information and analyses from proxy advisory firms would help plan fiduciaries understand how the advisory firms developed their recommendations.

The Department did not intend to create a higher standard for a fiduciary's monitoring of an investment manager's proxy voting activities than would ordinarily apply under ERISA with respect to the monitoring of any other fiduciary or fiduciary activity. Thus, the Department has revised the provision in the final rule to eliminate the requirement for documentation of the rationale for proxy voting decisions, and instead replaced it with a more general monitoring obligation. Specifically, paragraph (e)(2)(iii) of the final rule provides that where the authority to vote proxies or exercise shareholder rights has been delegated to an investment manager pursuant to ERISA section 403(a)(2), a proxy voting firm or other person who performs advisory services as to the voting of proxies, a responsible plan fiduciary shall prudently monitor the proxy voting activities of such investment manager or proxy advisory firm and determine whether such activities are consistent with paragraphs (e)(2)(i)–(ii) and (e)(3) of the final rule. The Department notes that while the provision does not contain a specific documentation requirement, an SEC rule requires investment advisers registered with the SEC under the Advisers Act to maintain a record of each proxy vote cast on behalf of a client, retain documents created by the adviser that were material to a decision on how to vote or that memorialize the basis for that decision, and to maintain each written client request for information on how the adviser voted proxies on behalf of the client and any written response by the investment adviser to any (written or oral) client request for information on how the adviser voted proxies on behalf of the requesting client.[43] These requirements may be helpful to responsible plan fiduciaries in fulfilling monitoring requirements under paragraph (e)(2)(iii).

Commenters also raised concerns about the statement in the preamble to the proposal that suggested uniform proxy policies may sometimes jeopardize responsible plan fiduciaries' satisfaction of their duties under ERISA as suggesting that ERISA plans should require investment managers to use customized policies. A commenter explained that currently investment managers with voting discretion may vote consistently across client accounts as appropriate (*i.e.,* on those proposals for which objectives of the accounts are consistent and divergent economic interests or client-specific preferences are not present). Similarly, another commenter indicated that many investment advisers registered with the SEC use consistent proxy voting policies across client accounts, including accounts held by ERISA plans and pooled investment vehicles, because they believe those policies are in the best interest of clients.

Some commenters believed that developing customized policies for particular ERISA plans or collective investment vehicles used by ERISA plans would increase costs for plans and investment managers without incremental benefit to participants and beneficiaries. A commenter noted that investment managers might need to run a parallel voting process for ERISA and non-ERISA assets, which would create additional administrative burden and costs. A commenter also asserted that due to increased risk, some managers might move in the direction of not undertaking voting responsibilities, which would then require plans to make their own assessments and invariably result in increased costs.

A commenter suggested that the proposal's approach to regulating fiduciary use of proxy advisory firms should align with the approach taken by the SEC so that SEC-registered investment advisers are subject to a consistent standard regarding their use of proxy advisory firms. A commenter noted similar concerns in the context of proxy advisory services, indicating that paragraph (e)(2)(iii) implied that proxy advisors must tailor their rationale for every recommendation to each specific plan (and its participants) whose asset manager uses its research. A commenter believed such a requirement would be unnecessarily plan specific and unworkable. The commenter explained that proxy advisory firms support their clients, such as asset managers to retirement plans, by providing recommendations based on their chosen proxy voting policy, which is usually a custom policy the asset manager has selected to serve the interest of its client (*e.g.,* a retirement plan and its participants). According to the commenter, the client's decisions as to what its policy should be and how it should vote are at the sole discretion of the asset manager.

With respect to uniform proxy policies being utilized by investment managers, it was not the Department's intention to suggest that plans must require investment managers to vote

[43] SEC Rule 204–2, 17 CFR 275.204–2; *see also* SEC Rule 206(4)–6(b) and (c), 17 CFR 275.206(4)–6(b) and (c) (relating to certain disclosures about proxy voting by an investment adviser that must be provided to, or may be requested by, a client of the investment adviser).

according to custom policies. Rather, the Department's statement reflected a general concern that responsible fiduciaries might be accepting investment managers' proxy voting policies without sufficient review as to whether those policies comply with ERISA and, if so, whether the investment managers were complying with those policies. The Department believes that the revisions to the recordkeeping requirement in the final rule described above appropriately address that issue.

Paragraph (e)(2)(iv)

In light of other changes in paragraph (e)(2) intended to adopt a more principles-based approach in the final rule, some provisions related to proxy advisory firms that were in paragraph (e)(2)(ii)(D) of the proposal have been moved to a new paragraph (e)(2)(iv) in the final rule. Specifically, paragraph (e)(2)(ii)(D) of the proposal stated that the fiduciary may not adopt a practice of following the recommendations of a proxy advisory firm or other service provider without appropriate supervision and a determination that the service provider's proxy voting guidelines are consistent with the economic interests of the plan and its participants and beneficiaries as defined in paragraph (e)(2)(ii)(A) of the proposal.

Paragraph (e)(2)(iv) of the final rule generally includes the same fiduciary obligations with respect to the use of proxy advisory firms and other service providers that were described in paragraph (e)(2)(ii)(D) of the proposal, with some modifications to strengthen the oversight obligations of fiduciaries who retain proxy advisory firms or other service providers. In response to the public comments that cited fiduciary practices that carry a high risk of noncompliance with ERISA, paragraph (e)(2)(iv) of the final rule has been modified so that a fiduciary that chooses to follow the recommendations of a proxy advisory firm or other service provider must determine that the firm or service provider's proxy voting guidelines are consistent with the five factors set forth in paragraph (e)(2)(ii)(A)–(E) of the final rule, rather than only paragraph (e)(2)(ii)(A). Because paragraph (e)(2)(ii)(F) of the final rule covers the exercise of prudence and diligence in the selection and monitoring of proxy advisory firms and other service providers, it would not generally be applicable to the proxy voting guidelines of a proxy advisory firm or other service provider.

Paragraph (e)(2)(iv) of the final rule removes the appropriate supervision requirement since that requirement duplicates the monitoring obligations set forth in paragraph (e)(2)(ii)(F) of the final rule. A fiduciary that retains a proxy advisory firm or other service provider, however, remains subject to the prudence and diligence obligations described in paragraph (e)(2)(ii)(F) regarding the selection of that person and, if the fiduciary adopts a practice of following the recommendations of that person, the fiduciary is subject to the additional requirements of paragraph (e)(2)(iv) of the final rule.

(iii) Paragraph (e)(3)

Paragraphs (e)(3)(i) and (ii) of the proposal, which would have required fiduciaries in certain circumstances to vote or not to vote proxies, were removed from the final rule, as discussed above. Paragraph (e)(3)(iii) of the proposal expressly acknowledged the appropriateness of ERISA fiduciaries' adoption of proxy voting policies to help them more cost-effectively comply with their obligations under the proposal. Paragraph (e)(3)(iii) of the proposal provided for adoption of general proxy voting policies or procedures and provided three examples of policies that could be utilized by fiduciaries (sometimes referred to as ''permitted practices'') in paragraphs (e)(3)(iii)(A)–(C) of the proposal. The proposed permitted practices included conditions intended to require a fiduciary to make prudence-based judgments about the policies.

The Department received a number of general comments on paragraph (e)(3)(iii) of the proposal. Several commenters supported use of proxy voting policies to help fiduciaries reduce costs and compliance burdens, but suggested that the scope of relief for fiduciaries under paragraph (e)(3)(iii) of the proposal was unclear, noting that clear ''safe harbor'' relief was not afforded by the proposal. Commenters also asked about the extent to which fiduciaries following permitted practices would still be required to comply with particular provisions of the proposal that seemed more directed as evaluations of individual votes, *e.g.,* some of the recordkeeping provisions in the proposal. Commenters recommended that the permitted practices should be made clear safe harbors indicating that fiduciaries are deemed to satisfy their prudence and loyalty obligations under ERISA. Commenters argued that without such treatment the permitted practices would not offer effective options for easing compliance burdens and associated costs as intended by the Department. Commenters also requested confirmation that plan fiduciaries have flexibility to adopt proxy voting policies in addition to the specific examples described in the rule. Other commenters did not support paragraph (e)(3)(iii) of the proposal, asserting that the proposal would effectively compel ERISA plans to adopt one of the permitted practices by imposing the proposal's burdensome cost-benefit analysis requirements.

The Department has decided to retain, with modifications, the framework for adoption of proxy voting policies as set forth in paragraph (e)(3)(iii) of the proposal as paragraph (e)(3)(i) of the final rule. The provision in the final rule has been modified to more clearly provide safe harbor relief. The safe harbors apply to a fiduciary's duties of loyalty and prudence with respect to decisions on whether to vote, but do not apply to decisions on how to vote. Thus, a fiduciary will not breach its fiduciary responsibilities under sections 404(a)(1)(A) and 404(a)(1)(B) of ERISA with respect to decisions on whether to vote, provided such policies are developed in accordance with a fiduciary's obligations under ERISA as set forth in the applicable provisions of paragraphs (e)(2)(i) and (ii) of the final rule. Because the compliance burdens under the rule should be significantly reduced by other changes from the proposal described elsewhere (*e.g.,* the principles-based approaches and elimination of proposed paragraphs (e)(3)(i) and (ii)), the Department does not believe that fiduciaries will be compelled to adopt the proxy voting policies described in paragraph (e)(3)(i) of the final rule but rather will use them, as the Department intended, to provide cost-effective options for exercising shareholder rights in compliance with their fiduciary obligations under ERISA.

Thus, paragraph (e)(3)(i) of the final rule provides that in deciding whether to vote a proxy pursuant to paragraphs (e)(2)(i) and (ii) of the final rule, fiduciaries to plans may adopt proxy voting policies under which voting authority shall be exercised pursuant to specific parameters prudently designed to serve the plan's economic interest. The final rule further provides that paragraphs (e)(3)(i)(A) and (B) set forth optional means for satisfying the fiduciary responsibilities under section 404(a)(1)(B) of ERISA, provided such policies are developed in accordance with a fiduciary's prudence obligations under ERISA as set forth in the applicable provisions of paragraphs (e)(2)(i) and (ii) of the final rule. These safe harbors are intended to be applied flexibly rather than in a binary ''all or none'' manner, and may be used either

independently or in conjunction with each other. The safe harbors are thus a means of establishing general proxy voting practices that allow plans to efficiently operationalize and manage shareholder rights consistent with the applicable fiduciary principles in paragraphs (e)(2)(i) and (ii). Paragraph (e)(3)(i) also makes clear that paragraphs (e)(3)(i)(A) and (B) are not intended to set forth an exclusive list of the policies that plans could adopt that would satisfy their responsibilities under the fiduciary principles in paragraphs (e)(2)(i) and (ii).

Paragraph (e)(3)(i)(A) sets forth the first of two safe harbor policies contained in the final rule. It describes a policy that voting resources will focus only on particular types of proposals that the fiduciary has prudently determined are substantially related to the issuer's business activities or are expected to have material effect on the value of the investment. The provision is substantively similar to the permitted practice described in paragraph (e)(3)(iii)(B) of the proposal. However, the proposed provision listed types of proposals that a fiduciary might prudently consider focusing voting resources on: Proposals relating to corporate events (mergers and acquisitions transactions, dissolutions, conversions, or consolidations), corporate repurchases of shares (buybacks), issuances of additional securities with dilutive effects on shareholders, or contested elections for directors. Commenters expressed concern that the Department did not provide any economic analysis for why matters listed in proposed paragraph (e)(3)(iii)(B) would be more material to shareholders than other issues, and argued that voting on a variety of issues not included in that list would be in the interest of ERISA plans. For example, a commenter pointed out that mutual fund proposals, which may present difficulties for these funds in achieving quorum as compared to solicitations made by corporate issuers, and votes to approve auditors were not included in the list but could be considered material to investors.

The list of matters included in the proposal was not intended as an exhaustive list of particular matters that merit consideration by fiduciaries. Nor was it intended to limit a fiduciary's flexibility to prudently consider other matters. The Department continues to believe that the listed issues are examples of matters that generally would be expected to have an economic impact on the value of the investment. Nonetheless, to avoid the potential for such a misperception, the Department is not including the list in paragraph (e)(3)(i)(A) of the final rule.

The final provision slightly revises the language used to describe the fiduciary's prudence determination to reflect a pecuniary-based analysis. The final rule also broadly references the value of the investment rather than the plan's investment to make it clear that the evaluation could be at the investment manager level dealing with a pool of investor's assets or at the individual plan level. Paragraph (e)(3)(i)(A) of the final rule thus describes a policy that voting resources will focus only on particular types of proposals the fiduciary has prudently determined are substantially related to the issuer's business activities or are expected to have a material effect on the value of the investment.[44]

Paragraph (e)(3)(i)(B) of the final rule sets forth the second safe harbor policy and is based on paragraph (e)(3)(iii)(C) of the proposal. The proposal provided that a fiduciary could adopt a policy of refraining from voting on proposals or particular types of proposals when the plan's holding of the issuer relative to the plan's total investment assets is below quantitative thresholds that the fiduciary prudently determines, considering its percentage ownership of the issuer and other relevant factors, is sufficiently small that the matter being voted upon is unlikely to have a material impact on the investment performance of the plan's portfolio (or investment performance of assets under management in the case of an investment manager). The proposal indicated that the Department was considering a specific quantitative upper limit for the threshold (*i.e.,* a cap) under paragraph (e)(3)(iii)(C), and solicited comments on setting this upper limit, including whether a maximum cap should be defined and, if so, what factors should be considered in setting a cap. In particular, the Department solicited comments on whether a five percent cap would be appropriate, or some other percent level of plan assets.

A commenter expressed the view that the permitted practice described in paragraph (e)(3)(iii)(C) to refrain from proxy voting would violate the requirement in ERISA section 404(a)(1)(B) that plan fiduciaries act ''with the care, skill, prudence, and diligence under the circumstances then prevailing [as] a prudent man acting in a like capacity and familiar with such matters.'' According to the commenter, the overwhelming majority of prudent experts—*i.e.,* the expert professionals who make up the investment management community—have determined that proxy voting is in their clients' interests. Another commenter disagreed with the Department's statement that voting shares of plan holdings that comprise a small portion of total plan assets rarely advances plans' economic interests. The commenter indicated that, depending on the size of a plan, even small relative positions can have a large dollar value.

Commenters also expressed concerns about potential negative unintended consequences of widespread adoption of the permitted practice. According to a commenter, if the majority of a plan's investments in portfolio companies fell within the parameters described in the permitted practice, this could leave the majority of the plan's portfolio un-voted, which in the aggregate would expose the plan investor to material risk even if the risk associated with each individual company was small. Additionally, according to commenters, non-voting by small plan investors could result in concentrating proxy votes in the hands of other investors whose interests might not align with the long-term interests of ERISA plans. Furthermore, non-voting by plans could result in companies with substantial portions of un-voted shares, and could also result in quorum requirements going unmet.

With respect to the Department's request for input on whether a percent cap would be appropriate, commenters generally opposed such a provision and suggested that the Department avoid specifying a percentage cap on the portion of the plan's portfolio that must be represented by an issuer for proxy votes to be considered.

The Department is not persuaded that the type of policy described in paragraph (e)(3)(iii)(C) of the proposal should be excluded from the final rule's safe harbor provision. The provision was designed to provide a fiduciary with flexibility to prudently tailor a quantitative threshold for a plan's portfolio, below which the outcome of the vote is unlikely to have a material impact on the performance of the plan's portfolio or, in situations where only a portion of the portfolio is being managed by an investment manager, the performance of the plan assets under

[44] The final rule uses the term ''material effect'' rather than ''significant impact.'' No substantive change is intended by the revision as the Department believes that ''significant impact'' is generally equivalent to ''material effect'' in this context. Use of the term materiality is intended to align the terminology consistent with the rest of the Investment Duties regulation. The Department believes that fiduciaries and investment managers are generally familiar with the concept of materiality from its use in connection with both ERISA and the Federal securities laws.

management. The Department believes that providing such an option in the final rule may be helpful to plans in reducing costs. The Department further believes that it can be prudent for a fiduciary to refrain from expending plan resources to vote on matters pertaining to a holding that makes up an immaterial portion because a fiduciary may prudently expect that voting on such matters will not have a material effect on performance. With respect to setting a cap, the Department does not believe it received sufficient information from comments to establish an upper limit in the final rule.

Paragraph (e)(3)(i)(B) of the final rule thus describes as the second safe harbor a policy of refraining from voting on proposals or particular types of proposals when holding in a single issuer relative to the plan's total investment assets, or the portion of a plan's assets being managed by an investment manager, is below a quantitative threshold that the fiduciary prudently determines, considering its percentage ownership of the issuer and other relevant factors, is sufficiently small that the matter being voted upon is not expected to have a material effect on the investment performance.[45] The final rule does not require a specific performance period for determining whether a material effect exists; fiduciaries must therefore prudently decide an appropriate performance period for use in its proxy voting policies under this safe harbor.

The Department notes that paragraph (e)(3)(iii)(A) of the proposal is not being incorporated in the final rule. Paragraph (e)(3)(iii)(A) of the proposal described a policy of voting proxies in accordance with the voting recommendations of a corporation's management on proposals or types of proposals that the fiduciary prudently determined would be unlikely to have a significant impact on the value of the plan's investment, subject to any conditions determined by the fiduciary as requiring additional analysis because the matter being voted upon concerns a matter that may present heightened management conflicts of interest or is likely to have a significant economic impact on the value of the plan's investment. Commenters expressed the view that this permitted practice would be unprecedented, indicating that the Department has never previously indicated that a fiduciary may assume that another person is acting in the best interest of the plan. Rather, according to a commenter, the Department's consistent position is that a fiduciary must prudently select and monitor both fiduciary and non-fiduciary service providers. The commenter questioned this provision's consistency with other provisions of the proposal, noting that under other provisions of the proposal plan fiduciaries would be required to increase their due diligence on proxy advisory firms consistent with prudence and loyalty obligations, but this permitted practice would allow them to follow corporate directors in deciding what is in the best interest of the fiduciaries' plan participants without undertaking similar due diligence.

A commenter specifically noted that proxy advisory firms that are registered with the SEC under the Advisers Act owe their clients fiduciary duties of care and loyalty and suggested that if the permitted practice for management recommendations under paragraph (e)(3)(iii)(A) was adopted, then the Department should create a permitted practice for fiduciaries to rely on such firms. Commenters also questioned the safeguards offered by a permitted practice that relies on fiduciary duties that officers and directors owe to a corporation based on state corporate laws. A commenter stated that such a standard is lower that the fiduciary standard of care under ERISA. The commenter further stated that Delaware corporate law authorizes companies to waive director liability for breaches of the duty of care, and that corporate conflicts of interest with the company may also be waived upon approval of non-interested directors. Another commenter criticized reliance on fiduciary duties under state corporate law by noting that the law imposes these duties because management's interests can and do differ from those of the company's shareholders, and state corporate law requires shareholder votes precisely because managers' fiduciary duties alone are not adequate to align management's and shareholders' interests.

The Department notes that some of the commenters may have misread paragraph (e)(3)(iii)(A) as establishing unconditional blanket reliance on management recommendations. The proposal expressly limited reliance on management recommendations to proposals or types of proposals that the fiduciary had prudently determined would be unlikely to have a significant impact on the value of the plan's investment. Nonetheless, based on concerns expressed by commenters, and on the Department's separate decision to remove the requirement not to vote in certain situations, the Department decided to not adopt this permitted practice in the final rule's safe harbor provisions.

Commenters also provided several suggestions for additional permitted practices, none of which the Department has adopted. Several recommended a policy based on a determination that voting would not result in material additional costs to the plan. There is no need to include this permitted practice (or safe harbor) because the final rule does not have an express prohibition on voting based on the balance of economic effect and costs. Other commenters suggested permitted practices for following prudently designed and applied proxy voting guidelines. The Department does not believe it is necessary or appropriate to include such a safe harbor. Paragraph (e)(3)(i) already states that fiduciaries may adopt proxy voting policies providing that the authority to vote a proxy shall be exercised pursuant to specific parameters prudently designed to serve the plan's economic interest. Another commenter suggested that if the rule retains a permitted practice that permits a fiduciary to follow management recommendations, then the Department should add a permitted practice that permits following recommendations of the proxy advisory firm if the adviser owes a fiduciary duty to its clients. The Department has not retained the permitted practice regarding following management recommendations and believes that proxy advisory firms are adequately addressed in other provisions of the final rule.

Paragraph (e)(3)(ii) of the final rule relates to the review of proxy voting policies adopted under paragraph (e)(3)(i). The corresponding provision at paragraph (e)(3)(iv) of the proposal, applicable to the proposal's permitted practices, required plan fiduciaries to review any proxy voting policies adopted pursuant to paragraph (e)(3)(iii) of the proposal at least once every two years. The Department explained that the proposed requirement was appropriate to ensure a plan's proxy voting policies remain prudent given ongoing changes in financial markets and the investment world, but solicited comments on whether some other maximum interval for review would be appropriate.

Commenters suggested that a two-year requirement would be unnecessary and recommended removal. Commenters

[45] The proposal referred to ''the outcome of the vote,'' rather than ''the matter being voted upon.'' This final rule uses ''the matter being voted upon'' to make it clear that whether the fiduciary's voting power could sway the vote one way or the other is not relevant to application of the safe harbor. Rather, the point is that the plan's holding would be sufficiently small that any outcome of the vote (and any consequent changes to the value of the underlying asset) would have no material effect on the investment performance of the plan.

expressed the view that review of permitted practices should be based on facts and circumstances and left to the fiduciary to decide. A commenter also expressed concern that a specific review requirement in the rule could create potential liability for fiduciaries in their ongoing monitoring of other plan policies, such as investment policy statements, fiduciary charters, plan expenses and other policies, or in connection with the frequency of requests for proposals.

After considering comments, the Department has decided to remove the specific two-year requirement and provide a general requirement for periodic review of policies. The Department understands that general industry practice is to review investment policy statements approximately every two years and expects that fiduciaries will review proxy voting policies with roughly the same frequency. Nevertheless, the Department is persuaded that it is unnecessary to set an exact deadline and that doing so could create liability based on a technical temporal violation of the rule. As a result, paragraph (e)(3)(ii) of the final rule provides that plan fiduciaries shall periodically review proxy voting policies adopted pursuant to paragraph (e)(3)(i) of the final rule.

Paragraph (e)(3)(iii) of the final rule relates to the effect of proxy voting policies adopted under the final rule's safe harbor provision. It is based on paragraph (e)(3)(v) of the proposal, which provided that no policies adopted under paragraph (e)(3)(iii) of the proposal would have precluded, or imposed liability for, submitting a proxy vote when the fiduciary prudently determines that the matter being voted upon would have an economic impact on the plan after taking into account the costs involved, or for refraining from voting when the fiduciary prudently determines that the matter being voted upon would not have an economic impact on the plan after taking into account the costs involved.

A commenter indicated that paragraph (e)(3)(v) of the proposal was not sufficient to provide safe harbor relief for fiduciaries following permitted practices under the proposal. Another commenter expressed the view that the provision was not broad enough and should expressly permit fiduciaries to consider any prudent alternative courses of action for any particular proxy issue that may otherwise fall within the description of a permitted practice.

The Department believes that paragraph (e)(3)(i) of the final rule provides sufficient clarity with respect to the Department's intended safe harbor treatment of proxy voting policies adopted under paragraph (e)(3) of the final rule. The Department also believes that the principles-based approach in the final rule provides sufficient flexibility for fiduciaries to exercise prudent judgment in making proxy voting determinations. Changes have been made to paragraph (e)(3)(iii) of the final rule to reflect this principles-based approach.

Paragraph (e)(3)(iii) of the final rule provides that no proxy voting policies adopted pursuant to paragraph (e)(3)(i) of this section shall preclude, or impose liability for, submitting a proxy vote when the fiduciary prudently determines that the matter being voted upon is expected to have a material effect on the value of the investment or the investment performance of the plan's portfolio (or investment performance of assets under management in the case of an investment manager) after taking into account the costs involved, or refraining from voting when the fiduciary prudently determines that the matter being voted upon is not expected to have such a material effect after taking into account the costs involved. In light of the potentially large number of individual proxy votes that may need to be considered on an annual basis, the safe harbor provisions are intended to apply and operationalize the fiduciary principles described in the final rule for a particular plan in a cost-efficient manner and provide an alternative to retaining a proxy advisory firm to provide advice on each vote. Paragraph (e)(3)(iii) of the final rule shields a fiduciary from liability to the extent that the fiduciary deviates from policies adopted pursuant to the safe harbors based on the fiduciary's conclusion that a different approach in a particular case is in the economic interests of the plan considering the specific facts and circumstances.

(iv) Paragraph (e)(4)

Paragraphs (e)(4)(i) and (ii) of the final rule, like the proposal, reflect longstanding interpretive positions published in the Department's prior Interpretive Bulletins. Paragraph (e)(4)(i)(A) of the proposal stated that the responsibility for exercising shareholder rights lies exclusively with the plan trustee, except to the extent that either (*1*) the trustee is subject to the directions of a named fiduciary pursuant to ERISA section 403(a)(1), or (*2*) the power to manage, acquire, or dispose of the relevant assets has been delegated by a named fiduciary to one or more investment managers pursuant to ERISA section 403(a)(2). Paragraph (e)(4)(i)(B) of the proposal provided that where the authority to manage plan assets has been delegated to an investment manager pursuant to ERISA section 403(a)(2), the investment manager has exclusive authority to vote proxies or exercise other shareholder rights appurtenant to such plan assets, except to the extent the plan or trust document or investment management agreement expressly provides that the responsible named fiduciary has reserved to itself (or to another named fiduciary so authorized by the plan document) the right to direct a plan trustee regarding the exercise or management of some or all of such shareholder rights.

A commenter indicated that paragraph (e)(4)(i) of the proposal was unclear as to trustee responsibilities with respect to voting directed by plan participants pursuant to plan provisions. As discussed below, a new paragraph (e)(5) was added to the final rule to address ''pass-through'' or ''participant-directed'' voting. Paragraph (e)(4)(i)(A) in the final rule is unchanged from the proposal, with a correction of a typographical error. Paragraph (e)(4)(i)(B) in the final rule is unchanged from the proposal.

Paragraph (e)(4)(ii) of the proposal described obligations of an investment manager of a pooled investment vehicle that holds assets of more than one employee benefit plan. It stated that an investment manager of a pooled investment vehicle that holds assets of more than one employee benefit plan may be subject to an investment policy statement that conflicts with the policy of another plan. It also provided that compliance with ERISA section 404(a)(1)(D) requires the investment manager to reconcile, insofar as possible, the conflicting policies (assuming compliance with each policy would be consistent with ERISA section 404(a)(1)(D)). In the case of proxy voting, to the extent permitted by applicable law, the investment manager must vote (or abstain from voting) the relevant proxies to reflect such policies in proportion to each plan's economic interest in the pooled investment vehicle. Such an investment manager may, however, develop an investment policy statement consistent with Title I of ERISA and the Investment Duties regulation, and require participating plans to accept the investment manager's investment policy, including any proxy voting policy, before they are allowed to invest. In such cases, a fiduciary must assess whether the investment manager's investment policy

statement and proxy voting policy are consistent with Title I of ERISA and the Investment Duties regulation before deciding to retain the investment manager.

Commenters indicated that the proposal's requirement to reconcile conflicting policies of investing plans and engage in proportionate voting to reflect conflicting policies would be highly burdensome for investment managers. A commenter noted that it is sometimes not possible to instruct a single client's holding within the fund differently than other clients, as ''split-voting'' is not permitted practice in certain markets or custodian banks. Commenters also indicated that paragraph (e)(4)(ii) of the proposal did not reflect current industry standard practice that investment in a plan asset vehicle is generally conditioned on acceptance of the investment objectives, guidelines, and policies that apply to the vehicle. Some commenters recommended deletion of the proposed requirement to reconcile conflicting policies of ERISA plans. Other commenters suggested deleting paragraph (e)(4)(ii) of the proposal entirely.

Commenters requested that the language in paragraph (e)(4)(ii) of the proposal addressing a plan's acceptance of an investment manager's proxy voting policy be modified to clarify that the investment manager's investment policy statement or proxy voting policy must be consistent with Title I of ERISA, but are not required to be consistent with the proposed rule. Commenters indicated that investment managers would have difficulties performing the plan-specific evaluations required by the proposal. These issues are discussed more generally above. A commenter also indicated that even if the rule were to allow elimination of the plan-specific evaluation, the task to make changes to an investment manager's policies would still be enormous. According to the commenter, the trust's proxy voting guidelines would likely require revision, and once revised, would need to be presented, explained, and accepted by each participating plan, including non-ERISA plans not subject to the rule. Similarly another commenter suggested that the subtle differences between paragraph (e)(4)(ii) of the proposal and the analogous provision in IB 2016–01 might cause an investment manager, in order to protect all of its clients, to adopt a revised investment policy statement that it would require participating plans to accept, and that the process would involve both drafting that policy and obtaining consent from investing plans.

The Department is not persuaded to remove paragraph (e)(4)(ii) from the final rule or change the language regarding reconciliation of conflicting policies of investing plans or proportionate voting. Similar guidance has been consistently part of the Department's prior Interpretive Bulletins in this area. As to the requirement that policies must be consistent with Title I of ERISA and the final rule and difficulties associated with plan specific evaluations, the Department believes that changes in paragraph (e)(2)(i) and (ii) of the final rule should address commenters' concerns. With respect to the commenter's identification of subtle differences between paragraph (e)(4)(ii) of the proposal and the relevant portion of IB 2016–01, the Department acknowledges that the language is not identical.[46] However, the Department did not intend the language changes to fundamentally alter that guidance. Like IB 2016–01, paragraph (e)(4)(ii) recognizes that there may be circumstances under which an investment manager of a pooled investment vehicle that holds assets of more than one plan may be subject to conflicting policies of investing plans, but that the manager may avoid conflicting policies by requiring investors to accept the investment manager's policies before they are allowed to invest.[47] However, paragraph (e)(4)(ii) adds language that describes the associated obligations of plan fiduciaries in making the decision to accept the investment manager's policies. Commenters did not question whether an ERISA fiduciary should assess an investment manager's investment policy statement for consistency with ERISA prior to accepting it. To the extent that the commenter's concerns about differences from the relevant portion of IB 2016–01 relate to the requirement that the manager's policies must be consistent with the final rule, the Department believes changes in paragraph (e)(2)(i) of the final rule, as described above, should address this concern. As a result, paragraph (e)(4)(ii) of the final rule is being adopted substantially as proposed.

(v) Paragraph (e)(5)

A number of commenters indicated that the proposal did not specifically address proxy rights passed through to plan participants. A commenter explained that participants may invest in publicly-traded companies, as well as mutual funds and other securities, through a self-directed brokerage window offered by their plans. According to the commenter, self-directed brokerage windows involve the broker passing voting rights through to the participants. Further, participant-directed plans, such as those structured to meet ERISA section 404(c) and related regulations, sometimes allow participants to invest in company stock and pass through voting to them. According to the commenter, many ERISA-covered plans have been drafted to explicitly provide that plan participants are deemed to be ''named fiduciaries'' when they vote securities held by their plan accounts. Commenters argued that the structure and provisions of the proposed regulation did not account for such ''pass-through'' or ''participant-directed'' voting activity, and requested that the Department expressly exclude such voting activity from the rule or provide clarification as to application of the proposed rule's requirements in the context of pass-through of voting rights, including the responsibilities of trustees in connection with the actual votes of participants and whether participants when exercising their proxy voting rights would be treated as fiduciaries under the rule.

The Department agrees that the proposal was not intended to address

[46] Specifically, IB 2016–01 stated: ''An investment manager of a pooled investment vehicle that holds assets of more than one employee benefit plan may be subject to a proxy voting policy of one plan that conflicts with the proxy voting policy of another plan. Compliance with ERISA section 404(a)(1)(D) would require the investment manager to reconcile, insofar as possible, the conflicting policies (assuming compliance with each policy would be consistent with ERISA section 404(a)(1)(D)) and, if necessary and to the extent permitted by applicable law, vote the relevant proxies to reflect such policies in proportion to each plan's interest in the pooled investment vehicle. If, however, the investment manager determines that compliance with conflicting voting policies would violate ERISA section 404(a)(1)(D) in a particular instance, for example, by being imprudent or not solely in the interest of plan participants, the investment manager would be required to ignore the voting policy that would violate ERISA section 404(a)(1)(D) in that instance. Such an investment manager may, however, require participating investors to accept the investment manager's own investment policy statement, including any statement of proxy voting policy, before they are allowed to invest. As with investment policies originating from named fiduciaries, a policy initiated by an investment manager and adopted by the participating plans would be regarded as an instrument governing the participating plans, and the investment manager's compliance with such a policy would be governed by ERISA section 404(a)(1)(D).''

[47] *See* 59 FR 38860, 38863 (July 29, 1994) (''Nothing in ERISA, however, prevents such an investment manager from maintaining a single investment policy, including a proxy voting policy, and requiring all participating investors to give their asse[n]t to such policy as a condition of investing.'').

the sort of pass-through voting that the commenters described. Accordingly, the final rule includes an express provision in new paragraph (e)(5) stating that the final rule does not apply to voting, tender, and similar rights with respect to such securities that are passed through pursuant to the terms of an individual account plan to participants and beneficiaries with accounts holding such securities. That should not be read as an indication that plan trustees and other plan fiduciaries do not have fiduciary obligations with respect to such practices. Prior Department guidance recognized that in certain circumstances a trustee may follow the instructions of participants in an eligible individual account plan that expressly states that a trustee is subject to the direction of plan participants with respect to certain decisions regarding the management of their account. In such a case, under section 403(a)(1) of ERISA, the trustee must follow the direction of participants if those directions are proper, made in accordance with plan terms, and not contrary to ERISA.[48] Plan trustees and other fiduciaries would continue to have to comply with ERISA's prudence and loyalty provisions with respect to the pass through of votes to plan participants and beneficiaries, and can continue to rely on the Department's prior guidance with respect to such participant-directed voting, including 29 CFR 2550.404c-1 implementing ERISA section 404(c)(1) to participant-directed pass through voting.

(vi) Paragraphs (g) and (h)

Paragraph (g) provides the applicability dates for the final rule. Under paragraph (g), the final rule will be applicable thirty days after the date this final rule is published in the **Federal Register**.[49] One commenter requested clarity with respect to whether the proposed applicability date applied only to paragraph (e) or to the entirety of § 2550.404a–1. Paragraphs (g)(1) and (g)(3) of the final rule state that the applicability date for paragraph (e) is thirty days after the date this final rule is published in the **Federal Register** and shall apply to exercises of shareholder rights after such date. A number of commenters on the proposal stated that the proposed 30-day effective date period would not accommodate the essential and lengthy transition processes that would be necessary for plan fiduciaries to fully comply with the rule.[50] These commenters requested extensions up to 12 or 18 months after publication of a final rule. Alternatively, or in addition to extending the applicability date, commenters requested that if the Department retains the 30-day provision, that the final rule include guidance that would permit affected parties a more reasonable amount of time to comply with the rule. Commenters proffered a variety of suggestions that would help plan fiduciaries and others manage this new process, including a different applicability date, a transition rule, a grandfather rule for existing voting arrangements, and a temporary non-enforcement policy.

The Department is not extending the applicability date, particularly given the benefits this final rule affords to participants and beneficiaries. Furthermore, the Department believes that the final rule does not represent so significant a change from existing guidance that fiduciaries can reasonably claim impossibility in timely implementing most of its requirements. However, the Department agrees that for certain portions of the final rule, a later applicability date will address concerns of some commenters with respect to their ability to comply with the rule within the 30-day effective period. Paragraph (g)(3) grants fiduciaries until January 31, 2022, to comply with the requirements of paragraphs (e)(2)(ii)(D) and (E), (e)(2)(iv), and (e)(4)(ii) of the final rule. This delay gives fiduciaries additional time in making any modifications with respect to their use of proxy advisory firms and other service providers and for reviewing any proxy voting policies of pooled investment vehicles by investment managers. However, fiduciaries that are investment advisers registered with the SEC must comply with the 30-day effective date with respect to paragraphs (e)(2)(ii)(D) and (E) as such provisions are intended to be aligned with existing obligations under the Advisers Act, including Rules 204–2 and 206(4)-6 thereunder and the 2019 SEC Guidance and 2020 SEC Supplemental Guidance.[51]

Finally, paragraph (h) of the final rule, as proposed, continues to provide that should a court of competent jurisdiction hold any provision of the rule invalid, such action will not affect any other provision. Including a severability clause describes the Department's intent that any legal infirmity found with part of the final rule should not affect any other part of the rule. The exact same paragraph is included in the final rule on Financial Factors in Selecting Plan Investments.

4. Interpretive Bulletin 2016–01 (IB 2016–01) and Field Assistance Bulletin 2018–01 (FAB 2018–01)

The final rule also withdraws IB 2016–01 and removes it from the Code of Federal Regulations. Accordingly, as of publication of the final rule, IB 2016–01 may no longer be relied upon as reflecting the Department's interpretation of the application of ERISA's fiduciary responsibility provisions to the exercise of shareholder rights and written statements of investment policy, including proxy voting policies or guidelines.

FAB 2018–01 concerned both ''ESG Investment Considerations'' and ''Shareholder Engagement Activities.'' The portion of FAB 2018–01 under the heading of ''ESG Investment Considerations'' was superseded by the Department's final rule on ''Financial Factors in Selecting Plan Investments.'' [52] Similarly, the portion of FAB 2018–01 under the heading ''Shareholder Engagement Activities'' will be superseded by this final rule and this accompanying preamble. Since that discussion is the sole remaining substantive portion of FAB 2018–01, as of the effective date of the final rule, FAB 2018–01 will no longer be considered current guidance issued by the Department.

C. Miscellaneous Issues

Constitutional Issues

A number of commenters raised concerns that the proposal, or specific provisions of the proposal, may be inconsistent with certain rights afforded shareholders by the First and Fifth Amendments in the Constitution's Bill of Rights. The Department disagrees

[48] *See* Letter from Deputy Assistant Secretary Lebowitz to Thobin Elrod (Feb. 23, 1989); Letter from Assistant Secretary Berg to Ian Lanoff (Sept. 28, 1995).

[49] One commenter argued that the rule is a ''major rule'' under the Congressional Review Act and thus may not be effective earlier than 60 days after publication in the **Federal Register**. As discussed in the Regulatory Impact Analysis below, the Office of Management and Budget has determined this rule is not a ''major rule'' for Congressional Review Act purposes and is therefore not subject to the delayed 60-day effective date.

[50] Commenters pointed out that plan sponsors and other fiduciaries would need to review, amend, and possibly renegotiate existing contracts with investment managers, proxy advisory firms, and other service and investment providers. Some commenters also expressed more specific concerns, for example, that, with respect to pooled investment vehicles, it may be necessary to obtain approval of revised investment policy statements from participating plans, which would be difficult to obtain in only 30 days.

[51] The final rule includes a technical language change in paragraph (g) to conform paragraph (g) to **Federal Register** drafting conventions regarding the use of ''effective date'' versus ''applicability date'' terminology.

[52] 85 FR at 72872.

with these constitutional arguments and, further, believes that the lack of merit of those arguments is even more pronounced in light of modifications to the proposed rule adopted in the final rule. Rather, the final rule is designed to help these ERISA fiduciaries meet statutory standards, in particular the requirement that ERISA fiduciaries must carry out their duties relating to the exercise of shareholder rights prudently and solely for the economic benefit of plan participants and beneficiaries. The Department's view of the scope of factors to be considered by an ERISA fiduciary when managing plans assets was articulated as recently as 2014 by the Supreme Court in *Fifth Third Bancorp* v. *Dudenhoeffer,* 573 U.S. 409, 421 (2014) (the ''benefits'' to be pursued by ERISA fiduciaries as their ''exclusive purpose'' do not include ''nonpecuniary benefits'').

First Amendment Free Speech and Exercise of Religion

Some commenters asserted that the proposal may violate the First Amendment's protection of free speech. The decision to vote shares or engage in shareholder activism is, they argued, a form of speech, and they claimed that the Department established strict conditions and costly burdens on the established mechanism by which shareholders (and therefore their representatives) are able to communicate their interests and provide for companies to take (or refrain from taking) certain actions. They also argued that the proposal was targeted at preventing support of ESG-related initiatives and, by increasing the costs associated with determining whether it is acceptable to vote, would force fiduciaries to use a permitted practice either to not support those initiatives or to vote with corporate management; thus, the commenters concluded that the proposal was both a content- and viewpoint-based restriction. The proposal, according to these commenters, could mandate that assets are managed in a manner that is inconsistent with the values and interests of ERISA investors. Similarly, a few commenters claimed that the proposal also may violate the First Amendment's protections for freedom of religion, because it would curtail the rights of religious organizations to vote in accordance with their beliefs.

The First Amendment bars the government from abridging freedom of speech or the right to assemble peaceably and from prohibiting the free exercise of religion.[53] The right of free speech protects the open expression of ideas without fear of government reprisal. Some commenters stated that the right to vote a proxy consistent with the participants' and beneficiaries' values is protected speech, and argued that the proposed rule's requirements would unconstitutionally limit this right.

These commenters relied predominantly on the premise that the proposal effectively would force fiduciaries either to not vote or to vote with management. As one commenter argued, the proposal would ''impose unique and burdensome restrictions on shareholder activities that may be contrary to the interests of a favored group, while removing those restrictions when the expressive activity favors the preferred group.'' However, the Department in this final rule has removed the provisions that these commenters argued would create a *fait accompli,* allegedly stifling fiduciaries' speech-through-proxy-vote. Because of those changes, these arguments are moot.

To the extent commenters would still argue that the final rule might run afoul of the Free Speech Clause, this argument is overbroad and inconsistent with Supreme Court precedent. ERISA requires fiduciaries to manage plan assets for the ''exclusive purpose'' of providing benefits and defraying expenses. Even if voting by a shareholder speaking for herself could be speech, as some commenters argued, proxy voting by a plan, which holds its shares in trust for its participants and beneficiaries, should appropriately and correctly be considered conduct. Consistent with *Dudenhoeffer,* fiduciary plan asset management activity must focus exclusively on providing ''benefits.'' That term refers to *financial* benefits (such as retirement income), and not to non-pecuniary goals. The final rule's provisions require that any proxy decision serves those financial benefits of participants and beneficiaries, a duty derived directly from the ERISA statute.

To the extent proxy voting by a plan is speech, ERISA's requirements and the final rule's standards of diligence and consideration of cost plainly satisfy the independent scrutiny that is required for regulations of commercial speech.[54] Moreover, the final rule is content- and viewpoint-neutral. The final rule does not require fiduciaries to say (or refrain from saying) anything in particular or take (or refrain from taking) any particular position, nor does it require fiduciaries to take action only on certain topics. The final rule instead requires that fiduciaries exercise authority over their proxies with the same loyalty and prudence applicable to all other aspects of their management of plan assets. And any restriction to express beliefs imposed by the rule still leaves open ample alternative channels to freely express those same beliefs.[55]

The Department also does not agree that the final rule violates the First Amendment's Free Exercise clause. The final rule is a neutral rule of general applicability and does not target any religious view.[56] The final rule's provisions aim solely to ensure that fiduciaries base proxy decisions of any kind exclusively on the financial benefits of participants and beneficiaries, as required by ERISA.[57] The impact on religion, if any, would be incidental and not violate the First Amendment.[58] Moreover, pursuant to ERISA section 4(b)(2), church plans, as defined in ERISA section 3(33), are not subject to ERISA and this regulation.[59]

Fifth Amendment Takings

A few commenters raised a different Constitutional concern—that the proposal may violate the Fifth Amendment's ''takings'' clause. Characterizing the right to vote a proxy as a plan asset, these commenters argue that the proposed rule would require ERISA plans to use their votes in a specific way, or relinquish them. The proposed rule's requirements, the commenters posited, are so burdensome as to prevent fiduciaries from fully exercising their voting rights.

The Department disagrees that the provisions of the final rule violate the Takings Clause. The Fifth Amendment prohibits the government from taking

[53] U.S. Const., amend. I.

[54] *See Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of New York,* 447 U.S. 557, 564 (1980). Commenters generally argued that *Central Hudson's* commercial speech test would apply.

[55] *Clark* v. *Community for Creative NonViolence,* 468 U.S. 288, 293 (1984).

[56] *Church of the Lukumi Babalu Aye* v. *City of Hialeah,* 508 U.S. 520, 531 (1993) (''In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that [a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.], *Employment Div., Dept. of Human Resources of Ore.* v. *Smith,* 495 U.S. 872 (1990)'').

[57] *Fraternal Order of Police of Newark* v. *City of Newark,* 170 F.3d 359, 360 (3d Cir. 1999) (''Because the Department makes exemptions from its policy for secular reasons and has not offered any substantial justification for refusing to provide similar treatment for officers who are required to wear beards for religious reasons, we conclude that the Department's policy violates the First Amendment'').

[58] *See Fraternal Order of Police of Newark,* 170 F.3d at 360; *Smith,* 495 U.S. at 878–79.

[59] *See* 29 U.S.C. 1002(33).

private property for public use without just compensation.[60] A ''regulatory taking'' is one in which a government regulation is ''so onerous that its effect is tantamount to a direct appropriation or ouster.'' [61] The Government action must (1) affect a property interest and (2) go ''too far'' in so doing (*i.e.,* amount to a deprivation of all or most economic use or a permanent physical invasion of property).[62] How far is too far depends upon several factors, including ''the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.'' [63]

At the outset, the Takings Clause applies only when ''property'' is ''taken.'' The Department has stated that the act of voting proxy shares is a fiduciary act of managing plan assets.[64] The Department is not aware of any judicial authority that has addressed whether a shareholder right appurtenant to a share of stock, as opposed to the share of stock itself, is ''property'' for purposes of the Takings Clause and whether the ''taking'' analysis would involve an evaluation of the regulation's impact on the overall value of the stock. Nonetheless, even if the right to vote a proxy itself constitutes a constitutionally-protected property interest, neither the proposal nor this final rule ''takes'' that right or the underlying shares. Instead, the rule fully preserves the right to vote proxies in the economic interests of the plan. It is designed to protect, not diminish, participants' and beneficiaries' interests in their retirement benefits and the plan's economic interests by ensuring proxy votes do not subordinate those interests to non-pecuniary factors. The fiduciary maintains discretion to vote or not vote consistent with these interests. Given the Department's longstanding position that the plan's pecuniary interests guide the exercise of shareholder rights, there is no reasonable expectation that plans can make proxy voting decisions based on anything but plans' pecuniary interests.[65] Further, both plans and securities are already subject to extensive regulation under state and federal law.[66] Finally, the rule does not ''take'' property for public use, such as for public safety or historical preservation, but instead places parameters around proxy voting conduct that would fall outside of the prudence and loyalty duties found in the ERISA statute itself.

Administrative Procedure Act

A few commenters suggested that the Department's proposal was arbitrary and capricious and, more specifically, failed to comply with the Administrative Procedure Act. Also, although not necessarily framed in terms of the Department's compliance with the Administrative Procedure Act, a number of commenters asserted that the Department lacked sufficient evidentiary support for proposing the rule. For example, commenters pointed out that the Department suggested an increase in shareholder proposals as justification for the rule, which they argued is not relevant to whether fiduciaries are confused about their fiduciary obligations with respect to proxy voting, and that the Department did not cite to any enforcement action or other evidence that ERISA plan participants have been harmed or that ERISA plan fiduciaries are actually confused about their responsibilities. Other commenters disagreed and believed that the Department established sufficient evidence to support its proposal—for example, evidence that politically charged shareholder proposals result in the incursion of sometimes significant costs but do not demonstrably enhance shareholder value—and that the Department, therefore, is correct to limit voting on such proposals. Commenters supporting the rule also discussed evidence that proxy advisory firms, which exert massive amounts of influence over public companies, have well-documented deficiencies, including conflicts of interest, errors, and a lack of transparency.

Some commenters also argued that the proposal was a significant departure from prior Departmental guidance on shareholder rights without sufficiently establishing the existence of a problem to be solved, or otherwise providing a reason why the rule otherwise is necessary. Commenters also argued that no further clarification of the existing Interpretive Bulletin and Field Assistance Bulletin regarding fiduciaries' ERISA obligations with respect to proxy voting is necessary.

With respect to the arguments of commenters concerning the Administrative Procedure Act, the Department believes that there are sufficient reasons to justify the promulgation of this final rule, including the lack of precision and consistency in the marketplace with respect to ERISA fiduciary obligations with respect to exercises of shareholder rights, shortcomings in the rigor of the prudence and loyalty analysis by some fiduciaries and other market participants, and perceived variation in some aspects of the Department's past guidance. Further, the iterative Interpretive Bulletins since 1994, followed by the Field Assistance Bulletin issued in 2018, and the number of advisory opinions and information letters historically issued on this topic demonstrate the need for notice and comment guidance issued under the Administrative Procedure Act.[67] The Department does not believe that there needs to be specific evidence of fiduciary misbehavior or demonstrated injury to plans and plan participants in order to issue a regulation addressing the application of ERISA's fiduciary duties to the exercise of shareholder rights, including proxy voting, the use of written proxy voting policies and guidelines, and the selection and monitoring of proxy advisory firms.

The need for this regulation was also demonstrated by the disagreements among commenters on fundamental aspects of the proposal, which itself confirmed that a lack of clarity in fact exists and that ERISA fiduciaries and other market stakeholders would benefit from the Department's guidance in this final rule, as well as the confusion regarding the scope of fiduciaries' duties with respect to proxy voting and shareholder rights evidenced by the number of statements by stakeholders and others expressing a belief that fiduciaries are required by ERISA to always vote proxies. Moreover, under the Department's authority to administer ERISA, the Department may promulgate rules that are preemptive in nature and is not required to wait for widespread harm to occur. The Department can take steps to ensure that plans and plan participants and beneficiaries are protected prospectively and has the ability to issue regulations

[60] U.S. Const. amend. V.

[61] *Lingle* v. *Chevron U.S.A. Inc.,* 544 U.S. 528, 537 (2005).

[62] *Ruckelshaus* v. *Monsanto Co.,* 467 U.S. 986, 1000–01, 1005 (1984).

[63] *Id.* at 1005 (quoting *PruneYard Shopping Ctr.* v. *Robins,* 447 U.S. 74, 832 (1980)).

[64] *Avon Letter, supra* note 6.

[65] *Penn Central Transp. Co.* v. *City of New York,* 438 U.S. 104, 127 (1978) (finding historical preservation law not a taking in part because it permitted owner to obtain a reasonable return on its investment.).

[66] *See, e.g., Ruckelshaus,* 467 U.S. at 1007 (1984) (noting that expectations are necessarily adjusted in areas that ''ha[ve] long been the source of public concern and the subject of government regulation''); *Franklin Mem'l Hosp.* v. *Harvey,* 575 F.3d 121, 128 (1st Cir. 2009) (holding that a claimant's investment-backed expectations were ''tempered by the fact that it operate[d] in the highly regulated hospital industry'').

[67] *See* Executive Order 13891, 84 FR 55235 (Oct. 15, 2019), promoting notice-and-comment rulemaking for guidance.

to ensure that fiduciaries follow their statutory duties and mitigate the possibility of future violations.

The Department also believes that proceeding through notice-and-comment rulemaking rather than promulgating further interpretive guidance has other benefits, including the benefit of public input and the greater stability of codified rules. Proceeding in this manner is also consistent with the principles of Executive Order 13891 and the Department's recently issued PRO Good Guidance rule, which emphasize the importance of public participation, fair notice, and compliance with the Administrative Procedure Act.

Tension With State Corporate Law

Some commenters argued that the proposal, if finalized, would undermine state corporate laws, which reflect the inherent value of shareholder voting, threaten good corporate governance, and impede shareholders' voting rights. The Department is, according to these commenters, overstepping its authority and substituting its opinion for that of shareholders, the owners of corporations, as to what is important for corporate management and business affairs. Shareholders' exercise of voting rights is a critical ''check'' on the principal-agent conflict that arises from the separation of ownership and management in modern corporate law. Other commenters asserted that, in addition to potentially conflicting with corporate law, the Department's rule may conflict with corporations' and institutional investors' existing policies for shareholder voting, policies that have evolved over time, in response to real economic and financial developments, to enhance the efficiency and efficacy of the shareholder voting process.

The Department disagrees with commenters that this rulemaking creates any real conflict with state corporate laws. Although the rule will affect ERISA plan fiduciaries as to whether and how they exercise certain shareholder rights, the rule will not impact such rights themselves. Commenters failed to provide specific examples demonstrating any material conflict or compliance issue concerning these state laws.

Coordination With Other Federal Laws and Policies

Some commenters expressed their concern that the rule, if finalized, could negatively impact the U.S. securities markets to the extent the rule interferes with other federal agencies' objectives—for example, by making it more difficult for the SEC to perform its mission of protecting securities markets and investors. According to commenters, in efficient markets shareholders are assumed to exercise their voting rights to ensure that investments are managed in their best interests, and the proposed rule would frustrate evolving market efficiencies concerning when and how shareholders vote proxies. Commenters also alleged that potential conflicts could arise for financial market stakeholders who are subject to the laws of other federal agencies, including the SEC, the Office of the Comptroller of the Currency, and the Commodity Futures Trading Commission.

The Department believes that the changes made to the final rule mitigate any concerns with respect to potential conflicts with other regulatory regimes. For example, the final rule is intended to align with comparable SEC requirements imposed on investment advisers with respect to recordkeeping.[68] Both the proposed and final rules were sent to the SEC and other federal agencies as part of the inter-agency review conducted by the Office of Management and Budget pursuant to Executive Order 12866. Also, the final rule, as described above, adopts a principles-based approach that is fundamentally consistent with the Department's published interpretive guidance in this area beginning in 1994. Accordingly, the Department does not agree that the final rule will make it more difficult for the SEC or any other federal agency to perform their missions or that the final rule will have any negative impact on the U.S. securities markets. Rather, many public comments welcomed the final rule as appropriately describing the prudence and loyalty obligations of ERISA fiduciaries in connection with the exercise of shareholder rights.

Consistency With International Practices and Regulatory Trends

A few commenters also raised concerns about how the proposal, if finalized, would impact international investment. For example, one commenter, a financial services provider, claimed that the rule's mandate that proxy voting be based solely on an ERISA plan's economic interests is inconsistent with the provider's clients' expectations, and also with investment stewardship standards outside of the United States. The commenter claimed that asset managers in the European Union and other developed nations are increasingly subject to standards exactly opposite to those proposed by the Department, which incorporate (and sometimes require) consideration of ESG factors. Further, some international securities issuers require that investors vote proxies, and commenters queried what a plan fiduciary should do in such cases.

This final rule reflects ERISA's requirements. Fiduciaries of ERISA-covered pension and other benefit plans are statutorily bound to manage those plans, including shareholder rights appurtenant to shares of stock, with a singular goal of maximizing the funds available to pay benefits under the plan. The duties of prudence and loyalty under ERISA may not be the same investment standards the commenters referenced under which international regulation of proxy voting and other exercises of shareholder rights is taking place. Accordingly, international trends or the actions of regulators in other countries are not an appropriate gauge for evaluating ERISA's requirements as they apply to fiduciary management of investments, including the topics covered by this final rule relating to the exercise of shareholder rights, including proxy voting, the use of written proxy voting policies and guidelines, and the selection and monitoring of proxy advisory firms. Moreover, to the extent foreign legal and financial standards condone sacrificing returns to consider non-pecuniary objectives, they are inconsistent with the fiduciary obligations imposed by ERISA.

As to commenters' assertion that some international securities issuers require that investors vote proxies, as discussed above, the final rule does not carry forward the provision from the proposal stating that a plan fiduciary must not vote any proxy unless the fiduciary prudently determines that the matter being voted upon would have an economic impact on the plan after considering those factors described in paragraph (e)(2)(ii) of the proposed rule, taking into account the costs involved (including the cost of research, if necessary, to determine how to vote). The Department also believes that such a voting requirement by an issuer of securities held by a plan would be a relevant consideration for the plan fiduciary when applying the more principles-based approach adopted in the final rule when deciding whether to vote. However, the Department has previously noted that in deciding

[68] In pursuing its consultations with other regulators, the Department aimed to avoid conflict with other federal laws and minimize duplicative provisions between ERISA and federal securities laws. However, the governing statutes do not permit the Department to make obligations under ERISA identical in all respects to duties under federal securities laws.

whether to purchase shares that may involve out-of-the-ordinary costs or unusual requirements—specifically referencing as an example voting proxies on shares of certain foreign corporations—the responsible fiduciary should consider whether the difficulty and expense of voting the shares is reflected in the market price.[69] Similarly, in the Department's view, in deciding whether to purchase or retain shares, a fiduciary would have to consider proxy voting requirements of an issuer that conflict with the fiduciary's duties of prudence and loyalty under ERISA or that interfere with the fiduciary's ability to comply with those duties.

D. Regulatory Impact Analysis

This section analyzes the regulatory impact of the Department's final regulation amendments to the ''Investment Duties'' regulation in 29 CFR 2550.404a–1 addressing the application of the prudence and exclusive purpose responsibilities under ERISA with respect to the exercise of shareholder rights, including proxy voting, the use of written proxy voting policies and guidelines, and the selection and monitoring of proxy advisory firms. As stated earlier in this preamble, in connection with proxy voting, the Department's longstanding position articulated in sub-regulatory guidance that was first issued in the 1980s is that the fiduciary act of managing plan assets includes the management of voting rights (as well as other shareholder rights) appurtenant to shares of stock. In carrying out these duties, ERISA mandates that fiduciaries act ''prudently'' as well as ''solely in the interest'' and ''for the exclusive purpose'' of providing benefits to participants and their beneficiaries.[70]

This regulatory project was initiated because the Department believes there is a persistent misunderstanding among some fiduciaries and other stakeholders with respect to ERISA's requirements regarding proxy voting and the exercise of shareholder rights. This misunderstanding may be due in part to varied statements the Department has made on the consideration of non-pecuniary or non-financial factors in sub-regulatory guidance about those activities. This final rule provides certainty to plan administrators and benefits ERISA plan participants by eliminating the misunderstanding that exists among some stakeholders that ERISA fiduciaries are required to vote all proxies rather than only proxies determined to have a net positive economic impact on the plan. The final rule also supplements the Department's sub-regulatory guidance by specifying actions fiduciaries can take to ensure they are meeting their long-standing obligation under ERISA to act prudently, solely in the interests of participants and beneficiaries, and for the exclusive purpose of providing benefits and defraying reasonable plan expenses.

While the Department expects that this final rule will benefit plans and participants overall, it also will impose some compliance costs to the extent that fiduciaries do not currently meet specific requirements found in the final rule. However, as discussed in the cost section below, the Department has made significant modifications to the proposal in the final rule by taking a less prescriptive, principles-based approach to the subject matter that focuses on whether a fiduciary has a prudent process for voting and other exercises of shareholder rights. These changes will significantly reduce the potential compliance costs for fiduciaries.

The benefits, costs, and transfer impacts associated with the final rule depend on the number of plan fiduciaries that are currently not following or misinterpreting the Department's existing sub-regulatory guidance. While the Department does not have sufficient data to estimate the number of such fiduciaries, the Department expects the number is small because the Department believes that most fiduciaries largely comply with the Department's existing sub-regulatory guidance in this area, which is consistent with the principles-based requirements of the final rule. The Department expects that the benefits of the rule will be appreciable for participants and beneficiaries covered by plans with noncompliant investment fiduciaries. If the Department's assumption regarding the number of noncompliant fiduciaries is understated, the proposed rule's benefits, costs, and transfer impacts will be proportionately higher; however, even in this instance, the Department believes that the final rule's benefits still justify its costs.

1. Relevant Executive Orders

The Department has examined the effects of this rule as required by Executive Order 12866,[71] Executive Order 13563,[72] Executive Order 13771,[73] the Congressional Review Act,[74] the Paperwork Reduction Act of 1995,[75] the Regulatory Flexibility Act,[76] Section 202 of the Unfunded Mandates Reform Act of 1995,[77] and Executive Order 13132.[78]

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (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, ''significant'' regulatory actions are subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive order 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.

OMB has determined that this rule is not economically significant within the meaning of section 3(f)(1) of the Executive Order 12866, but that it is significant within the meaning of section 3(f)(4) of the Executive order. Therefore, the Department provides an assessment of the potential costs, benefits, and transfers associated with

[69] *See, e.g.,* 29 CFR 2509.2016–01 (last paragraph in the section entitled ''Proxy Voting'').

[70] ERISA section 404(a)(1). *See also* ERISA section 403(c)(1) (''[T]he assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries'').

[71] Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993).

[72] Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 18, 2011).

[73] Reducing Regulation and Controlling Regulatory Costs, 82 FR 9339 (Jan. 30, 2017).

[74] 5 U.S.C. 804(2) (1996).

[75] 44 U.S.C. 3506(c)(2)(A) (1995).

[76] 5 U.S.C. 601 *et seq.* (1980).

[77] 2 U.S.C. 1501 *et seq.* (1995).

[78] Federalism, 64 FR 43255 (Aug. 10, 1999).

this final rule below. OMB has reviewed the final rule pursuant to the Executive order. Pursuant to the Congressional Review Act, OMB has determined that this final rule is not a ''major rule,'' as defined by 5 U.S.C. 804(2).

1. Introduction

ERISA plan assets comprise a substantial stake of the shares of public companies. In 2018, pension plan assets contained stock holdings of $1.7 trillion; such holdings made up 27 percent of large defined benefit plan assets and 25 percent of large defined contribution plan assets.[79] However, ERISA pension holdings represent a decreasing share of all corporate equity. ERISA defined benefit and defined contribution plans held just 5.5 percent of total corporate equity in 2019, down from a high of 22 percent in 1985.[80]

Prior to its annual meeting, a publicly traded company sets a record date and sends out a list of proposals on which shareholders will vote. A shareholder must hold shares as of the record date in order to vote at a shareholder meeting. There are two types of proposals: Management proposals and shareholder proposals. Management proposals—including director elections, audit firm ratification proposals, and proposals regarding the company's executive compensation program (also known as ''say-on-pay'' proposals)—account for 98 percent of proposals and are largely mandated by law or exchange listing requirements. From 2011 to 2017, shareholder proposals accounted for about two percent of proposals but often were more controversial and thus received more attention than management proposals.[81] Shareholder votes on some proposals, such as director elections, are binding. Votes on many other proposals, including shareholder proposals and say-on-pay proposals, are not binding and serve only as shareholder recommendations for the company's board.[82]

1.1. Need for Regulation

As discussed above in section A, Background and Purpose of Regulatory Action, the Department believes that this final rule is necessary to provide clarity and certainty regarding the application of fiduciary obligations of loyalty and prudence with respect to exercises of shareholder rights, including proxy voting. Despite past efforts to make clear fiduciary obligations in this regard, the Department is concerned that its existing sub-regulatory guidance may have inadvertently created the perception that fiduciaries must vote proxies on every shareholder proposal to fulfill their obligations under ERISA. This belief may have caused some fiduciaries to pursue proxy proposals that have no connection to increasing the value of investments used to pay benefits or defray reasonable plan administrative expenses.

For example, some fiduciaries may feel obligated to vote proxies for non-pecuniary proposals related to environmental, social, or public policy agendas. The situation is concerning due to the recent increase in the number of environmental and social shareholder proposals introduced. From 2011 through 2017, shareholders submitted 462 environmental proposals and 841 social shareholder proposals, and resubmitted at least once 41 percent of environmental and 51 percent of social proposals.[83] These proposals increasingly call for disclosure, risk assessment, and oversight, rather than for specific policies or actions, such as phasing out products or activities.[84] The Department believes it is likely that many of these proposals have little bearing on share value or other relation to plan financial interests.[85] The Department also has reason to believe that responsible fiduciaries may sometimes rely on third-party proxy voting advice without taking sufficient steps to ensure that the advice is impartial and rigorous.

The Department's objective in issuing this final rule is to ensure that plan fiduciaries act solely in accordance with the economic interest of the plan and its participants and beneficiaries and consider only pecuniary factors when deciding whether to vote proxies or exercise shareholder rights. The Department believes that addressing these issues in the final rule will help safeguard the interests of participants and beneficiaries in their plan benefits.

1.2. Affected Entities

This final rule would affect ERISA-covered pension, health, and other welfare plans that hold shares of corporate stock. It would affect plans with respect to stocks they hold directly, as well as with respect to stocks they hold through ERISA-covered intermediaries, such as common trusts, master trusts, pooled separate accounts, and 103–12 investment entities. The final rule would not affect plans with respect to stock held through registered investment companies, because the final rule does not apply to such funds' internal management of such underlying investments. The final rule also does not apply to voting, tender, and similar rights with respect to securities that are passed through pursuant to the terms of an individual account plan to participants and beneficiaries with accounts holding such securities.

ERISA-covered plans with 100 or more participants (large plans) annually report data on their stock holdings on Form 5500 Schedule H (see Table 1). Approximately 27,000 defined contribution plans and 5,000 defined benefit plans, with approximately 84 million participants, either hold common stocks or are an Employee Stock Ownership Plan (ESOP). Additionally, 573 health and other welfare plans file the schedule H and report holding common stocks either directly or indirectly. In total, large pension plans and welfare plans hold approximately $1.7 trillion in stock value. Common stocks constitute about 25 percent of total assets of those pension plans that are not ESOPs and hold common stock. Out of the 25,400 pension plans that hold common stock and are not ESOPs, about 20,000 plans hold common stock through an ERISA-covered intermediary and approximately 3,500 plans hold common stock directly. A smaller number of plans hold stock both directly and indirectly.[86] In total, there are approximately 32,000 plans holding either common stock or employer stock, comprised of large plans, welfare plans, and ESOPs. In addition to the large pension plans, approximately 629,000

[79] Department estimates are based on Form 5500 annual reports filed by plans with 100 or more participants. These estimates include only stocks held directly or through Direct Filing Entities, not through mutual funds.

[80] Department calculations are based on U.S. Federal Reserve statistics. Board of Governors of the Federal Reserve System, *Financial Accounts of the United States—Z.1* (Sept. 2020).

[81] Morris Mitler, Dorothy Donohue & Sean Collins, *Proxy Voting by Registered Investment Companies, 2017,* Investment Company Institute Research Perspective (July 2019), at 4 (hereinafter ''ICI Proxy Voting Report'').

[82] *Id.,* at 6; *see also* 15 U.S.C. 78n–1.

[83] *Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a–8,* 84 FR 66458, 66491 (Dec. 4, 2019).

[84] *See* 2019 ISS Proxy Voting Trends, *supra* note 20.

[85] *See* John G. Matsusaka, Oguzhan Ozbas, & Irene Yi, *Can Shareholder Proposals Hurt Shareholders? Evidence from SEC No-Action Letter Decisions,* U.S.C. CLASS Research Paper No. CLASS17–4 (2019), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2881408,* at 25; Joseph P. Kalt, L. Adel Turki, Kenneth W. Grant, Todd D. Kendall & David Molin, *Political, Social, and Environmental Shareholder Resolutions: Do They Create or Destroy Shareholder Value?,* National Association of Manufacturers (June 2018), *www.shopfloor.org/wp-content/uploads/2018/06/nam_shareholder_resolutions_survey.pdf.*

[86] DOL estimates from the 2018 Form 5500 Pension Research Files.

small pension plans hold assets and some may invest in stock.[87]

TABLE 1—NUMBER OF PENSION AND WELFARE PLANS HOLDING COMMON STOCKS OR ESOP BY TYPE OF PLAN, 2018 [a]

Common Stock (no employer securities)	Defined benefit	Defined contribution	Total pension plans	Welfare plans	Total all plans
Direct Holdings Only	1,272	2,286	3,558	569	4,127
Indirect Holdings Only	2,792	17,591	20,383	3	20,386
Both Direct and Indirect	941	586	1,527	1	1,528
Total	5,005	20,463	25,468	573	26,041
ESOP (No Common Stock)	.....	5,809	5,809	.....	5,809
Common Stock and ESOP	.....	591	591	.....	591
Total All Plans Holding Stocks	5,005	26,863	31,868	573	32,441

[a] DOL calculations from the 2018 Form 5500 Pension Research Files.

While this final rule would directly affect ERISA-covered plans that possess the relevant shareholder rights, the activities covered under the final rule would be carried out by responsible fiduciaries on plans' behalf. Many plans hire asset managers to carry out fiduciary asset management functions, including proxy voting. In 2018, large ERISA plans reportedly used approximately 17,800 different service providers, some of whom provide services related to the exercise of plans' shareholder rights. Such service providers include trustees, trust companies, banks, investment advisers, and investment managers.[88]

In addition, this final rule will indirectly affect proxy advisory firms.[89] Currently, this market is dominated by two firms: Institutional Shareholder Services, Inc. (ISS) and Glass, Lewis & Co., LLC (Glass Lewis). It has been estimated that in 2013, the combined market share of these two firms was 97 percent (61 percent for ISS and 36 percent for Glass Lewis).[90] Each year, ISS covers approximately 44,000 shareholder meetings and executes 10.2 million ballots on behalf of clients holding 4.2 trillion shares. Glass Lewis covers about 20,000 shareholder meetings annually and provides services to more than 1,300 clients that collectively manage more than $35 trillion in assets.[91]

ERISA plans' demand for proxy advice might decline if fiduciaries refrain from voting shares under the provisions of this final rule or under proxy voting policies adopted pursuant to the safe harbors provided in paragraphs (e)(3)(i)(A) and (B). Plan fiduciaries may want customized recommendations about which particular proxy proposals would have a material effect on the investment performance of their particular plan and how they should cast their vote. Plans' preferences for proxy advice services could shift to prioritize services offering more rigorous and impartial recommendations. These effects may be more muted, however, if the SEC rule amendments enhance the transparency, accuracy, and completeness of the information provided to clients of proxy voting firms in connection with proxy voting decisions.

1.3. General Comments on the Proposed Regulatory Impact Analysis

Comments on the proposed regulatory impact analysis included comments that supported the proposal and others that challenged the Department's analytical approach, assumptions, and conclusions, including criticizing the Appendix A ''illustrative'' analysis as a fundamentally flawed approach to the measurement of possible costs, benefits, and transfers associated with the proposed rule.

As noted, a few commenters agreed with the Department's conclusion that the rule would provide certainty to plan administrators and benefits ERISA plan participants by eliminating the misunderstanding that exists among some stakeholders that ERISA fiduciaries are required to vote all proxies rather than only proxies determined to have a net positive economic impact on the plan analysis. One commenter stated that outside of clear cases of economic gain, the benefits of proxy voting ''are dubious at best.'' Another commenter dismissed the argument that the benefits of shareholder engagement may include realizing gains over the long term and asserted that short-term costs are non-trivial and long-term future benefits are highly speculative. A commenter stated that the rule will add elements of transparency and accountability to the proxy voting process.

Many commenters, however, challenged the Department's proposed Regulatory Impact Analysis and criticized the Department's analysis of the relevant literature.

With respect to the literature, commenters criticized DOL's assertion that the evidence on the effectiveness of and benefits from proxy voting is ''mixed.'' The Department continues to believe that the research studies have a wide range of findings. Some studies have found that the adoption of shareholder proposals has a positive effect on financial performance. For example, Dimson, Karakas, and Li's research, which examines U.S. public companies, finds that the adoption of ESG shareholder proposals increases the returns of companies.[92] Flammer's research, which examines shareholders proposals of U.S. publicly traded companies, also finds that the adoption of shareholder proposals related to corporate social responsibility improves the financial performance of

[87] The Form 5500 does not require these plans to categorize the assets as common stock, so the Department does not know if they hold stock.

[88] DOL estimates are derived from the 2018 Form 5500 Schedule C.

[89] One commenter pointed out that in a proprietary survey of the largest pension funds and defined contribution plans, approximately 92 percent of the respondents indicated that they have formally delegated proxy voting responsibilities to another named fiduciary (*e.g.,* an Investment Manager), and approximately 42 percent of respondents engage a proxy advisory firm (directly or indirectly) to help with voting some or all proxies.

[90] Glassman, James K., and J.W. Verret, ''How to Fix our Broken Proxy Advisory System.'' Arlington, VA: Mercatus Center (2013).

[91] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 FR 55082 (Sept. 3, 2020) (2020 SEC Proxy Voting Advice Amendments).

[92] Dimson, Elroy, Oğuzhan Karakaş, and Xi Li., *Active Ownership,* 28 *The Review of Financial Studies* 12 (2015).

companies.[93] In addition, Martin's research finds that the adoption of shareholder proposals relating to corporate social responsibility increases the returns and market share of companies.[94] Finally, Cuñat, Giné, and Guadalupe's research, which examines shareholder proposals filed with the SEC, finds that adoption of shareholder proposals relating to executive pay improves the market value and the long-term profitability of firms.[95] In contrast, other studies have found shareholder proposals to have a negative effect on financial performance. Cai and Walking's research finds that the announcement of labor-sponsored shareholder proposals results in a negative market reaction.[96] Prevost and Rao's research finds that firms that receive shareholder proposals for the first time experience transitory declines in market returns, while firms that repeatedly receive shareholder proposals experience permanent declines in market returns.[97] In addition, Larcker, McCall, and Ormazabal's research, which examines Russell 3000 companies, finds that changes in compensation contracts made to comply with proxy advisor voting policies results in a negative stock market reaction.[98] Finally, Woidtke's research, which examines Fortune 500 companies, finds that an increase in shareholder activism by public pension funds is negatively associated with stock returns.[99] Furthermore, there are studies with inconclusive results. Karpoff, Malatesta, and Walking's research finds that shareholder proposals have a negligible effect on the share values and operating returns of firms.[100] Wahal's research, which examines firms targeted by pension funds with a social agenda, finds that firms that receive proxy proposals do not experience significant abnormal returns.[101] Wahal's research also finds no evidence of long-term improvement in the performance of the firm.[102] Similarly, Del Guercio and Hawkins' research, which examines firms that received shareholder proposals from large pension funds, finds no evidence of significant abnormal long-term returns.[103] Smith's research, which also examines firms targeted by CalPERS, finds that there is no statistically significant change in the operating performance.[104]

With respect to the Department's analysis, assumptions, and conclusions, although several commenters noted that the costs and benefits associated with a proxy vote are highly uncertain and difficult to quantify, commenters argued that the Department's analysis overstated the current costs of proxy voting, understated the new costs that ERISA plans will incur if the proposal were finalized, and neglected to account for benefits to proxy voting that the proposal would appear to classify as non-economic in nature yet have been linked to better financial performance. One commenter cited the research of a team of academics that found benefits of shareholder voting for the market value of shares.[105]

Many commenters asserted that the proposed rule will discourage voting, and some suggested that less proxy voting by ERISA investors will increase the influence of non-ERISA investors. Several of the commenters expressed concerns that the costs imposed by the rule would cause fiduciaries not to vote proxies, even when economically beneficial, or to adopt the permitted practices described in the proposal which they argued would benefit corporate management at the expense of plan participants and beneficiaries. A commenter asserted that because abstentions may have the effect of a ''no'' or ''yes'' vote, the rule may tip votes one way or the other.[106] Some commenters argued that having proxy votes cast by individuals who are not experts, for example by activists or hedge fund managers rather than by stable, expert, fiduciary shareholders, would not be in the interests of ERISA beneficiaries. Several commenters stated that the rule could lead to a concentration of voting power among a few large firms whose proxy votes are large enough to make an economic impact on the plan's investment. Several commenters noted that proxy voting serves as an important vehicle for checks and balances to keep corporate management accountable, focused on long-term value creation, and to prevent opportunistic behavior.[107] Another commenter suggested that there is significant uncertainty with respect to the economic impact of any proxy vote and that the proposal's requirement to determine the economic impact of voting proxies requires a level of precision that is inconsistent with the way fiduciaries operate. Other commenters expressed concern about determining whether to vote proxies in relation to ESG issues; many criticized the rule for ignoring academic evidence supporting the pecuniary impact of issues the proposal deemed to be non-economic, such ESG concerns that involve significant risks to companies—such as litigation, reputational harm, or stranded assets—and business activities that cause adverse impacts to individuals, employees, and communities.[108] They argued such

[93] Flammer, Caroline, *Does Corporate Social Responsibility Lead to Superior Financial Performance? A Regression Discontinuity Approach,* 61 *Management Science* 11 (2015).

[94] Martins, Fernando, *Corporate Social Responsibility, Shareholder Value, and Competition.* (2020).

[95] Cuñat, Vicente, Mireia Giné, and Maria Guadalupe, *Say Pays! Shareholder Voice and Firm Performance,* 20 *Review of Finance* 5 (2016).

[96] Cai, Jie, and Ralph A. Walkling., *Shareholders' Say on Pay: Does it Create Value*?, *Journal of Financial and Quantitative Analysis* (2011).

[97] Prevost, Andrew K., and Ramesh P. Rao, *Of What Value are Shareholder Proposals Sponsored by Public Pension Funds,* 73 *Journal of Business* 2 (2000).

[98] Larcker, David F., Allan L. McCall, and Gaizka Ormazabal, *Outsourcing Shareholder Voting to Proxy Advisory Firms,* 58 *Journal of Law and Economics* 18 (2015).

[99] Woidtke, Tracie, *Agents Watching Agents?: Evidence from Pension Fund Ownership and Firm Value,* 63 *Journal of Financial Economics* 1 (2002).

[100] Karpoff, Jonathan M., Paul H. Malatesta, and Ralph A. Walkling, *Corporate Governance and Shareholder Initiatives: Empirical Evidence,* 42 *Journal of Financial Economics* 3 (1996).

[101] Wahal, Sunil, Pension Fund Activism and Firm Performance, *Journal of Financial and Quantitative Analysis* (1996).

[102] *Id.*

[103] Del Guercio, Diane, and Jennifer Hawkins, *The Motivation and Impact of Pension Fund Activism,* 52 *Journal of Financial Economics* 3 (1999).

[104] Smith, Michael, *Shareholder Activism by Institutional Investors: Evidence from CalPERS,* 51 *Journal of Finance* 1 (1996).

[105] Vicente Cuñat & Mireia Giné & Maria Guadalupe, 2012. ''The Vote Is Cast: The Effect of Corporate Governance on Shareholder Value,'' *Journal of Finance;* Vicente Cuñat & Mireia Giné & Maria Guadalupe, 2016. ''Say Pays! Shareholder Voice and Firm Performance,'' Review of Finance, European Finance Association, vol. 20(5), at 1799–1834.

[106] Data on abstentions not tipping votes is suggestive, but not definitive. Figure 9 of the ICI's 2017 research on proxy voting (*www.ici.org/pdf/per25-05.pdf*), indicates that the percentage of shares voting ''for'' various proposals (the overwhelming number of which were management proposals) as 95.2% in favor of management proposals and 29.2% in favor of shareholder proposals. The data is aggregated for all votes and not focused on specific proposals, which could indicate that there are no close votes or at least some close votes which could be tipped. Based on this uncertainty, the Department cannot quantify the number of close votes that could be tipped based on the available data, especially for shareholder proposals. While the Department received multiple comments expressing concern that the rule would make it more difficult to reach a quorum, the commenters did not include any data supporting this assertion, and the Department is not aware of any data sources that would support a qualitative or quantitative analysis of the final rule's impact on reaching a quorum.

[107] For the CFA Institute Code of Ethics and Standards of Professional Conduct and the CFA Institute Corporate Governance Manual, please see *www.cfainstitute.org/en/ethics-standards/ethics/code-of-ethics-standards-of-conduct-guidance.*

[108] Some commenters cited a 2015 survey by the CFA Institute that reported that 73 percent of global investors take ESG factors into account in their investment analysis and decisions. They also refer to a McKinsey study that reports that ESG

Continued

matters are critical to performing due diligence risk analysis and have become increasingly germane to assessing company strategy and long-term financial viability. One commenter criticized the Department for allowing the permitted practice of voting with management but not allowing a similar permitted practice of voting with proxy advisors. The commenter asserted that voting with proxy advisors costs less and that proxy advisors are subject to fewer and less severe conflicts than management.

Finally, some commenters focused specifically on proxy advisory firms. Some commenters disagreed with the Department's expectation that the rule may reduce plans' demand for proxy advice. A commenter pointed to a report from the Manhattan Institute that suggested that some ERISA fiduciaries are using proxy advisors as a low-cost way of meeting their own fiduciary voting obligations, despite the fact that the proxy advisor firms themselves are not held to a fiduciary standard. One commenter argued that proxy advisors are in a resource-constrained environment that adversely affects the advice they provide. In support, the commenter cites a study suggesting that ISS provides lower quality advice during the proxy season, when the firm is at its busiest, and higher quality advice during other times. This result suggests that during the busy proxy season, when proxy advisor firms' resources are most constrained, such firms are unable to maintain the same quality of service as provided during other periods.

After reviewing the public comments, the Department agrees that there is uncertainty regarding the costs and benefits of proxy voting activities of ERISA plans, both currently and under the terms of the proposed regulation. The Department presented an illustration of an analytical approach to evaluating the possible impacts of the proposed rule. The Department presented the data it had to estimate the impacts of the rule and also highlighted places where it lacked data to accurately measure key parameters. In so doing, the Department solicited comments and data to allow the accurate estimation of the impact of the rule's requirement and the permitted practices. The Department received comments on the illustration and its assumptions that sought to estimate the costs of the proposed rule. Commenters did not provide explicit data or estimates for a per vote burden to conduct research or required documentation, nor did they provide alternative estimates of the number of proxies that would be impacted by the proposal. Thus, notwithstanding the solicitation of such data, the Department still lacks critical information that would allow it to use or modify the model to try to produce a more accurate measure of the cost of the final rule's requirements.

The Department included the illustration to solicit public input on one possible way to envision and quantify the potential cost burden and costs savings that could be associated with the proposal. The Department emphasized that the illustration was based on speculative assumptions due to insufficient data, and, as noted above, many of the commenters criticized its basis. Based on the public comments and the fact that commenters did not provide data or estimates that would support continued use of the illustration as part of this final regulatory impact analysis, the Department has concluded that the illustrative analysis that was presented for public comment as part of the proposal does not represent a reliable construct for evaluating the costs, benefits, and transfers associated with the final rule. Perhaps more importantly, however, as discussed above and below, the Department has made substantial changes to the proposed rule that have reduced much of the cost burden associated with the final rule and thus the illustrative analysis, even with its challenges identified by the commenters, no longer reflects the potential burdens associated with the rule.

1.4. Benefits

This final rule would benefit plans by providing improved guidance regarding how ERISA's fiduciary duties apply to proxy voting. As discussed above, sub-regulatory guidance that the Department has previously issued over the years may have led to a misunderstanding among some that fiduciaries are required to vote on all proxies presented to them. This misunderstanding may have led some plans to expend plan assets unnecessarily to research and vote on proxy proposals not likely to have a pecuniary impact on the value of the plan's investments. The final rule is intended to eliminate that confusion and includes specific language in paragraph (e)(2)(ii) clearly stating that plan fiduciaries do not have an obligation to vote all proxies. The rule also includes a ''safe harbor'' provision under which plan fiduciaries may adopt proxy voting policies and parameters prudently designed to serve the plan's economic interest. This will encourage ERISA fiduciaries to execute shareholder rights in an appropriate and cost-efficient manner.

The final rule clarifies the duties of fiduciaries with respect to proxy voting and the monitoring of proxy advisory firms. Specifically, in order to meet their fiduciary obligations to manage shareholder rights, plan fiduciaries must (i) act solely in accordance with the economic interest of the plan and its participants and beneficiaries considering the impact of any costs involved; (ii) not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to any non-pecuniary objective, or promote non-pecuniary benefits or goals; and (iii) prudently monitor the proxy voting activities of investment managers or proxy advisory firms to whom that authority to vote proxies or exercise shareholder rights has been delegated.

Accordingly, plan fiduciaries will be better positioned to conserve plan assets by having clear direction and the option to prudently adopt voting policies that (i) focus voting resources only on particular types of proposals that the fiduciary has prudently determined are substantially related to the issuer's business activities or are expected to have a material effect on the value of the investment; and (ii) refrain from voting on proposals or particular types of proposals when the plan's holding in a single issuer relative to the plan's total investment assets is below a quantitative threshold that the fiduciary prudently determines, considering its percentage ownership of the issuer and

companies create value disproportionate to their peers. Similarly, by citing many studies made by the investment industry, some commenters asserted that there is a substantial, and growing, body of empirical research that has identified meaningful links between a company's ESG characteristics and financial performance. These include studies produced by MSCI, Bank of America Merrill Lynch, Allianz Global Investors, Nordea Equity Research, Goldman Sachs, Morningstar, and Deutsche Asset & Wealth Management. Some commenters cited an academic study that uses ISS and FactSet data to present evidence of a positive causal effect of the passing of corporate social responsibility shareholder proposals, the ones that are presumably tied to ESG investing motives, to the correspondent shareholder returns. Martins, Fernando, *Corporate Social Responsibility, Shareholder Value, and Competition* (July 1, 2020). Available at *SSRN: https://ssrn.com/abstract=3651240* or *http://dx.doi.org/10.2139/ssrn.3651240*. The same commenter cited an observational study that reaches the same conclusion: *www.hbs.edu/faculty/conferences/2013-sustainability-and-corporation/Documents/Active_Ownership_-_Dimson_Karakas_Li_v131_complete.pdf*. One commenter referred to a meta-study showing that there is a correlation between sustainability business practices and economic performance. Clark, Gordon L. and Feiner, Andreas and Viehs, Michael, From the Stockholder to the Stakeholder: How Sustainability Can Drive Financial Outperformance (March 5, 2015). Available at SSRN: *https://ssrn.com/abstract=2508281* or *http://dx.doi.org/10.2139/ssrn.2508281*.

other relevant factors, is sufficiently small that the matter being voted upon is not expected to have a material effect on the investment performance of the plan's portfolio. Thus, votes will be cast that more frequently advance plans' economic interests. Cost savings and other benefits to plans would flow to plan participants and beneficiaries and plan sponsors.

The final rule will replace existing guidance on fiduciary responsibilities for exercising shareholders' rights. The final rule will provide more certainty than the existing sub-regulatory guidance, and unlike such guidance, the final rule sets forth binding, specific requirements.

The final regulation could increase investment returns on plan assets by specifying when plan fiduciaries should or should not exercise their shareholder rights to vote proxies. Plan fiduciaries are responsible for maximizing the economic benefits to the plan, including in their management of proxy voting rights, which may involve voting proxies or declining to vote them. If the cost of obtaining information that informs the vote exceeds the likely economic benefits to the plan of voting, then fiduciaries should not vote. This course of action will save resources and increase societal benefits.

The resources freed for other uses due to voting fewer proxies (minus potential upfront transition costs) would represent benefits of the rule. To the extent that the final regulation increases the investment return on plan assets, it would enhance participants' and beneficiaries' retirement security, thereby strengthening a central purpose of ERISA. For the plans and participants that would be affected by the final rule, the benefits they would experience from higher investment returns, compounded over many years, could be considerable.

The increased returns would be associated with investments generating higher pre-fee returns, which means the higher returns qualify as benefits of the rule. However, to the extent that there are any externalities, public goods, or other market failures, those might generate costs to society on an ongoing basis. For example, a fiduciary may vote for a proposal on a corporate merger or acquisition transaction to maximize shareholder value even though implementation of the proposal would bring about impacts in an affected geographic area that would be adverse for local businesses or residents. Finally, some portion of the increased returns would be associated with transactions in which there is an opposite party experiencing a decreased return of equal magnitude. This portion of the rule's impact would, from a society-wide perspective, be appropriately categorized as a transfer as discussed further in the Transfers section below (though it should be noted that, if there is evidence of wealth differing across the transaction parties, it would have implications for marginal utility of the assets).

1.5. Costs

The Department received several comments regarding estimated costs for the proposed rule. Commenters were divided in their opinions about whether the illustration over or under estimated the proposed rule's total costs.

Several commenters expressed concern that the rule will increase plan costs. One commenter said that conducting a cost-benefit analysis for each vote is ''unworkable'' and will ''create a dramatic cost burden.'' Some commenters asserted that the proposed rule would substantially increase costs because the commenters claimed that the current cost to vote proxies was small, with one commenter even suggesting it was approaching zero. Other commenters argued that the Department's cost estimates were suspect because the Department estimates that saving resulting from adopting the proposal's permitted practices were significantly larger than the entire revenues of the proxy advisory market. One commenter suggested their cost to provide services would increase by 10 to 20 times their current rate. Other commenters pointed out that although the model showed large costs, actual costs would be even larger, approaching $13 billion a year.

A few of the commenters criticized that the rule places a higher emphasis on short-term costs and performance, as the short-term economic impact is often easier to quantify with less uncertainty. The commenters argued that this would lead fiduciaries to focus on short-term economic implications at the expense of long-term value, which some commenters argued would be in violation of a fiduciary's duty.

One commenter stated the proposal was onerous and that it may not even be possible for a plan fiduciary to do the proposal's mathematical exercises to determine the economic impact, let alone defend the determination, of every proxy vote in a detailed way and document it. The commenter felt this would raise the costs of even routine proxy votes. The commenter also said plans may need to hire additional service providers to help determine the economic impact on the plan of each vote. The need to have additional reviews and recordkeeping procedures would increase costs for voting analysis. Several commenters noted that the Department's economic analysis overlooked costs associated with the proposed rule, such as the cost of analyzing whether to abstain from a vote and the overhead costs of voting with management.

A commenter said plans do not have the expertise nor the desire to vote the proxies themselves but instead rely on asset managers. The commenter suggested the proposed rule would make proxy advisory services more expensive, and the need to independently investigate the basis of the proxy advisor's recommendation will be costly. Another commenter reported that they would need to charge a rate 10 to 20 times the firm's current rate due to the proposal. The commenter stated that such a high cost to vote would force plans to either not vote or defer to management.

Another commenter expressed the view that the cost to use ERISA 3(38) investment managers will increase as they will have to bifurcate their processes, policies, and voting to accommodate ERISA and non-ERISA accounts. Additionally, the commenter argued that institutional investors already approach their proxy voting methodically and professionally.

Several commenters noted that the analysis failed to address opportunity costs or externalities. With reference to externalities, one commenter referred to academic research on corporate voting and elections that highlights the voters' motivation of communication with the board of directors.[109] According to this research, voting can be used as a channel of communication with boards of directors, and protest voting can lead to significant changes in corporate governance and strategy. In such scenarios, voting success would not only be assessed by examining the returns to individual targeted firms' stocks, but also by the impact on the behavior of other companies throughout their portfolios. Another commenter noted, as an example of a negative externality, a study by Arjuna Capital that emphasized the negative environmental effects of carbon

[109] David Yermack, *Shareholder Voting and Corporate Governance,* 2 Ann Rev. Fin. Econ. 2.1, 2.15 (2010); Frederick Alexander, *The Benefit Stance: Responsible Ownership in The Twenty-First Century, 36* Oxford Rev. Econ Policy 341, 355 (2020); Robert G. Hansen and John R. Lott, *Externalities and Corporate Objectives in a World with Diversified Shareholder/Consumers,* Journal Of Financial And Quantitative Analysis, 1996, vol. 31, issue 1, 43–68.

emissions, which could potentially be addressed through proxy voting.[110]

One commenter stated they currently incur minimal costs to execute proxy votes in a way that they believe best protects the interests of participants and beneficiaries. Another commenter said that any increased costs would be minimal and suggested that to ensure the rule imposes a minimal burden on plan managers and proxy advisory firms, the Department could allow these firms to make the data used for voting shareholder decisions publicly available for external economic analysis, allowing academics, think tanks, and concerned citizens to provide additional economic analysis.

Finally, commenters expressed concern that by requiring plan fiduciaries to determine economic materiality and to document that determination, the proposed rule would increase litigation risk for plan fiduciaries. A few of the commenters specifically alluded to increased litigation risk from plan participants, alleging improper voting activity. Some of the commenters stated that this risk would discourage plan fiduciaries to vote proxy votes.

After carefully considering such comments, the Department made several modifications to the proposed rule. The most significant adjustment from the proposal results from the Department's agreement with the recommendation of some commenters that the final rule take a more principles-based approach to this subject matter. The Department estimates that the more principles-based approach will reduce much of the cost burden associated with the proposed rule. As discussed earlier in this preamble, the most significant revision in the final rule eliminates paragraphs (e)(3)(i) and (ii) from the proposal.

Paragraph (e)(3)(i) of the proposal provided that a plan fiduciary must vote any proxy where the fiduciary prudently determines that the matter being voted upon would have an economic impact on the plan, after considering those factors described in paragraph (e)(2)(ii) of the proposal and taking into account the costs involved (including the cost of research, if necessary, to determine how to vote). Paragraph (e)(3)(ii) of the proposal provided that a plan fiduciary must not vote any proxy unless the fiduciary prudently determines that the matter being voted upon would have an economic impact on the plan after considering those factors described in paragraph (e)(2)(ii) of the proposal and taking into account the costs involved.

As stated above, commenters criticized these provisions of the proposal as requiring a fiduciary to undertake an economic impact analysis in advance of each issue that is the subject of a proxy vote in order to even consider voting. A commenter further noted that a fiduciary may not discover until after the analysis is performed that the cost involved in determining whether to vote outweighs the economic benefit to the plan.

The Department is persuaded by the comments that the requirements contained in paragraphs (e)(3)(i) and (ii) of the proposal should not be incorporated in the final rule. The Department recognizes the concerns expressed regarding potential increased costs and liability exposure, as well as potential risks to plan investments that could result from fiduciaries not voting when prudent to do so. Due to this and other changes the Department has made in the final rule that are discussed above, the Department expects that the incremental costs of the final rule provisions will be minimal on a per-plan basis.

The Department recognizes that plans will need to spend time reviewing the final rule, evaluating how it affects their proxy voting practices, and implementing any necessary changes. The Department estimates that this review process will require a lawyer to spend approximately four hours to complete, resulting in a cost burden of approximately $34.3 million.[111] The Department believes that these processes will likely be performed for most plans by a service provider that likely oversees multiple plans. Therefore, the Department's estimate likely represents an upper bound, because it is based on the number of affected plans. The Department does not have sufficient data that would allow it to estimate the number of service providers acting in such a capacity for these plans.

The Department believes that many fiduciaries already are compliant with the final rule, because they are meeting the requirements of the Department's sub-regulatory guidance and prudently conducting their business operations to satisfy their fiduciary obligations as required by ERISA.[112] The Department acknowledges that such practices are not universal. In the course of its enforcement activity, the Department sometimes encounters instances where documentation is absent or does not meet the requirements of this final rule. The Department additionally believes that the availability of economies of scale limits the costs of this final rule. The Department understands that under the final rule, most of the relevant fiduciary duties will reside with, and most of the required activities will be performed by, third-party asset managers, as is already common practice. Such asset managers are often large and provide the relevant fiduciary services for a large number of plans. The Department estimates that plan fiduciaries or investment managers will require a half hour annually and a half hour of help from clerical staff to maintain or document the required information, resulting in an annual cost burden estimate of $6.05 million.[113] For a more in-depth discussion on the costs for maintaining the required documentation, please refer to the Paperwork Reduction Act section of this document below.

Several of the commenters noted that the Department failed to recognize the additional costs associated with developing or updating policies or procedures to reflect the requirements of the proposed rule. One commenter, however, asserted that most fiduciaries have thoughtful proxy policies. Another commenter stated that, contrary to the DOL assumption that there are ''cost savings'' because of the provisions in the rule that allow the adoption of proxy voting policies, proxy voting policies already exist and the rule would impose additional costs because such policies will need to be reviewed on an initial and ongoing basis. After further deliberation, the Department agrees that plans are likely to incur such costs, particularly plans that choose to adopt the safe harbors contained in paragraphs (e)(3)(i)(A) and (B) of the final rule. The Department believes that the final rule largely comports with industry practice for ERISA fiduciaries; therefore the Department estimates that on average, it will take a legal professional two hours to update policies and procedures for each of the estimated 63,911 plans affected by the rule. This results in a cost of $17.2 million in the first year.[114]

[110] *See http://arjuna-capital.com/wp-content/uploads/2016/07/Climate_Change_from_the_Investor_s_Perspective.pdf.*

[111] The burden is estimated as follows: (63,911 plans * 4 hours) = 255,644 hours. A labor rate of $138.41 is used for a lawyer. The cost burden is estimated as follows: (63,911 plans * 4 hours * $138.41) = $34,309,915.

[112] 29 CFR 2509.2016–01 (81 FR 95879, Dec. 29, 2016).

[113] The burden is estimated as follows: 63,911 plans * 0.5 hours = 31,955.4 hours for both a plan fiduciary and clerical staff. A labor rate of $134.21 is used for a plan fiduciary and a labor rate of $55.14 for clerical staff (31,955.4 * $134.21 = $4,288,739 and 31,955.4 * $55.14 = $1,762,023).

[114] The burden is estimated as follows: 63,911 plans * 2 hours = 127,821.8. A labor rate of $134.21

The requirement in paragraph (e)(3)(ii) to periodically review proxy voting policies already is required for fiduciaries to meet their obligations under ERISA; therefore, the Department does not expect that plans will incur additional cost associated with the periodic review.

The Department generally does not expect that this final rule will change the costs associated with plans' remaining voting activity. Provisions requiring responsible fiduciaries to monitor and document voting policies and activities would generally be satisfied by current best practices that satisfy earlier Departmental guidance. Neither does the Department expect plans to incur substantial costs from proxy advisory firms' potential efforts to help fiduciaries meet the final rule's requirements. If they do not already meet the standards detailed in the final regulation, plans that currently exercise shareholder rights, including proxy voting activities, will incur the costs associated with deciding whether to exercise shareholder rights pursuant to this final rule. The Department, however, does not have sufficient information to document such costs.

It is possible that proxy advisory firms would take steps to avoid or mitigate conflicts of interest, strengthen factual and analytic rigor, better match their research and recommendations with ERISA plans' interests, or increase transparency as a result of the final rule. The Department notes, however, that proxy advisory firms are likely to take at least some of these steps in response to recent SEC policy initiatives and spread their related costs across all of their clients, not just ERISA plans.[115] At the same time, the final rule may reduce plans' demand for proxy advice. However, this reduction in demand is beneficial to plans as they previously were purchasing more advice than they would have otherwise chosen due to their misunderstanding that they were required to vote all proxies. This reduced demand will lower the market price and the amount of advice purchased. Consequently, any compliance costs passed on from proxy advisory firms to ERISA plans are likely to be at least partially offset by plans' cost savings from purchasing a smaller amount of advice. It should be noted that proxy advisory firms will see a reduction in revenues as a result of the decreased demand for their services. In addition, proxy advisory firms' efforts to satisfy any SEC requirements might ease responsible fiduciaries' efforts to comply with this final rule. For example, it may be easier to monitor proxy advisory firms if those firms provide additional disclosure about their conflicts of interest and their policies and procedures to address such conflicts.

The Department estimates that the final rule would impose incremental costs of approximately $57.52 million in the first year and $6.05 million in subsequent years. Over 10 years, the associated costs would be approximately $90.6 million with an annualized cost of $12.90 million, using a seven percent discount rate.[116] Using a perpetual time horizon (to allow the comparisons required under Executive Order 13771), the annualized costs in 2016 dollars are $6.76 million at a seven percent discount rate.[117]

1.6. Transfers

Proxy advisory firms that respond best to this final rule will likely gain a relative competitive advantage. Firms that limit or eliminate conflicts of interest and modify their services to better align with the guidance of these final regulations could gain market share relative to firms that do not. Firms that are willing to tailor their voting guidelines, strategies, and costs according to each plan's investment guidelines could gain market share relative to firms that do not.

The final rule may reduce plans' demand for proxy advice, lowering the market price, the amount of advice purchased, and revenues. This represents a transfer from proxy advisory firms to plans, who will benefit as they previously were purchasing more advice than they would have chosen to due to their misunderstanding that plan fiduciaries were required to vote all proxies.

The Department also notes, however, that the market for proxy advisors could also change as a result of the final rule. Such changes could lead to increased competition among proxy advisory firms. In such a scenario, it is possible that the rule will result in a reduction in the expenses plans incur to purchase proxy advisory services. Although the Department does not have sufficient data to quantify this possibility, it would result in a transfer from proxy advisory firms to plans.

Moreover, as noted previously, if some portion of rule-induced increases in returns would be associated with transactions in which the opposite party experiences decreased returns of equal magnitude, then this portion of the final rule's impact would, from a society-wide perspective, be appropriately categorized as a transfer.

1.7. Regulatory Alternatives

As discussed above, the Department considered retaining paragraphs (e)(3)(i) and (ii) of the proposal. Paragraph (e)(3)(i) of the proposal provided that a plan fiduciary must vote any proxy where the fiduciary prudently determines that the matter being voted upon would have an economic impact on the plan, after considering those factors described in paragraph (e)(2)(ii) of the proposal and taking into account the costs involved (including the cost of research, if necessary, to determine how to vote). Paragraph (e)(3)(ii) of the proposal provided that a plan fiduciary must not vote any proxy unless the fiduciary prudently determines that the matter being voted upon would have an economic impact on the plan after considering those factors described in paragraph (e)(2)(ii) of the proposal and taking into account the costs involved.

After carefully considering comments, the Department was persuaded to eliminate paragraphs (e)(3)(i) and (ii) and adopt a more principles-based, less prescriptive approach in the final rule that will reduce much of the cost burden associated with the proposed rule. Commenters criticized these provisions of the proposal as requiring a fiduciary to undertake an economic impact analysis in advance of each issue that is the subject of a proxy vote in order to even consider voting. A commenter further noted that a fiduciary may not discover until after the analysis is performed that the cost involved in determining whether to vote outweighed the economic benefit to the plan. The Department recognizes the concerns expressed regarding potential increased costs and liability exposure associated with these provisions, as well as potential risks to plan investments

is used for a plan fiduciary: (127,821.8 * $134.21 = $17,154,957).

[115] The SEC's rule amendments require proxy advisory firms engaged in a solicitation to provide conflicts of interest disclosure, to adopt and publicly disclose policies and procedures reasonably designed to ensure that the company subject of the proxy voting advice has such advice made available to it at or prior to the time the advice is disseminated, and to provide a mechanism by which its clients can become aware of any written statements by the company in response to the proxy advice. The SEC also modified its proxy solicitation antifraud rule to specifically include material information about the proxy advisor's methodology, sources of information, or conflicts of interest, as examples of when the failure to disclose could, depending upon the particular facts and circumstances, be considered misleading. *See* 2020 SEC Proxy Voting Advice Amendments, at 242–246.

[116] The costs would be $101.58 million over 10-year period with an annualized cost of $11.91 million, applying a three percent discount rate.

[117] The annualized costs in 2016 dollars would be $6.31 million applying a three percent discount rate.

that could result from fiduciaries not voting when prudent to do so.

1.8. Uncertainty

The Department's economic assessment of this final rule's effects is subject to uncertainty. Specific areas of uncertainty are discussed below:

Cost Savings—As noted earlier, the Department lacks complete data on plans' exercise of their shareholder rights appurtenant to their stock holdings, including proxy voting activities, and on the attendant costs and benefits. Many of the commenters criticized that the Department lacks data and evidence to support its cost-benefit analysis and remarked that the Department should not move forward with the rule until the associated costs and benefits are more certain. The Department firmly disagrees and believes that the impact of the rule has been reasonably assessed based on the best available data.

Demand for New Services—The Department solicited comments regarding whether the final rule would create a demand for new services, and if so, what alternate services or relationships with service providers might result and how overall plan expenses could be impacted. The Department did not receive comments that specifically addressed this question.

Other Securities—The final rule will generally govern plans' exercise of shareholder rights appurtenant to their stock holdings of individual companies, but not to their holdings of other securities. The Department cannot determine whether some plans nonetheless would modify their practices with respect to other securities because of this final rule. As noted earlier, ERISA pensions held just 5.5 percent of total corporate equity in 2019, down from a high of 22 percent in 1985. Mutual funds, in contrast, held 22 percent of all corporate equity in 2019, up from 6 percent in 1985.[118] As ERISA-covered pensions have shifted from defined benefit to defined contribution plans, both the proportion of pension assets invested in mutual funds and the proportion of all mutual fund shares owned by pensions have increased dramatically. In 2019, ERISA-covered pensions held 25 percent of all mutual fund shares, up from 8 percent in 1985. ERISA would apply to any proxy votes for mutual fund shares and shares of other funds registered with the SEC for which the plan fiduciary is responsible. ERISA does not govern the management of the portfolio internal to a fund registered with the SEC, including such fund's exercise of its shareholder rights appurtenant to the portfolio of stocks it holds, though ERISA would apply to similar funds organized as collective investment trusts. One commenter stated that if plans do not participate in the proxy process, it may prevent issuers from reaching quorum for their shareholder meetings, and this would impose costs on plans.

Non-ERISA Investors—Many asset managers serve both ERISA plans and other investors. The Department believes such uniform voting for ERISA and non-ERISA clients may sometimes jeopardize responsible fiduciaries' satisfaction of their duties under ERISA. However, as noted earlier in the preamble, this concern may be mitigated in the case of investment managers subject to the SEC's jurisdiction by the fact that federal securities law requires investment advisers to make the determination in their client's best interest and not to place the investment adviser's own interests ahead of their client's.[119] Where an SEC registered investment adviser has assumed the authority to vote on behalf of its client, the SEC has stated that the investment adviser, among other things, must have a reasonable understanding of the client's objectives and must make voting determinations that are in the client's best interest.

Under this final rule, responsible fiduciaries might increase their demands for asset managers to implement separate policies customized for particular ERISA plans or for ERISA plans generally, such as policies that align with the proposed permitted practices in paragraph (e)(3)(iii). One commenter noted that policies would increase costs for plans and investment without an incremental benefit to participants and beneficiaries. The Department discusses the impact of updating policies and procedures in the cost section above.

Asset Allocation—This final rule could exert influence on a plan's asset allocation. For example, the quantitative threshold provision in paragraph (e)(3)(i)(B) would permit responsible fiduciaries, after prudently considering the relevant factors, to adopt proxy voting policies allowing them to refrain from voting on proposals or particular types of proposals when the plan's holding in a single issuer is sufficiently small relative to the plan's total investment that the outcome of the vote is not expected to have a material impact on the investment performance of the plan's portfolio. This provision might produce additional economic benefits by promoting fuller and more optimal diversification where it may otherwise have been lacking. That is, the quantitative threshold could prompt a fiduciary to diversify what otherwise would have been a concentration of more than the specified threshold amount of a plan's portfolio in a single stock.

Vote Categories—Proxy votes can be tallied in four ways: For, against/withhold, abstain, and not voted. The vast majority of outstanding shares are held in ''street name'' by intermediaries, such as broker-dealers. Broker-dealers may have discretionary authority to vote proxies without receiving voting instructions from the owner of the shares for routine and noncontroversial matters, such as the ratification of a company's independent auditors. For matters in which a broker-dealer does not have discretionary authority to vote, a broker non-vote is required. For matters that require approval of a majority of shares present and voting, abstentions (which are cast neither for nor against a proposal) and broker non-votes are not counted in the final tally. For matters that require approval of a majority of the shares issued and outstanding, abstentions or broker non-votes are treated as votes against the proposal. If an investor is unsure about a matter or unsure whether her interests and management's interests are aligned, the investor arguably should abstain.

[118] Department calculations based on U.S. Federal Reserve statistics, Financial Accounts of the United States—Z.1.

[119] *See* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 FR 33669, 33673 (July 12, 2019) (discussing an adviser's obligation to make a reasonable inquiry into its client's financial situation, level of financial sophistication, investment experience and financial goals and have a reasonable belief that the advice it provides is in the best interest of the client based on the client's objectives); Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, Release No. IA–5325 (Aug. 21, 2019) (82 FR 47420 (Sep. 10, 2019) (clarifying investment advisers' duties when voting shareholder proxies). *See also* Rule 206(4)–6 under the Investment Advisers Act of 1940, 17 CFR 275.206(4)–6 (Under rule 206(4)–6, it is a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of section 206(4) of the Investment Advisers Act for an investment adviser to exercise voting authority with respect to client securities, unless the adviser (i) has adopted and implemented written policies and procedures that are reasonably designed to ensure that the adviser votes proxies in the best interest of its clients, which procedures must include how the investment adviser addresses material conflicts that may arise between the adviser's interests and interests of their clients; (ii) discloses to clients how they may obtain information from the investment adviser about how the adviser voted with respect to their securities; and (iii) describes to clients the investment adviser's proxy voting policies and procedures and, upon request, furnishes a copy of the policies and procedures to the requesting client.

1.9. Conclusion

The final rule would benefit ERISA-covered plans, as it provides guidance regarding how ERISA's fiduciary duties apply to proxy voting and in particular when fiduciaries should refrain from voting. Plan fiduciaries will be able to conserve plan assets as they refrain from researching and voting on proposals that are unlikely to have a material effect on the investment performance of the plan's portfolio, and thereby increase the return on plan assets. The Department estimates that the final rule's cost impact is substantially less than the proposal due to significant revisions to the required actions of a plan fiduciary that were made in the final rule in response to comments on the proposal.

2. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)), the Department solicited comments concerning the information collection request (ICR) included in the Fiduciary Duties Regarding Proxy Voting and Shareholder Rights ICR (85 FR 55219). At the same time, the Department also submitted an information collection request (ICR) to the Office of Management and Budget (OMB), in accordance with 44 U.S.C. 3507(d).

The Department received comments that specifically addressed the paperwork burden analysis of the information collection requirement contained in the proposed rule. The Department took into account such public comments in developing the revised paperwork burden analysis discussed below.

In connection with publication of this final rule, the Department is submitting an ICR to OMB requesting approval of a new collection of information under OMB Control Number 1210–0165. The Department will notify the public when OMB approves the ICR.

A copy of the ICR may be obtained by contacting the PRA addressee shown below or at *www.RegInfo.gov.* PRA ADDRESSEE: G. Christopher Cosby, Office of Regulations and Interpretations, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW, Room N–5718, Washington, DC 20210; *cosby.chris@dol.gov.* Telephone: 202–693–8410; Fax: 202–219–4745. These are not toll-free numbers.

It has long been the view of the Department that the duty to monitor necessitates proper documentation of the activities that are subject to monitoring.[120] Accordingly, the Department's final rule requires that plan fiduciaries maintain records on proxy voting activities and other exercises of shareholder rights. This requirement applies to all pension plans with investments, including those that have shareholder rights and proxy votes that may need to be exercised.

The Department believes that most plan fiduciaries have followed the Department's prior sub-regulatory guidance or already are performing most if not all of the documentation requirements of the final rule as a prudent practice in their normal course of business. While the incremental burden of the final rule is generally small, perhaps even *de minimis,* the Department discussed the full burden of such requirements below to allow for full evaluation of the requirements in the information collection.

According to the most recent Form 5500 data there are 721,876 pension plans (92,480 large plans and 629,396 small plans) and 8,475 health or welfare plans (5,626 large plans filing a schedule H, and 2,849 small plans filing a schedule I).[121] While the Schedule H collects information on a plan's stock holdings, Schedule I lacks the specificity to determine if small plans hold stocks. As shown in Table 1, 31,868 pension plans hold stocks and would have shareholder rights they may need to exercise. Additionally, 573 health and other welfare plans file the schedule H and report holding either common stocks or employer stocks. The Department lacks information on the number of small plans that hold stock. Small plans are significantly less likely to hold stock than larger plans. For purposes of estimating the burden, five percent of small plans are presumed to hold stock resulting in 31,470 small plans needing to comply with the information collection. Therefore, a total of 63,911 plans will need to comply with this information collection.

2.1. Maintain Documentation

The final rule requires that the named plan fiduciary must maintain records on proxy voting activities and other exercises of shareholder rights. Where the authority to vote proxies or exercise shareholder rights has been delegated to an investment manager pursuant to ERISA section 403(a)(2), or a proxy voting firm or another person performs advisory services as to the voting of proxies, plan fiduciaries must prudently monitor the proxy voting activities of such investment manager or proxy advisory firm and determine whether such activities are consistent with paragraphs (e)(2)(i) and (ii) and (e)(3) of this section.

Much of the information needed to fulfill these requirements is generated in the normal course of business. Plans may need additional time to maintain the proper documentation, but this burden is likely to be reduced by the adoption of policies by plan fiduciaries that incorporate one or more of the final rule's safe harbors.

Commenters expressed concerns that the proposed rule would be onerous, since it would not be feasible for plan fiduciaries to determine the economic impact of every proxy vote in a detailed way and document it. Thus, commenters suggested that the Department underestimated the amount of time that fiduciaries and clerical staff would spend documenting and maintaining documentation for votes. As discussed above in Section 1.5, after carefully considering these comments, the Department was persuaded to adopt a more principles-based, less prescriptive approach in the final rule that does not carry forward specific documentation and recordkeeping provisions in the proposal that were identified by commenters as burdensome and unnecessary. The Department believes that with this revision, the final rule's documentation and recordkeeping requirements should result in less burden than the proposal's requirements, because the final rule requirements mirror previous guidance and align with existing fiduciary duty of documentation.

However, in light of the public comments that argued that the Department underestimated the recordkeeping burden and because of the uncertainty involved in determining which plans will need to change recordkeeping practices to comply with the final rule, the Department is retaining the documentation time estimate from the proposal. This is responsive to the commenters' assertion and is a step intended to avoid underestimating the average time required for plan fiduciaries to comply with the final rule.

The Department estimates that plan fiduciaries or investment managers will require a half hour annually and a half hour of help from clerical staff to maintain or document the required information. This is likely an overestimate, because many, if not most, plans use investment managers. These investment managers provide similar services for many plans. This results in

[120] 29 CFR 2509.2008–2 (73 FR 61731 (Oct. 17, 2008)).

[121] EBSA estimates using 2018 Form 5500 filing data.

an annual cost burden estimate of $6,050,762.[122]

These paperwork burden estimates are summarized as follows:

Type of Review: New collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Fiduciary Duties Regarding Proxy Voting and Shareholder Rights.

OMB Control Number: 1210–0165.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 63,911.

Estimated Number of Annual Responses: 63,911.

Frequency of Response: Occasionally.

Estimated Total Annual Burden Hours: 0.

Estimated Total Annual Burden Cost: $6,050,762.

3. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)[123] imposes certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act[124] and are likely to have a significant economic impact on a substantial number of small entities. Unless the head of an agency certifies that a final rule is not likely to have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires the agency to present a final regulatory flexibility analysis of the final rule.[125]

For purposes of analysis under the RFA, the Employee Benefits Security Administration (EBSA) considers employee benefit plans with fewer than 100 participants to be small entities.[126] The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for plans that cover fewer than 100 participants. Under section 104(a)(3) of ERISA, the Secretary may also provide for exemptions or simplified annual reporting and disclosure for welfare benefit plans. Pursuant to the authority of section 104(a)(3), the Department has previously issued (see 29 CFR 2520.104–20, 2520.104–21, 2520.104–41, 2520.104–46, and 2520.104b–10) simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare plans, that cover fewer than 100 participants and satisfy certain requirements. While some large employers have small plans, small plans are maintained generally by small employers. Thus, the Department believes that assessing the impact of this final rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business based on size standards promulgated by the Small Business Administration (SBA)[127] pursuant to the Small Business Act.[128] The Department solicited comments on this assumption in the proposed rule; however, no comments were received.

The Department has determined that this final rule could have a significant impact on a substantial number of small entities during the first year. Therefore, the Department has prepared a Final Regulatory Flexibility Analysis that is presented below.

3.1. Need for and Objectives of the Rule

The Department believes that this final rule is an appropriate way to provide clarity and certainty regarding the application of fiduciary obligations of loyalty and prudence with respect to exercises of shareholder rights, including proxy voting. Despite past efforts to make clear fiduciary obligations in this regard, the Department is concerned that its existing sub-regulatory guidance may have inadvertently created the perception that fiduciaries must vote proxies on every shareholder proposal to fulfill their obligations under ERISA. This belief may have caused some fiduciaries to pursue proxy proposals that have no connection to increasing the value of investments used to pay benefits or defray the reasonable plan administrative expenses.

Both of these concerns point to the risk that a plan's proxy voting activity will sometimes impair rather than advance participants' economic interest in their benefits. This final rule aims to ensure that the costs plans incur to vote proxies and exercise other shareholder rights are economically justified, and that responsible fiduciaries' use of third-party advice supports rather than jeopardizes their adherence to ERISA's fiduciary requirements.

The Department is monitoring other federal agencies whose statutory and regulatory requirements overlap with ERISA. In particular, the Department is monitoring SEC rules and guidance to avoid creating duplicate or overlapping requirements with respect to proxy voting.

3.2. Significant Issues Raised by Public Comments in Response to the IFRA and Changes Made to the Proposed Rule in Response

One of the most significant issue raised by commenters was that paragraphs (e)(3)(i) and (ii) of the proposal require a fiduciary to undertake an economic impact analysis in advance of each issue that is the subject of a proxy vote in order to even consider voting. A commenter further noted that a fiduciary may not discover until after the analysis is performed that the cost involved in determining whether to vote outweighed the economic benefit to the plan. The Department recognizes the concerns expressed regarding potential increased costs and liability exposure associated with these provisions, as well as potential risks to plan investments that could result from fiduciaries not voting when prudent to do so. Therefore, after carefully considering comments, the Department was persuaded to eliminate paragraphs (e)(3)(i) and (ii) and adopt a more principles-based, less prescriptive approach in the final rule that reduces the cost burden associated with the proposed rule. This revision to the proposal is further discussed in Section 3.5 below.

In the proposal, the Department included an illustration to try to capture the cost burden on service providers from the rule. This illustration was based on certain assumptions the Department described as speculative in the proposal, and many of the commenters criticized its basis. In response to the commenters and changes made to the rule since the proposal, the Department has removed this illustration. For a more detailed description about the Department's decision, please refer to the Cost section above.

Some commenters were concerned that the rule would be burdensome on small plan sponsors. One commenter expressed concern that the requirements of the regulation will have a significant impact on small entities because of their limited staff resources. The Department acknowledges this concern as well as the concern that smaller plans may not be able to absorb the additional burden of the regulation as easily as larger plans. As described in the Cost section

[122] The burden is estimated as follows: 63,911 plans * 0.5 hours = 31,955.4 hours for both a plan fiduciary and clerical staff. A labor rate of $134.21 is used for a plan fiduciary and a labor rate of $55.14 for clerical staff (31,955.4 * $134.21 = $4,288,739 and 31,955.4 * $55.14 = $1,762,023).

[123] 5 U.S.C. 601 *et seq.* (1980).

[124] 5 U.S.C. 551 *et seq.* (1946).

[125] 5 U.S.C. 604 (1980).

[126] The Department consulted with the Small Business Administration Office of Advocacy in making this determination, as required by 5 U.S.C. 603(c) and 13 CFR 121.903(c) in a memo dated June 4, 2020.

[127] 13 CFR 121.201 (2011).

[128] 15 U.S.C. 631 *et seq.* (2011).

above, the Department has amended the proposed rule's requirements and adopted a less prescriptive, principles-based approach in the final rule that mirrors and supplements requirements contained in the Department's prior sub-regulatory guidance and industry best practices. These changes will substantially reduce the Department's estimate of the proposed rule's cost impact.

Another commenter expressed concern that the Department substantially underestimated costs for small plans, as many small plans would need to hire a service provider to produce additional documentation to supplement existing investment policy statements. The Department recognizes that plans may need to make various changes to compliance policies and procedures to respond to the rule, so it has added an additional cost for the time it takes to develop or update such policies and procedures in the final rule.

3.2. Affected Small Entities

This final rule will affect ERISA-covered pension, health, and welfare plans that hold stock either through common stock or employer securities. This includes plans that indirectly hold stocks through collective trusts, master trusts, pooled separate accounts, and other similar plan asset investment entities. Plans that only hold their assets in registered investment companies, such as mutual funds, will be unaffected by the final rule.

There is minimal data available about small plans' stock holdings. The primary source of information on assets held by pension plans is the Form 5500. Schedule H, which reports data on stock holdings, is filed almost exclusively by large plans. While the majority of participants and assets are in large plans, most plans are small plans (plans with fewer than 100 participants). It is likely that many small defined benefit plans hold stock. Many small defined contribution plans hold stock only through mutual funds, and consequently would not be affected by this final rule. In 2018, there were 39,142 small defined benefit plans and 590,254 small defined contribution plans. The Department lacks sufficient data to estimate the number of small plans that hold stock, but it assumes that small plans are significantly less likely to hold stock than larger plans. The Department did not receive any comments or additional data from commenters regarding the number of small plans that hold stock directly or indirectly. As discussed elsewhere, while the Department assumes that small affected entities will spend some time familiarizing themselves with the rule, it expects that even in the case of small plans that hold stock directly or indirectly, these costs will be small, because the required activities are reflected in common practice. Therefore, for purposes of determining whether a substantial number of small plans are affected, the Department presumes that five percent of small plans hold stock resulting in as assumed 31,470 affected small plans.

The Department recognizes that service providers, including small service providers who act as asset managers, could also be impacted by this rule, if they provide compliance assistance to the plans they serve. The Department does not have complete information on the number of affected small service providers. However, the Department does not believe that there will be more service providers than the 63,911 affected plans. The Department assumes the number of service providers who will experience a substantial impact from the final rule will be significantly smaller as only about 7.5 percent of service providers in the NAICS categories that could be affected have revenues below $100,000.[129] As discussed in Table 2, below, the Department estimates that compliance costs in the first year are less than $900. Therefore, only service providers with revenues less than $100,000 could experience a cost that is more than one percent of revenues. If service providers incur compliance costs, they could pass some of these costs onto plans and experience a smaller impact.

3.4. Estimate Cost Impact of the Final Rule on Affected Small Entities

This final rule will benefit small plans, by providing guidance regarding how ERISA's fiduciary duties apply to proxy voting and the monitoring of proxy advisory firms, and in particular, when fiduciaries should refrain from voting. Plan fiduciaries will be able to better conserve plan assets by having clear direction to refrain from researching and voting on proposals that they prudently determine have no material effect on the investment performance of the plan's portfolio (or investment performance of assets under management in the case of an investment manager). The final rule also will benefit plans by improving the frequency with which voting resources are expended on matters that the fiduciary has prudently determined are substantially related to the issuer's business activities or are expected to have a material effect on the value of the investment. Cost savings and other benefits to small plans will flow to plan participants and beneficiaries in the form of more secure retirement income.

As discussed under the Costs section above, while the Department assumes that small affected entities will spend some time familiarizing themselves with the rule, it expects that these familiarization costs will be small, because the required activities are reflected in common practice. The Department estimates it will take four hours for an in-house attorney to review the rule, at an hourly labor cost of $138.41,[130] resulting in an average cost of $536.84. The Department believes small plans are likely to rely on service providers to monitor regulatory changes and make necessary changes to the plan, so this is likely an overestimate of the costs incurred by small plans to familiarize themselves with the rule.

Fiduciaries of plans must ensure that all investments are prudently monitored. The final rule provides that fiduciaries responsible for the exercise of shareholder rights must maintain records on proxy voting activities and other exercises of shareholder rights in order to demonstrate compliance with ERISA's fiduciary provisions. The Department assumes that, because the documentation of fiduciary decision-making is a common practice, responsible fiduciaries are likely already recording and maintaining documentation related to their own and investment managers' actions, including voting proxies and exercising other shareholder rights.

The final rule will have a small impact on plans that are not currently in full compliance, because their

[129] To capture the number of potentially affected service providers, the Department looked at the number of small entities with the following North American Industry Classification System (NAICS) Codes: 523110 Investment Banking and Securities Dealing; 523920 Portfolio Management; 523930 Investment Advice; 523991 Trust, Fiduciary, and Custody Activities; and 525910 Open-End Investment Funds. Small entities were identified based on their revenue and the size standards from the SBA. According to data provided by the SBA, the Department estimates there are 8,616 small entities in these industries with revenues less than $100,000. This accounts for 7.5 percent of all firms in these industries. The calculation of the number of firms by industry is based on: NAICS. *Businesses by NAICS, https://www.naics.com/business-lists/counts-by-company-size/.*

[130] Labor costs are based on statistics from *Labor Cost Inputs Used in the Employee Benefits Security Administration, Office of Policy and Research's Regulatory Impact Analyses and Paperwork Reduction Act Burden Calculation,* Employee Benefits Security Administration (June 2019), *www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

fiduciaries will be required to maintain records or document decisions related to voting proxies or exercising other shareholder rights. Much of the information required to comply with this requirement is generated by affected entities in the normal course of business; however, additional time may be required to maintain the proper documentation. The Department estimates that compliance with this final regulation will require 30 minutes of a plan fiduciary's time and 30 minutes of a clerical worker's time. The Department assumes an hourly rate of $134.21 for a plan fiduciary and an hourly rate of $55.14 for a clerical worker,[131] resulting in an estimated per-entity annual cost of $94.68.[132]

Additionally, the Department estimates that to comply with the rule, many plans will need to either develop or update proxy-voting policies and procedures. This is particularly true for plans choosing to adopt one of the final rule's safe harbors. The Department estimates that it will take two hours for a legal professional to develop or update relevant policies and procedures. The Department assumes an hourly rate of $134.21 for a legal professional, resulting in an estimate per-entity cost of $268.42 in the first year.

Under these assumptions, the Department estimates the additional requirements of the rule will increase costs by $899.94 per plan in the first year and $94.68 per plan in subsequent years, on average. This is illustrated in Table 2 below.

TABLE 2—COSTS FOR PLANS TO COMPLY WITH REQUIREMENTS

Affected entity	Labor rate	Hours	Year 1 cost	Year 2 cost
Documentation: Plan Fiduciary	$134.21	0.5	$67.11	$67.11
Documentation: Clerical workers	55.14	0.5	27.57	27.57
Rule Familiarization: Plan Fiduciary	134.21	4	536.84	0
Develop or Update Proxy-Voting Policies and Procedures	134.21	2	268.42	0
Total			899.94	94.68

Source: DOL calculations based on statistics from *Labor Cost Inputs Used in the Employee Benefits Security Administration, Office of Policy and Research's Regulatory Impact Analyses and Paperwork Reduction Act Burden Calculation,* Employee Benefits Security Administration (June 2019), *www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

To put these costs in perspective, the Department looked at how the additional cost from the proposed rule would compare to the average total plan cost of 401(k) plans by assets. Plan costs include investment fees as well as administrative and recordkeeping fees. The way plan costs are paid vary by plan. A 2019 survey of 240 plan sponsors found that 33 percent of defined contribution (DC) plans paid all recordkeeping and administrative fees through investment revenue, while 52 percent of DC plans paid recordkeeping and administrative fees through a direct fee.[133] Accounts from the industry purport that per-participant recordkeeping fees are becoming the best practice standard; this trend has been driven by digital recordkeeping technology that requires the same amount of resources for large accounts as small accounts.[134]

Fees paid by plans also vary by firm size. A survey of 361 defined contribution plans for the Investment Company Institute calculated an ''all-in'' fee that included both administrative and investment fees paid by the plan and the participant. They found that small plans with 10 participants pay approximately 50 basis points more than plans with 1,000 participants. Further, small plans with 10 participants are paying about 90 basis points more than large plans with 50,000 participants.[135] Another study documented the same trend, noting that larger plans tend to have lower fees because larger plans tend to have a greater share of assets invested in index funds, which tend to have lower expenses. Additionally, large 401(k) plans are able to spread the fixed costs across more participants, lowering the per participant fee.[136]

For this analysis, the Department relies on data from BrightScope to establish a baseline of total plan fees, before the implementation of this rule. In August of 2020, BrightScope released updated total plan costs based on 2017 data. Their total plan cost includes asset-based investment management fees, asset-based administrative and advice fees, and other fees from the Form 5500 and audited financial statements of ERISA-covered 401(k) plans.[137] This data does not include plans with fewer than 100 participants, the standard set for a small plan in this analysis. However, the Department believes that the median total plan costs, provided by BrightScope, serves as a helpful reference point when considering the additional burden from this rule.

Table 3 shows total plan costs from BrightScope; plan cost information is based on categories of plans with assets less than $1 million, between $1 million and $10 million, and between $10 million and $50 million. The Department provides as the impact of the rule the additional cost plans will incur as a percent of plan assets, using the median asset value of each category, to illustrate how the rule is likely to affect plans with different amounts of assets. As seen in the table below, the estimated burden in the first year will

[131] Labor costs are based on statistics from Labor Cost Inputs Used in the Employee Benefits Security Administration, Office of Policy and Research's Regulatory Impact Analyses and Paperwork Reduction Act Burden Calculation, Employee Benefits Security Administration (June 2019), *www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

[132] This cost is estimated as: 0.5 hours * $134.21 + 0.5 hours * $55.14 = $94.68.

[133] Deloitte. ''2019 Defined Contribution Benchmarking Survey Report: the Retirement Landscape has Changed—Are Plan Sponsors Ready?'' *www2.deloitte.com/us/en/pages/human-capital/articles/annual-defined-contribution-benchmarking-survey.html.*

[134] Manganaro, John. ''Recordkeeping Fees Under the Microscope Retirement Plans of All Sizes are Seeing Their Recordkeeping Fee Schedules Questioned, Especially When Those Fees are Expressed as a Percentage of Assets.'' Planadviser. (November 2019). *www.planadviser.com/recordkeeping-fees-microscope/.*

[135] Deloitte Consulting and Investment Company Institute, ''Inside the Structure of Defined Contribution/401(k) Plan Fees, 2013: A Study Assessing the Mechanics of the 'All-in' Fee'' (Aug. 2014).

[136] BrightScope, ICI. ''The BrightScope/ICI Defined Contribution Plan Profile: a Close Look at 401(k) Plans, 2017.'' (August 2020).

[137] BrightScope, ICI. ''The BrightScope/ICI Defined Contribution Plan Profile: a Close Look at 401(k) Plans, 2017.'' (August 2020).

increase the costs significantly for small plans with minimal assets. The cost in subsequent years is negligible—less than one percent of plan assets for even the smallest size category and for most plans less than 0.25 percent of plan assets.

TABLE 3—TOTAL FIRST YEAR PLAN COST AS A PERCENT OF PLAN ASSETS FOR PLANS WITH LESS THAN 100 PARTICIPANTS

Plan assets	Number of plans [a]		Beginning median total plan cost [b] (percent)	Additional plan cost from the rule [c]
	Defined benefit	Defined contribution		Percent of mid-point in asset range
$1–24K	12	1,750	1.24 [d]	7.500
$25–49K	8	1,072	1.24 [d]	2.368
$50–99K	37	1,716	1.24 [d]	1.200
$100–249K	188	3,638	1.24 [d]	0.514
$250–499K	300	4,124	1.24 [d]	0.240
$500K–999K	433	5,095	1.24 [d]	0.120
$1 Million to $10 Million	547	6,458	1.05	0.018
$10 Million to $50 Million	202	2,818	0.78	0.003

[a] Calculated as five percent of plans in each asset range, based on data from the 2018 Form 5500 for the distribution of pension plans with fewer than 100 participants by type of plan and plan assets. As the Form 5500 does not allow a determination of which small plans has stock, the actual size distribution is unknown. The population distribution is used.

[b] Total plan cost is BrightScope's measure of the total cost of operating the 401(k) plan and includes asset-based investment management fees, asset-based administrative and advice fees, and other fees (including insurance charges) from the Form 5500 and audited financial statements of ERISA-covered 401(k) plans. Total plan cost is computed only for plans with sufficiently complete information. The sample is 53,856 plans with $4.4 trillion in assets. BrightScope audited 401(k) filings generally include plans with 100 participants or more. Plans with fewer than four investment options or more than 100 investment options are excluded from BrightScope audited 401(k) filings for this analysis. The data does not include DB plans, but due to lack of comparable data it is applied to DB plans as a proxy for their plan costs. *Source:* BrightScope, ICI. ''The BrightScope/ICI Defined Contribution Plan Profile: a Close Look at 401(k) Plans, 2017.'' (August 2020).

[c] The Department estimates that additional plan cost from the rule will be $899.94. The Department applied this fixed cost as a percent of mid-point in each asset range.

[d] BrightScope did not differentiate between plans with less than $1 million in assets; however, as most of the small plans have less than $1 million in assets, the Department applied this broader estimate to smaller sub-sets of assets to illustrate how small plans are likely to affected by the rule.

The Department believes that this is likely an overestimate of the costs faced by small plans, as small plans are likely to rely on service providers. The Department believes these service providers offer economies of scale in meeting the requirements of the final rule; however, the Department does not have data that would allow it to estimate the number of service providers acting in such a capacity for these plans.

The time required to make necessary changes to compliance policies and procedures in response to the rule may vary widely between plans, the Department believes the requirements in the final rule closely resemble existing prior guidance and industry best practices. The Department believes that, on average, the marginal cost to meet the additional requirements regulation, outside of existing fiduciary duties, will be small because the required activities are reflected in common practice and the requirements are similar to prior guidance. Further, plan fiduciaries would be able to conserve plan assets by refraining from researching and voting on proposals that they prudently determine do not have a material effect on the value of the plan's investment. Thus, the final rule would result in cost savings and other benefits for small plan sponsors.

3.5. Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities

As discussed above, the Department's longstanding position is that the fiduciary duties of prudence and loyalty under ERISA sections 404(a)(1)(A) and 404(a)(1)(B) apply to the exercise of shareholder rights, including proxy voting, proxy voting policies and guidelines, and the selection and monitoring of proxy advisory firms. These duties apply to all affected entities–large and small. Accordingly, no special actions were taken into consideration for small entities.

As discussed above, after carefully considering comments, the Department was persuaded to eliminate paragraphs (e)(3)(i) and (ii) and adopt a more principle-based, less prescriptive approach in the final rule that will reduce much of the cost burden associated with the proposed rule. Paragraph (e)(3)(i) of the proposal provided that a plan fiduciary *must* vote any proxy where the fiduciary prudently determined that the matter being voted upon would have an economic impact on the plan after considering those factors described in paragraph (e)(2)(ii) of the proposal and taking into account the costs involved (including the cost of research, if necessary, to determine how to vote). Paragraph (e)(3)(ii) of the proposal provided that a plan fiduciary must *not* vote any proxy unless the fiduciary prudently determined that the matter being voted upon would have an economic impact on the plan after considering those factors described in paragraph (e)(2)(ii) of the proposal and taking into account the costs involved. This is a significant adjustment from the proposal that results in a less prescriptive, more principles-based approach that will reduce much of the cost burden associated with the proposed rule for all plans, including small plans. See the section above entitled ''Elimination of Paragraphs (e)(3)(i) and (ii) from the Proposal'' for a more detailed discussion of this change.

4. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 [138] requires each federal agency to prepare a written statement assessing the effects of any

[138] 2 U.S.C. 1501 *et seq.* (1995).

federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any one year by state, local, and tribal governments, in the aggregate, or by the private sector. For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this final rule does not include any federal mandate that the Department expects would result in such expenditures by state, local, or tribal governments, or the private sector. This final rule will not result in an expenditure of $100 million or more in any one year, because the Department is simply restating and modernizing fiduciary practices related to voting rights and aligning its regulations to the extent possible with guidance issued by the SEC.

5. Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism and requires federal agencies to adhere to specific criteria when 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. Federal agencies promulgating regulations that have federalism implications must consult with state and local officials and describe the extent of their consultation and the nature of the concerns of state and local officials in the preamble to the final rule.

In the Department's view, this final rule does not have federalism implications because it does not have direct effects on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among various levels of government. The final rule describes requirements and permitted practices related to the exercise of shareholder rights under ERISA. While ERISA generally preempts state laws that relate to ERISA plans, and preemption typically requires an examination of the individual law involved, it appears highly unlikely that the provisions in this final regulation would have preemptive effect on general state corporate laws.

Statutory Authority

This regulation is adopted pursuant to the authority in section 505 of ERISA (Pub. L. 93–406, 88 Stat. 894; 29 U.S.C. 1135) and section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979), 3 CFR 1978 Comp. 332, and under Secretary of Labor's Order No. 1–2011, 77 FR 1088 (Jan. 9, 2012).

List of Subjects in 29 CFR Parts 2509 and 2550

Employee benefit plans, Employee Retirement Income Security Act, Exemptions, Fiduciaries, investments, Pensions, Prohibited transactions, Reporting and recordkeeping requirements, Securities.

For the reasons set forth in the preamble, the Department amends parts 2509 and 2550 of subchapters A and F of chapter XXV of title 29 of the Code of Federal Regulations as follows:

Subchapter A—General

PART 2509—INTERPRETIVE BULLETINS RELATING TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

■ 1. The authority citation for part 2509 continues to read as follows:

Authority: 29 U.S.C. 1135. Secretary of Labor's Order 1–2003, 68 FR 5374 (Feb. 3, 2003). Sections 2509.75–10 and 2509.75–2 issued under 29 U.S.C. 1052, 1053, 1054. Sec. 2509.75–5 also issued under 29 U.S.C. 1002. Sec. 2509.95–1 also issued under sec. 625, Pub. L. 109–280, 120 Stat. 780.

§ 2509.2016–01 [Removed]

■ 2. Remove § 2509.2016–01.

Subchapter F—Fiduciary Responsibility Under the Employee Retirement Income Security Act of 1974

PART 2550—RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY

■ 3. The authority citation for part 2550 continues to read as follows:

Authority: 29 U.S.C. 1135 and Secretary of Labor's Order No. 1–2011, 77 FR 1088 (January 9, 2012). Sec. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. App. at 727 (2012). Sec. 2550.401c–1 also issued under 29 U.S.C. 1101. Sec. 2550.404a–1 also issued under sec. 657, Pub. L. 107–16, 115 Stat 38. Sec. 2550.404a–2 also issued under sec. 657 of Pub. L. 107–16, 115 Stat. 38. Sections 2550.404c–1 and 2550.404c–5 also issued under 29 U.S.C. 1104. Sec. 2550.408b–1 also issued under 29 U.S.C. 1108(b)(1). Sec. 2550.408b–19 also issued under sec. 611, Pub. L. 109–280, 120 Stat. 780, 972. Sec. 2550.412–1 also issued under 29 U.S.C. 1112.

■ 4. Section 2550.404a–1 is amended by adding paragraph (e), revising paragraph (g), and republishing paragraph (h) to read as follows:

§ 2550.404a-1 Investment duties.

* * * * *

(e) *Proxy voting and exercise of shareholder rights.* (1) The fiduciary duty to manage plan assets that are shares of stock includes the management of shareholder rights appurtenant to those shares, such as the right to vote proxies.

(2)(i) When deciding whether to exercise shareholder rights and when exercising such rights, including the voting of proxies, fiduciaries must carry out their duties prudently and solely in the interests of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying the reasonable expenses of administering the plan.

(ii) The fiduciary duty to manage shareholder rights appurtenant to shares of stock does not require the voting of every proxy or the exercise of every shareholder right. In order to fulfill the fiduciary obligations under paragraph (e)(2)(i) of this section, when deciding whether to exercise shareholder rights and when exercising shareholder rights, plan fiduciaries must:

(A) Act solely in accordance with the economic interest of the plan and its participants and beneficiaries;

(B) Consider any costs involved;

(C) Not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to any non-pecuniary objective, or promote non-pecuniary benefits or goals unrelated to those financial interests of the plan's participants and beneficiaries;

(D) Evaluate material facts that form the basis for any particular proxy vote or other exercise of shareholder rights;

(E) Maintain records on proxy voting activities and other exercises of shareholder rights; and

(F) Exercise prudence and diligence in the selection and monitoring of persons, if any, selected to advise or otherwise assist with exercises of shareholder rights, such as providing research and analysis, recommendations regarding proxy votes, administrative services with voting proxies, and recordkeeping and reporting services.

(iii) Where the authority to vote proxies or exercise shareholder rights has been delegated to an investment manager pursuant to ERISA section 403(a)(2), or a proxy voting firm or other person who performs advisory services as to the voting of proxies, a responsible plan fiduciary shall prudently monitor the proxy voting activities of such investment manager or proxy advisory firm and determine whether such activities are consistent with paragraphs (e)(2)(i) and (ii) and (e)(3) of this section.

(iv) A fiduciary may not adopt a practice of following the recommendations of a proxy advisory firm or other service provider without a determination that such firm or service provider's proxy voting guidelines are consistent with the fiduciary's obligations described in paragraphs (e)(2)(ii)(A) through (E) of this section.

(3)(i) In deciding whether to vote a proxy pursuant to paragraphs (e)(2)(i) and (ii) of this section, fiduciaries may adopt proxy voting policies providing that the authority to vote a proxy shall be exercised pursuant to specific parameters prudently designed to serve the plan's economic interest. Paragraphs (e)(3)(i)(A) and (B) of this section set forth optional means for satisfying the fiduciary responsibilities under sections 404(a)(1)(A) and 404(a)(1)(B) of ERISA with respect to decisions whether to vote, provided such policies are developed in accordance with a fiduciary's obligations under ERISA as set forth in the applicable provisions of paragraphs (e)(2)(i) and (ii) of this section. Paragraphs (e)(3)(i)(A) and (B) of this section do not establish minimum requirements or the exclusive means for satisfying these responsibilities. A plan may adopt either or both of the following policies:

(A) A policy to limit voting resources to particular types of proposals that the fiduciary has prudently determined are substantially related to the issuer's business activities or are expected to have a material effect on the value of the investment.

(B) A policy of refraining from voting on proposals or particular types of proposals when the plan's holding in a single issuer relative to the plan's total investment assets is below a quantitative threshold that the fiduciary prudently determines, considering its percentage ownership of the issuer and other relevant factors, is sufficiently small that the matter being voted upon is not expected to have a material effect on the investment performance of the plan's portfolio (or investment performance of assets under management in the case of an investment manager).

(ii) Plan fiduciaries shall periodically review proxy voting policies adopted pursuant to paragraph (e)(3)(i) of this section.

(iii) No proxy voting policies adopted pursuant to paragraph (e)(3)(i) of this section shall preclude submitting a proxy vote when the fiduciary prudently determines that the matter being voted upon is expected to have a material effect on the value of the investment or the investment performance of the plan's portfolio (or investment performance of assets under management in the case of an investment manager) after taking into account the costs involved, or refraining from voting when the fiduciary prudently determines that the matter being voted upon is not expected to have such a material effect after taking into account the costs involved.

(4)(i)(A) The responsibility for exercising shareholder rights lies exclusively with the plan trustee except to the extent that either:

(*1*) The trustee is subject to the directions of a named fiduciary pursuant to ERISA section 403(a)(1); or

(*2*) The power to manage, acquire, or dispose of the relevant assets has been delegated by a named fiduciary to one or more investment managers pursuant to ERISA section 403(a)(2).

(B) Where the authority to manage plan assets has been delegated to an investment manager pursuant to section 403(a)(2), the investment manager has exclusive authority to vote proxies or exercise other shareholder rights appurtenant to such plan assets in accordance with this section, except to the extent the plan, trust document, or investment management agreement expressly provides that the responsible named fiduciary has reserved to itself (or to another named fiduciary so authorized by the plan document) the right to direct a plan trustee regarding the exercise or management of some or all of such shareholder rights.

(ii) An investment manager of a pooled investment vehicle that holds assets of more than one employee benefit plan may be subject to an investment policy statement that conflicts with the policy of another plan. Compliance with ERISA section 404(a)(1)(D) requires the investment manager to reconcile, insofar as possible, the conflicting policies (assuming compliance with each policy would be consistent with ERISA section 404(a)(1)(D)). In the case of proxy voting, to the extent permitted by applicable law, the investment manager must vote (or abstain from voting) the relevant proxies to reflect such policies in proportion to each plan's economic interest in the pooled investment vehicle. Such an investment manager may, however, develop an investment policy statement consistent with Title I of ERISA and this section, and require participating plans to accept the investment manager's investment policy statement, including any proxy voting policy, before they are allowed to invest. In such cases, a fiduciary must assess whether the investment manager's investment policy statement and proxy voting policy are consistent with Title I of ERISA and this section before deciding to retain the investment manager.

(5) This section does not apply to voting, tender, and similar rights with respect to such securities that are passed through pursuant to the terms of an individual account plan to participants and beneficiaries with accounts holding such securities.

* * * * *

(g) *Applicability date.* (1) Except for paragraph (e) of this section, this section shall apply in its entirety to all investments made and investment courses of action taken after January 12, 2021.

(2) Plans shall have until April 30, 2022, to make any changes to qualified default investment alternatives described in § 2550.404c–5, where necessary to comply with the requirements of paragraph (d)(2) of this section.

(3) Paragraph (e) of this section applies on January 15, 2021. Fiduciaries, other than investment advisers subject to 17 CFR 275.206(4)–6, shall have until January 31, 2022, to comply with the requirements of paragraphs (e)(2)(ii)(D) and (E) of this section. All fiduciaries shall have until January 31, 2022 to comply with the requirements of paragraphs (e)(2)(iv) and (e)(4)(ii) of this section.

(h) *Severability.* If any provision of this section is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of invalidity or unenforceability, in which event the provision shall be severable from this section and shall not affect the remainder thereof.

Signed at Washington, DC.

Jeanne Klinefelter Wilson,

Acting Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

[FR Doc. 2020–27465 Filed 12–15–20; 8:45 am]

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Part V

Department of Justice

Executive Office for Immigration Review

8 CFR Parts 1003, 1103, 1208, et al.
Procedures for Asylum and Withholding of Removal; Final Rule

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1003, 1103, 1208 and 1240

[Docket No. EOIR 19–0010; Dir. Order No. 04–2021]

RIN 1125–AA93

Procedures for Asylum and Withholding of Removal

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: Final rule.

SUMMARY: On September 23, 2020, the Department of Justice (''DOJ'' or ''the Department'') published a notice of proposed rulemaking (''NPRM'' or ''proposed rule'') that proposed to amend the regulations governing the adjudication of applications for asylum and withholding of removal before the Executive Office for Immigration Review (''EOIR''), including outlining requirements for filing a complete application for relief and the consequences of filing an incomplete application, and establishing a 15-day filing deadline for aliens applying for asylum in asylum-and-withholding-only-proceedings, and clarifying evidentiary standards in adjudicating such applications. Further, the Department proposed changes related to the 180-day asylum adjudication clock. This final rule responds to comments received in response to the NPRM and adopts the NPRM with few changes.

DATES: This rule is effective on January 15, 2021.

FOR FURTHER INFORMATION CONTACT: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Falls Church, VA 22041, telephone (703) 305–0289 (not a toll free call).

SUPPLEMENTARY INFORMATION:

I. Background

A. Proposed Rule

On September 23, 2020, the Department published an NPRM that would amend EOIR's regulations regarding the procedures for the submission and consideration of applications for asylum, statutory withholding of removal, and protection under the regulations issued pursuant to the legislation implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (''CAT''). Procedures for Asylum and Withholding of Removal, 85 FR 59692 (Sept. 23, 2020). Through the NPRM, the Department proposed changes to 8 CFR parts 1003, 1208, and 1240 regarding completeness requirements for such an application, and the consequences of filing an incomplete application. Further, it proposed to establish a 15-day filing deadline for aliens applying for asylum [1] in asylum-and-withholding only proceedings and proposed changes to improve adherence to the statutory requirement that asylum applications be adjudicated within 180 days absent exceptional circumstances. The rule also proposed to clarify evidentiary standards in adjudicating such applications.

B. Authority

The Attorney General is issuing this final rule pursuant to the authority at sections 103(g) and 208(d)(5)(B) of the Immigration and Nationality Act (''INA'' or ''the Act''), 8 U.S.C. 1103(g) and 1158(d)(5)(B).

C. Final Rule

Following consideration of the public comments received, discussed below in section II, the Department has determined to publish the provisions of the proposed rule as final except for the changes noted in I.C.1 below and certain technical amendments. The rationale for those provisions that are unchanged from the proposed rule remains valid. 85 FR at 59693–97.

1. Filing Deadline for Aliens in Asylum-and-Withholding-Only Proceedings

The NPRM added a new paragraph (d) to 8 CFR 1208.4, but the final rule splits that paragraph into three parts, including adding a clarification regarding fee receipts in response to commenters' concerns. Paragraph (d)(1) of the final rule mirrors paragraph (d) in the proposed rule; it establishes an initial 15-day filing deadline for the submission of Form I–589, Application for Asylum and for Withholding of Removal, including applications for protection under the CAT, by aliens in asylum-and-withholding-only proceedings under 8 CFR 1208.2(c)(1) and 1208.4(b)(3)(iii). The 15-day period is calculated from the date of the alien's first hearing before an immigration judge and is subject to possible extension for good cause by the immigration judge. For aliens who do not file the application by the deadline set by the immigration judge, the immigration judge will deem the alien's opportunity to submit the application waived in the proceedings pending before EOIR, and the case will be returned to the Department of Homeland Security (''DHS'').

If the Form I–589 requires payment of a fee, this final rule at paragraph (d)(2) maintains the general requirement for applications and motions before EOIR: The alien must submit a fee receipt together with the application by the deadline set by the immigration judge. In response to commenters' concerns, however, this final rule adds a provision at paragraph (d)(3) to allow flexibility for aliens to meet the filing deadline when the aliens cannot meet all requirements due to no fault of their own. Accordingly, if the alien has not yet received a copy of the fee receipt from DHS in time to meet the Form I–589 filing deadline, the alien may instead provide the immigration court with a copy of the payment submitted to DHS when the alien submits his or her application to EOIR. Aliens who provide this alternative proof of payment must still provide a copy of the fee receipt. In such an instance, the fee receipt will be due by the deadline the immigration judge sets. If the immigration judge does not set a separate deadline for the submission of the fee receipt, the alien must submit the fee receipt within 45 days [2] of the date of filing the associated application.[3]

In response to a recommendation by a commenter, the Department is also amending 8 CFR 1208.4(d)(1) in the final rule to apply the 15-day deadline to applications for statutory withholding of removal and protection under the CAT for aliens in proceedings under 8

[1] An application for asylum is also an application for statutory withholding of removal, 8 CFR 1208.3(b), and this rule clarifies that it is also an application for protection under the CAT. Moreover, as discussed, infra, the final rule contains provisions related to aliens seeking withholding of removal or CAT protection—but not asylum—in proceedings under 8 CFR 1208.2(c)(2). Thus, unless the context indicates otherwise, references to an asylum application in this final rule encompass references to statutory withholding of removal and protection under the CAT.

[2] The INA states both that a fee may be charged for an asylum application, INA 208(d)(3), 8 U.S.C. 1158(d)(3), and that the initial hearing on an asylum application occur within 45 days of filing the application absent exceptional circumstances, INA 208(d)(5)(A)(ii), 8 U.S.C. 1158(d)(5)(A)(ii). Thus—for an asylum application that requires a fee—because the application cannot be filed until the fee is paid and because a hearing cannot occur on the application until it is filed, the Department finds that the statutory scheme in INA 208, 8 U.S.C. 1158, contemplates that it is reasonable to expect an alien to have received a fee receipt within 45 days of filing the asylum application.

[3] In addition, this final rule adds corresponding cross-references to 8 CFR 1003.8, 1003.24, 1003.31, and 1103.7 to account for this exception to the general requirement that any form or application that requires a fee must be submitted together with the fee receipt.

CFR 1208.2(c)(2). The Department sees no reason to distinguish between aliens subject to proceedings under 8 CFR 1208.2(c)(1) and those subject to proceedings under 8 CFR 1208.2(c)(2), as both groups are generally detained. Moreover, the reasons underpinning the application deadline for 8 CFR 1208.2(c)(1) apply with equal force to proceedings under 8 CFR 1208.2(c)(2). Accordingly, in response to the recommendation of at least one commenter, the final rule adopts the commenter's suggestion and edits the language in 8 CFR 1208.4(d)(1) to make the 15-day deadline, with the possibility of an extension for good cause, applicable to aliens in proceedings under 8 CFR 1208.2(c)(2) seeking statutory withholding of removal or protection under the CAT regulations.

Finally, the final rule makes a syntax change to the language in 8 CFR 1208.4(d)(1) to clarify that if an alien does not file an appropriate application by the deadline set by the immigration judge, the immigration judge shall deem the opportunity to file such an application waived, and the case shall be returned to DHS. The proposed rule included the phrase ''for execution of an order of removal'' after ''DHS,'' but that phrasing risks confusion because not every alien in proceedings under 8 CFR 1208.2(c)(1) is subject to an order of removal. *See, e.g.,* 8 CFR 1208.2(c)(1)(iii) (VWP applicant for admission who is denied admission). Accordingly, the final rule deletes that phrase to make clear that in the circumstances of 8 CFR 1208.4(d)(1), the case will simply be returned to DHS, and DHS will take whatever subsequent action it deems appropriate.

2. Requirements for the Filing of an Application

The rule amends 8 CFR 1208.3(c)(3) regarding the requirements for filing a Form I–589, Application for Asylum and for Withholding of Removal, and the procedures for correcting errors in filed applications. These amendments apply to the submission of any Form I–589 before EOIR, including aliens in removal proceedings under section 240 of the Act, 8 U.S.C. 1229a, aliens in asylum-and-withholding-only proceedings under 8 CFR 1208.2(c)(1) and 1208.4(b)(3)(iii), and aliens in withholding-only proceedings under 8 CFR 1208.2(c)(2).

First, the rule specifies that the application must be filed in accordance with the form instructions and the general requirements for filings before the immigration court at 8 CFR 1003.24, 1003.31(b), and 1103.7(a)(3), including the payment of any required fee. The rule provides that an application is incomplete if, in addition to existing grounds, it is not completed and submitted in accordance with the form instructions or is unaccompanied by any required fee receipt (or alternate proof, as necessary).

Second, the rule further revises 8 CFR 1208.3(c)(3) by removing the current provision that deems an alien's incomplete asylum application to be complete if the immigration court fails to return the application within 30 days of receipt. Instead, the rule provides that immigration courts will reject all incomplete applications. Moreover, the rule adds a maximum of 30 days from the date of rejection for the alien to correct any deficiencies in his or her application. Under the rule, an asylum applicant's failure to re-file a corrected application within the 30-day time period, absent exceptional circumstances, shall result in a finding that the alien has abandoned that application and waived the opportunity to file such an application in the proceedings pending before EOIR.

Lastly, the rule updates language in 8 CFR 1208.3(c)(3) regarding incomplete asylum applications and potential work authorization, changing a reference to the ''150-day period after which the applicant may file an application for employment authorization'' to remove the specific time period to ensure that EOIR regulations do not contradict DHS regulations regarding employment authorization eligibility.

3. Clarification Regarding Immigration Judge Evidentiary Considerations

The rule clarifies what type of external materials an immigration judge may rely on under 8 CFR 1208.12 when deciding an asylum application, which includes an application for withholding of removal and protection under the CAT, or deciding whether an alien has a credible fear of persecution or torture pursuant to 8 CFR 1208.30, or a reasonable fear of persecution or torture pursuant to 8 CFR 1208.31. The rule allows immigration judges to rely on resources provided by the Department of State, other DOJ offices, DHS, or other U.S. government agencies. The rule also provides that immigration judges may rely on foreign government and non-governmental sources when the judge determines those sources are credible and the material is probative.

Additionally, the rule expands 8 CFR 1208.12 to allow an immigration judge, on his or her own authority, to submit probative evidence from credible sources into the record. The immigration judge may consider such evidence in ruling on an asylum application, including an application for withholding of removal and protection under the CAT, so long as the judge has provided a copy to both parties and both parties have had an opportunity to comment on or object to the evidence prior to the issuance of the immigration judge's decision.

4. Asylum Adjudication

The rule removes and reserves 8 CFR 1208.7, relating to obtaining work authorization from DHS, and 1208.9, relating to procedures for interviews before DHS asylum officers. The rule also amends 8 CFR 1003.10(b) to make clear that, in the absence of exceptional circumstances, an immigration judge shall complete adjudication of an asylum application within 180 days after the application's filing date.

The rule amends 8 CFR 1003.10(b) to provide a definition of ''exceptional circumstances'' for purposes of 1003.10(b), 1003.29, and 1240.6, and to clarify that the section's use of the phrase ''exceptional circumstances'' refers to those scenarios that are beyond the control of the parties or the immigration court.

Furthermore, the rule amends 8 CFR 1003.29 to specify that nothing in that section authorizes a continuance that causes the adjudication of an asylum application to exceed 180 days. Similarly, the rule revises 8 CFR 1003.31 to provide that the section shall not authorize setting or extending time limits for the filing of documents after an asylum application has been filed that would cause the adjudication of an asylum application to exceed 180 days. Consistent with INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), both of these changes provide for an exception if exceptional circumstances as defined in 8 CFR 1003.10(b) apply. The rule also revises 8 CFR 1240.6 to include that the section does not authorize an adjournment that causes the adjudication of an asylum application to exceed 180 days in the absence of exceptional circumstances as defined in 8 CFR 1003.10(b).

5. Technical Amendments

The file rule adopts the proposal that any required fee be submitted by the time of filing, but further provides for cross-references to both 8 CFR 103.7 and 8 CFR part 106 to prevent confusion and ensure consistency regardless of how the litigation over the DHS rule [4] is resolved.

[4] The final rule related to fees charged by USCIS for filing of an I–589 was preliminarily enjoined by two federal district courts prior to its effective date. *Immigrant Legal Resource Ctr.* v. *Wolf,* No. 20–cv–

Continued

In addition, this rule provides for technical amendments not addressed in the proposed rule. It corrects outdated references to ''Service'' to properly reference ''DHS'' in 8 CFR 1001.31(b). Similarly, it clarifies references to ''withholding of removal'' by referencing section 241(b)(3) of the INA in order to distinguish that form of protection from protection under the CAT. Additionally, for precision, it replaces references to the CAT with reference to 8 CFR 1208.16 through 1208.18. No substantive changes are intended by these amendments.

D. Effective Date

As noted above, this rule is effective on January 15, 2021.

Further, the Department clarifies herein the rule's mostly prospective temporal application. The provisions of the rule regarding the 15-day filing deadline for the submission of asylum applications apply only to asylum-and-withholding-only proceedings initiated after the effective date of the final rule. The provisions of the rule related to the I–589 completeness and filing requirements apply only to asylum applications submitted after the rule's effective date. Except as noted below, the provisions of the rule related to immigration judge evidentiary considerations apply to proceedings of any type initiated after the rule's effective date.

The rule incorporates the statutory requirement that ''in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed.'' INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii). That provision was enacted nearly 25 years ago and is currently in force. Moreover, EOIR reiterated its policy to comply with that statutory provision, including the legal conclusion that ''good cause'' is not synonymous with ''exceptional circumstances,'' over two years ago. EOIR Policy Memorandum 19–05, *Guidance Regarding the Adjudication of Asylum Applications Consistent with INA § 208(d)(5)(A)(iii)* (Nov. 19, 2018), *https://www.justice.gov/eoir/page/file/1112581/download.* Thus, the provisions of the rule relating to INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii) and continuances based on exceptional circumstances, which are already in effect by both statute and policy, apply to pending cases. These provisions are simply adoptions of existing law or, at most, clarifications of existing law. Accordingly, they do not have an impermissible retroactive effect if applied to pending cases. *See Levy* v. *Sterling Holding Co., LLC,* 544 F.3d 493, 506 (3d Cir. 2008) (''Thus, where a new rule constitutes a clarification—rather than a substantive change—of the law as it existed beforehand, the application of that new rule to pre-promulgation conduct necessarily does *not* have an impermissible retroactive effect, regardless of whether Congress has delegated retroactive rulemaking power to the agency.'' (emphasis in original)).

Similarly, the rule incorporates principles established by binding precedent allowing—if not also requiring, in some instances—an immigration judge to submit evidence in an asylum adjudication. *See* 85 FR at 59695 (collecting authorities, including *Matter of S–M–J–,* 21 I&N Dec. 722, 729 (BIA 1997) (en banc)). Thus, the provisions of the rule relating to an immigration judge's submission of evidence, which are already in effect through binding precedent, apply to pending cases. These provisions are simply adoptions of existing law or, at most, clarifications of existing law and, thus, do not have an impermissible retroactive effect if applied to pending cases. *See Sterling Holding Co., LLC,* 544 F.3d at 506.

Additionally, EOIR does not adjudicate—and has never adjudicated—applications for employment authorization documents (EADs) for aliens with pending asylum applications; rather, DHS does. 8 CFR 274a.13(a) (2020). Further, the settlement agreement applicable to the processing of asylum applications and EAD applications in *A.B.T.* v. *U.S. Citizenship and Immigration Servs.,* No. CV11–2108–RAJ (W.D. Wash.) (''ABT Settlement Agreement'') expired in 2019, and EOIR has already announced that it will no longer provide aliens or their representatives with a copy of a 180-Day Asylum EAD Clock Notice. *See* EOIR Policy Memorandum 21–02, *Withdrawal of Operating Policies and Procedures Memoranda 13–03 and 16–01* (Nov. 6, 2020). Accordingly, the provisions of the rule deleting a regulation regarding EAD applications that is inapplicable to EOIR, 8 CFR 1208.7, will be effective on the effective date. Finally, and for similar reasons, the provisions of the rule deleting a regulation regarding asylum officers, 8 CFR 1208.9, that is inapplicable to EOIR—because asylum officers are employees of DHS, not EOIR—will be effective on the effective date.

II. Public Comments on the Proposed Rule

A. Summary of Public Comments

The comment period for the proposed rule ended on October 23, 2020. Of the 2,031 comments received, the majority were from individual and anonymous commenters. The minority of comments came from non-profit organizations, law firms, and members of Congress. While some commenters supported the NPRM, the majority of commenters expressed opposition to the rule, either in whole or in part.

In general, comments opposing the rule misapprehended its impact; misstated its contents; failed to recognize that significant portions of it merely incorporate longstanding law—from either statute or binding precedent—into the regulations, provided no evidence—other than isolated and often distinguishable anecdotes—to support broad claims of particular impacts; made unverified, speculative, and hypothetical generalizations that do not account for the case-by-case and individualized decision-making associated with adjudicating asylum applications; were inconsistent with applicable law, contrary to the Department's considerable experience in adjudicating asylum applications, or otherwise untethered to a reasoned basis; lacked an understanding of relevant law and procedures regarding asylum application adjudications or the overall immigration system; failed to engage with the specific reasons and language put forth by the Department in lieu of broad generalizations or hyperbolic, unsupported presumptions; or, reflected assertions rooted in the rule's failure to agree with the commenters' policy preferences rather than the identification of specific legal deficiencies or other factors the Department should consider. As the vast majority of comments in opposition fall within one of these categories, the Department offers the following general responses to them, supplemented by

05883–JSW, 2020 WL 5798269 (N.D. Cal. Sept. 29, 2020); *Nw. Immigrant Rights Project* v. *U.S. Citizenship & Immigration Servs.,* No. 19–3283 (RDM), 2020 WL 5995206 (Oct. 8, 2020). Although this final rule updates cross-references in EOIR's regulations to DHS's regulations to account for the USCIS rule's amendments of DHS's regulations, the USCIS fees remain governed by DHS's previous regulations while the aforementioned injunctions remain in effect. Because the ultimate resolution of the litigation challenging the DHS fee rule is unknown, this final rule amends EOIR's regulations to include cross-references to both the previous DHS regulations and the new regulations to ensure that the cross-references do not become inaccurate regardless of how the litigation is resolved.

more detailed, comment-specific responses below.[5]

In particular, the Department notes that many, if not most, commenters failed to engage with or acknowledge the existing law that informed the NPRM, much of which has been in existence for years with no noted challenges or expressions of concerns. For example, the provisions incorporating the statutory requirement that ''in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed,'' INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), do not reflect any novel or recent legal development. That statutory provision was enacted nearly 25 years ago and is currently in force with no noted challenges since it was enacted. Moreover, EOIR reiterated its policy to comply with that statutory provision over two years ago, including the legal conclusion that ''good cause'' is not synonymous with ''exceptional circumstances,'' over two years ago. EOIR Policy Memorandum 19–05, *Guidance Regarding the Adjudication of Asylum Applications Consistent with INA § 208(d)(5)(A)(iii)* (Nov. 19, 2018), *https://www.justice.gov/eoir/page/file/1112581/download.*

Similarly, the rule incorporates principles established by binding precedent allowing—if not also requiring, in some instances—an immigration judge to submit evidence in an asylum adjudication. *See* 85 FR at 59695. In particular, *Matter of S–M–J–* has been binding for over 20 years, again with no noted challenge to it. Further, the rule, in multiple ways, reflects influence from longstanding existing regulations that have also not been the subject of challenge or concern. *See, e.g.,* 8 CFR 1208.5(a) (''Where possible, expedited consideration shall be given to [adjudicating asylum] applications of detained aliens.''); 8 CFR 1208.5(b) (''An alien crewmember shall be provided the appropriate application forms and information required by section 208(d)(4) of the Act and may then have 10 days within which to submit an asylum application to the district director having jurisdiction over the port-of-entry. The district director may extend the 10-day filing period for good cause.''); 8 CFR 1208.3(c)(3) (''An asylum application that does not include a response to each of the questions contained in the Form I–589, is unsigned, or is unaccompanied by the required materials specified in paragraph (a) of this section is incomplete.''). Commenters did not persuasively explain—if they attempted to explain at all—why these well-established legal principles are inappropriate bases for the rule.

Most commenters failed to acknowledge the benefits of the rule, such as expeditious consideration of meritorious asylum claims by detained aliens. Indeed, commenters did not explain why it would be preferable for the Department not to expedite consideration of asylum claims, particularly those made by detained aliens, given the risks of faded memories and evidence degradation that adjudicatory delays invite. Relatedly, few, if any, commenters acknowledged or addressed the issue of how a delay in adjudication also makes it more difficult for aliens to obtain pro bono representation. *See, e.g.,* Human Rights First, *The U.S. Immigration Court, https://www.humanrightsfirst.org/sites/default/files/HRF-Court-Backlog-Brief.pdf* (last visited Dec. 4, 2020) (hereinafter ''HRF Report'') (''In a February 2016 survey conducted by Human Rights First of 24 pro bono coordinators at many of the nation's major law firms, nearly 75 percent of pro bono professionals indicated that delays at the immigration court are a significant or very significant negative factor in their ability to take on a pro bono case for legal representation before the court.''). In short, commenters failed to put forth a persuasive argument for why the Department should not expeditiously consider asylum applications, especially for detained aliens with meritorious claims,[6] and the Department is unaware of any such argument that would outweigh the benefits in that regard in the rule.

Most, if not all, commenters opposed to the rule appeared to view its procedural changes wholly through a results-oriented lens such that a proposal that commenters speculatively believed would cause aliens to ''win'' fewer cases was deemed objectionable, even without evidence that such a result would follow. Such a view appeared to have been based on a tacit belief that aliens were entitled to specific outcomes in specific cases, notwithstanding the relevant evidence or law applicable to a case, and that the rule inappropriately required adjudicators to maintain impartiality in adjudicating cases rather than continuing to provide what commenters viewed as favorable treatment toward aliens. To the extent that commenters simply disagree as a policy matter that asylum cases should be adjudicated in a timely manner, *Doherty,* 502 U.S. at 323 (''As a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.''), or that the Department should take measures, consistent with due process, to ensure the timely completion of such cases, the Department finds such policy disagreements utterly unpersuasive.

Many, if not all, commenters failed to acknowledge the reality that no one rulemaking can cover every conceivable adjudicatory scenario. EOIR currently has over 570,000 asylum applications pending adjudication, and each one is subject to adjudication based on its own individual facts. Consequently, the Department cannot rule out the possibility that at least one claim will present an issue not contemplated by the rule, including a unique scenario posited by a commenter. Nevertheless, the rule is expected to cover most applications and contains appropriate safeguards—*e.g.,* extension of a filing deadline for good cause—that should adequately address any unique or unexpected situations.

Relatedly, many commenters criticized the Department for not providing more quantitative data in the NPRM, yet did not explain what type of data that is actually tracked would be appropriate, particularly to address unique or hypothetical scenarios put forth by commenters. The level of granularity presumed by commenters for hundreds of thousands of asylum applications does not exist, and even if it did, the Department could not be

[5] Many comments were also inconsistent, both internally and with other comments. For example, some comments posited that the rule focused too much on efficiency whereas others argued that the rule did not promote efficiency at all. Some comments asserted that immigration judges are ''biased,'' while others suggested that the Department should allow immigration judges to continue to set deadlines rather than providing deadlines through rulemaking or should even promote immigration judges to become judges under Article I of the Constitution. The Department has addressed all of these comments individually herein and acknowledges that inconsistencies make many of the comments even less persuasive.

[6] To the extent that commenters tacitly acknowledged that most asylum claims are not meritorious and, thus, that such claims should not be expedited in order to allow aliens additional time in the United States, the Department finds such an argument hardly compelling. The Department recognizes and agrees with the Supreme Court's observation that ''as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.'' *INS* v. *Doherty,* 502 U.S. 314, 323 (1992). Any rationale for encouraging or supporting the dilatory adjudication of cases both is both inherently unpersuasive and wholly outweighed by the importance of timeliness and fairness—especially to detained aliens with meritorious claims—in adjudicating asylum applications.

expected to consider every speculative possibility presented by commenters. Moreover, the portions of the rule incorporating existing law—*e.g.,* the 180-day adjudication deadline, the authority of an immigration judge to submit evidence—are not dependent on data because the stem from already-binding authority.

Many commenters raised questions about the possibility of the Department issuing multiple final rules related to asylum in 2020. The Department acknowledges that it has proposed and finalized multiple rules in 2019 and 2020 but categorically rejects any assertions that it has done so for any sort of nefarious purpose. Each of the Department's rules stands on its own, however, and each includes explanations of its basis and purpose, while allowing for public comment. Further, the interplay and impact of all of the rules is speculative at the present time, particularly due to ongoing and expected future litigation, which may allow all, some, or none of the rules to ultimately take effect. Nevertheless, to the extent commenters noted some potential overlap or joint impacts, the Department regularly considers the existing and potential legal framework when a specific rule is proposed or implemented.

Regarding the interplay of this rule and other recent proposed and finalized rules, the Department notes that commenters generally focused on the Department's proposed joint rule with DHS from June 2020, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 36264 (June 15, 2020). According to commenters, that proposed rule, if implemented, would result in a significant number of aliens being subject to proceedings under 8 CFR 1208.2(c) and, thus, subject to the new 15-day filing deadline under this rule.[7] Although the Department does not dispute that by finalizing that proposed rule, there will be an additional category of aliens subject to proceedings under 8 CFR 1208.2(c) and, thus, subject to the new filing deadline under this rule, it does note that commenters' suggestion of the size of that category is both grossly speculative—because the number would depend on variables that cannot be accurately predicted such as new inflows of illegal immigration, the validity of any claims made by aliens in those inflows subject to the credible fear screening process, and DHS's exercise of prosecutorial discretion—and wholly outside the Department's control.

Moreover, commenters did not explain why the size of the population subject to proceedings under 8 CFR 1208.2(c) matters for purposes of the rule. Regardless of the size of the population subject to a 15-day filing deadline, the Department, DHS, and the asylum applicant all have a strong interest in the expedited consideration of an asylum claim, particularly where that claim is a meritorious one put forth by a detained alien. Further, even if the size of the population of aliens subject to 8 CFR 1208.2(c) mattered to the degree alleged by commenters, the Department has determined, as a matter of policy, that the benefits of the rule as a whole—*e.g.,* better effectuation of statutory directives, the expedited consideration of meritorious asylum claims, and the elimination of provisions that are immaterial to EOIR—far outweigh any negative impacts that it would, including in tandem with other rules.

Additionally, commenters who raised the issue of the interplay between this rule and the June 2020 proposed rule failed to acknowledge that this rule would actually provide an additional safeguard to that rule to ensure that an alien's asylum claims is not inadvertently pretermitted. *See* 85 FR at 36277; *see also* note 47, *infra.* For all of these reasons—and as discussed in more detail below—the Department simply finds commenters' concerns about this rule in connection with other proposed and finalized rules to be unavailing.

Relatedly, regarding the 15-day filing deadline in particular, many, if not most commenters, failed to acknowledge that the 15-day deadline in the rule for filing an asylum application applies principally to detained aliens. That provision applies to aliens in proceedings under 8 CFR 1208.2(c), and those categories are usually subject to detention unless paroled from custody by DHS. The categories of aliens described in 8 CFR 1208.2(c) encompass aliens subject to inspection and detention as applicants for admission, INA 232(a), 235(a)(3) and (d)(2), 8 U.S.C. 1222(a), 1225(a)(3) and (d)(2); 8 CFR 235.3(a), including those who are later denied admission, and aliens who have entered the United States and subsequently become subject to removal through an administratively final removal order issued by DHS outside of immigration proceedings conducted by the Department, INA 241(a)(2), 8 U.S.C. 1231(a)(2). In either case, however, the Department lacks authority to either parole the aliens into the United States—and, thus, order them as applicants for admission released from DHS custody—or to order the release of aliens subject to a final order of removal. Consequently, unless released by DHS, such aliens would be subject to custody during the adjudication of their asylum applications.

More specifically, alien crewmembers described in 8 CFR 1208.2(c)(1)(i)(A) who are applicants for a landing permit are subject to detention during inspection. INA 232(a), 235(a)(3) and (d)(2), 254(a)(1), 8 U.S.C. 1222(a), 1225(a)(3) and (d)(2), 1284(a)(1); 8 CFR 235.3(a), 252.1(a). Alien crewmembers described in 8 CFR 1208.2(c)(1)(i)(B) who have been refused permission to land are also subject to detention. INA 254(a)(2), 8 U.S.C. 1284(a)(2). Alien crewmembers described in 8 CFR 1208.2(c)(1)(i)(C) who have been granted permission to land are subject to detention and removal if their landing permits are subsequently revoked.[8] INA 252(b), 8 U.S.C. 1282(b); 8 CFR 252.2.

Alien stowaways described in 8 CFR 1208.2(c)(1)(ii) found to have a credible fear of persecution or torture are subject to detention pursuant to INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii). Alien applicants for admission under the Visa Waiver Program (''VWP'') described in 8 CFR 1208.2(c)(1)(iii) are subject to detention during inspection, like all arriving aliens. INA 232(a), 235(a)(3) and (d)(2), 8 U.S.C. 1222(a), 1225(a)(3) and (d)(2); 8 CFR 235.3(a). An alien admitted under the VWP who is found to be deportable is ordered removed. 8 CFR 217.4(b).[9] Accordingly, an alien admitted under the VWP described in 8 CFR 1208.2(c)(1)(iv) is subject to detention as an alien with an order of removal. INA 241(a)(2), 8 U.S.C. 1231(a)(2).[10]

[7] Commenters also posited that DHS's expansion of expedited removal authority would further increase the number of affected aliens subject to this rule. *See* Designating Aliens for Expedited Removal, 84 FR 35409 (July 23, 2019); *see also Make the Rd. New York* v. *Wolf,* 962 F.3d 612, 618 (D.C. Cir. 2020). As discussed, *infra,* the size of the population affected has little relationship to the import of the rule, and even if the size were material to some degree of operational impact, the benefits of the rule far outweigh any such impacts.

[8] Landing permits are typically valid for 29 days. 8 CFR 252.1(d). An alien crewman who applies for asylum during that 29-day period expresses an intent not to depart on the vessel or aircraft on which the crewman arrived and, thus, triggers the possibility of revocation of the crewman's landing permit. INA 252(b), 8 U.S.C. 1282(b); *cf.* 8 CFR 1208.5(b)(1) (''If the alien [crewman] makes such fear known to an official while off such conveyance, the alien shall not be returned to the conveyance but shall be retained in or transferred to the custody of the [DHS].'').

[9] As a condition of participation in the VWP, an alien agrees to waive any right to contest any removal action against the alien, other than through an application for asylum, which would necessarily include detention. INA 217(b)(2), 8 U.S.C. 1187(b)(2).

[10] Aliens subject to the Guam-Commonwealth of the Northern Mariana Islands VWP are subject to

Alien applicants for admission with an S visa described in 8 CFR 1208.2(c)(1)(vi) are subject to detention during inspection, like all arriving aliens. INA 232(a), 235(a)(3) and (d)(2), 8 U.S.C. 1222(a), 1225(a)(3) and (d)(2); 8 CFR 235.3(a). An alien admitted as an S nonimmigrant described in 8 CFR 1208.2(c)(1)(vi) who is subsequently ordered removed, 8 CFR 236.4(b), is also subject to detention. INA 241(a)(2), 8 U.S.C. 1231(a)(2).[11]

Aliens described in 8 CFR 1208.2(c)(1)(v) are those ordered removed under INA 235(c), 8 U.S.C. 1225(c). Such aliens are subject to detention as aliens with final orders of removal. INA 241(a)(2), 8 U.S.C. 1231(a)(2). Similarly, aliens described in 8 CFR 1208.2(c)(2) are those subject to removal orders, either through reinstating a prior order, INA 241(a)(5), 8 U.S.C. 1231(a)(5), or through the issuance of an administrative order of removal as an alien convicted of an aggravated felony, INA 238(b), 8 U.S.C. 1228(b). Such aliens are subject to detention as aliens with orders of removal. INA 241(a), 8 U.S.C. 1231(a).

The June 2020 proposed joint rule on asylum procedures was recently finalized without change to the provision cited by commenters. *See* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, signed by the Attorney General and the Acting Secretary of Homeland Security on December 2, 2020. The Department expects that there will be a litigation challenge to that rule, just as there has been to most of its recent immigration-related rulemakings.[12] Thus, the Department cannot predict definitively whether that rule will go into effect as finalized.

Nevertheless, even if that joint rule goes into effect and aliens who receive a positive credible fear determination are placed in proceedings under 8 CFR 1208.2(c), 85 FR at 36267, such aliens would still be subject to detention unless paroled by DHS. *See Jennings* v. *Rodriguez,* 138 S. Ct. 830, 842 (2018) (''Read most naturally, [8 U.S.C.] §§ 1225(b)(1) and (b)(2) thus mandate detention of applicants for admission until certain proceedings have concluded. Section 1225(b)(1) aliens are detained for ''further consideration of the application for asylum,'' and § 1225(b)(2) aliens are in turn detained for ''[removal] proceeding[s].'' Once those proceedings end, detention under § 1225(b) must end as well. Until that point, however, nothing in the statutory text imposes any limit on the length of detention. And neither § 1225(b)(1) nor § 1225(b)(2) says anything whatsoever about bond hearings.''); *see also Matter of M–S–,* 27 I&N Dec. 476 (A.G. 2018) (''The [INA] provides that, if an alien in expedited proceedings establishes a credible fear, he '*shall be detained* for further consideration of the application for asylum.' . . . There is no way to apply those provisions except as they are written—unless paroled, an alien must be detained until his asylum claim is adjudicated. The Supreme Court recently held exactly that, concluding that section 235(b)(1) 'mandate[s] detention throughout the completion of [removal] proceedings' unless the alien is paroled.'' (emphasis added) (citations omitted) (quoting *Jennings,* 138 S. Ct. at 844–45)).[13]

In short, aliens described in 8 CFR 1208.2(c) are generally subject to detention by DHS under various statutes and regulations with no authorization for the Department to reconsider DHS's detention determination and, thus, unless paroled by DHS, will be detained while their asylum applications are adjudicated by immigration judges. A pre-existing regulation unaltered by this rule already directs the Department to adjudicate such applications

similar procedures regarding refusal of admission and removal as aliens subject to the regular VWP. 8 CFR 212.1(q)(8). Consequently, aliens described in 8 CFR 1208.2(c)(1)(vii) and (viii) are subject to detention on the same bases as aliens described in 8 CFR 1208.2(c)(1)(iii) and (iv).

[11] As a condition of being granted S nonimmigrant status, an alien waives any right to contest, other than an application for withholding of removal, any removal action against the alien, including detention, before the alien obtains lawful permanent resident status. INA 214(k)(3)(C), 8 U.S.C. 1184(k)(3)(C); 8 CFR 236.4(a).

[12] The Department recognizes that litigation, including the potential for an initial nationwide injunction, has become almost inevitable regarding any immigration policy or regulation that does not provide a perceived benefit to aliens, and it is aware that litigation will likely follow this rule, just as it has others of a similar nature. *Cf. DHS* v. *New York,* 140 S. Ct. 599, 599 (2020) (Gorsuch, J. concurring in the grant of a stay) (''On October 10, 2018, the Department of Homeland Security began a rulemaking process to define the term 'public charge,' as it is used in the Nation's immigration laws. Approximately 10 months and 266,000 comments later, the agency issued a final rule. Litigation swiftly followed, with a number of States, organizations, and individual plaintiffs variously alleging that the new definition violates the Constitution, the Administrative Procedure Act, and the immigration laws themselves. These plaintiffs have urged courts to enjoin the rule's enforcement not only as it applies to them, or even to some definable group having something to do with their claimed injury, but as it applies to *anyone.*''). The Department is also aware of the pernicious effects of nationwide injunctions. *See, e.g., Trump* v. *Hawaii,* 138 S. Ct. 2392, 2424–25 (2018) (Thomas, J. concurring) (''Injunctions that prohibit the Executive Branch from applying a law or policy against anyone—often called 'universal' or 'nationwide' injunctions—have become increasingly common. District courts, including the one here, have begun imposing universal injunctions without considering their authority to grant such sweeping relief. These injunctions are beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.'' (footnote omitted)). Nevertheless, the Department does not believe that the inevitability of litigation over contested issues is a sufficient basis to preclude the exercise of statutory and regulatory authority in furtherance of the law and the policies of the Executive Branch.

[13] The Ninth Circuit has affirmed a preliminary injunction restoring the availability of bond hearings for aliens who have received positive credible fear determinations, though that decision was premised on a putative constitutional due process right to a bond hearing rather than the statutory interpretation of INA 235(b)(1), 8 U.S.C. 1225(b)(1), advanced by the Supreme Court in *Jennings* and the Attorney General in *Matter of M–S–. See Padilla* v. *Immig. And Cust. Enforc.,* 953 F.3d 1134 (9th Cir. 2020), *petition for cert. filed,* Dkt. 20–234 (Aug. 27, 2020). As noted, supra, the Department also expects the rulemaking referenced by commenters, which places aliens who receive a positive credible fear determination in proceedings under 8 CFR 1208.2(c), to be challenged through litigation. The Department cannot predict the outcomes of either litigation, but the possible outcomes would not affect this final rule or the Department's consideration of comments regarding it. If the provisions of the joint rulemaking referenced by commenters are finalized as proposed but then permanently enjoined, then that rule would, of course, have no effect on this final rule. If the provisions of the joint rulemaking referenced by commenters are finalized as proposed and go into effect and if the Government's position in *Padilla* is ultimately determined to be correct, then this final rule addresses that situation as discussed herein. In that situation, all aliens subject to proceedings under 8 CFR 1208.2(c) would remain ineligible for bond hearings, and their cases would warrant expeditious treatment accordingly, consistent with longstanding regulatory language, 8 CFR 1208.5(a) (''Where possible, expedited consideration shall be given to [asylum] applications of detained aliens''). Finally, if the provisions of the joint rulemaking referenced by commenters are finalized as proposed and go into effect but the Government's position in *Padilla* is ultimately determined not to be correct, then aliens who receive a positive credible fear determination would still be subject to both detention and proceedings under 8 CFR 1208.2(c), but would be eligible for bond hearings before an immigration judge. In that situation, any impacts of this rule have also been accounted for, contrary to commenters' suggestions. Aliens seeking bond in that situation would have a strong incentive—consistent with this final rule—to file an asylum application expeditiously to bolster their arguments in support of release from custody. *See, e.g., Matter of Andrade,* 19 I&N Dec. 488, 491 (BIA 1997) (alien's potential eligibility for relief reflects on the likelihood of the alien's appearance at future hearings which addresses whether an alien is a likely flight risk). To be sure, the filing of an asylum application does not automatically entitle an alien to bond. *See Matter of R–A–V–P–,* 27 I&N Dec. 803 (BIA 2020) (alien with a pending asylum application but no family, employment, community ties, or probable path to obtain lawful status is a flight risk who does not warrant release on bond). But, consistent with 8 CFR 1208.5(a), an alien who is not granted bond still warrants expeditious consideration of his or her asylum application which is facilitated by this final rule. In short, regardless of the possible permutations of litigation outcomes related to relevant other rulemakings referenced by commenters, this final rule has fully considered the possible variations and commenters' attendant concerns.

expeditiously. 8 CFR 1208.5(a) (''Where possible, expedited consideration shall be given to [asylum] applications of detained aliens.''). Commenters did not challenge this longstanding directive or provide persuasive reasons why detained aliens—*e.g.,* those subject to proceedings under 8 CFR 1208.2(c), including those are subject to such proceedings if the recent joint rule goes into effect—should not be given expedited consideration, particularly if such aliens have meritorious claims and the approval of the claim will lead to release from detention. The Department believes strongly that asylum claims of detained aliens should receive expeditious considerations, and commenters' suggestions to the contrary overall were not sufficiently compelling to warrant changing this rule.

Finally, many comments appeared rooted in a belief that EOIR's adjudicators are incompetent or unethical and are either incapable or unwilling to adhere to applicable law. Some commenters explicitly traduced immigration judges; for example, one commenter asserted that immigration judges have a ''routine bias'' against aliens and that immigration judges routinely ''engage in a host of other unethical behavior toward respondents.'' Such generalized, ad hominem allegations of bias or impropriety are insufficient to ''overcome a presumption of honesty and integrity in those serving as adjudicators.'' *Withrow* v. *Larkin,* 421 U.S. 35, 47 (1975); *see also United States* v. *Chem. Found., Inc.,* 272 U.S. 1, 14–15 (1926) (''The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.''). Moreover, they provide no principled basis for the Department to consider changes to the NPRM.

In sum, the Department issued the NPRM for the reasons given in order to ensure asylum claims are expeditiously considered, especially claims of detained aliens, to better effectuate statutory directives in the INA, to ensure authority is appropriately exercised, to ensure immigration judges consider only complete asylum applications and a developed record containing probative evidence from credible sources, and to promote impartial and timely adjudications consistent with the law. It did not do so for any nefarious purpose, nor did it intend for its procedural changes to have any substantive bearing on the outcomes of additional cases, which flow from the evidence and the law, not the Department's process. As discussed herein, nothing in the NPRM singles out specific populations of aliens, including unrepresented aliens,[14] nor do any of its changes fall disproportionately upon such groups in unacceptable manner. To the extent that commenters did not engage with the NPRM itself, provided unsupported assertions of fact or law, attacked, tacitly or explicitly, the motivations of the Department's adjudicators, or otherwise put forward suggestions based on their preferred results rather than an impartial and timely process, the Department declines to adopt those comments. Further, to the extent that commenters provided substantive analysis and raised important issues, the Department has considered all of them; however, on balance, except for changes noted above, it has determined that the policy and operational benefits of the rule expressed above outweigh all of the issues raised by commenters. Accordingly, although the Department has reviewed all comments received, the vast majority of them fall into the groupings outlined above, and few of them are persuasive for reasons explained in more detail below.

B. Comments Expressing Support

Comment: Several commenters expressed general support for the rule and immigration reform. Commenters noted the need for regulatory reform given the delays in asylum adjudications. These commenters supported all aspects of the rule, which they stated would allow the Department to resolve cases in an expeditious manner. One commenter stated that the rule will increase efficiency and bring asylum and withholding regulations within the plain meaning and intent of the INA.

Response: The Department agrees with the commenters that these regulatory changes will better support congressional intent and increase operational efficiencies.

C. Comments Expressing Opposition

1. Administrative Procedure Act: Concerns Regarding the Ability To Comment

Comment: Many commenters objected to the Department's allowance of a 30-day comment period instead of a 60-day or longer period and requested an extension of the 30-day comment period. Commenters cited Executive Order 12866 and stated that a 60-day comment period is the standard period of time that should be provided for a complex rule like the NPRM.

Commenters stated that the 30-day comment period is an insufficient period of time for them to adequately consider and respond to the significance of the rule's proposed changes. Many commenters emphasized that the comment period is particularly inadequate given the broader context that DOJ independent and DHS and DOJ jointly have recently published a number of complex proposed rules on a wide range of immigration-related topics.[15] Commenters noted that the closeness of the comment periods for these rules and that, because the Departments have not yet issued final rules, commenters cannot accurately know the broader regulatory context for providing comment on the instant rule in a short period of time.

Commenters also stated that the 30-day comment period is insufficient in the context of the COVID–19 pandemic, which, commenters explained, has strained commenters' ability to prepare comments due to unique childcare, work-life, and academic difficulties. Commenters noted examples of other Federal agencies that have extended comment periods due to the impact of COVID–19.[16]

Other commenters further noted that there was a Federal holiday (Labor Day) during the comment period or that natural disasters and wildfires have caused other personal difficulties that make the 30-day comment period particularly short for meaningful comment.

Some commenters stated that there is no need for urgency given the lengthiness of the immigration court process, delays due to COVID–19, and the effective closure of the border by the Centers for Disease Control and Prevention under Title 42 authority.[17] Other commenters explained that the

[14] The Department has fully considered the possible impacts of this rule on the relatively small pro se population of aliens with asylum applications. As discussed below, however, the rule neither singles such aliens out for particular treatment, nor does it restrict or alter any of the many procedural avenues such aliens already have available to them in advancing their cases. Further, nothing in the rule inhibits the availability of pro bono counsel to assist such aliens as appropriate.

[15] For example, commenters noted, *inter alia,* the following recent rulemaking actions: Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 FR 52491 (Aug. 26, 2020); Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 36264 (June 15, 2020).

[16] *See, e.g.,* Bureau of Consumer Financial Protection, Debt Collection Practices (Regulation F); Extension of Comment Period, 85 FR 30890 (May 21, 2020).

[17] *See* Order Suspending the Right to Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists, 85 FR 65806 (Oct. 16, 2020).

30-day comment period was particularly short as they were also working extra hours during the comment period to take action for clients in advance of the October 2, 2020 effective date for U.S. Citizenship and Immigration Services' (''USCIS'') new fees. U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 85 FR 46788 (Aug. 3, 2020).

Some commenters noted that DHS has provided 60-day comment periods for much less complex or significant items related to forms. *See, e.g.,* Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Petition for U Nonimmigrant Status, 85 FR 58381 (Sept. 18, 2020).

Response: The Department believes the 30-day comment period was sufficient to allow for meaningful public input, as evidenced by the 2,031 public comments received, including numerous detailed comments from interested organizations. The NPRM was comparatively short (seven full pages in the **Federal Register** plus parts of two other pages), it proposed to amend only nine paragraphs in all of chapter V of 8 CFR, and the issues it addressed were either already set by statute (*e.g.,* the 180-day adjudication deadline in INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii)), well-known to aliens and practitioners (*e.g.,* completing and filing an application), well-established as immigration court practices (*e.g.,* the setting of filing deadlines and the development of the record by an immigration judge), or the deletion of provisions that were practically inapplicable to EOIR (*e.g.,* former 8 CFR 1208.7 and 1208.9). Moreover, commenters generally did not explain what additional issues they would raise during a longer comment period, and the volume of comments—as well as their breadth—reflects an ample consideration of issues during the comment period. In short, there is no indication that the comment period was insufficient.

Additionally, to the extent that commenters referred to other proposed rulemakings as a basis for asserting the comment period should have been longer, their comparisons are inapposite. No other proposed rulemaking cited by commenters addressed small, discrete changes which relate to well-established provisions and with which aliens and practitioners have been quite familiar with for decades. In short, the Department acknowledges and has reviewed commenters' concerns about the 30-day comment period, but those comments are unavailing for all of the reasons given herein.

Similarly, contrary to commenters' assertions, there is no evidence that either the COVID–19 pandemic or the Labor Day holiday had any effect on the sufficiency of the 30-day comment period. To the contrary, the number of comments received, as well as their breadth, are strong evidence that the comment period was sufficient, particularly for a short NPRM that made few substantive changes. Employers around the country have adopted telework flexibilities to the greatest extent possible, and the Department believes that interested parties can use the available technological tools to prepare their comments and submit them electronically. Indeed, nearly every comment was received in this manner. Further, crediting the assertions of commenters would effectively preclude rulemaking by the Department for the duration of the COVID–19 outbreak, regardless of the length of the comment period. The Department finds no basis to suspend all rulemaking while the COVID–19 outbreak is ongoing. Similarly, commenters' assertions regarding Labor Day reflect an intent to impose a blanket rule that any comment period encompassing a Federal holiday should always be extended, but that position is not supported by law, policy, or practice. The Department acknowledges that particular commenters may have faced individual personal circumstances which created challenges to commenting, but that assertion is true of every rulemaking. Further, there is no evidence of a systemic inability of commenters to provide comments based on personal circumstances, and commenters' assertions appear to reflect a desire to slow the rulemaking due to policy disagreements rather than an actual inability to comment on the rule. Overall, the Department finds that neither the COVID–19 pandemic nor any other particular circumstances alleged by commenters limited the public's ability to meaningfully engage in the notice and comment period.

The Administrative Procedure Act (''APA'') does not require a specific comment period length, *see generally* 5 U.S.C. 553(b)–(c). While it is true that Executive Order 12866 recommends a comment period of at least 60 days, no specific length is required. Rather, Federal courts have presumed 30 days to be a reasonable comment period length. For example, the D.C. Circuit has stated that ''[w]hen substantial rule changes are proposed, a 30-day comment period is generally the shortest time period sufficient for interested persons to meaningfully review a proposed rule and provide informed comment.'' *Nat'l Lifeline Ass'n* v. *Fed. Commc'ns Comm'n,* 921 F.3d 1102, 1117 (D.C. Cir. 2019) (citing *Petry* v. *Block,* 737 F.2d 1193, 1201 (D.C. Cir. 1984)).

Further, litigation has mainly focused on the reasonableness of comment periods shorter than 30 days, often in the face of exigent circumstances. *See, e.g., North Carolina Growers' Ass'n.* v. *United Farm Workers,* 702 F.3d 755, 770 (4th Cir. 2012) (analyzing the sufficiency of a 10-day comment period); *Omnipoint Corp.* v. *FCC,* 78 F.3d 620, 629–30 (D.C. Cir. 1996) (15-day comment period); *Northwest Airlines, Inc.* v. *Goldschmidt,* 645 F.2d 1309, 1321 (8th Cir. 1981) (7-day comment period). Here, the significant number of detailed public comments is evidence that the 30-day period was sufficient for the public to meaningfully review and provide informed comment. *See, e.g., Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania,* 140 S. Ct. 2367, 2385 (2020) (''The object [of notice and comment], in short, is one of fair notice.'' (citation omitted)).

Finally, commenters' comparisons to the time allowed for comment on changes related to forms are inapposite. By statute, the Paperwork Reduction Act (''PRA'') requires a 60-day comment period for proposed information collections like those referenced by the commenters. 44 U.S.C. 3506(c)(2)(A). In contrast, as explained above, there is no similar statutory requirement for the proposed rule itself. Overall, the Department disagrees that the comment period was too short or that commenters did not receive fair notice and an opportunity to respond.

Comment: Some commenters accused the Department of engaging in ''staggered rulemaking,'' which, according to commenters, has made it impossible for them to adequately comment on the potential effect of this rule. According to commenters, several pending rulemakings could ''radically alter'' procedures before the EOIR. As such, commenters asserted that, without knowing which proposed rules will ultimately be published and how they might be altered in their final form, they are being forced to comment without being able to consider the full aggregate effect of all of the Department's proposed rules.

Response: The Department did not purposefully separate its policy goals into separate regulations in order to prevent the public from being able to meaningfully review and provide comment and rejects any assertions to

the contrary. The Department acknowledges that it has proposed multiple rules in 2019 and 2020 but categorically rejects any assertions that it has done so for any sort of nefarious purpose. Each of the Department's rules stands on its own, includes explanations of their basis and purpose, and allows for public comment, as required by the APA. *See Little Sisters of the Poor Saints Peter & Paul Home,* 140 S. Ct. at 2386 (explaining that the APA provides the ''maximum procedural requirements'' that an agency must follow in order to promulgate a rule). Further, the interplay and impact of all of the rules is speculative at the present time, both because many of them are not yet finalized and because of ongoing and expected future litigation, which may allow all, some, or none of the rules to ultimately take effect. Nevertheless, to the extent commenters noted some potential overlap or joint impacts, the Department regularly considers the existing and potential legal framework when a specific rule is proposed or implemented. Further, nothing in any rule proposed by the Department, including the one underlying this final rule, precludes the public from meaningfully reviewing and commenting on that rule. Moreover, even if all rules were in effect, the Department has concluded that the benefits of the instant rule discussed in the NPRM, *e.g.,* 85 FR at 59693–98 and herein—as well as the benefits discussed in the other rules ultimately outweigh any combined impact the rules may have.

2. General Opposition

The majority of commenters opposed the rule, and many commenters expressed generalized statements of opposition, sometimes in overwrought and tendentious terms, that were not specifically related to the rule's substantive changes.

Comment: Several commenters stated that the rule conflicts with American values and its deeply rooted policy of welcoming immigrants and refugees, which, commenters asserted, would damage the Nation's standing in the world. Moreover, a number of commenters stated that the rule is immoral, cruel, or the product of racist or other ill-intent. Other commenters expressed statements of admiration for immigrants or asylum seekers, such as commenters' belief that asylum seekers as a group contribute positively to the United States.

Response: The rule is not immoral, cruel, motivated by racial animus, or promulgated with discriminatory intent. Instead, the rule is intended to help the Department better allocate limited resources in order to more expeditiously adjudicate meritorious asylum and statutory withholding of removal claims. For example, setting a 15-day deadline for asylum applications in asylum-and-withholding-only proceedings will help streamline the process by ensuring that immigration judges can adjudicate such claims expeditiously. Similarly, establishing a deadline by which an incomplete application must be returned will allow cases to be adjudicated in a timely and predictable manner. Likewise, the clarifications regarding what materials an immigration judge may consider will prevent time being wasted on from non-credible sources or material that is not probative.

Further, this rule is not representative of a particular value judgment regarding the contributions or relative merits of immigrants or asylum seekers in the United States. Instead, the rule is intended to increase overall efficiencies for the processing and adjudication of asylum applications before EOIR, which in turn would benefit asylum seekers by enabling individuals with meritorious claims to more quickly receive relief and gain stability in the United States.

Comment: Similarly, many commenters expressed a belief that the rule was designed to make the asylum process more difficult and an attempt to severely limit immigration through asylum. Commenters stated that the rule erects needless barriers for those fleeing violence and persecution. Numerous commenters also asserted that the rule would virtually negate the United States' asylum system and turn immigration courts into deportation-focused entities, which would prioritize the deportation of asylum seekers rather than the fair adjudication of their claims. Several of the commenters suggested that the underlying motive behind the rule is a desire by the administration to end the ability of people to seek asylum in the United States. Likewise, many commenters stated that the rule would essentially lead to the denial of all asylum claims.

In addition, commenters also asserted that the rule would result in more backlogs in the immigration court system because more appeals would be filed.

Response: This rule does not in any way ''negate'' the United States' asylum system, prevent aliens from applying for asylum, or prevent the granting of meritorious claims, contrary to commenters' claims. To the contrary, the changes make the asylum system more efficient and uniform, and will ultimately benefit those with meritorious claims. The Department agrees with commenters that asylum remains an important form of possible relief for individuals seeking protection, and notes that these changes are needed to better address the backlog of pending asylum cases and address current inefficiencies in the asylum system. *See, e.g.,* EOIR, *Adjudication Statistics: Total Asylum Applications* (July 14, 2020), *https://www.justice.gov/eoir/page/file/1106366/download.* In addition, this rule will help ensure that the system is more effective for those who truly have ''nowhere else to turn.'' *Matter of B–R–,* 26 I&N Dec. 119, 122 (BIA 2013) (internal citations omitted).

Additionally, the Department rejects the assertion that this rule will lead to further backlogs. The Department has made or proposed numerous regulatory changes recently to address inefficiencies where appropriate, and this rule is another tool to do so. *See, e.g.,* Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 FR 52491 (Aug. 26, 2020) (proposed) (addressing inefficiencies in case adjudications at the Board of Immigration Appeals (BIA)); Expanding the Size of the Board of Immigration Appeals, 85 FR 18105 (Apr. 1, 2020) (interim rule) (adding two member positions to the BIA so that the BIA may more efficiently and timely adjudicate appeals); Organization of the Executive Office for Immigration Review, 84 FR 44537 (Aug. 26, 2019) (interim rule) (providing, in part, for more efficient disposition of cases through a delegation of authority); EOIR Electronic Filing Pilot Program, 83 FR 29575 (June 25, 2018) (public notice) (creating a pilot program to test an electronic filing system that would greatly improve immigration adjudication processing in the immigration courts and eventually the BIA). Overall, the Department believes that the rule will not exacerbate inefficiencies considering all changes in the aggregate. Moreover, commenters' prediction that more appeals will be filed because of the rule is purely speculative and ignores the case-by-case way in which asylum applications are adjudicated.

Comment: Some commenters expressed concerns with the Department's exercise of authority and jurisdiction related to the rule. For example, commenters stated that Congress, not the Department, must be the entity to make the sorts of changes to the asylum procedures set out in the proposed rule. Commenters cited a variety of reasons why these changes are most appropriately the province of

Congress, including commenters' belief, as mentioned above, that the rule would effectively end or eliminate asylum availability and limit how many asylum seekers would get relief annually, the breadth of the changes in the proposed rule, and alleged inconsistencies between the Act and the rule. Commenters expressed a belief that changes as significant as those proposed should only be undertaken by Congress. Other commenters asserted that the Department should not amend its regulations in such close proximity to a presidential election.

Response: To the extent that commenters intimated that the Department should adhere to laws passed by Congress regarding asylum adjudications such as INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), which is incorporated into the rule, the Department agrees that it should effectuate the laws passed by Congress. Commenters are incorrect, however, that Congress, not the Department, must make the sorts of changes to the asylum procedures set out in the proposed rule. Both the proposed rule and this final rule are issued pursuant to the Attorney General's statutory authority provided by Congress. *See* INA 103(g) and 208(d)(5)(B), 8 U.S.C. 1103(g) and 1158(d)(5)(B). Despite commenters' statements, the provisions of the rule are consistent with the Act. Should Congress enact legislation that amends the provisions of the Act that are interpreted and affected by this rule, the Department will engage in future rulemaking as needed.

The Department also rejects commenters' argument that the Department's authority to engage in rulemaking is related to the relative timing of a presidential election. The APA already allows for democratic input in agency decision-making through the required notice and comment procedures. *See* 5 U.S.C. 553(c). Moreover, the Supreme Court has stated that ''an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely on the incumbent administration's views of wise policy to inform its judgments.'' *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.,* 467 U.S. 837, 865 (1984). As such, it is irrelevant that the presidential election was set to occur in close proximity to the rule's publication and comment period. Further, there is no law suspending rulemaking within a certain period before a presidential election, and the American system of government does not generally countenance the cessation of work on important policies for an extended period of time, such as a presidential election cycle.

Comment: Many commenters also expressed broad concern that the rule would erode aliens' due process rights in immigration court proceedings. Specifically, commenters asserted that the rule would diminish aliens' due process rights by rushing the asylum process and by making it more difficult for them to have enough time to obtain representation, pay fees, or gather records.

Response: Commenters are incorrect that the rule will impede aliens' due process rights in the manner speculated by commenters. It should be noted that EOIR's mission remains ''to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws.'' EOIR, *About the Office* (Aug. 14, 2018), *https://www.justice.gov/eoir/about-office.* In other words, the Department must balance fairness concerns with the countervailing need for efficiency and expeditiousness in EOIR proceedings. Although the rule changes timing and other procedural requirements, the rule does not deny due process to any alien. Due process in an immigration proceeding requires notice and a meaningful opportunity to be heard, neither of which are affected by this rule. *See LaChance* v. *Erickson,* 522 U.S. 262, 266 (1998) (''The core of due process is the right to notice and a meaningful opportunity to be heard.''). None of the changes in the rule limit aliens in immigration proceedings before EOIR from obtaining representation, presenting evidence, or applying for immigration relief such that it violates their due process rights.

3. Violates International Law

Comment: Several commenters were concerned that the rule violates the United States' ostensible obligations under international law, citing the 1948 Universal Declaration of Human Rights (''UDHR''), the 1951 Convention relating to the Status of Refugees (''1951 Refugee Convention''), the 1967 Protocol relating to the Status of Refugees (''1967 Protocol''), and the CAT. Specifically, commenters asserted that the rule violates the international right to seek asylum, the principle of non-refoulement, and the international obligation to provide fair and efficient asylum procedures.

Commenters stated that the rule's provisions implementing a 15-day filing deadline, requiring an asylum application fee, and mandatorily rejecting incomplete applications violates the applicant's right to seek asylum and the United States' non-refoulement obligations. Commenters explained that the 15-day deadline was too short and would prevent asylum seekers from applying for asylum or accessing legal representation, thereby subjecting them to the possibility of return to a country where their life or freedom may be threatened. Commenters also stated that the 15-day filing deadline, when read in conjunction with the Department's other recently proposed asylum rules, would create a categorical bar to asylum for many asylum seekers in violation of the applicant's right to seek asylum.

Similarly, commenters stated that requiring an asylum application fee would prevent asylum seekers from applying for asylum and that the Department should include an income-based or other exception. Commenters noted that only three other countries impose an asylum fee but that even those countries allowed for exceptions. Commenters stated that requiring such a fee without an exception raises the risk of refoulement.

Commenters likewise argued that mandatorily rejecting incomplete applications would subject applicants to potential refoulement for even minor omissions, such as failing to complete a field on the Form I–589 that is not applicable to the applicant. One commenter noted that the 1951 Refugee Convention obligates countries to give applicants the benefit of the doubt, which should apply to minor errors or omissions on the form.

Lastly, commenters stated that the rule does not provide for fair and efficient procedures, which commenters explain are an essential element in applying the 1951 Refugee Convention and related international obligations. Commenters explained that implementing these standards includes providing a realistic opportunity for asylum seekers to have their claims developed, heard in full, and fairly decided. Commenters alleged that the 15-day filing deadline, the mandatory rejection of incomplete applications, the charging of asylum application fees, and the 180-day adjudication deadline are not fair procedures because they do not take into account the difficulties and needs of asylum-seekers, such as lack of English language skills, lack of counsel, unfamiliarity with the U.S. legal system, and the lasting effects of trauma, among others. Rather, commenters alleged that the changes appear to be intended to prevent asylum seekers from applying for relief.

Response: This rule is consistent with the United States' obligations as a party

to the 1967 Protocol, which incorporates Articles 2 through 34 of the 1951 Refugee Convention. This rule is also consistent with U.S. obligations under Article 3 of the CAT, as implemented in the immigration regulations pursuant to the implementing legislation. These treaties are not directly enforceable in U.S. law, but some of their obligations have been implemented by domestic legislation and implementing regulations. *See INS* v. *Stevic,* 467 U.S. 407, 428 & n.22 (1984); *Al-Fara* v. *Gonzales,* 404 F.3d 733, 743 (3d Cir. 2005) (''The 1967 Protocol is not self-executing, nor does it confer any rights beyond those granted by implementing domestic legislation.''); Foreign Affairs Reform and Restructuring Act of 1998 (''FARRA''), Public Law 105–277, sec. 2242(b), 112 Stat. 2681, 2631–822 (8 U.S.C. 1231 note); 8 CFR 208.16(b) and (c), 208.17 and 208.18; 1208.16(b) and (c), 1208.17, and 1208.18. Similarly, the UDHR does not create enforceable obligations on its own. *Sosa* v. *Alvarez-Machain,* 542 U.S. 692, 734 (2004) (''But the [UDHR] does not of its own force impose obligations as a matter of international law.'').

The Department disagrees that this rule contravenes the UDHR's article stating that everyone has the right to seek asylum protections in other countries. The rule does not prohibit anyone from seeking asylum. Instead, the rule simply requires all applicants to comply with established filing requirements, including, for aliens in asylum-and-withholding-only proceedings, complying with delineated filing deadlines. Further, in the rare instances where an applicant has good cause to miss the filing deadline, the immigration judge may extend the filing deadline after considering the relevant facts.

Immigration laws should enable the granting of immigration relief or protection to eligible individuals, and the prompt removal of those who are ineligible. This revision will expedite the consideration of meritorious claims and help such aliens obtain relief quickly while similarly reducing the likelihood that those with non-meritorious claims will be able to remain in the United States for longer and substantial periods of time. It is in the national interest and is consistent with U.S. non-refoulement obligations that meritorious claims are granted as quickly as possible while unwarranted claims are similarly screened out expeditiously.

The Department disagrees with comments that the rule's requirement that the applicant must pay the required fee, if any, for submitting a Form I–589 for the purposes of asylum violates non-refoulement obligations.[18] Because the rule does not impose a fee for statutory withholding of removal or protection under the CAT regulations,[19] the rule would still be consistent with the provisions of the 1951 Refugee Convention, 1967 Protocol, and the CAT. *See R–S–C– v. Sessions,* 869 F.3d 1176, 1188 n.11 (10th Cir. 2017) (explaining that ''the Refugee Convention's non-refoulement principle—which prohibits the deportation of aliens to countries where the alien will experience persecution—is given full effect by the Attorney General's withholding-only rule''); *Cazun* v. *Att'y Gen. U.S.,* 856 F.3d 249, 257 & n.16 (3d Cir. 2017); *Ramirez-Mejia* v. *Lynch,* 813 F.3d 240, 241 (5th Cir. 2016); *Maldonado* v. *Lynch,* 786 F.3d 1155, 1162 (9th Cir. 2015) (explaining that Article 3 of the CAT, which sets out the non-refoulement obligations of signatories, was implemented in the United States by the Foreign Affairs Reform and Restructuring Act of 1998 (''FARRA'') (Pub. L. 105–277, sec. 2242(b), 112 Stat. 2681, 2631–822 (8 U.S.C. 1231 note)) and its implementing regulations); *see also INS* v. *Cardoza-Fonseca,* 480 U.S. 421, 429, 441 (1987) (''[Withholding of removal] corresponds to Article 33.1 of the Convention . . . . [Asylum] by contrast, is a discretionary mechanism which gives the Attorney General the *authority* to grant the broader relief of asylum to refugees. As such, it does not correspond to Article 33 of the Convention, but instead corresponds to Article 34.'') (emphasis in original).

The Department also notes that rejecting incomplete or deficient asylum applications does not violate non-refoulement principles. Again, this rule does not alter any applicant's substantive rights regarding eligibility for asylum, statutory withholding of removal, and protection under the regulations issued pursuant to legislation implementing the CAT. When applicants comply with the filing requirements, including submission of a completed application, and are otherwise eligible for consideration, their applications receive full review and deliberation. Additionally, even where the applicant errs in submitting an incomplete application, the applicant has the opportunity to correct any deficiencies within 30 days. Rejection of an application for failure to comply with these reasonable filing deadlines and requirements does not conflict with the United States' international obligations. *See, e.g., Hui Zheng* v. *Holder,* 562 F.3d 647, 655–56 (4th Cir. 2009) (''[T]he U.N. Protocol [and] the CAT [are] . . . effectuated through a statutory scheme that Congress has established, and which the Attorney General has implemented through regulations governing both the BIA and the procedures available to aliens seeking entry to the United States.''); *Yuen Jin* v. *Mukasey,* 538 F.3d 143, 159 (2d Cir. 2008); *Chen* v. *Mukasey,* 524 F.3d 1028, 1033 (9th Cir. 2008); *Foroglou* v. *Reno,* 241 F.3d 111, 113 (1st Cir. 2001).

Finally, as stated before, it is widely accepted that meritorious claims should be granted as rapidly as possible while acknowledging that frivolous or untenable claims be identified as soon as is feasible in the screening process. This rule benefits legitimate asylum claims by clarifying statutory requirements and streamlining the asylum process.

4. Concerns With Changes Regarding I–589 Filing Requirements

a. 15-Day Filing Deadline in Asylum-and-Withholding-Only Proceedings

i. General Opposition to the Deadline

Comment: The majority of commenters expressed opposition to the 15-day deadline. Commenters asserted that establishing a 15-day deadline would likely prevent legitimate claims from being submitted or would be too short for legitimate claims to adequately be raised; thus commenters alleged that the rule would effectively end the U.S. asylum system and ensure deportations.

[18] Comments objecting to that fee are beyond the scope of the rule and the Department generally. Whether a fee is required for the Form I–589 is a matter determined by DHS, not by the Department. *See* 8 CFR 1103.7(b)(4)(ii). DHS issued a final rule imposing a $50 fee for asylum applications—other than for genuine unaccompanied alien children (UAC) who file for asylum while in immigration proceedings before EOIR—that was scheduled to go into effect on October 2, 2020. *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,* 85 FR at 46791. That rule was enjoined on September 29, 2020, *Immigrant Legal Res. Ctr.* v. *Wolf,* --- F. Supp. 3d ----, 2020 WL 5798269 (N.D. Cal. 2020). *See supra.* While that injunction is in effect, EOIR cannot charge a fee for asylum applications in its proceedings. Further discussion of the rule's provisions regarding the requirement of aliens to pay a fee is below in section II.c.4.d.

[19] This rule only provides that ''a fee must be submitted if DHS requires one.'' As DHS noted in its final rule regarding a fee for an asylum application: ''No fee would apply where an applicant submits a Form I–589 for the sole purpose of seeking withholding of removal under INA section 241(b)(3), 8 U.S.C. 1231(b)(3), or protection from removal under the regulations implementing U.S. obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).'' 85 FR at 46793 n.17. As noted, *supra,* the DHS final rule is currently enjoined and, thus, has not yet taken effect.

Response: As an initial point, few, if any, commenters acknowledged that existing regulations have contained a 10-day application filing deadline for many years for a particular category of asylum seekers, with no noted opposition or complaints. 8 CFR 1208.5(b)(1)(ii). Similarly, most commenters ignored or downplayed the rule's provision of an extension of the 15-day filing deadline for good cause without addressing why the possibility of such an extension would not respond to concerns about timing. Similarly, most commenters asserted that the rule required the submission of both an application and all supporting documents with no further opportunity to update or supplement it, but the rule requires no such thing. The rule requires only the filing of an application by a deadline and does not alter existing provisions regarding the supplementation of an existing application. 8 CFR 1208.4(c); *cf. Matter of Interiano-Rosa,* 25 I&N Dec. 264 (BIA 2010) (distinguishing between the submission of an application itself and the later submission of supporting documents). To the extent that commenters ignored or misstated the actual provisions of the rule, otherwise failed to engage with the safeguards provided by the rule, or conflated different types of filings, the Department acknowledges such comments but declines to adopt them based on such misapprehensions.

Further, commenters' hyperbolic statements that the imposition of a filing deadline that is nevertheless subject to extension somehow effectively precludes asylum eligibility or prevents the filing of an asylum application are without merit. Moreover, such statements ignore the reality that those with meritorious claims typically want their claims heard as quickly as possible to avoid evidence becoming stale and to receive the benefits associated with asylee status. The Department seeks to continue extending protection and relief to aliens with meritorious claims, but the realities of the size of EOIR's pending caseload and the continued increase in notices to appear filed in immigration court cannot be understated. *See* EOIR, *Adjudication Statistics: Pending Cases, New Cases, and Total Completions* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1242166/download.* Accordingly, as noted in the NPRM, this rule is designed to ensure that protection and relief is not delayed for meritorious claims and that evidence is preserved to the fullest extent possible. *See* 85 FR at 59696 (''[D]elaying filing of the claim risks delaying protection or relief for meritorious claims and increases the likelihood that important evidence, including personal recollections, may degrade or be lost over time.''). The Department believes that establishing this deadline, as well as availability of an extension for good cause and the retained ability to supplement or amend the application later in proceedings, will best facilitate those aims. *See* 8 CFR 1208.4(c), (d).

Further, this deadline appropriately eliminates unnecessary delays in what should be a streamlined proceeding, notwithstanding the possibility of an extension for good cause in unusual situations. Moreover, as discussed, *supra,* aliens subject to proceedings under 8 CFR 1208.2(c)(1) generally are detained, and the filing deadline is in keeping with the instruction that detained aliens should receive ''expedited consideration'' of their asylum claims. *Id.*

Moreover, commenters alleged that establishing a 15-day deadline violated the APA for various reasons, as has been addressed at length, *supra. See* section II.C.4.a.iii for further discussion regarding this issue.

Comment: Commenters expressed general opposition to the 15-day deadline in light of other regulatory changes that commenters alleged would drastically increase the number of aliens subject to the 15-day filing deadline by increasing the number of aliens in asylum-and-withholding-only proceedings. Commenters explained that these changes are contrary to the small number of alien crewmembers subject to the current 10-day filing deadline, to which the Department compared the proposed rule.

For example, commenters cited the Department's proposed joint rule with DHS, 85 FR 36264, which commenters explained would expand the number of aliens subject to asylum-only proceedings, would allow immigration judges to pretermit asylum applications that failed to establish *prima facie* claims for relief, and would expand the definition of a ''frivolous'' claim. Commenters stated that the impact of this rule and that proposed rule, if implemented, would result in a massive amount of people subject to the new filing deadline.

Similarly, commenters asserted concerns that the Department failed to consider the impact of DHS's expansion of expedited removal authority, which commenters stated would further increase the number of affected aliens. *See* Designating Aliens for Expedited Removal, 84 FR 35409 (July 23, 2019); *see also Make the Rd. New York,* 962 F.3d at 618.

Response: As an initial point, the number of aliens who may be placed in asylum-and-withholding-only proceedings is both speculative and unpredictable because a precise chain of events has to occur—involving, inter alia, international migration flows, the possibility of the exercise of prosecutorial discretion, and legal determinations by adjudicators—in order to reach that result, and those events, both discretely and especially in combination, cannot be predicted with any degree of precision; moreover, several links in that chain are wholly outside the Department's control. *See Home Box Office, Inc.* v. *FCC,* 567 F.2d 9, 35 n.58 (D.C. Cir. 1977) (per curiam) (''Moreover, comments which themselves are purely speculative and do not disclose the factual or policy basis on which they rest require no response. There must be some basis for thinking a position taken in opposition to the agency is true.''). For example, under the recently-finalized joint rule, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, signed by the Attorney General and the Acting Secretary of Homeland Security on December 2, 2020, the Department is unable to accurately predict the future number of aliens who would enter or seek to enter the United States illegally, be subjected to a credible fear screening by DHS, receive a positive credible fear determination by either DHS or an immigration judge, and, in turn, be placed into asylum-and-withholding-only proceedings. Similarly, DHS has autonomy over its own enforcement-related decisions and is tasked by Congress with ''[e]stablishing national immigration enforcement policies and priorities.'' Homeland Security Act of 2002, Public Law 107–296, sec. 402(5), 116 Stat. 2135, 2178 (codified at 6 U.S.C. 202(5)). Consequently, the Department has neither control over nor the means to predict how many aliens DHS may subject to expedited removal procedures as opposed to other enforcement options or the exercise of prosecutorial discretion. Thus, while the Department is aware that these other rules may have some impact on immigration proceedings relevant to this rule, the size and nature of that impact is speculative and unknowable because of intervening factors, namely levels of illegal immigration and DHS's exercise of its prosecutorial discretion authority. Moreover, even if that impact were predictable, the Department has determined, as a matter of policy, that

the benefits of the rule—*e.g.,* better effectuation of statutory directives, the expedited consideration of meritorious asylum claims, and the elimination of provisions that are immaterial to EOIR—far outweigh any negative impacts that the rule would have, either singularly or in tandem with other rules.

Moreover, assuming, arguendo, that other rules increase the number of aliens subject to asylum-and-withholding proceedings under 8 CFR 1208.2(c), the provisions of this rule would remain important to effectuate. As discussed, *supra,* aliens subject to proceedings under 8 CFR 1208.2(c) are generally subject to detention unless paroled by DHS. Both parties, especially in cases of aliens with meritorious claims, and the immigration courts have an interest in the expeditious consideration of asylum claims made by detained aliens. In fact, current regulations already provide for such expedited consideration, 8 CFR 1208.5(a), and commenters did not explain why detained aliens should not receive expedited consideration of their asylum claims nor challenge the application of 8 CFR 1208.5(a). In short, regardless of whether the rule is considered alone or in conjunction with other rules, it simply reaffirms the importance of well-established principles, namely adhering to statutory deadlines and providing expedited consideration of asylum claims for detained aliens, particularly for meritorious claims. Commenters' suggestions that the Department should depart from these principles are unpersuasive.

Furthermore, the Department's reasoning for the 15-day deadline does not rely on or involve the number of aliens who may be affected. In other words, the proposed rule at 85 FR 36264—nor the finalized rule, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, signed by the Attorney General and the Acting Secretary of Homeland Security on December 2, 2020—had no bearing on the reasoning underlying the deadline in the rule at hand. In the proposed rule, 85 FR at 59693–94, the Department explained that aliens in asylum-and-withholding-only proceedings are ''generally already subject to removal orders, denials of applications for admission, or denials of permission to land in the case of crewmembers, and are often also detained . . . . [T]heir only avenues for relief or protection are applications for asylum, statutory withholding of removal, and protection under the regulations issued pursuant to legislation implementing U.S. obligations under the [CAT] . . . and they would not be in asylum-and-withholding-only proceedings if they had not already claimed a fear of persecution or torture upon being returned to their home countries.'' The Department subsequently concluded that because asylum and withholding of removal are the ''sole issues to be resolved in the proceeding and are squarely presented at the outset of the proceeding . . . there is no reason not to expect the alien to be prepared to state his or her claim as quickly as possible.'' 85 FR at 59694. In addition, the Department provided further reasoning for its decision to establish a deadline: Delayed filing risks delayed protection or relief for meritorious claims; delayed filing increases the likelihood that evidence may degrade or be lost; and applicants may simply delay proceedings, thus causing inefficiencies in what should be a streamlined proceeding. *See id.* The Department also noted that a deadline was consistent with current regulations establishing a 10-day deadline for detained crewmembers to file an asylum application, 8 CFR 1208.5(b)(1)(ii), and directing the agency to provide ''expedited consideration'' to asylum applications filed by detained aliens, 8 CFR 1208.5(a). *Id.* None of these factors relies upon or is altered based on the number of aliens subject to proceedings under 8 CFR 1208.2(c)(1).[20]

Comment: Commenters claimed the rule's inclusion of the possibility of an extension of the filing period for good cause was disingenuous for several reasons. First, commenters claimed that case quotas and performance metrics would incentivize judges to deny requests for extensions. Second, commenters claimed that adjudicating an extension request, which takes time and effort from all parties involved, did not align with the Department's purported aims of streamlining the process.

Response: As an initial point, immigration judges are not subject to any performance metric related to the length of a case adjudication; thus, whether they would grant an extension or not would have no bearing on any applicable performance measure.[21] Even if immigration judges were subject to a performance measure that was relevant to the rule, immigration judges are well aware that it is not appropriate to base continuance or extension decisions solely on case-completion goals. *See, e.g., Matter of L–A–B–R–,* 27 I&N Dec. 405, 416–17 (A.G. 2018) (stating that it is inappropriate to base a decision on a continuance request solely on case completion goals). As discussed, *supra,* commenters' suggestions that immigration judges are biased or incompetent and will either ignore applicable law or will make decisions on factors other than the record and the law are not well-taken. The Department is confident that EOIR's immigration judge corps adheres to the highest levels of professionalism and will continue to apply their independent judgment and discretion, 8 CFR 1003.10(b), when evaluating good cause in relation to requests for extensions. Further, immigration judges regularly adjudicate requests for continuances as part of their duties, and there is no reason to expect that any new requests as a result of this rule would exacerbate the time required for adjudication of these motions.

Comment: Multiple commenters alleged that the extension for good cause was limited to 10 days and disagreed with a 10-day limit.

Response: Commenters misread the rule. The extension for good cause is not limited to 10 days; rather, the immigration judge in his or her discretion determines the length of the extension.

ii. 15 Days Is Too Short

(1) Evidence-Related Concerns

Comment: Commenters asserted that a 15-day deadline is an improper solution to the Department's evidence concerns because 15 days is insufficient to collect relevant evidence. Commenters explained that gathering evidence—including declarations, corroborating documents such as medical and police

[20] The Department notes, however, that to the extent commenters argue more aliens will be in asylum-and-withholding-only proceedings and subject to the 15-day filing deadline in the future, such arguments further the Department's reasoning rather than counter it. In other words, the Department's concerns to ensure efficiency, accurate recall of claims, and avoiding gamesmanship are greater if more proceedings are benefited than fewer.

[21] Non-supervisory immigration judges are subject to a biannual performance work plan based on three elements and a combined total of fourteen sub-elements. A non-supervisory immigration judge's seven performance measures are one of six sub-elements of one of three job elements. Although one of the performance measures—*i.e.,* one of seven sub-sub-elements of one of six sub-elements of one of three elements—is a case completion goal, the establishment of a filing deadline has little correlation with how many cases an immigration judge may ultimately complete. Moreover, the failure to meet any performance measure does not automatically result in the lowering of an immigration judge's performance rating. For instance, for the rating cycle that concluded at the end of FY 2019, although not all non-supervisory immigration judges met the numeric performance measures, every non-supervisory immigration judge nevertheless received a performance rating of satisfactory for the job element encompassing those measures.

reports, letters from witnesses, country conditions documentation, and reports from expert witnesses—and then paying for certain documents to be translated takes much longer than 15 days, especially considering that evidence may be located abroad or possessed by a foreign government.

Commenters stated that the government should have an interest in considering the complete facts of a claim. Commenters alleged, however, that immigration judges would not have all of the evidence before them for consideration because (1) aliens would be unable to submit evidence in such a short timeframe, or (2) the short deadline would rush aliens and inevitably cause contradictions or omissions in the evidence, thereby creating unnecessary false credibility issues.

Commenters explained that aliens who need or request more than 15 days are not trying to circumvent the immigration process; rather, those aliens seek to engage in the legal immigration process by gathering all relevant information and evidence for their claim, which commenters emphasized takes longer than 15 days. Further, commenters explained that aliens who unnecessarily delay their proceedings accept the risk of degradation or loss of evidence. Commenters stated that such concern should incentivize aliens to act efficiently but does not warrant a 15-day deadline.

Response: As discussed, *supra,* commenters either misread the rule or misstated its contents. Nothing in the rule requires that all supporting evidence be submitted within 15 days. Nothing in the rule precludes amending or supplementing an application after it has been filed in accordance with existing regulations. Further, nothing in the rule requires an immigration judge to render a decision within 15 days or to schedule a hearing at any particular time, subject to the general deadline contains in INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii).

Similarly, commenters did not address why aliens in proceedings under 8 CFR 1208.2(c)(1), who are the one of the subjects of the rule, should not receive expedited consideration of their asylum claims because they are detained. The rule ensures that such aliens receive expedited consideration of their applications consistent with existing regulations, 8 CFR 1208.5(a), but it does not alter an alien's ability to submit evidence in support of an application.

The rule does not limit evidence-gathering to 15 days; rather, it requires the application and available supporting evidence to be submitted within 15 days of the alien's first hearing before the immigration judge. *See* 8 CFR 1208.4(d) (''[T]he immigration judge . . . shall set a deadline of fifteen days from the date of the alien's first hearing before an immigration judge by which the alien must file an asylum application''). The Department believes the 15-day deadline appropriately balances the concern regarding risk of degradation or loss of evidence with the need to provide adequate time for preparation and the need to provide expedited consideration of the claims of detained aliens, especially those with meritorious claims.

The Department notes that the 15-day deadline begins from the date of the alien's first hearing with the immigration judge, which may not occur until several weeks after the alien was first encountered by DHS [22] and, in some cases, until after the alien has already resided in the United States for an extended length of time.[23] Thus, contrary to commenters' suggestions, aliens are not limited to a 15-day period to prepare an application or to gather evidence, and many aliens will have had a considerably longer period of time to prepare their claims. In fact, some aliens subject to the rule will have already filed an asylum application even before the 15-day deadline begins. *Compare* 8 CFR 1208.2(c)(1)(i) (alien crewmembers subject to asylum-and-withholding-only proceedings before an immigration judge), *with* 8 CFR 1208.5(b)(1)(ii) (requiring an alien crewmember seeking asylum to file the application with DHS first—and giving the alien ten days to do so, subject to an extension for good cause—before being placed in proceedings under 8 CFR 1208.2(c)(1)). Moreover, aliens in DHS custody who express a desire to seek asylum or a fear of return are provided an asylum application at that time,[24] and that expression necessarily occurs before an alien is placed in proceedings under 8 CFR 1208.2(c)(1) or (2) and before the alien's first hearing is subsequently scheduled. 8 CFR 208.5(a), 1208.5(a). Thus, aliens will always have had time beyond the 15-day deadline in order to complete the application, and few, if any, commenters acknowledged this additional time in their opposition to the rule.

Additionally, the aliens affected by the 15-day filing deadline have necessarily already considered and made a claim for asylum or protection, either through the credible fear process or when faced with removal or the denial of an application for admission under other provisions. Accordingly, there is no reason to believe—and commenters did not provide one—that such aliens cannot memorialize the claim they recently made on an asylum application. To the contrary, the Department expects that aliens with meritorious claims will generally welcome the opportunity to have their

[22] As of October 23, 2020—and excluding aliens detained in the Institutional Hearing Program and the Migrant Protection Protocols program, detained aliens with competency issues, and detained UAC in the custody of the Department of Health and Human Services—the median time between the issuance of a notice to appear for a detained alien and the filing of a notice to appear with an immigration court is seven days, and the median time between the receipt of a notice to appear for a detained alien and that alien's first hearing is sixteen days. Thus, detained aliens will, on average, have 23 days before the 15-day deadline even begins to run, and commenters did not persuasively explain why 38 days, which is more than five weeks and may be extended due to good cause, is an insufficient amount of time for an alien to file an asylum application, especially for an alien who has recently made a claim of a fear of return to his or her country of nationality.

[23] For example, aliens who have overstayed an authorized period of admission under the Visa Waiver Program (VWP) and later seek asylum under 8 CFR 1208.2(c)(1)(iv) may have already spent years in the United States prior to applying for asylum and, thus, will have already had ample time to prepare their case. *See, e.g., Matter of D–M–C–P–,* 26 I&N Dec. 644, 644–45 (BIA 2015) (alien admitted under the VWP in 1999 but did not make an asylum claim in proceedings under 8 CFR 1208.2(c)(1) until 2011).

[24] Although DHS does not have a duty to provide an asylum application to a detained alien pending a credible fear determination, it may do so upon request. 8 CFR 208.5(a). Thus, aliens may be able to obtain an asylum application even before a credible fear determination. Even in cases in which DHS does not provide an asylum application while a credible fear determination is pending, once a detained alien receives a positive credible fear determination—and, thus, may become subject to proceedings under 8 CFR 1208.2(c)(1)—DHS would provide an application at that point consistent with 8 CFR 208.5(a). Moreover, although it was not addressed by commenters, the Department notes that, in conjunction with DHS, it proposed a rule in June 2020 that was recently finalized, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, signed by the Attorney General and the Acting Secretary of Homeland Security on December 2, 2020, and—if it goes into effect, *see* note 12, supra—would explicitly codify this requirement and ensure that it applies to aliens in detention following the receipt of a positive credible fear determination. 85 FR at 36267 (''Additionally, to ensure that these claims [*i.e.,* asylum claims by aliens who have received a positive credible determination and are subject to proceedings under 8 CFR 1208.2(c)(1)] receive the most expeditious consideration reasonably possible, the Departments propose to amend 8 CFR 208.5 and 8 CFR 1208.5 to require DHS to make available appropriate applications and relevant warnings to aliens in its custody who have expressed a fear in the expedited removal process and received a positive determination.''). In short, all detained aliens subject to proceedings under 8 CFR 1208.2(c)(1) will have already received an asylum application before those proceedings commence and before the first hearing is even scheduled. Thus, aliens subject to the rule will actually receive more than 15 days to file an asylum application, even without an extension under 8 CFR 1208.4(d).

claims heard expeditiously by an immigration judge so that they may obtain protection and the benefits of asylum as quickly as possible.

The Department again emphasizes that the alien may also seek an extension of the filing deadline for good cause. 8 CFR 1208.4(d). Thus, in appropriate circumstances, an alien may receive an extension of the deadline in which to file an application, obviating the concerns connected to many of the hypothetical scenarios raised by commenters.

The Department also reiterates that aliens may amend or supplement the application later in proceedings, pursuant to an immigration judge's discretion. Accordingly, aliens and counsel are welcome to begin gathering evidence, including translating or coordinating delivery of certain documents as referenced by commenters, at any time and, subject to any separate filing deadlines set by the immigration judge, may submit additional supporting evidence as it becomes available.

The Department also notes that an alien's testimony alone ''may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.'' INA 208(b)(1)(B)(ii), 8 U.S.C. 1158(b)(1)(B)(ii). Thus, particularly for meritorious claims, an alien may not need extensive documentation to support his or her claim because an alien can meet the relevant burden of proof through credible, persuasive, and specific testimony. Commenters did not explain why aliens who would testify credibly, persuasively, and specifically would need lengthy amounts of time to file an application or to obtain supporting documentation, and the Department is unaware of any such reasons.

The deadline itself does not preclude an immigration judge's full consideration of the facts of a claim. Because applicants for asylum and for withholding of removal bear the full burden of proof, *see* INA 240(c)(4)(A), 8 U.S.C. 1229a(c)(4)(A) (asylum); INA 241(b)(3)(C), 8 U.S.C. 1231(b)(3)(C) (withholding of removal), the alien is responsible for ensuring that the immigration judge has all relevant facts to consider. If, for example, an alien needs additional time to file an application, the alien may request an extension for good cause. 8 CFR 1208.4(d). Likewise, if the application needs to be amended or supplemented later in the proceedings due to evidence-issues, the alien may request to amend or supplement the application. 8 CFR 1208.4(c). Similarly, nothing in the rule prohibits an immigration judge from granting a continuance to obtain corroborating evidence in appropriate cases. *Matter of L–A–C–,* 26 I&N Dec. 516 (BIA 2015). Moreover, the rule itself provides that immigration judges themselves may submit relevant evidence consistent with their duty to develop the record in appropriate circumstances. Through these mechanisms, the Department provides aliens a full opportunity to present all relevant facts to an immigration judge within the deadline, and there is no reason why the establishment of a filing deadline for the application—as opposed to supporting documents—would necessarily create a credibility issue for the alien.

Although the rule referenced the possibility that, without a deadline, aliens may attempt to delay proceedings, the Department does not believe that is the case for all aliens, nor did the rule exclusively consider or rely on that point in establishing the deadline. For the reasons discussed above and in section II.C.4.a.iii, the Department established the deadline and believes 15 days is an appropriate timeframe in which an alien must file an application. The Department disagrees with the commenters' conclusion that evidence-related risks should simply incentivize aliens to reduce delays or else accept those risks. The impact of delayed proceedings reaches far beyond the alien's case; delays result in inefficiencies that affect the entire immigration system. *See generally* 85 FR at 59694. In part for that reason, the rule established the 15-day deadline rather than rely on aliens responding to incentives or accepting the risks associated with delays.

(2) Events Outside of the Alien's Control

Comment: Commenters argued that the 15-day filing deadline is too short in effect due to various circumstances outside of the alien's control that may preclude submission of the application within the required time period. Commenters explained that the U.S. Postal Service (''USPS'') or other carriers may be delayed. Relatedly, commenters said that aliens' documents may have been lost or stolen in transit to the United States.

Some commenters also alleged that DHS would seize documents at the border, such that aliens would no longer have them in their possession to include with an application for protection or relief.

Response: As an initial point, the Department notes that filing delays and missing filing deadlines due to third-party carriers such as the USPS are already a possibility in the current system for considering asylum applications, and the rule does not alter that risk. The Department is also unaware of any systemic issues with third-party carriers delaying filings, and any isolated anecdotal instances identified by commenters are redressable through existing procedures such as a motion to accept an untimely filing. Immigration Court Practice Manual, ch. 3.1(d)(ii), (iii) (July 2, 2020).

Moreover, as discussed supra, most aliens subject to the filing deadline will be detained. Because detained hearings are generally expedited, there is a greater possibility that the alien will be able to file the application directly with the court and, thus, not need to rely on an outside carrier. Nevertheless, even in cases in which there is a legitimate carrier delay, nothing in the rule precludes an alien from filing either a motion to accept the untimely filing, *id.,* or an extension of the filing deadline, 8 CFR 1204.8(d).

In addition, the Department emphasizes that an alien may begin the application at any time. The 15-day deadline is merely 15 days from the date of the first hearing with the immigration judge; thus, aliens are not prohibited from beginning an application prior to the first hearing, nor are they limited to only a single 15-day period to gather evidence. As noted above, detained aliens will have already a copy of an asylum application from DHS prior to their first hearing before an immigration judge and, thus, will have had already more than 15 days to complete the application even without an extension.

The Department is unaware of any practice by DHS of routinely seizing documents from aliens at the border and failing to maintain or to return them, as appropriate. In the Department's experience, any documents seized from aliens that are not returned are maintained in DHS's administrative file on the alien and are available to the DHS attorney representing the agency before the immigration judge. Mechanisms for DHS to return documents to aliens in custody are substantially beyond the scope of the rule. Nevertheless, as officers of the court with an interest in justice in all immigration proceedings, the Department expects that DHS attorneys would submit any probative evidence in DHS's possession in the course of a proceeding under 8 CFR 1208.2(c)(1) or (2) and would ensure that no

misrepresentations are made to an immigration judge.

Comment: Commenters explained that it usually takes USCIS three to five weeks to issue the receipt that the rule requires be attached to a ''complete'' application; thus, submitting a complete application within 15 days is impossible and outside of a practitioner's or alien's control.

Response: The Department acknowledges the commenters' concerns regarding timing with USCIS to receive a fee receipt, although in the Department's experience, USCIS typically provides a one-day turnaround in issuing fee receipts and most receipts are issued within seven days. Moreover, USCIS allows electronic payment for some of its most common applications, USCIS, *Forms Available to File Online* (June 11, 2020), *https://www.uscis.gov/file-online/forms-available-to-file-online,* and the Department does not know whether USCIS intends to allow electronic payment for asylum applications if the injunction on charging a fee is lifted. Nevertheless, in response to commenters' concerns, the Department has amended 8 CFR 1208.4(d) and related cross-references to that regulation to allow for submission of alternative proof of payment in the event that an alien has not received a fee receipt from USCIS within the filing deadline. *See* section I.C.1 for further discussion regarding this change.

(3) Concerns Related to the Complexity of the Form I–589

Comment: Commenters argued that the 15-day filing deadline is too short due to the complexity of the Form I–589 and most applicants' lack of English-language proficiency. Commenters explained that aliens must usually find a translator, interpreter, and counsel to fill out the form and prepare certain documents. Commenters alleged that this process often takes weeks but that such assistance is crucial.

Response: Again, the Department notes that regulations have contained a 10-day application filing deadline for many years for a particular category of asylum seekers, with no noted opposition or complaints, including concerns about the complexity of the form or its requirement to be completed in English. 8 CFR 1208.5(b)(1)(ii). Further, as discussed above, the rule provides an alien an opportunity to request an extension of the deadline if the alien needs additional time to complete the form. Additionally, most aliens with pending asylum cases, 85 percent, have representation, and an alien's representative can assist with completing the application or, as appropriate, requesting an extension of the filing deadline. EOIR, *Current Representation Rates* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1062991/download.*

As discussed, *supra,* in practice, aliens subject to the rule will have additional time beyond 15 days to complete an asylum application, even without an extension, and the Department disagrees with commenters that the Form I–589 is too complex for aliens to complete within weeks. The substantive portion of the Form I–589 is currently eight pages, half of which call for biographic information and half of which request information about the alien's claim.[25] Tens of thousands of aliens—and hundreds of thousands in recent years, EOIR, *Total Asylum Applications* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1106366/download*—whose first language is not English file for asylum every year, and there is simply no indication that applicants cannot complete the application and file it within a few weeks.[26] In short, although the Department acknowledges the commenters' concerns and has fully considered, they are ultimately unpersuasive.

The Department believes the 15-day deadline provides sufficient time for the alien, in coordination with counsel, an interpreter, or translator if the alien so chooses, to apply for relief, particularly because the actual deadline will be more than 15 days in practice and because an alien may request an extension as appropriate. Further, the Department reiterates that the 15-day timeframe begins from the date of the first hearing before the immigration judge. An alien is not precluded from beginning the application or seeking assistance from counsel, an interpreter, or a translator to prepare the application before the first hearing.

(4) Concerns Related to Aliens' Personal Circumstances and Challenges

Comment: Commenters also explained that aliens often have limited financial resources, are usually uneducated or even illiterate, have experienced trauma, and are in need of mental health resources. Considering those facts, commenters explained that 15 days was especially insufficient to secure representation or complete the form on their own, let alone pay the filing fee.

Response: For many of the same reasons noted above, the Department finds these concerns to be both gross generalizations and unpersuasive. The Department does not have data—and commenters did not provide any—and, thus, declines to agree with a blanket characterization that most aliens applying for asylum are illiterate or in need of mental health treatment. Further, commenters raising these issues did not engage with, *inter alia,* the existence of a longstanding 10-day deadline for filing an asylum application for a particular category of applicants, 8 CFR 1208.5(b); the availability of an extension of the 15-day deadline for good cause; the fact that most aliens applying for asylum are represented; the fact that all aliens subject to the rule will, in reality, have more than 15 days to file the application; the demonstrated ability of approximately 200,000 aliens to file for asylum in FY 2019 and FY 2020; the desire of aliens with meritorious claims to have those claims adjudicated quickly; the longstanding regulatory directive to complete asylum cases of detained aliens expeditiously; and, the risks associated with needless delays in asylum adjudications, including the degradation of evidence. To the extent that commenters posited hypothetical scenarios about particular characteristics of aliens, the Department notes that if such scenarios are reflected by actual applicants, then the immigration judge can consider whether any of the factors referenced by the commenters warrant an extension of the filing deadline.

(5) Concerns That the Deadline Is Too Short for Preparation by Counsel

Comment: Commenters explained that even if an alien was able to timely hire counsel, counsel would need more than 15 days to prepare and submit the

[25] If the recent joint rulemaking, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, signed by the Attorney General and the Acting Secretary of Homeland Security on December 2, 2020, goes into effect, the substantive portion of the Form I–589 will increase to thirteen pages, though only nine of those pages call for information about an alien's claim.

[26] The Department also notes there is a plethora of information regarding asylum available to aliens in multiple languages from pro bono or nonprofit organizations or from international organizations. For example, the UNHCR maintains a Spanish-language translation of the instructions for the *Form I–589, https://www.unhcr.org/585ae89c4.pdf* (last visited Dec. 4, 2020), and multiple advocacy organizations within the United States, including ones affiliated with commenters opposing the rule, have created Spanish-language versions of the form itself, *e.g.,* Immigration Justice Campaign, *I–589* in Spanish, *https://immigrationjustice.us/get-trained/asylum/application-declaration-evidence/sample-i-589-in-spanish/* (last visited Oct. 31, 2020). Although non-English versions of the I–589 are not official, they reflect a much greater availability of information to asylum seekers in languages other than English—and thus a greater capacity to complete the form in a timely manner—than most commenters acknowledged.

application. Commenters provided examples of common challenges faced by counsel when working with detained aliens, which they claimed have only been exacerbated by the pandemic. Examples include: Difficulty in arranging meetings with aliens at detention centers, especially with pandemic-related restrictions on visitors; difficulty in securing interpreters; and gathering evidence. Many commenters explained that representation made a significant difference to the likelihood of aliens' success.

Commenters also stated that the 15-day period is too short of a time period to prepare a sufficient application that is sufficiently thorough to meet the higher burden of proof required for success on the application as opposed to the lower standard for credible fear reviews. Commenters explained that the rule failed to acknowledge the difference between the burden of proving ''significant possibility'' of succeeding on an asylum claim required to establish credible fear and the burden of proving every element of an asylum claim under *Matter of A–C–A–A–,* 28 I&N Dec. 84 (A.G. 2020). Relatedly, other commenters claimed the rule's reasoning that ''there is no reason not to expect the alien to be prepared to state his or her claim as quickly as possible,'' 85 FR at 59694, improperly conflated the significant possibility standard used in the credible fear interview with the preponderance of the evidence standard used at the hearing. Commenters explained that the distinction between these standards—one imposing a reduced burden while the other imposed a greater burden that requires a fully developed record to satisfy all elements of the claim—demonstrates that aliens who satisfy the lesser burden are not necessarily ready to satisfy the greater burden in such a short timeframe. In short, given the increased burden of proof, commenters stated that 15 days would be far too short to prepare the application, despite the alien having met the lesser burden of proof in the credible fear interview.

Response: Again, commenters either misread or affirmatively misstated the contents of the rule. Nothing in the rule limits the alien, or the alien's representative, to a single 15-day period to prepare the application; rather, the application must be submitted within 15 days of the alien's first hearing before the immigration judge. Thus, the alien will have more than 15 days to prepare the application, an alien or the alien's representative may begin to prepare the application or gather evidence at any time, the alien may seek an extension of the filing deadline as appropriate, and the alien may supplement the application consistent with existing regulations. To the extent that commenters raise concerns that COVID–19 has created or exacerbated logistical challenges for representatives, the Department notes that cases of detained aliens, such as those who are subject to the rule, have generally been heard during the pandemic to avoid raising significant questions about prolonged detention and that DHS has made arrangements to ensure unimpeded communications between aliens and representatives. *See, e.g., Nat'l Immigration Project of Nat'l Lawyers Guild* v. *Exec. Office for Immigration Review,* 456 F. Supp. 3d 16, 22–23 (D.D.C. 2020) (summarizing DHS actions taken to ensure communication between detained aliens and representatives continue during the outbreak of COVID–19). In isolated instances in which communication between a representative and a detained alien has been interrupted due to COVID–19, the Department reiterates that the rule provides for an extension for good cause, 8 CFR 1208.4(d).

The Department did not conflate the burdens of proof in credible fear interviews and the merits of asylum adjudications. The Department recognizes the distinction between the burdens of proof in the interview and the hearing but believes the rule's timeframe is sufficient for aliens to file their application and meet the requisite burden of proof. *See* INA 240(c)(4)(a), 8 U.S.C. 1229a(c)(4)(A) (burden of proof for asylum); INA 241(b)(3)(C), 8 U.S.C. 1231(b)(3)(C) (burden of proof for withholding of removal). The Department referenced the interview in the proposed rule simply to demonstrate that aliens who pass the credible fear interview are on notice of their eligibility for various forms of relief or protection, that such aliens would logically be expected to want to perfect an application for asylum and soon as possible thereafter, and that it is not unreasonable to expect an alien who has passed a credible fear screening to be anticipating and preparing for consideration of their ultimate application for asylum, including the preparation of their application and gathering of evidence, especially if the alien's claim is meritorious.

(6) The 15-Day Filing Deadline Will Limit the Availability of Low Cost or Pro Bono Legal Services

Comment: Commenters alleged that the 15-day deadline would put undue pressure on services funded by local governments, as well as nonprofit organizations and pro bono volunteers, including clinics and law students, to assist aliens with their applications in an effort to reduce the likelihood that applications would be rejected. Commenters specifically asserted that the deadline would interfere with local government investments into funding legal service providers, specifically such providers' case management processes. Relatedly, commenters explained that the deadline would require nonprofit organizations and clinics to substantially change their operations and would limit the number of aliens they could assist. For example, because students working in law clinics take a full course load in addition to taking a pro bono case, commenters explained that they would be unable to devote the hours necessary to meet the 15-day deadline, thus preventing them from taking cases, which in turn would harm aliens who rely on such assistance.

Response: For all of the reasons previously given—including, *inter alia,* the existence of a longstanding 10-day deadline for a particular category of asylum applicants with no noted effects on low cost or pro bono representation, the similar longstanding existence of immigration judge authority to set deadlines for filing applications for relief, the availability of an extension of the 15-day deadline for good cause, the desire of aliens with meritorious claims to have those claims adjudicated quickly, the longstanding regulatory directive to complete asylum cases of detained aliens expeditiously, and, the risks associated with needless delays in asylum adjudications, including the degradation of evidence—the Department believes that a general 15-day filing period, while providing for exceptions where the immigration judge finds good cause, strikes the appropriate balance between expediency and fairness and would not impact the availability of low cost or pro bono representation. To the contrary, ensuring that detained aliens file an asylum application expeditiously may help ensure that a law school clinic can assist the alien before a student completes the clinical course or graduates. *Cf.* Registry for Attorneys and Representatives, 78 FR 19400, 19404 (Apr. 1, 2013) (declining to require law students to register with EOIR due to, among other things, ''the transient nature of law students' participation in clinical programs and the limited circumstances under which students can represent individuals before EOIR . . . . the absence of any mechanism to inform EOIR when a student leaves a program . . . [and the lack of a]

regulatory provision permitting a law student to appear before EOIR if not enrolled in a 'legal aid program or clinic,' [making] it . . . problematic for those students to remain registered after leaving a clinical program''). Similarly, because lengthy delays in immigration proceedings often dissuade pro bono representation, ensuring expeditious consideration of asylum applications filed by detained aliens may encourage more pro bono representation. *See, e.g.,* HRF Report *supra.* To the extent that commenters posited hypothetical scenarios about particular low cost or pro bono service providers or particular types of aliens, the Department notes that if such scenarios are reflected by actual applicants, then the immigration judge can consider whether any of the factors referenced by the commenters warrant an extension of the filing deadline.

Further, nothing in this rule requires the diversion of resources or alteration of the mission of any low cost and pro bono legal service providers, including nonprofit organizations, pro bono volunteers, clinics and law students, and government-funded representatives, beyond what is already required by existing regulations and professional responsibility requirements. In other words, immigration judges already possess the authority to set application filing deadlines, 8 CFR 1003.31(c), and asylum cases of detained aliens are already subject to expeditious processing, 8 CFR 1208.5(a). Further, practitioners are already prohibited from taking on more work than they can handle competently. 8 CFR 1003.102(q)(1). Thus, pro bono organizations already operate under the conditions outlined in this rule, and commenters did not identify any changes that the rule itself would require that are independent of longstanding and well-established regulatory requirements.

Furthermore, the Department believes that low cost and pro bono legal service providers, including nonprofit organizations, pro bono volunteers, including clinics and law students, and government-funded representatives, can meet this deadline, absent situations in which the deadline may be extended for good cause. Given the alien's already-limited available avenues for relief, the common goal of providing relief or protection to aliens with meritorious claims as quickly as possible, and the risk of loss or degradation of evidence with the passing of time—none of which were challenged by commenters, including low cost and pro bono organizations themselves—the Department believes it is prudent to establish the 15-day deadline. Although the Department acknowledges that nonprofit organizations, pro bono volunteers, and government-funded representatives, like all legal representatives, may face unforeseen challenges confronting deadlines set by a judge, the Department is confident that such representatives will be able to handle such deadlines, just as they do in other courts and just as they handle all regulatory changes inherent across government agencies, and will continue to be able to provide assistance and resources to aliens in proceedings before EOIR.

Finally, the Department notes that nothing in the rule prohibits nonprofits, pro bono groups, local government-funded representatives, or any other class of representatives from taking on an alien's case at a later point in the proceedings. An alien who obtains counsel may choose a representative at any point in the proceedings, including after the filing of an application, and the ability to provide representation does not require assistance from the very first hearing. Thus, low cost or pro bono organizations, local government-funded representatives, and law school clinics realistically have more opportunities to provide assistance that many commenters suggested.

iii. 15-Day Deadline Is Arbitrary

(1) In General

Comment: Commenters generally characterized the 15-day deadline as being arbitrarily short. Commenters expressed concern that the Department failed to include specific data regarding the selection of 15 days as the specific deadline for filing an asylum application in asylum-and-withholding-only proceedings rather than some other period of time. Commenters alleged that the Department's reasoning for the deadline conflated efficiency with speed.

Commenters also stated that the deadline was arbitrary because the Department's reasoning was flawed: Commenters stated the application process and the adjudication process were distinct from one another with separate time periods. Thus, commenters alleged that changing the time limit for the application process would not affect the separate period of time required for adjudication.

Response: The Department disagrees that the 15-day deadline is arbitrary, unrealistic, or unjust. First, the current regulation at 8 CFR 1208.5(a) directs that ''[w]here possible, *expedited* consideration shall be given to applications of detained aliens'' (emphasis added). The Department believes that establishing a deadline will better provide expedited consideration for aliens described in 8 CFR 1208.2(c)(1) and 1208.4(b)(3)(ii). Second, and relatedly, EOIR has had a longstanding policy of allowing asylum merits hearings for detained aliens to be scheduled within 14 days of a master calendar hearing with no noted objections or problems with that policy. *See, e.g.,* EOIR Operating Policies and Procedures Memorandum (''OPPM'') 00–01, *Asylum Request Processing* at 8 (Aug. 4, 2000) (''Generally, when setting a case from the Master Calendar to the Individual Calendar, a minimum of 14 days should be allowed before the case is set for the Individual Calendar.''); EOIR OPPM 13–03, *Guidelines for Implementation of the ABT Settlement Agreement* at 6 (Dec. 2, 2013) (''Generally, when setting a detained [asylum] case from a master calendar hearing to an individual calendar hearing, a minimum of 14 days should be allowed.'').[27] Because—for over two decades with no noted challenge—the Department has found two weeks a potentially sufficient amount of time to prepare a case for a merits hearing on a detained alien's asylum application, it finds that 15 days is similarly a sufficient time to simply file the application, particularly because, as discussed, supra, the alien will actually receive more than 15 days to do so. Third, in determining an appropriate deadline, the Department considered the current regulation establishing a 10-day deadline for detained crewmembers to file an application for asylum. 8 CFR 1208.5(b)(1)(ii). Because detained crewmembers are listed in the regulation at 8 CFR 1208.2(c)(1) as a class of aliens subject to asylum-and-withholding-only proceedings, the Department determined it was appropriate to set a comparable deadline for other classes of aliens subject to asylum-and-withholding-only proceedings included in 8 CFR 1208.2(c)(1), as well as aliens subject to withholding-only proceedings under 8 CFR 1208.2(c)(2).

Regarding commenters' concerns about the lack of supporting data, the Department notes first that because each asylum application is adjudicated on a case-by-case basis and each application will vary accordingly in its facts and support, there is no common metric for determining how long it will typically

[27] Although OPPM 13–03 has been rescinded because the ABT Settlement Agreement expired in 2019, EOIR maintains a policy of providing at least 14 days between a master calendar hearing and an individual hearing on an asylum application for detained aliens.

take an alien to fill out and submit a Form I–589 because there is not a ''typical'' asylum case. Thus, the data suggested by commenters is not available and is untraceable due to the inherently fact-specific nature of each case. Moreover, commenters did not suggest that such data was available or could be obtained. To the extent that the PRA, 44 U.S.C. 3501 *et seq.,* offers data and a potential metric for completing and submitting an asylum application, the Department notes that—in contrast to commenters' concerns—it supports an even quicker deadline than that proposed by the Department. *See Form I–589 Instructions* at 14 (Aug. 25, 2020), *https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf* (providing a response time of 12 hours, ''including the time for reviewing instructions, and completing and submitting the form'').[28] As discussed, the provision of the rule setting a deadline follows from well-established comparable regulations or policies and is not intended to turn on data. Nevertheless, even if it were, the best available data regarding the time it takes to complete the Form I–589—*i.e.,* the PRA determination—supports the deadline chosen by the Department.

Additionally, the Department emphasizes that the deadline is an exercise of the Attorney General's statutory authority and judgement to ''establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section.'' INA 103(g)(2), 8 U.S.C. 1103(g)(2). Congress acknowledged that there may be instances in which the Attorney General may have to act in order to effectuate the statutory scheme. And, given the statute's silence on a filing timeframe for aliens in asylum-and-withholding-only proceedings, the Department presumes Congress intended for the Attorney General to determine such timeframe as necessary.

In drafting the rule, the Department considered that the particular aliens affected—those in asylum-and-withholding-only proceedings—are (1) already subject to removal orders, denied applications for admission, or, for crewmembers, denied permission to land; (2) generally detained; and (3) solely limited to claims for asylum and withholding of removal, which are presented at the outset of the proceeding. *See* 85 FR at 59694. Given the unique position of these aliens, the Department concluded there was ''no reason not to expect the alien to be prepared to state his or her claim as quickly as possible,'' thereby enabling timely provision of relief or protection for meritorious claims. *Id.* The rule also noted that delaying proceedings risked degradation or loss of evidence, which could affect adjudication of the claim.

The Department recognizes that the deadline for filing the application is distinct from the general 180-day deadline for adjudicating the application established by INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), and the rule as a whole addresses both the filing deadline and the adjudication deadline. Finally, the Department notes that the rule does not conflate an interest in efficiency with pure speed, as commenters claimed. As discussed throughout, the rule is rooted in concerns about the expeditious consideration of claims made by detained aliens, the need to ensure meritorious claims are adjudicated as swiftly as possible, the risk of evidence becoming stale, and the expectation that aliens who have recently claimed a fear of persecution or torture will be well-situated to perfect that claim quickly through the filing of an asylum application. In short, the Department—as well as asylum applicants and DHS—has a strong interest in adjudicating cases expeditiously, particularly cases of valid claims for asylum, and the rule does not simply make proceedings more efficient for the sake of speed alone.

(2) Arbitrary Because the Deadline Demands Expediency Not Followed by the Government Itself

Comment: Some commenters alleged that the rule creates an arbitrary deadline because it demands expediency that commenters alleged EOIR and DHS do not follow. Commenters alleged that DHS routinely fails to file notices to appear (''NTA'') with EOIR for more than a year. Likewise, commenters alleged that it takes EOIR six months to a year to schedule a hearing. Commenters explained that these delays by EOIR and DHS impose an unreasonable burden on aliens to constantly check the automated system to determine when they can file.

In a similar vein, commenters surmised that the Department-facilitated general Legal Orientation Program (''LOP'') would be unable to meet alien's needs from the 15-day deadline. Citing to the *LOP Cohort Analysis Phase II* study,[29] commenters emphasized that 24% of participants failed to receive any services until after their first hearing, while participants who received services prior to their first hearing received services on average only seven days prior to the hearing.

Some commenters stated that the 15-day deadline was arbitrary because backlogs in the immigration courts would preclude review of such applications for months or years. Commenters stated that the rule failed to address the inefficiencies caused by the Department itself, such as hiring new immigration judges without hiring support staff, restricting immigration judges' ability to manage their dockets, and shifting prioritization of particular dockets.

Response: As an initial point, many commenters failed to apprehend that most aliens subject to the rule will be detained. Consequently, DHS is unlikely to wait over a year to file a charging document, *cf.* 8 CFR 287.3(d) (except in an emergency or exceptional circumstance DHS will determine within 48 hours of detention whether to file an NTA), and EOIR is unlikely to wait six months to a year to schedule a hearing, EOIR Policy Memorandum 20–07, *Case Management and Docketing Practices* at 2 (Jan. 31, 2020) (detained cases should be entered into EOIR's case management system within three days of filing the charging document), *https://www.justice.gov/eoir/page/file/1242501/download.* Similarly, detained aliens are unlikely to need to check the automated case system to determine when to file an application.[30]

This rule does not purport to address every inefficiency in the U.S. immigration system. The 15-day filing deadline instead is designed to increase one efficiency in asylum-and-withholding-only proceedings—the timeframe for aliens in such proceedings to file an application for

[28] If the recent joint rulemaking, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, signed by the Attorney General and the Acting Secretary of Homeland Security on December 2, 2020, goes into effect, the response time for the Form I–589 will increase to 18.5 hours. That length of time to complete the application would still support the Department's position that between 15 and 38 days—if not longer based on extensions due to good cause—is sufficient time to complete the Form I–589. *See also* note 22, supra.

[29] *See* Executive Office for Immigration Review, *LOP Cohort Analysis: Phase II* (Jan. 29, 2019), *https://www.justice.gov/eoir/file/1125621/download.*

[30] Even if an alien is not detained, he or she would not need to check the automated case system to determine when to file. The rule clearly states that the application deadline is 15 days after the first hearing, which the alien will have attended. Thus, an alien will always know when the application is due.

protection or relief.[31] As explained above, that timeframe is not arbitrary; rather, it was promulgated to address a number of the Department's concerns. *See generally* 85 FR at 59693–94. Thus, the commenters' concerns with other inefficiencies at DHS and EOIR, including the automated system and the LOP,[32] are outside the scope of this particular rulemaking.

The Department disagrees with commenters' allegation that the rule is arbitrary because the backlog would nonetheless delay hearings for such applications. Again, commenters generally did not apprehend that the rule will apply principally to detained aliens, whose cases are generally adjudicated within 180 days already, EOIR, *Median Completion Times for Detained Cases* (Oct. 23, 2019), *https://www.justice.gov/eoir/page/file/1163621/download,* and do not constitute a backlog. Because detained cases are already subject to expeditious consideration, 8 CFR 1208.5(a), the rule should not create new delays, contrary to commenters' assertions.

(3) Arbitrary Because the Rule Failed To Analyze Certain Impacts of the Rule

Comment: Commenters asserted that the rule was arbitrary because it failed to analyze the impact of other proposed or enacted regulatory changes that commenters explained would increase the number of aliens subject to the 15-day filing deadline.[33] Commenters noted this increase is contrary to the small number of alien crewmembers subject to the current 10-day filing deadline, to which the Department compares the proposed rule.

Response: As discussed, supra, the number of aliens who may be placed in asylum-and-withholding-only proceedings and, thus, subject to the deadline established by the rule is speculative, unpredictable, and ultimately wholly outside the Department's control. *See Home Box Office,* 567 F.2d at 35 n.58 (''Moreover, comments which themselves are purely speculative and do not disclose the factual or policy basis on which they rest require no response.''). The Department is unable to accurately or precisely predict the future number of aliens who would both enter or seek to enter the United States illegally and, in turn, be placed into asylum-and-withholding-only proceedings following a positive credible fear or reasonable fear interview; further, commenters did not offer a prediction, apart from unsupported generalizations. Similarly, DHS has autonomy over its own enforcement-related decisions and is statutorily tasked by Congress with ''[e]stablishing national immigration enforcement policies and priorities.'' Homeland Security Act of 2002, Public Law 107–296, section 402(5), 116 Stat. 2135, 2178 (codified at 6 U.S.C. 202(5)). Consequently, the Department has neither control over nor the means to predict how many aliens DHS may subject to expedited removal procedures as opposed to other enforcement options or the exercise of prosecutorial discretion. Thus, while the Department is cognizant that other rules may have some impact on immigration proceedings relevant to this rule, the size and nature of that impact is speculative. Moreover, even if that impact were predictable, the Department has determined, as a matter of policy, that the benefits of the rule—*e.g.,* better effectuation of statutory directives, the expedited consideration of meritorious asylum claims, and the elimination of provisions that are immaterial to EOIR—far outweigh any negative impacts that the rule would have, either singularly or in tandem with other rules. Such balancing of preferences is not arbitrary and capricious.

Moreover, assuming, arguendo, that other rules increase the number of aliens subject to asylum-and-withholding proceedings under 8 CFR 1208.2(c), the provisions of this rule would remain important to effectuate. As discussed, *supra,* aliens subject to proceedings under 8 CFR 1208.2(c) are generally subject to detention unless paroled by DHS. Both parties, especially in cases of aliens with meritorious claims, and the immigration courts have an interest in the expeditious consideration of asylum claims made by detained aliens. In fact, current regulations already provide for such expedited consideration, 8 CFR 1208.5(a), and commenters did not explain why it would be arbitrary and capricious for detained aliens to receive expedited consideration of their asylum claims consistent with existing regulations. The rule simply reaffirms the importance of well-established principles, namely adhering to statutory deadlines and providing expedited consideration of asylum claims for detained aliens, especially meritorious claims. Such re-affirmation is not arbitrary and capricious.

Furthermore, the Department's reasoning for the 15-day deadline does not rely on or involve the number of aliens who may be affected. In other words, the proposed rule at 85 FR 36264, and the recently-finalized rule, had no bearing on the reasoning underlying the deadline in the rule at hand. In the proposed rule, 85 FR at 59693–94, the Department explained that aliens in asylum-and-withholding-only proceedings are ''generally already subject to removal orders, denials of applications for admission, or denials of permission to land in the case of crewmembers, and are often also detained . . . . [T]heir only avenues for relief or protection are applications for asylum, statutory withholding of removal, and protection under the regulations issued pursuant to legislation implementing U.S. obligations under the [CAT] . . . and they would not be in asylum-and-withholding-only proceedings if they had not already claimed a fear of persecution or torture upon being returned to their home countries.'' The Department subsequently concluded that because asylum and withholding of removal are the ''sole issues to be resolved in the proceeding and are squarely presented at the outset of the proceeding . . . there is no reason not to expect the alien to be prepared to state his or her claim as quickly as possible.'' 85 FR at 59694. In addition, the Department provided further reasoning for its decision to establish a deadline: Delayed filing risks delayed protection or relief for meritorious claims; delayed filing increases the likelihood that evidence may degrade or be lost; and applicants may simply delay proceedings, thus causing inefficiencies in what should be a

[31] In recent rulemakings, the Department has sought, in part, to reduce various inefficiencies throughout the immigration system. *See, e.g.,* Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 FR 52491 (Aug. 26, 2020) (proposed) (addressing inefficiencies in case adjudications at the BIA); Expanding the Size of the Board of Immigration Appeals, 85 FR 18105 (Apr. 1, 2020) (interim rule) (adding two Board member positions to the BIA so that the BIA may more efficiently and timely adjudicate appeals); Organization of the Executive Office for Immigration Review, 84 FR 44537 (Aug. 26, 2019) (interim rule) (providing, in part, for more efficient disposition of cases through a delegation of authority); EOIR Electronic Filing Pilot Program, 83 FR 29575 (June 25, 2018) (public notice) (creating a pilot program to test an electronic filing system that would greatly improve immigration adjudication processing in the immigration courts and eventually the BIA).

[32] The Department notes that the same study cited by commenters disclosed that the general LOP cost the government over $100 million annually, increased an alien's length of detention, did not generally affect an alien's case outcome, and did not increase representation for detained aliens. *See* EOIR, *LOP Cohort Analysis* at 4 (Sept. 5, 2018), *https://www.justice.gov/eoir/file/1091801/download; cf.* 5 CFR 2635.101(b)(11) (requiring the disclosure of government waste). Consequently, even prior to the NPRM, the general LOP provided no benefit to detained aliens, and the rule's impact on detained aliens served by the general LOP is accordingly minimal, if any.

[33] *See also* section II.C.4.a.i above for further discussion of these proposed changes.

streamlined proceeding. *See id.* The Department also noted that a deadline was consistent with current regulations establishing a 10-day deadline for detained crewmembers to file an asylum application, 8 CFR 1208.5(b)(1)(ii), and directing the agency to provide ''expedited consideration'' to asylum applications filed by detained aliens, 8 CFR 1208.5(a). *Id.* None of these factors relies upon or is altered based on the number of aliens subject to proceedings under 8 CFR 1208.2(c)(1).[34]

Furthermore, pursuant to 5 U.S.C. 706(2)(A), an agency must articulate a ''rational connection between the facts found and the choice made.'' *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168 (1962). Those facts must be ''relevant'' and considered with no ''clear error in judgment,'' *see Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 416 (1971), but a court will ''uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'' *Motor Vehicles Mfrs. Ass's of U.S., Inc.* v. *State Farm Mutual Auto. Ins.,* 463 U.S. 29, 43 (1983) (quoting *Bowman Transp. Inc.* v. *Arkansas-Best Freight System,* 419 U.S. 281, 286 (1974)). Under that standard, the rule is not arbitrary and capricious. The rule clearly discussed the relevant factors considered in establishing the 15-day filing deadline, at least to an extent that the rule was ''reasonably discerned.'' *See* 85 FR at 59693–94; *see also* section II.C.4.a.iii.(1), *supra.*

Factors over which the Department has no control were considered, but as discussed, they do not impact the nature of the rule. For example, DHS's expansion of expedited removal stems from DHS's ''sole and unreviewable'' authority to determine the scope of aliens to whom expedited removal provisions may be applied. INA 235(b)(1)(A)(iii)(I), 8 U.S.C. 1235(b)(1)(A)(iii)(I). The Department and DHS are separate agencies with distinct authorities and responsibilities, and EOIR played no part in developing or implementing that notice. Further, the notice bore no effect on the Department's decision to establish a filing deadline for aliens in asylum-and-withholding-only proceedings in an effort to address inefficiencies in the system and reduce delayed protection or relief for meritorious claims. And, to the extent that DHS's action may result in more aliens subject to proceedings under 8 CFR 1208.2(c)(1), that outcome, which is highly speculative, would not undermine or alter the rule for the reasons given.

Comment: In addition, commenters explained that the rule should have analyzed the impact of the deadline on aliens, counsel, and court operations, including the reliance interests of those parties on the current timeframe to seek and engage representation. Commenters stated that the rule's lack of a cost benefit analysis on the 15-day deadline evidenced the Department's failure to assess the harms caused by the rule.

More specifically, commenters stated that the Department failed to consider the ''severe consequences'' on aliens from imposing a 15-day deadline, which they alleged could lead to denials of thousands of asylum applications and subsequent orders of removal under the BIA's decision in *Matter of R–C–R–,* 28 I&N Dec. 74 (BIA 2020). Commenters stated this would deprive pro se aliens the opportunity to request extensions or build a record to explain why they did not meet the deadline. In regard to nonprofits, commenters stated that the Department failed to consider that with such a short deadline, pro bono attorneys would be less willing to take cases and nonprofits would be unable to place attorneys with detained aliens. In regard to court operations, commenters stated that the Department failed to consider that courts would be overwhelmed by the number of pro se cases.

Response: As an initial point, commenters did not quantify the asserted ''severe consequences'' they alleged would flow from the rule, and because the Department believes such consequences are unsupported, hypothetical, unrealistic, or based on an incorrect understanding of the rule, it declines to seek to develop a metric for measuring them. Moreover, most of the alleged ''harms'' asserted by commenters are, in reality, founded in policy disagreements over a belief that not enough asylum applications are being granted or simply repeat tendentious or spurious claims about how the Department considers asylum cases under the applicable law.

As with other rules issued by the Department, many, if not most, commenters asserted that this rule was ''arbitrary and capricious,'' though nearly all of those assertions were ultimately rooted in the rule's failure to adopt the commenters' policy preferences rather than the identification of specific legal deficiencies. The Department has considered all comments and looked at alternatives. The Department understands that many, if not most, commenters opposing the rule believe that most asylum applications are meritorious and, thus, would prefer that nearly all applications for asylum be granted, that border restrictions be loosened accordingly if not eliminated, and that the Department, as a matter of forbearance or discretion, decline to follow the law in situations where doing so would be beneficial to aliens. For all of the reasons discussed in the NPRM, and reiterated herein, however, the Department declines to adopt those positions. In short, although the Department has considered the issues raised and policy perspectives advanced by commenters, it finds them unpersuasive and insufficient to warrant withdrawing the rule.

Similarly, the Department further understands that, at the least, most commenters would prefer to maintain the status quo, believing that it is preferable to the changes in the rule. The Department has been forthright in acknowledging the changes created by the rule from the status quo, but has also explained the reasoning behind those changes, including the better effectuation of statutory directives, the expedited consideration of meritorious asylum claims, and the elimination of provisions that are immaterial to EOIR. The Department has acknowledged changes in positions, where applicable, it has provided good reasons for those changes, it believes the changes are better implementations of the law than the status quo, and it has provided a ''reasoned analysis'' for the changes, which is contained in the NPRM and reiterated herein in response to the comments received; in short, the rule is not ''arbitrary and capricious'' under existing law. *See FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009).

Many of commenters' concerns are also addressed, *supra,* and the Department reiterates its prior responses accordingly. For example, commenters did not engage with the many reasons supporting the deadline in the rule—*e.g.,* the existence of a longstanding 10-day deadline for a particular category of asylum applicants with no noted effects on pro bono representation, the similar longstanding existence of immigration judge authority to set deadlines for filing applications for relief, the availability of an extension of the 15-day deadline for good cause, the desire of aliens with meritorious claims to have those claims adjudicated quickly, the longstanding regulatory directive to complete asylum cases of detained aliens expeditiously, and, the risks

[34] The Department notes, however, that to the extent commenters argue more aliens will be in asylum-and-withholding-only proceedings and subject to the 15-day filing deadline in the future, such arguments further the Department's reasoning rather than counter it. In other words, the Department's concerns to ensure efficiency, accurate recall of claims, and avoiding gamesmanship are greater if more proceedings are benefited than fewer.

associated with needless delays in asylum adjudications, including the degradation of evidence. The Department considered those issues, as well as the ones raised by commenters, but determined for the reasons given that a general 15-day filing period, while providing for exceptions where the immigration judge finds good cause, strikes the appropriate balance between expediency and fairness.

The Department further finds that the rule would not impact the availability of pro bono representation. To the contrary, as discussed, supra, ensuring expeditious consideration of asylum applications filed by detained aliens may promote increased pro bono representation which is often dissuaded by lengthy delays in immigration proceedings. *See, e.g.,* HRF Report *supra* (''In a February 2016 survey conducted by Human Rights First of 24 pro bono coordinators at many of the nation's major law firms, nearly 75 percent of pro bono professionals indicated that delays at the immigration court are a significant or very significant negative factor in their ability to take on a pro bono case for legal representation before the court.''). To the extent that commenters posited hypothetical scenarios about particular pro bono groups or particular types of aliens, the Department notes that if such scenarios are reflected by actual applicants, then the immigration judge can consider whether any of the factors referenced by the commenters warrant an extension of the filing deadline.

Overall, the Department believes that nonprofit organizations and pro bono volunteers can meet this deadline, absent situations in which the deadline may be extended for good cause. Given the alien's already-limited available avenues for relief, the common goal of providing relief or protection to aliens with meritorious claims as quickly as possible, and the risk of loss or degradation of evidence with the passing of time—none of which were challenged by commenters, including pro bono organizations themselves—the Department believes it is prudent to establish the 15-day deadline. Although the Department acknowledges that nonprofit organizations and pro bono volunteers, like all legal representatives, may face unforeseen challenges confronting deadlines set by a judge, the Department is confident that such representatives will be able to handle such deadlines, just as they do in other courts and just as they handle all regulatory changes inherent across government agencies, and will continue to be able to provide assistance and resources to aliens in proceedings before EOIR.

The Department further notes that nothing in the rule prohibits nonprofits, pro bono groups, or any other class of representatives from taking on an alien's case at a later point in the proceedings. An alien who obtains counsel may choose a representative at any point in the proceedings, including after the filing of an application, and the ability to provide representation does not require assistance from the very first hearing. Thus, pro bono organizations have more opportunities to provide assistance that many commenters suggested.

In drafting this rule, the Department considered the potential impacts of the deadline on various referenced groups, but finds assertions of deleterious impacts unsupported, grossly speculative, and ultimately unpersuasive. The rule's extension for good cause, 8 CFR 1208.4(d), and the retained provision allowing for future amendments or supplements to the application, 8 CFR 1208.4(c), stem from consideration of aliens, counsel (including pro bono counsel), and nonprofit organizations who may encounter unusual situations that prevent them from meeting the deadline. 85 FR at 59694. Commenters' concerns regarding ''thousands'' of denied applications and subsequent orders of removal are speculative and overwrought almost to the point of histrionic. In fact, commenters' concerns on this point appear to tacitly suggest that most asylum claims are non-meritorious, as commenters generally failed to address the need for detained aliens with meritorious claims to have those claims adjudicated as efficiently as possible.

The deadline, in and of itself, does not prevent aliens from requesting an extension or explaining why they did not meet the deadline. Aliens may request an extension at any point during the 15-day timeframe following their initial hearing. *See* 8 CFR 1208.4(d). Further, the deadline is not subject to retroactive application and does not infringe on the reliance interests of aliens subject to the current regulations.

In addition, a significant motivation for establishing the deadline stemmed from the Department's consideration of inefficiencies in court operations due to the delayed filing of applications. *See* 85 FR at 59693–94. Commenters' concerns that courts will be ''overwhelmed'' with *pro se* cases is both speculative and unsupported by evidence. To be sure, immigration courts have seen an increase in cases in recent years due to increased illegal immigration, but the rule will neither increase nor decrease the number of overall cases filed with the immigration courts. *See* EOIR, Workload and Adjudication Statistics, *New Cases and Total Completions—Historical, https://www.justice.gov/eoir/page/file/1139176/download* (reflecting that DHS filed a record number of new cases—over 500,000—in FY 2019 and then filed the second highest number of new cases—over 361,000—in FY 2020). Furthermore, most asylum cases have legal representation notwithstanding this dramatic increase in new case filings. *See* EOIR, *Workload and Adjudication Statistics, Current Representation Rates, https://www.justice.gov/eoir/page/file/1062991/download.* Nothing in the rule would logically cause representation rates to decline or suggests a reason why aliens would be unable to secure representation. Moreover, ample resources for pro se aliens are available in immigration court. *See, e.g.,* EOIR, *List of Pro Bono Service Providers, https://www.justice.gov/eoir/list-pro-bono-legal-service-providers;* EOIR, *Pro Bono Portal, https://probono.eoir.justice.gov/;* EOIR, Immigration Court Online Resource, *https://icor.eoir.justice.gov/en/;cf. EOIR Launches Resources to Increase Information and Representation* (Oct. 1, 2020), *https://www.justice.gov/eoir/pr/eoir-launches-resources-increase-information-and-representation.* In short, suggestions that immigration courts will be ''overwhelmed'' by pro se cases are not rooted in the current reality of asylum adjudications.

Finally, the Department considered the potential impact of the deadline on nonprofit or pro bono organizations as discussed above. See section C.4.a.ii(6), *supra.*

iv. Deadline Removes Immigration Judge Discretion

Comment: Commenters opposed the deadline because they alleged that it removed all immigration judge discretion by requiring judges to deem an application abandoned if a deadline is not met. Commenters stated that if immigration judges did not exercise discretion in considering the unique circumstances in each case, due process would be violated. Commenters explained that such discretion was necessary for immigration judges to manage their dockets, given that immigration judges were best suited to set filing deadlines. Commenters also contended that the rule allegedly did not allow for an immigration judge to further extend a filing deadline beyond the initial extension for good cause.

Response: Again, commenters misapprehend the rule, existing regulations, and the Department's administrative interests. Current regulations, 8 CFR 1003.31(c), already provide that the ''Immigration Judge may set and extend time limits for the filing of applications and related documents and responses thereto, if any,'' and that ''[i]f an application or document is not filed within the time set by the Immigration Judge, the opportunity to file that application or document shall be deemed waived.'' The rule does not change this longstanding principle, and many commenters failed to acknowledge that immigration judges already have well-established authority to set filing deadlines and are already authorized to find applications abandoned for failing to comply with such deadlines.

Instead, the rule acknowledges the inefficiency of the current case-by-case system in which immigration judges may set varying filing deadlines for similarly-situated cases. Such a situation is ripe for rulemaking. *See Lopez* v. *Davis,* 531 U.S. 230, 244 (2001) (observing that ''a single rulemaking proceeding'' may allow an agency to more ''fairly and efficiently'' address an issue than would ''case-by-case decisionmaking'' (quotation marks omitted)); *Marin-Rodriguez* v. *Holder,* 612 F.3d 591, 593 (7th Cir. 2010) (''An agency may exercise discretion categorically, by regulation, and is not limited to making discretionary decisions one case at a time under open-ended standards.''). The Department is appropriately using rulemaking to provide guidance in order to streamline determinations consistent with its statutory authority. Although the Department acknowledges that the rule may proscribe immigration judge discretion to a degree, the rule's promotion of consistency, clear deadlines, and continued expeditious treatment of asylum claims, especially meritorious asylum claims, by detained aliens far outweigh its limitation on immigration judge discretion. *See Heckler* v. *Campbell,* 461 U.S. 458, 467 (1983) (''The Court has recognized that even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration . . . A contrary holding would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding.'' (internal citations omitted)); *see also Lopez,* 531 U.S. at 243–44 (''[E]ven if a statutory scheme requires individualized determinations, which this scheme does not, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority. The approach pressed by Lopez—case-by-case decision-making in thousands of cases each year—could invite favoritism, disunity, and inconsistency.'' (internal citations omitted)).

In addition, immigration judges are appointed by the Attorney General and act as his delegates in cases that come before them. 8 CFR 1003.10(a). They exercise delegated authority in accordance with the Act and from the Attorney General by way of regulations. 8 CFR 1003.10(b); *see also* INA 103(g)(2), 8 U.S.C. 1103(g)(2). As generally explained by the Supreme Court, ''[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.'' *Chevron,* 467 U.S. at 843–44 (1984). This section of the rule was promulgated in light of the Act's silence on a timeframe for filing applications in asylum-and-withholding-only proceedings. Regardless of whether immigration judges previously had discretion under the regulations to set deadlines, this rule amends the regulations to establish in asylum-and-withholding-only proceedings a 15-day deadline from the date of the alien's first hearing to file an application. EOIR acknowledges this is a change from the previous regulation; however, agencies are ''free to change their existing policies'' if they provide a reasoned explanation for the change. *Encino Motor Cars, LLC* v. *Navarro,* 136 S. Ct. 2117, 2125 (2016) (citing *Nat'l Cable & Telecomm. Ass'n.* v. *Brand X internet Services,* 545 U.S. 967, 981–982 (2005)). That explanation was provided in the proposed rule, 85 FR at 59693–94, and is reiterated throughout this final rule. Generally, the Department established a 15-day deadline, subject to an extension for good cause, in order to reduce the risk of degradation or loss of evidence, reduce the risk of delayed grants of protection or relief for meritorious claims, accomplish the regulatory directive that detained aliens receive ''expedited consideration'' of their applications, and reduce inefficiencies caused by delayed filings. *See id.*

Accordingly, consistent with applicable law and existing regulations, the rule removes individual immigration judge discretion only as it applies to the initial deadline for filing an application for asylum and withholding of removal. *See* 85 FR at 59694. It does not preclude immigration judges from managing their dockets. In fact, the rule expressly provides discretion to immigration judges to extend the filing deadline for good cause shown, 8 CFR 1208.4(d)(1), and the rule does not affect immigration judges' discretion to allow an alien to amend or supplement the application later in the proceedings, 8 CFR 1208.4(c).

This does not violate due process. Due process in immigration proceedings requires notice and a meaningful opportunity to be heard, neither of which are affected by this rule. *See LaChance,* 522 U.S. at 266 (''The core of due process is the right to notice and a meaningful opportunity to be heard.''). Aliens in asylum-and-withholding-only proceedings will continue to be provided notice of removability, 8 CFR 235.6, 1003.13 (defining ''charging document'' used by DHS to initiate immigration proceedings before an immigration judge); have an opportunity to present the case to an immigration judge, INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii), and 8 CFR 1208.2(c); and have an opportunity to appeal, 8 CFR 1003.1(b)(9).

Without an initial filing deadline, aliens have no established timeframe in which to expect consideration of their applications for relief or protection. The Department is unaware of any reason why an alien with a valid claim for asylum would oppose a clear, defined filing deadline, especially one that expeditiously allows the alien to obtain the benefit he or she seeks (including release from detention), in favor of uncircumscribed discretion that could delay consideration of the alien's claims.[35] In addition, without an initial filing deadline, proceedings may be delayed, resulting in degradation or loss of evidence that is oftentimes crucial to an alien's claims. The Department is similarly unaware of why an alien would oppose a deadline that facilitates expeditious presentation of oftentimes time-sensitive evidence that may be

[35] The Department recognizes and agrees with the Supreme Court's observation that ''as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.'' *Doherty,* 502 U.S. at 323. Thus, it is aware that aliens without valid claims may likely prefer substantial delays in the adjudications of their cases and, accordingly, oppose any efforts to increase the efficiency of such adjudications. Nevertheless, the Department finds any rationale for encouraging or supporting the dilatory adjudication of cases both inherently unpersuasive and wholly outweighed by the importance of timeliness and fairness—especially to detained aliens with meritorious claims—in adjudicating asylum applications.

crucial to the outcome of the alien's case.

Finally, commenters misinterpret the rule in regard to the extension provision. There is no limitation to a single good-cause extension. The only requirement for the extension would be that the alien must demonstrate good cause for any extension. *Cf. Matter of L–A–B–R–,* 27 I&N Dec. at 405 (providing non-exhaustive factors for consideration when determining whether or not a party has demonstrated good cause for a continuance).

v. Deadline Raises Efficiency Concerns

(1) Agency Incorrectly Prioritizes Efficiency Above All Else

Comment: Commenters alleged that the deadline improperly prioritizes efficiency over all other concerns and factors.

Response: Commenters are correct that this section of the rule relates to efficiency. *See* 85 FR at 59694 (''[T]he deadline would ensure only that the application is filed in a timely manner consistent with the streamlined and focused nature of asylum-and-withholding-only proceedings.''). However, commenters are incorrect that the Department considered only efficiency to the exclusion of all other factors. As discussed throughout this rule, the Department considered, *inter alia,* that most aliens subject to the rule are detained, that aliens with meritorious claims have a strong incentive to obtain relief—and release from detention—as quickly as possible, that aliens who have recently claimed a fear of persecution or torture will be well-situated to perfect that claim quickly through the filing of an asylum application, that most asylum applicants have representation, that filing deadlines are a well-established part of immigration court practice and are utilized by courts at all levels, that an even shorter filing deadline has existed for many years for a particular class of asylum applicants with no noted challenges or complaints, that delays in adjudication may risk evidence degradation and may make it more difficult to obtain pro bono representation, that the deadline is not absolute because it may be extended in appropriate circumstances, and that the rule does not alter longstanding rules and practices allowing aliens to supplement an application and to seek to have an immigration consider late-filed evidence. The Department has also fully considered the issues raised by commenters and finds them largely unavailing for the reasons given. Moreover, even if the comments were more founded or persuasive, the Department nevertheless believes that the concerns asserted by most commenters are outweighed by the benefits provided by the rule, namely consistency in setting filing deadlines, better effectuation of the regulatory directive to provided expeditious consideration to adjudicating asylum applications of detained aliens, faster resolution of meritorious claims, and better protection against claims going stale due to delay.

In drafting the rule, the Department considered that the particular aliens affected—those in asylum-and-withholding-only proceedings—are (1) already subject to removal orders, denied applications for admission, or, for crewmembers, denied permission to land; (2) generally detained; and (3) solely limited to claims for asylum and withholding of removal, which are presented at the outset of the proceeding. *See* 85 FR at 59694. Given the unique position of these aliens, the Department concluded there was ''no reason not to expect the alien to be prepared to state his or her claim as quickly as possible,'' thereby enabling timely provision of relief or protection for meritorious claims. *Id.* The rule also noted that delaying proceedings risked degradation or loss of evidence, which could affect adjudication of the claim(s).

To be sure, the realities of the pending caseload and the continued increase in new cases filed by DHS in immigration court should not be underestimated. *See* EOIR, *Adjudication Statistics: New Cases and Total Completions—Historical* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1139176/download; see also* EOIR, *Adjudication Statistics: Pending Cases, New Cases, and Total Completions* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1242166/download.* Further, the regulation at 8 CFR 1208.5(a) provides that detained aliens should receive ''expedited consideration.'' Consistent with those observations, this deadline appropriately eliminates unnecessary delays in what should be a streamlined proceeding.

Nevertheless, although the rule referenced the possibility that, without a deadline, aliens may attempt to delay proceedings, the rule did not exclusively rely on that point in establishing the 15-day deadline. Further, most commenters failed to appreciate the rule's acknowledgment of ''unusual situations'' in which an alien may need additional time to file an application. *Id.* In such situations, despite efficiency concerns, the regulation authorizes the immigration judge to extend the deadline for good cause. 8 CFR 1208.4(d)(1). In short, contrary to commenters' arguably tendentious views, efficiency does not trump due process, and nothing in the rule suggests otherwise.

Comment: As an overarching concern, commenters claimed that the Department is attempting to speed up proceedings, by imposing the 15-day deadline, in the name of efficiency. Commenters alleged such action violates due process because aliens and counsel are deprived of meaningful presentation of their cases.

Response: The Department reiterates its response to similar comments, *supra,* and adds the following further response. Due process in immigration proceedings requires notice and a meaningful opportunity to be heard, neither of which are affected by this rule. *See LaChance,* 522 U.S. at 266 (''The core of due process is the right to notice and a meaningful opportunity to be heard.''). The Department will continue to provide aliens in asylum-and-withholding-only proceedings notice of the charges of removability, 8 CFR 235.6, 1003.13 (defining ''charging document'' used by DHS to initiate immigration proceedings before an immigration judge); an opportunity to present the case to an immigration judge, INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii), and 8 CFR 1208.2(c); and an opportunity to appeal, 8 CFR 1003.1(b)(9). In short, nothing in the rule compromises the provision of notice to an alien or an alien's ability to be heard on any asylum application. To the contrary, the rule provides an alien clearer notice of the relevant filing deadline and seeks to ensure that an alien will have the opportunity to be heard before memories or other evidence fade. *See generally* 85 FR at 59693–94.

Further, nothing in the rule inhibits an alien's ability to meaningfully present his or her case. The alien will, in reality, have more than 15 days to file an asylum application, and the immigration judge does not adjudicate the application at the same time that it is filed. An alien's testimony alone ''may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.'' INA 208(b)(1)(B)(ii), 8 U.S.C. 1158(b)(1)(B)(ii). Thus, particularly for meritorious claims, an alien may not need extensive documentation or preparation to support and present his or her claim because an alien can meet

the relevant burden of proof through credible, persuasive, and specific testimony. In appropriate cases, aliens can also request an extension of the filing deadline and, if necessary, a continuance of any hearing. In short, commenters' allegations that the rule prohibits aliens and representatives from presenting their cases are wholly unfounded.

(2) Deadline Does Not Promote Efficiency

Comment: Commenters stated that the 15-day deadline would incentivize the use of ''placeholder'' applications and boilerplate language, increased filings of motions to amend and supplement, and subsequent piecemeal submission of supplemental evidence. Commenters stated that the Department failed to consider these administrative burdens on both DHS, adjudicators, and court staff. The commenters asserted that allowing at the outset adequate time to submit a well-prepared application, rather than rush an application that consequently needs further paperwork, would benefit the entire immigration system.

Response: As an initial point, commenters did not explain why these allegations are unique to the rule. Many aliens currently file ''placeholder'' applications and boilerplate language, file motions to amend and supplement, and submit supplemental evidence for review piecemeal; thus, immigration judges are already well-accustomed to such scenarios. Commenters' suggestion that the rule will cause more of these actions is speculative at best, but even if it were more well-founded, the Department expects any additional burdens to be minimal because it would represent little change from the adjudicatory status quo and immigration judges are already experienced at handling these actions.

Additionally, commenters again misstate or misapprehend the rule. It does not require all paperwork to be filed by the 15-day deadline—only the application. Because the alien, by definition, will have recently made his or her claim to DHS, the claim should be fresh and ripe for memorialization. In fact, because memories fade over time, it will generally be to the benefit of the alien to memorialize the claim and file the application as soon as possible. Further, commenters simply discount the availability of an extension of the deadline to file the application, 8 CFR 1208.4(d), even though it should obviate concerns about allegedly too-soon filing deadlines. Further, as stated in the proposed rule, the purpose of the initial 15-day deadline was to ''ensure only that the application is filed in a timely manner consistent with the streamlined and focused nature of asylum-and-withholding-only proceedings.'' 85 FR at 59694. The Department promulgates this rule in part to effectuate the regulatory directive of 8 CFR 1208.5(a) to provide these aliens with expedited consideration.

Finally, commenters' suggestions on this point may also implicate ethics or professional responsibility issues. Although placeholder applications with boilerplate language are not uncommon currently, in certain circumstances the filing of such documents may warrant disciplinary sanction. *See* 8 CFR 1003.102(u) (''Repeatedly files notices, motions, briefs, or claims that reflect little or no attention to the specific factual or legal issues applicable to a client's case, but rather rely on boilerplate language indicative of a substantial failure to competently and diligently represent the client'').[36] To the extent that commenters assert that the rule will cause representatives to violate their ethical and professional responsibility obligations, that assertion is not well-taken. The Department expects that all representatives will comport themselves in accordance with relevant ethics and professional responsibility rules, and nothing in the rule excuses engaging in conduct or behavior that may constitute grounds for disciplinary sanctions. *See* 8 CFR 1003.101(a).

Comment: Commenters explained that the vague ''good cause'' standard for extension requests was prone to inconsistent application that would lead to confusion and an increased number of appeals. Commenters stated this result conflicts with the rule's purported efficiency justifications.

Response: The Department appreciates commenters' concerns about the ambiguity of a ''good cause'' standard and the possibility of inconsistent application. For those reasons, among others, the Department recently proposed regulatory clarifications of the definition of ''good cause'' in the context of continuance requests in immigration proceedings. *See* Good Cause for a Continuance in Immigration Proceedings, 85 FR 75925 (Nov. 27, 2020). Although that rulemaking is not final, the Department expects that when it is finalized, it will provide helpful guidance to adjudicators considering questions of ''good cause'' across different situations. Until guidance in that rule is finalized, however, immigration judges will continue to adjudicate requests alleging ''good cause''—including extension requests, which are tantamount to requests for a continuance—as they currently do so.[37]

To the extent that commenters believe an increased number of appeals will result from the rule, such a concern is speculative, ignores the inherently fact-specific and case-by-case nature of asylum adjudications, and tacitly suggests that most asylum claims are unmeritorious necessitating the need for an appeal. Commenters did not support this assertion regarding appeals, and the Department declines to endorse the speculative and unfounded bases for it.

vi. Deadline Deprives Aliens of Right to Counsel[38]

Comment: Commenters alleged that the 15-day deadline, including the extension for good cause, violates an alien's right to counsel at no expense to the government.[39] Commenters alleged

[36] Conduct in violation of 8 CFR 1003.102(u) may implicate other disciplinary grounds as well. For example, 8 CFR 1003.102(j)(1) prohibits engaging in frivolous behavior, which includes a practitioner who ''knows or reasonably should have known that his or her actions lack an arguable basis in law or in fact, or are taken for an improper purpose, such as . . . to cause unnecessary delay.'' Further, 8 CFR 1003.102(o) states that a practitioner may be subject to disciplinary sanctions if he or she ''[f]ails to provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.''

[37] The phrase ''good cause'' currently appears in at least 26 places in the Department's regulations in 8 CFR chapter V. *See, e.g.,* 8 CFR 1003.20(b), 1003.29, 1240.6. As noted, the Department acknowledges that ''good cause'' is not currently defined in the regulations and, thus, may be subject to inconsistent application. Nevertheless, the Department did not propose defining ''good cause'' in the NPRM for this final rule because continuance requests are not limited solely to cases involving asylum applications and, thus, a separate rulemaking on the subject applicable to all cases was more appropriate. *See* 85 FR at 75926–28 (discussing the application of the ''good cause'' standard in multiple contexts, including those unrelated to an asylum application). Accordingly, the Department does not believe that interjecting a new definition in the final rule would be appropriate, particularly because commenters did not supply a workable suggestion for such a definition. Nevertheless, the Department will consider commenters' concerns about the ambiguity of the ''good cause'' standard and the possibility of inconsistent application when it finalizes the separate rule on ''good cause.''

[38] This section focuses specifically on representation by attorneys because commenters' concerns focused specifically on attorneys. However, the Department notes that aliens may also be represented by a wide range of representatives beyond traditional attorneys. *See generally* 8 CFR 1292.1 (providing who may represent aliens in proceedings before EOIR).

[39] In removal proceedings before an immigration judge or the Board aliens ''have the privilege of

that the deadline restricts aliens' access to meaningful representation because 15 days is too short to hire counsel and for such counsel to prepare the application.

Commenters referenced case law that held that denial of a continuance to seek counsel deprives aliens of their rights—*Chlomos* v. *INS,* 516 F.2d 310, 313–14 (3d Cir. 1975) and *Njoroge* v. *Holder,* 753 F.3d 809, 812 (8th Cir. 2014). Commenters stated that those cases are analogous to the 15-day deadline's deprivation of an alien's right to counsel.

Relatedly, commenters alleged that the 15-day deadline would undermine the practice of informing aliens of pro bono services at their master calendar hearings, pursuant to 8 CFR 1240.10(a)(2) and (3), thus defeating the purpose of pro bono organizations' inclusion in the ''List of Pro Bono Legal Service Providers.''

Response: As discussed both above and below in more detail, the rule does not affect an alien's authority or ability to obtain counsel at no expense to the government in proceedings subject to the rule. Accordingly, the Department reiterates its response to similar comments elsewhere in the rule and adds the following further response.

The rule does not limit an alien to 15 days to find counsel. The 15-day deadline applies to the time in which an alien must file an application, absent an extension for good cause, and begins from the date of the first hearing before the immigration judge. The deadline does not establish a time period in which an alien must secure representation, and an alien may secure representation at any time—before, during, or after the alien files an asylum application.

In particular, nothing precludes an alien from hiring counsel before the first hearing, and as noted above, some aliens subject to the rule may have already been in the United States for a considerable amount of time and, thus, have had years to procure counsel. An alien may procure representation at multiple points between the time the alien expresses a fear of return and the commencement of the 15-day period, as the alien receives information that may assist in procuring counsel multiple times before the 15-day period runs, even without an extension of that period.

As an initial point, every alien detained by DHS, including those subject to the rule, is ''notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States.'' 8 CFR 236.1(e). Through that communication, an alien's consulate may assist the alien with obtaining representation, including an ''accredited official'' of the alien's country of nationality. *See* 8 CFR 1292.1(a)(5) (authorizing an accredited official, defined as ''[a]n accredited official, in the United States, of the government to which an alien owes allegiance, if the official appears solely in his official capacity and with the alien's consent,'' to represent an alien in immigration court proceedings).

Although aliens alleging persecution by the government of their country of nationality may not be expected to utilize that same government to obtain representation, other mechanisms also exist to assist aliens with understanding their situation and obtaining representation. For example, DHS detention standards authorize the presentation of information to detained aliens regarding U.S. immigration law and procedures and their rights and options within the U.S. immigration system. *See, e.g., Standard 6.4(I), National Detention Standards* (rev. 2019), *https://www.ice.gov/doclib/detention-standards/2019/6_4.pdf* (''Facilities shall permit authorized persons to make presentations to groups of detainees for the purpose of informing them of U.S. immigration law and procedures, consistent with the security and orderly operation of each facility. ICE/ERO encourages such presentations, which instruct detainees about the immigration system and their rights and options within it.''). Additionally, DHS detention centers typically provide detainees with EOIR's list of pro bono representatives and also provide links to that list publicly. *See, e.g.,* Laredo Detention Center, *Legal & Case Information, Nationwide pro bono representatives listing, https://www.ice.gov/detention-facility/laredo-detention-center.* Thus, aliens may be informed of options and the availability of representation while in DHS custody.

Additionally, for aliens subject to credible fear procedures, following an alien's indication to apply for asylum, expression of fear of persecution or torture, or expression of fear of return to his or her country, the referring officer provides a written disclosure on Form M–444 that describes the alien's ''right to consult with other persons prior to the interview and any review thereof at no expense to the United States Government.'' 8 CFR 235.3(b)(4)(i)(B), 1235.3(b)(4)(i)(B). Next, prior to the credible fear interview, the alien is ''given time to contact and consult with any person or persons of his or her choosing.'' 8 CFR 235.3(b)(4)(ii), 1235.3(b)(4)(ii). Once the asylum officer determines that an alien has a credible fear, the alien is provided Form I–863, Notice of Referral to Immigration Judge, *see* 8 CFR 235.6(a)(2), 1235.6(a)(2), which includes an advisal regarding the alien's right to representation at no expense to the government and an attached copy of EOIR's pro bono list. *Cf.* INA 239(a)(1)(E), 8 U.S.C. 1229(a)(1)(E) (requiring the provision of a list of available pro bono representatives at the time a notice to appear is issued). Moreover, for all cases subject to the rule, DHS provides a copy of the pro bono list as part of the notice to the alien when it issues the Form I–863.

Finally, at the first hearing, the immigration judge also (1) advises the alien that he or she may apply for asylum in the United States or withholding of removal to those countries; (2) makes available the appropriate application forms; (3) advises the alien of the privilege of being represented by counsel at no expense to the government and of the consequences, pursuant to section 208(d)(6) of the Act, of knowingly filing a frivolous application for asylum; and (4) provides to the alien a list of persons who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis. 8 CFR 1240.11(c)(1)(i)–(iii). These procedures are enshrined in current regulations and are not altered by the rule. In other words, existing regulations already suggest that an immigration judge will provide an alien with an asylum application and the pro bono list at the same hearing and, presumably, will also set a deadline for the filing of the application provided. Commenters did not address this existing procedure, did not appear to recognize that the rule does not alter it, except to provide a clear filing deadline subject to an extension, and did not explain why this existing procedure is problematic.[40]

being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.'' INA 292, 8 U.S.C. 1362; *see also* INA 240(b)(4)(A), 8 U.S.C. 1229a(b)(4)(A). Although the proceedings subject to the rule under 8 CFR 1208.2(c)(1) are not removal proceedings, they are generally governed by the same procedural rules as removal proceedings set forth in 8 CFR part 1240, subpart A. 8 CFR 1208.2(c)(3)(i). Thus, they incorporate by reference an alien's privilege of being represented at a hearing conducted under 8 CFR 1208.2(c). *See* 8 CFR 1240.3 (''The respondent may be represented at the hearing by an attorney or other representative qualified under 8 CFR part 1292.'').

[40] Most, if not all, commenters also failed to acknowledge that the INA provides only a minimum 10-day window for an alien to obtain representation before an alien's first hearing in removal proceedings, INA 239(b)(1), (3), 8 U.S.C. 1229(b)(1), (3), and by practice EOIR extends that

Continued

Given the multiple points at which aliens are advised of the availability of consultation or representation prior to the completion of the 15-day deadline and the availability of an extension of that deadline for good cause, the Department rejects commenters' assertions that the rule inhibits or eliminates an alien's meaningful opportunity to obtain representation.[41] Moreover, as noted elsewhere, in practice, aliens have far more time than 15 days to obtain representation. Similarly, the rule does not deprive counsel of time to prepare an alien's claim. Because the government is not required to provide aliens with representation, the alien is responsible for securing or consulting with counsel, and the time afforded counsel is often a function of how diligent an alien is in seeking representation. *See* INA 240(b)(4)(A), 8 U.S.C. 1229a(b)(4)(A); *Cf. Hidalgo-Disla* v. *INS,* 52 F.3d 444 (2d Cir. 1995) (finding an immigration judge's decision to proceed with a hearing after providing an alien 26 days to seek counsel was not erroneous and dismissing as frivolous an appeal asserting that it was); *Ghajar* v. *INS,* 652 F.2d 1347, 1348–49 (9th Cir. 1981) (''Ghajar's assertion that she was denied due process because she was not granted a second continuance to allow her attorney further time to prepare for the deportation hearing is without merit . . . . One full month elapsed between the date of the show cause order and the date on which the hearing ultimately took place . . . . The immigration judge did not abuse his discretion in refusing to grant a second continuance.''). Further, a representative may seek an extension of the deadline to file an application and may seek a continuance of any scheduled hearing. Thus, the rule's 15-day deadline itself does not deprive counsel of adequate time to prepare the application.

To reiterate, the deadline does not affect an immigration judge's ability to grant a continuance for good cause, *see* 8 CFR 1003.39, including one to find counsel.[42] The 15-day deadline applies to the time period in which an alien must file an application, absent an extension for good cause; it does not establish a time period in which an alien must secure counsel and thus does not interfere with an immigration judge's discretion to grant a continuance in that regard. For these reasons, the deadline does not deprive an alien of the opportunity to obtain counsel of his her choosing at no expense to the government.

Likewise, the deadline does not affect the requirement that an immigration judge advise the alien of (1) the right to representation at no expense to the government, and (2) the availability of pro bono legal services and whether the alien received a list of such pro bono legal service provider, *see* 8 CFR 1240.10(a)(1) and (2), at the first hearing, nor does it affect the requirement of the immigration judge to provide certain advisals to aliens with an intent to apply for asylum, including the provision of an asylum application and a copy of the pro bono list, 8 CFR 1240.11(c)(1). In fact, the rule makes it explicit that immigration judges must follow those procedures in proceedings conducted under 8 CFR 1208.2(c)(1) and (2). 8 CFR 1208.4(d).

vii. Deadline Is Biased in Favor of the Government

Comment: Commenters explained that, under recently enacted rules, the government could ''file evidence without it being contested,'' thereby increasing bias toward the government in these proceedings.

Response: In response to commenters' specific concerns with evidence filed by the government, that concern relates to a separate rulemaking and is thus outside the scope of this final rule.

In regard to a general concern of bias towards the government, which the Department understands comments to have implicitly referenced, the Department disagrees that the deadline disfavors aliens or shows bias in favor of the government. The deadline is intended to effectuate efficient processing, consistent with the regulatory directive that applications of detained aliens be given ''expedited consideration'' where possible, 8 CFR 1208.5(a), and is fully consistent with longstanding authority to set deadlines in immigration proceedings, 8 CFR 1003.31(c). Efficient processing benefits both the government and aliens, especially aliens who have meritorious claims.[43] Given the pending caseload and the recent uptick in proceedings initiated by DHS,[44] the government has an interest in timely adjudications, consistent with applicable law and regulations, so that it may continue to accomplish its mission of fairly, expeditiously, and uniformly interpreting and administering the nation's immigration laws. Likewise, detained aliens should want their claims considered in a timely fashion in order to receive relief or protection and subsequent release from detention as quickly as possible.

Finally, as discussed *supra,* the Department rejects any insinuation that its adjudicators are biased or that it is

period to asylum-and-withholding-only proceedings. Thus, an alien will have the statutorily-required minimum amount of time to obtain counsel, and the rule does not alter that procedure.

[41] Despite the availability of the option for representation at no expense to the government in proceedings subject to this rule, 8 CFR 1240.3, and the fact that the overwhelming majority of aliens seeking asylum obtain representation, the Department recognizes that a certain small percentage of aliens do not obtain representation. The Department understands that some aliens do not secure representation because they do not wish to pay the fee charged by a potential representative. The Department also understands that many representatives, due to ethical or professional responsibility obligations, will not take cases of aliens who are ineligible or present weak claims for relief or protection from removal because they do not wish to charge money for representation when representation is unlikely to affect the outcome of the proceeding. These situations illustrate only that some aliens may not ultimately secure representation for reasons common to issues of representation in all civil cases—*i.e.,* the cost of the representation and the strength of the case—not that aliens are limited or prohibited from obtaining representation by this or any other Department regulation. *See United States* v. *Torres-Sanchez,* 68 F.3d 227, 231 (8th Cir. 1995) (''Although Torres-Sanchez expressed some frustration over his attempt to obtain counsel, that frustration, in our view of the record, stemmed from his realization that he faced the inevitable consequence of deportation, not from a lack of opportunity to retain counsel. In any event, the mere inability to obtain counsel does not constitute a violation of due process.''). As the Department is not involved in discussions between respondents and potential representatives, it cannot definitively state every reason that an alien who seeks representation may not obtain it. Nevertheless, it can state that this rule does not limit or restrict any alien's ability to obtain representation in immigration proceedings.

[42] The Department recognizes that aliens should receive a fair opportunity to secure counsel. *Matter of C–B–,* 25 I&N Dec. 888 (BIA 2015). The Board has not specifically defined what a reasonable amount of time is for purposes of obtaining representation, and the respondent in *Matter of C–B–* was given only eight days between the issuance of an NTA and his first hearing, in apparent contravention of INA 239(b)(1), 8 U.S.C. 1229(b)(1). *See id.* at 889. Nevertheless, *Matter of C–B–* cannot be interpreted to contradict the INA, and the INA clearly indicates that 10 days between the service of a notice to appear and the first hearing is a sufficient amount of time to obtain representation. *See* INA 239(b)(3), 8 U.S.C. 1229(b)(3). Accordingly, this rule is not in tension with *Matter of C–B–* and does not deviate from recognizing the statutory parameters for providing time for an alien to obtain representation.

[43] To the extent commenters suggest that the rule disadvantages aliens without meritorious claims by making it more difficult for such aliens to delay their removal from the United States, the Department finds such a suggestion unavailing. Overall, the Department finds any rationale for encouraging or supporting the dilatory adjudication of cases, especially cases lacking merit, both inherently unpersuasive and wholly outweighed by the importance of timeliness and fairness—especially to detained aliens with meritorious claims—in adjudicating asylum applications.

[44] *See* EOIR, *Adjudication Statistics: New Cases and Total Completions—Historical* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1139176/download; see also* EOIR, *Adjudication Statistics: Pending Cases, New Cases, and Total Completions* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1242166/download.*

engaging in this rulemaking for biased reasons against either party in immigration proceedings. Generalized, ad hominem allegations of bias or impropriety are insufficient to ''overcome a presumption of honesty and integrity in those serving as adjudicators.'' *Withrow,* 421 U.S. at 47. Accordingly, the Department declines to accept commenters' unfounded suggestions of bias. *Chem. Found., Inc.,* 272 U.S. at 14–15 (''The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'').

viii. Conflicts With the INA

Comment: Commenters argued that the 15-day filing deadline conflicts with the INA for multiple reasons. For example, many commenters argued that the 15-day filing deadline conflicts with the statutory one-year bar for asylum applications. INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B). Commenters further argued that applying the 15-day filing deadline to aliens' applications for withholding of removal and protection under the CAT conflicts with the Act because Congress did not include any similar filing deadline requirement for those applications. *See generally* INA 241(b)(3), 8 U.S.C. 1231(b)(3).

Response: As an initial point, most, if not all, commenters on this issue failed to recognize or address (1) the existence of the 10-day filing deadline in 8 CFR 1208.5(b) with no noted challenges to its alleged inconsistency with the INA; (2) the longstanding ability of Department adjudicators, under 8 CFR 1003.31(c) and *Matter of R–R–,* 20 I&N Dec. 547, 549 (BIA 1992) (''The Board has long held that applications for benefits under the Act are properly denied as abandoned when the alien fails to timely file them.''), to set filing deadlines, including for asylum applications within one year of an alien's arrival in the United States; (3) the affirmation of the enforcement of such deadlines by the Board and by Federal courts, including for deadlines set well within one year of arrival, *see, e.g., Matter of R–C–R–,* 28 I&N Dec. 74, 75–77 (BIA 2020) (affirming a decision finding an alien's opportunity to file for asylum abandoned for an alien who entered the United States on March 13, 2019, and failed to file an asylum application by the deadline set by the immigration judge of December 6, 2019); *Jie Zhu* v. *U.S. Att'y Gen.,* 648 F. App'x 957, 960–62 (11th Cir. 2016) (affirming a decision finding an alien's opportunity to file for asylum abandoned for an alien who entered the United States on June 8, 2014, and failed to file an asylum application by the deadline set by the immigration judge of September 3, 2014); *Rageevan* v. *U.S. Att'y Gen.,* 151 F. App'x 751, 753–56 (11th Cir. 2005) (affirming a decision finding an alien's opportunity to file for asylum abandoned for an alien who arrived in the United States on January 18, 2004, and failed to file a complete asylum application by the deadline set by the immigration judge of May 7, 2004); *cf. Alsamhouri* v. *Gonzales,* 484 F.3d 117, 123 (1st Cir. 2007) (''The IJ was then well within his discretion to find that, as against [the alien's] disregard of a known deadline, the government's strong interest in the orderly and expeditious management of immigration cases justified the denial of a continuance.''); (4) Federal case law holding that a filing deadline can be applied to an application for withholding of removal under the INA and for protection under the CAT, *see, e.g., Taggar* v. *Holder,* 736 F.3d 886, 889–90 (9th Cir. 2013) (''Taggar separately argues that no deadline can lawfully be imposed on applications for relief under the Convention Against Torture. This is incorrect.''); *Lakhavani* v. *Mukasey,* 255 F. App'x 819, 822–23 (5th Cir. 2007) (''Other circuits have held that petitioners can waive CAT or asylum claims by failing to raise them at the time designated by the IJ under 8 CFR 1003.31. The IJ gave Lakhavani the opportunity to file an application for withholding at his April 2002 hearing, and he failed to do so. The BIA correctly affirmed the IJ's decision denying Lakhavani leave to file an untimely application for withholding of removal.'' (internal citations omitted)); *cf. Foroglou* v. *Reno,* 241 F.3d 111, 113 (1st Cir. 2001) (''On review, Foroglou's main argument is that the Board's time limit on petitions to reopen is itself invalid because it would result in denying relief to deportees who might then suffer torture, contrary to the [CAT] and to the policies embodied in federal legislation and regulations that implement the [CAT] or otherwise protect the rights of aliens. The short answer to this argument is that Foroglou points to nothing in the [CAT] or legislation that precludes the United States from setting reasonable time limits on the assertion of claims under the [CAT] in connection with an ongoing proceeding or an already effective order of deportation. Even in criminal cases, constitutional and other rights must be asserted in a timely fashion.''); and, (5) the logical and legal ramifications of the position that an immigration judge must wait in every case of an alien who has been in the United States less than one year—and regardless of whether the alien is detained—until one year has elapsed from the time of an alien's arrival in the United States before proceeding with the case to ensure that an alien is provided one year in which to file for asylum. To the extent that commenters' concerns on this point failed to address relevant law or to engage with the implications of their position, especially for detained aliens, the Department finds them unavailing.

Under what is commonly referred to as the ''one-year bar,'' an alien seeking asylum must generally file his or her application within one year of arrival in the United States. INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B) (providing that an alien may not apply for asylum ''unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States''); *see also* 8 CFR 1208.4(a)(2). An alien may be excepted from the one-year requirement due to ''changed circumstances [that] materially affect the applicant's eligibility for asylum or extraordinary circumstances related to the delay in filing an application within'' the one-year period. INA 208(a)(2)(D), 8 U.S.C 1158(a)(2)(D); *see also* 8 CFR 1208.4(a)(4) and (5).

The ability of immigration judges to set and enforce filing deadlines for applications does not conflict with the statutory one-year bar. Immigration judges have long maintained the authority to set and enforce time limits on the filing of applications for asylum and withholding of removal in the proceedings before them. *See Matter of Jean,* 17 I&N Dec. 100, 102 (BIA 1979) (explaining that ''it is well within the authority of the immigration judge . . . to set reasonable time limits for the filing of written applications for asylum'') Similarly, immigration judges have long maintain the authority to set and enforce time limits on the filing of applications for protection under the CAT. *Taggar,* 736 F.3d 890 (holding that immigration judges can set and enforce deadlines for the filing of CAT applications). This authority reflects ''the government's strong interest in the orderly and expeditious management of immigration cases.'' *Gomez-Medina* v. *Holder,* 687 F.3d 33, 37 (1st Cir. 2012). Although Congress enacted a maximum outer limit of one year from arrival for aliens to apply for asylum in INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B),

nothing in that provision [45] or the INA precludes immigration judges from setting a specific deadline for the filing of an asylum application in immigration proceedings in order to promote the ''orderly and expeditious management of immigration cases.'' *Gomez-Medina,* 687 F.3d at 37.

Moreover, if the Department accepted commenters' logic, aliens in removal proceedings would, for example, be able to delay their proceedings for up to a year by simply stating that they intend to file an asylum application by some future date. *See Matter of Jean,* 17 I&N Dec. at 102 (''To allow otherwise would permit a deportable alien to avoid the conclusion of his deportation case and thus his departure by merely requesting the relief but not choosing to file the claims.''). This is an erroneous reading of the statute and regulations and would eviscerate immigration judges' ability to manage proceedings. *See, e.g.,* 8 CFR 1240.1(c) (providing immigration judges the ability to ''regulate the course of the hearing'').

Commenters' reading of INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B) would also raise additional issues, including potential constitutional issues related to prolonged detention. For example, under the commenters' view, a detained alien, such as one covered by the rule, could continue to delay his or her proceedings up to a year after arrival without filing for asylum while simultaneously raising arguments that he or she should be released from custody because the prolonged detention has implicated constitutional rights. *See, e.g., Velasco Lopez* v. *Decker,* 978 F.3d 842, 852 (2d Cir. 2020) (''Detention under [INA 236(a),] § 1226(a) is frequently prolonged because it continues until all proceedings and appeals are concluded. . . . The longer the duration of incarceration, the greater the deprivation.''). Nothing in INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B), however, contemplates its use as a basis for either prolonging immigration proceedings or as a wedge to obtain an alien's release from detention, especially in situations where Congress has otherwise indicated that proceedings should be expedited. *Cf. Matter of L–N–Y,* 27 I&N Dec. 755, 759 (BIA 2020) (''The Immigration Courts and the Board expedite the adjudication of cases involving detained aliens, recognizing the liberty interest of detained aliens and the interest of the Government to reasonably limit the expense of detention.''). Additionally, if commenters were correct that INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B) provides an alien with an absolute right to file for asylum at any time within one year after arrival in the United States, then, by that same logic, the lack of a filing deadline prior to the enactment of that provision meant that previously aliens had an absolute right to apply for asylum at any time after arrival. However, the Department is unaware of any court adopting such a position, nor is it aware of any court adopting the view urged by commenters regarding the relationship between INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B) and the 15-day deadline in the rule. In short, although the Department acknowledges and has fully considered commenters' assertions on this point, it finds them unavailing and unpersuasive for all of the reasons given herein.

ix. Recommendations

Comment: Many commenters provided a wide range of recommendations to the Department.

For example, commenters suggested that if EOIR imposed this short deadline, then government should provide aliens with attorneys and translators to ensure that they can meet the deadline. Some commenters acknowledged the Department's concern regarding degradation or loss of evidence, but they suggested a deadline longer than 15 days to balance evidence-related concerns with concerns that aliens need adequate time to gather evidence.

Commenters suggested that the Department should include an exception to the filing deadline for pandemic-related delays, such as filing delays due to COVID–19.

Commenters asserted that aliens should be granted a ''per se extension'' whenever due process rights are threatened, such as the right to counsel, to ensure those rights are not violated. For example, the commenters explained that an alien who seeks to retain counsel should get an automatic extension on the 15-day deadline to find representation who can assist with the application. The commenters predicted that the exceptions would render the rule unworkable.

One commenter, who generally supported the Department's inclusion of the 15-day submission deadline, recommended that the Department provide the same 15-day deadline for aliens in ''withholding-only'' proceedings under 8 CFR 1208.2(c)(2).

Response: The Department acknowledges and appreciates the commenters' recommendations. It has considered all of them and adopted one as discussed below. Some recommendations are beyond the scope of this rulemaking and potentially beyond the scope of rulemaking altogether. For example, the Department cannot simply provide aliens a right to counsel or to personal translators in all immigration cases by regulation due to the significant amount of Congressional appropriations—far in excess of EOIR's current budget—that would be required to effectuate such a rule. Further, as such a proposal was not part of the NPRM—and implicates a potentially massive overhaul of immigration court procedures—it would not be appropriate to include it in a final rule without additional comment and study.

Regarding recommendations related to exceptions to the deadline, the Department believes that the rule's allowance of an extension of that deadline for good cause addresses and responds to those recommendations, as well as the continued availability of continuances in appropriate cases, which is not affected by the rule. The Department recognizes that no rule can cover every potential scenario, particularly in the context of hundreds of thousands of cases with asylum applications. Consequently, it declines to establish any per se rules about

[45] Congress enacted the one-year bar in INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B) against the backdrop of longstanding Department regulations and practice finding asylum applications to be abandoned if they were not filed by a deadline specified by an immigration judge, *e.g., Matter of R–R–,* 20 I&N Dec. at 549 (''The Board has long held that applications for benefits under the Act are properly denied as abandoned when the alien fails to timely file them.''), and it could have easily phrased it in the affirmative to state that an alien shall be afforded one year from the date of arrival in order to apply for asylum, rather than by framing it in the negative as an outer deadline, INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B) (''paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States''). In other words, the statutory phrasing indicates that an alien has, at most, one year after arrival to apply for asylum—not at least one year, as urged by commenters. Moreover, Congress's phrasing against the backdrop of longstanding agency practice is additional evidence that the language in in INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B) was not intended to displace the Department's ability to set filing deadlines in immigration proceedings for asylum applications. *Cf. NLRB* v. *Bell Aerospace Co. Div. of Textron, Inc.,* 416 U.S. 267, 275 (1974) (''[C]ongressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress''). Indeed, as discussed, *infra,* if commenters were correct, then the Department's practice of setting filing deadlines prior to the enactment of INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B) was arguably inappropriate because the INA provided no deadline for an alien to apply for asylum and, thus—according to the commenters' logic—immigration judges could never have set a deadline consistent with the statute. However, there is no evidence, either before or after the enactment of INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B) that Congress intended to displace an immigration judge's authority to set filing deadlines in order to manage dockets efficiently.

whether an extension or a continuance is warranted and expects that immigration judges will adjudicate such requests consistent with applicable law and mindful of an alien's detention status and the direction in 8 CFR 1208.5(a) to adjudicate such cases expeditiously.

The Department agrees with the commenter who recommended applying the 15-day deadline to applications for statutory withholding of removal and protection under the CAT for aliens in proceedings under 8 CFR 1208.2(c)(2). The Department sees no reason to distinguish between aliens subject to proceedings under 8 CFR 1208.2(c)(1) and those subject to proceedings under 8 CFR 1208.2(c)(2), as both groups are generally detained. Moreover, the reasons underpinning the application deadline for 8 CFR 1208.2(c)(1)—*e.g.,* most aliens subject to the rule are detained, that aliens with meritorious claims have a strong incentive to obtain relief or protection—and potentially release from detention—as quickly as possible, that aliens who have recently claimed a fear of persecution or torture will be well-situated to perfect that claim quickly through the filing of an application, that filing deadlines are a well-established part of immigration court practice and are utilized by courts at all levels, that an even shorter filing deadline has existed for many years for a particular class of asylum applicants with no noted challenges or complaints, that delays in adjudication may risk evidence degradation and may make it more difficult to obtain pro bono representation, that the deadline is not absolute because it may be extended in appropriate circumstances, and that the rule does not alter longstanding rules and practices allowing aliens to supplement an application and to seek to have an immigration consider late-filed evidence—apply with equal force to proceedings under 8 CFR 1208.2(c)(2). Accordingly, in response to the recommendation of at least one commenter, the final rule adopts the commenter's suggestion and edits the language in 8 CFR 1208.4(d)(1) to make the 15-day deadline, with the possibility of an extension for good cause, applicable to aliens in proceedings under 8 CFR 1208.2(c)(2) seeking statutory withholding of removal or protection under the CAT.

b. Concerns With Changes Regarding Refiling Incomplete Applications

i. Completeness Requirement

Comment: Commenters expressed concerns about requiring the immigration court to reject applications that are incomplete or that have other minor mistakes without providing any exceptions. Commenters explained that this provision would result in applications being rejected for technicalities or due to minor instances of confusion, citing, for example, hypotheticals of the immigration court denying the application of an asylum seeker without a middle name or children because the corresponding name and children boxes were purposefully left blank.

Commenters asserted that the rule was unnecessary and complained that the Department did not address why the change was necessary—specifically, why applicants could no longer complete their applications before the court during a hearing.

Commenters also stated that it will be difficult, if not impossible, for some applicants to submit a complete application due to a lack of command of the English language, a lack of access to supporting evidence, and the effects of trauma. Other commenters noted that the structure of the form itself increases this difficulty because of the number of questions and blank boxes; the formatting of multiple boxes or lines per questions; and a lack of clarity regarding how to address a question that does not apply based on answering ''no'' to the immediately preceding question. Commenters noted that their concerns may be even greater in the future if DHS moves forward with codifying proposed amendments to the Form I–589, *Instructions,* which would add to the form's length and general complexity.

Other commenters suggested that inaccuracies and mistakes will be inevitable for aliens subject to the filing deadline imposed by the rule.

Numerous commenters compared the rule's requirement to what commenters described as USCIS's policy of rejecting applications that fail to follow form instructions, namely answering every question. Commenters explained that the USCIS policy has led to confusion and inconsistencies, and commenters predicted that the rule will create similar issues before the immigration courts.

Lastly, commenters expressed concerns that the rule removes the completeness determination from immigration judges and places it on untrained agency staff; such a shift, commenters alleged, is inefficient and will further strain an already overburdened system.

Response: As an initial mater, commenters misconstrue the changes implemented by this rule or fail to acknowledge what the rule does not actually change. For instance, it does not create a new completeness requirement for the submission of Forms I–589. Indeed, this requirement already exists in the relevant regulations. *See* 8 CFR 1208.3(c)(3) (''An asylum application that does not include a response to each of the questions contained in the Form I–589, is unsigned, or is unaccompanied by the required materials specified in paragraph (a) of this section is incomplete.''); *see also* Form I–589 Instructions, Pt. 1, Sec. V. (''You must provide the specific information requested about you and your family and *answer all the questions asked.* If any question does not apply to you or you do not know the information requested, answer ''none,'' ''not applicable,'' or ''unknown.'') (emphasis in original). This rule merely clarifies this existing standard by including the necessity to follow the Form I–589 instructions and other filing-related regulations.

In response to commenters who requested an explanation for why applicants would no longer be allowed to supply missing information during a hearing before an immigration judge, the Department notes that such a process does not comply with these existing regulations.[46] By ensuring that applications are complete at filing, the parties and court can be confident that they are proceeding with an adjudication on the full application and, as noted in the proposed rule, that the application is completed as timely as possible. Further, requiring a complete application protects the alien by ensuring that there are no incorrect assumptions regarding the facts of an alien's claim or personal status as set out in the application.[47] Moreover, allowing applicants to complete applications in court is inefficient and uses valuable court time that is better spent adjudicating issues in dispute. *See* 8 CFR 1240.11(c)(3) (requiring a hearing

[46] To the extent that immigration courts may have previously failed to follow the existing regulations, the Department reiterates that its employees are expected to follow all applicable regulations.

[47] The Department further notes that the recently-finalized joint rule, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, signed by the Attorney General and the Acting Secretary of Homeland Security on December 2, 2020, codifies an immigration judge's authority to pretermit asylum applications that fail to present a *prima facie* claim for relief. *See* 85 FR at 36277. Even if that codification does not go into effect, immigration judges nevertheless possess authority to pretermit legally deficient asylum applications in certain instances. *Id.* Thus, this rule would ensure that aliens are afforded all opportunities to correct deficiencies in their applications in order to ensure that their claim for relief is fully presented before an immigration judge would consider any questions of pretermission.

on an asylum application only when necessary ''to resolve factual issues in dispute''). As noted in the proposed rule, however, aliens may continue to supplement or amend a previously filed asylum application after the application is filed, subject to an immigration judge's discretion. *See* 8 CFR 1208.4(c).

The Department also disagrees with concerns regarding agency staff making completeness determinations rather than adjudicators and categorically rejects the ugly, underlying insinuation that its legal support employees are too ignorant or incompetent to determine whether an application is complete. By requiring all questions to be answered, there is no room for discretion as to what responses are necessary; thus, all applicants are subject to the same requirements. Similarly, commenters did not explain why the acceptance of an incomplete application would be either desirable or efficient, and the Department is aware of no bases for doing so. The completeness requirement provides a clear, logical, and straightforward guidepost and one that most individuals understand. Moreover, a completeness requirement has existed in the regulations for many years with no noted difficulties; to the contrary, asylum applications have risen significantly in recent years, even with the requirement that the application be complete. *See, e.g.,* EOIR, *Adjudication Statistics: Total Asylum Applications* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1106366/download.* Immigration court staff receive training on reviewing filings for sufficiency and regularly reject deficient filings as part of their duties.

Regarding commenters' concerns about the grammatical structure of the Form I–589's questions, the amount of questions, or the English language requirement, the Department notes that this rule does not make any changes to the Form I–589 itself. Further, to the extent that commenters' suggest that the Department should amend the Form I–589 to address such concerns, the Department notes that although the Form I–589 is a shared form between EOIR and DHS, it is managed and updated by DHS. Accordingly, altering the form is beyond the scope of this rulemaking and the Department's authority, and commenters' concerns about the form itself are most appropriately directed to DHS.

Similarly, commenters' concerns about USCIS are beyond the scope of this rulemaking, as USCIS is a separate agency beyond the purview of the Department. Further, the Department reiterates that the completeness requirement is not novel; rather, it has been an existing requirement for many years, and the Department is unaware of any issues, challenges, or complaints regarding it previously. Thus, commenters' suggestion that an existing regulation will lead to future confusion at EOIR is purely speculative and unpersuasive.

Regarding concerns about applicants' past trauma and limited access to evidence, and its effect on applicants' ability to complete their applications, the Department reiterates that the completeness requirement has existed for many years and that allegations of trauma or access to evidence have not previously been alleged to be such a pervasive or systemic issue as to warrant an exception to the general rule that applications should be filled out completely. The Department certainly recognizes the potential existence of trauma for aliens with meritorious claims and associated difficulties, but this rule, overall, helps ensure that such aliens receive expeditious consideration of their claims and favorable adjudications so that they can obtain the relief they deserve without any undue delay. Moreover, at a minimum, every applicant must present his or her case for adjudication, which requires filing an application in accordance with the regulations and form instructions. This includes responding to every question on the Form I–589 and submitting any supporting evidence.

The Department rejects the notion that the completeness requirement is unnecessarily complicated or confusing, and it is unaware of any situation—and commenters did not provide one—in which an incomplete application is deemed acceptable or even desirable. Rather, the Department believes that incomplete applications may cause confusion and that such confusion will be eliminated by requiring applications to be fully completed before they are filed and accepted for adjudication. The Department believes requiring completion of the Form I–589 will avoid potentially differing interpretations from immigration staff as to what is ''complete'' and will prevent the possibility of uneven filing acceptance practices at the immigration courts. In addition, by following this requirement, applicants can ensure that they did not inadvertently fail to complete any fields and can be confident that the immigration judge is adjudicating a complete asylum application.

Lastly, commenters' assertions that incomplete applications will be rejected and result in a denial of relief are incorrect. The return of an incomplete application is not an adjudication on the merits and does not automatically result in an immediate ''denial'' of relief. Rather, incomplete applications will be returned to the applicants, who will have 30 days to complete and return the application. This is discussed in more detail in section II.C.4.b.iii.

ii. Removal of Deadline for Immigration Court

Comment: Many commenters objected to the proposed amendment at 8 CFR 1208.3(c)(3) that an alien's incomplete asylum application would not be deemed complete if the immigration court failed to return the incomplete application within 30 days. Instead, the immigration courts would continue to reject incomplete applications in a ''timely'' manner but without a maximum allowable period of time.

Commenters objected that the rule would give the immigration courts an indeterminate amount of time to reject asylum applications for incompleteness. Commenters raised concerns that the lack of a deadline would make proceedings less predictable and make it more difficult for asylum seekers to appropriately budget their savings before being able to possibly obtain work authorization.

Other commenters argued that the removal of the deadline for the immigration courts is contrary to the Department's justifications elsewhere in the rule to ensure that proceedings occur in a timely and predictable manner and noted that shortening the 30-day time period for the rejection of applications, rather than removing the deadline altogether, would instead be more efficient. Other commenters argued that the Department did not sufficiently justify this provision in general.

Further, commenters stated that the rule's requirement that immigration courts return incomplete asylum applications to applicants in a ''timely fashion'' to be vague and arbitrary and argued that the Department should provide some sort of definition or specific standard. At least one commenter expressed concern that the standard is vague enough to allow gamesmanship, citing a hypothetical where the immigration judge waits to reject an application as incomplete until just after the alien's one-year filing deadline expires.

Moreover, commenters expressed general disbelief that the courts would return incomplete applications or alert aliens of deficient applications in a timely manner, noting, for example, general processing delays by USCIS or other agencies.

Commenters also thought it was generally unfair that asylum seekers

would be held to time restrictions, such as a 30-day correction deadline, while immigration courts are not held to a similar standard.

Response: As an initial point, the Department categorically rejects the suggestion of at least one commenter that an immigration judge would engage in gamesmanship by purposefully delaying the rejection of an application solely to be able to deny it.[48] As discussed, supra, commenters' attacks on the integrity of immigration judges are unfounded and have no place in this rulemaking.

Further, comments about USCIS are beyond the scope of this rulemaking, as USCIS is a separate agency beyond the purview of the Department. USCIS is part of DHS, while EOIR is part of the Department. *See* Department of Homeland Security, *Operational and Support Components* (Nov. 17, 2018), *https://www.dhs.gov/operational-and-support-components.* To the extent that commenters have concerns about procedures utilized by USCIS, those concerns are most appropriately directed to DHS.

As discussed above in section II.C.4.b.i, all asylum applications must be submitted ''in accordance with the instructions on the form.'' 8 CFR 1208.3(a). The instructions, in turn, inform applicants that they ''must provide the specific information requested about [their] family and *answer all the questions asked.*'' *See* Form I–589, *Application for Asylum and for Withholding of Removal, Instructions,* 5 (Aug. 25, 2020), *https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf* (emphasis in original). Further, ''[a]n asylum application that does not include a response to each of the questions contained in the Form I–589, is unsigned, or is unaccompanied by the required materials specified in [8 CFR 1208.3(a)] is incomplete.'' 8 CFR 1208.3(c)(3). Accordingly, the Department disagrees with commenters' general concerns that the Department should not remove the 30-day deadline for the immigration court to return an incomplete application or else have the application deemed complete. Without this change, the provision at 8 CFR 1208.3(c)(3) is inconsistent with the overarching requirement that aliens must submit the asylum application in accordance with the instructions on the form—in other words, completely filled out.

Additionally, the Department finds that the removal of the 30-day return period will better ensure that all asylum claims before the immigration courts for adjudication are fully presented for adjudication and review. Incorrectly deeming an incomplete application complete does not ensure that the alien is able to fully pursue his or her claim as the missing information may in fact be integral to the alien's claim for relief, and the Department does not want to risk having an immigration judge consider an incomplete application without the relevant information.[49] For this reason, the Department further rejects commenters' alternative suggestions that the Department should instead shorten the 30-day time period as an alternative way to increase efficiencies.

In general, commenters failed to explain why the default in the existing regulation—*i.e.,* an immigration court accepts an incomplete application—based on a legal fiction that an incomplete application is deemed complete if the immigration court fails to return the application as incomplete provides any benefit to the alien, DHS, or the immigration courts. To the contrary, an application that is incomplete in fact—regardless of whether it is ''deemed'' complete by regulation—benefits neither the parties nor the immigration judge. It risks creating credibility issues for the respondent based on the parts that are incomplete even if those parts do not go to the merits of the claim. INA 208(b)(1)(B)(iii), 8 U.S.C. 1158(b)(1)(B)(iii) (inconsistencies may form the basis of an adverse credibility determination without regard as to whether they go to the heart of an alien's claim). It inhibits the ability of the opposing party—and potentially the immigration judge—to prepare for a hearing on that application and risks springing surprises on the opposing party at the hearing that may require a postponement to investigate further. It further increases inefficiency in the overall proceeding, particularly at the merits hearing where the parties and the immigration judge may have to go over each incomplete part first to determine its bearing on the case before being able to proceed to the merits of the case. In short, commenters did not identify any reasonable benefit provided by filing and accepting an incomplete application and the Department is unaware of any; moreover, the costs associated with such an application in terms of the risk of an adverse credibility finding, unfair surprise to the opposing party, and overall inefficiency in adjudicating the case all strongly militate in favor of the Department's decision to replace the current regulatory language with that contained in this rule.

In addition, commenters are incorrect regarding the effect this provision would have on the calculation of aliens' possible eligibility for employment authorization.[50] To reiterate, existing regulations already provide that the filing of an incomplete application does not begin the timeframe by which DHS adjudicates an application for employment authorization based on an asylum application, and nothing in this rule alters that longstanding principle. Accordingly, the Department disagrees that an alien who submits a Form I–589 that is incomplete would begin to accrue time towards his or her employment authorization eligibility. In short, aliens seeking employment authorization have an incentive to submit a complete asylum application as soon as possible, and nothing in this rule either affects that incentive or changes the Department's position that the submission of an incomplete application does not begin the timeframe to adjudicate an employment authorization application.

Commenters are incorrect that EOIR will be unable to return incomplete asylum applications in a timely manner following the removal of the 30-day period. To the contrary, as discussed throughout this rule, EOIR has a powerful incentive to ensure that proceedings are conducted in as expeditious manner as possible consistent with due process. The rule's ''timely fashion'' requirement obligates immigration courts to act promptly in returning incomplete asylum applications, and the insulting suggestion that EOIR's employees lack the competence or diligence to effectuate that requirement is

[48] The Department notes, parenthetically, that the commenter's hypothetical is also legally inaccurate. An alien whose asylum application is filed before the one-year deadline but is rejected as incomplete may be able to demonstrate extraordinary circumstances excusing the application of the deadline provided that the alien refiles the application within a ''reasonable period thereafter,'' which the 30 days allowed for by this rule would certainly be. 8 CFR 1208.4(a)(5)(v). Thus, the commenter's hypothetical, even if it were realistic, would not result in the denial of the alien's application as untimely.

[49] Again, the Department reiterates that, as noted in footnote 47 above, this provision would further benefit aliens who may wish to prevent an immigration judge from considering whether to pretermit an incomplete application.

[50] As a general matter, the Department emphasizes that questions of employment authorization eligibility are adjudicated by DHS and not by the Department. Indeed, that is why this rule removes regulatory provisions from chapter V of 8 CFR pertaining to alien employment authorization. Nevertheless, the Department addresses commenters' concerns to the extent they are directly related to the provisions of this rule.

unsupported. Immigration court staff receive training on how to process filings, and defective filings are already subject to review and return, as appropriate.

Finally, the Department believes that commenters are incorrect in asserting that the rule is unfair because asylum seekers are being held to time restrictions, while immigration courts are not. As discussed, supra, the Department has powerful incentives to promptly return incomplete asylum applications to ensure efficiency, especially as the number of asylum applications file has risen astronomically in recent years. EOIR, *Workload and Adjudication Statistics, Total Asylum Applications* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1106366/download.* Moreover, the Department is held to a 180-day adjudication deadline for asylum applications absent exceptional circumstances, INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), and that deadline is only triggered once an alien files a complete asylum application. Thus, there is no asymmetry between asylum seekers and the immigration courts; rather, both are held to intertwined and mutually-reinforcing deadlines regarding asylum applications.

iii. 30-Day Correction Deadline

Comment: Commenters expressed concern about the rule's requirement that aliens only be allowed a 30-day period to re-file an application that is rejected for being incomplete. According to commenters, the imposition of a 30-day time period is arbitrary and too limited for aliens to correct any errors with the application or gather missing evidence. Commenters asserted that by establishing such a timeframe, the Department is inappropriately prioritizing efficiency over all other concerns.

Some commenters requested that the deadline, if any, be extended to 45 days rather than 30 days.

Commenters also worried the 30-day correction deadline will lead to unnecessary and inadvertent waivers of aliens' right to seek asylum. For example, some commenters stated that a failure by a mail carrier could result in the foreclosing of relief. Other commenters expressed general disbelief that the government will timely return or alert aliens of deficient applications.

Some commenters asserted that the rule was both redundant and unduly restrictive because immigration judges already possess the authority to set and extend filing deadlines without requiring the alien to demonstrate the high exceptional circumstances standard. Commenters also claimed that applicants would not understand the rejection from the court nor how to remedy it.

Commenters also argued that the Department's assertion that a 30-day period is sufficient for remediation of application defects because of EAD incentives is incorrect. Commenters disagreed with the Department regarding this alleged incentive due to the combined effect of DHS's recent regulatory changes extending the minimum timeline for obtaining EAD eligibility and the Department's clarification in this rule regarding the 180-day timeline for the adjudication of asylum applications.

Response: As an initial point, commenters provided no evidence that asylum applications are routinely filed in such a grossly incomplete manner with errors so great that they cannot be corrected within one month, and the Department is unaware of any systemic trend of asylum applications being filed in such a manner. Accordingly, the Department declines to address further commenters' hyperbolic and unfounded assertions regarding the scale of deficiencies in initial asylum applications.

The Department rejects commenters' assertions that that 30-day deadline to re-file an application is too short, arbitrary, or prioritizes efficiency above all other concerns. The Department believes that 30 days is a reasonable time period that balances both the time necessary for a respondent to amend and return a complete application and the needs of the immigration court to operate efficiently. The Department notes that affected applicants must necessarily have already attempted to file an application, so any additional changes should be few in number and limited only to those fields that were incomplete. Applicants in general must meet their obligation to file an application that is full and complete as part of the applicant's burden of proof for relief as an initial matter and should not be relying on this additional 30-day time period to make significant changes to their applications. The Department also notes that this 30-day timeline only applies to the Form I–589 itself and does not prevent applicants from filing additional supporting documentation after the deadline, provided such filings comply with any deadlines set by the immigration court.

Further, the 30-day timeline is fully consistent with existing regulatory provisions requiring the refiling of incomplete asylum applications ''within a reasonable period'' after return in order to demonstrate extraordinary circumstances and avoid the application of the one-year bar. 8 CFR 1208.4(a)(5)(v). Moreover, 30-day filing deadlines are already well-established in immigration proceedings—*e.g.,* a motion to reconsider, 8 CFR 1003.23(a)(1); an appeal to the Board, 8 CFR 1003.38(b)—and the resubmission of an asylum application is roughly analogous to these other procedures because it requires the correction of an initial determination. Accordingly, the Department finds that 30 days is an appropriate amount of time to correct an incomplete asylum application and disagrees that an additional 15 days would result in any meaningful benefit, especially when aliens already have a strong incentive to file quickly in order to begin the process of attaining eligibility for work authorization and ultimately obtain relief or protection.

The Department rejects commenters' assertions that the rule is both redundant and unduly restrictive because immigration judges already possess the authority to set filing deadlines and are able to extend these deadlines without establishing exceptional circumstances. *See* 8 CFR 1003.31(c). When an immigration judge sets a filing deadline under 8 CFR 1003.31, he or she is setting a deadline for the initial filing of applications and supporting evidence. If an applicant fails to comply with the deadline, the opportunity to file such applications or evidence is deemed waived. *Id.* In contrast, this 30-day deadline focuses on applicants who have already attempted to file their application and must merely fix an incomplete application. This re-filing deadline ensures that applications are ready for adjudication in a reasonable time period and serves to increase the uniformity, fairness, and efficiency of the adjudication process. In addition, the Department believes that the ''exceptional circumstances'' exception is appropriate in this context because the 30-day deadline commences only after the initial filing period.

Additionally, as discussed, supra, the Department notes that commenters' concerns that general delays, including mail carrier mistakes, could prevent applicants from submitting the Form I–589 within the deadline are true for every deadline—including other important 30-day deadlines such as for filing appeals to the Board, 8 CFR 1003.38(b)—and that risk is not altered by the rule. Again, the Department recognizes that no rule can cover every hypothetical scenario, and the existence of speculative assertions does not warrant the removal of deadline

requirements, particularly when other similar deadlines have existed for years without the ''parade of horribles'' posited by commenters occurring. The Department believes—and commenters have not meaningfully or persuasively disputed—that 30 days is a reasonable time period for applicants to correct minor mistakes and re-file the application.

As to commenters' concerns regarding applicants' understanding of a rejection, the Department notes that the rule does not change the rejection process. EOIR will continue to follow current practice in rejecting documents, which includes returning the filing with an explanation for the rejection. *See Immigration Court Practice Manual, Ch. 3.1(d)(i), https://www.justice.gov/eoir/page/file/1258536/download* (last revised July 2, 2020) (''If an application, motion, brief, exhibit, or other submission is not properly filed, it is rejected by the Immigration Court with an explanation for the rejection.''). Commenters have not expressed confusion with the existing process, and it is well-established. As such, the Department finds changes to these existing processes unnecessary.

Finally, the Department disagrees with commenters and reiterates the discussion in the proposed rule that aliens who seek to file asylum applications are motivated to do so promptly in part because of the possibility of obtaining employment authorization. *See* 85 FR at 59624. While employment authorization eligibility is adjudicated solely by DHS, the Department finds that the possibility of employment authorization is generally a desirable benefit for asylum seekers, and it is illogical that the possibility of obtaining such a benefit would not be a motivating factor to promptly file a complete asylum application.

The Department disagrees that DHS's extension of the waiting period to be eligible to apply for asylum-based employment authorization from 150 days to 365 days would negatively affect this incentive, though it notes that DHS's extension has been temporarily enjoined with respect to the individual members of the Plaintiff organizations, CASA de Maryland, Inc. (''CASA'') and Asylum Seeker Advocacy Project (''ASAP''). *See Casa de Md.* v. *Wolf,*— F.Supp.3d—, 2020 WL 5500165 (D. Md. Sept. 11, 2020) (preliminarily enjoining, *inter alia,* DHS's increase to the waiting period for employment authorization eligibility for individual members of Plaintiffs CASA and ASAP). Rather, the Department finds that the longer period would only further increase the incentive for aliens to start their accrual period for employment authorization as quickly as possible.

The Department acknowledges comments that the 180-day asylum adjudication period in INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), which this rule incorporates as discussed, *infra,* counter-balances the 180-day statutory period before which an alien who has filed an asylum application can apply for employment authorization under INA 208(d)(2), 8 U.S.C. 1158(d)(2), but notes that counter-balanced system was established by Congress. Thus, to the extent that commenters disagree with the interplay of those statutory sections, their comments are beyond the Department's authority in this rulemaking and are more appropriately addressed to Congress. The Department disagrees that this system reduces an alien's incentive to file promptly for the purposes of earning time towards employment authorization. Many asylum applications are not currently adjudicated within 180 days due to operational constraints and the size of the pending caseload, and the presence of exceptional circumstances causes adjudicatory delays beyond the 180-day mark for other cases. Moreover, litigation has effectively forced DHS to adjudicate employment authorization applications within 30 days after an alien files such an application once the alien's asylum application has been pending for the applicable period of time, *Gonzalez Rosario* v. *USCIS,* 365 F.Supp.3d 1156, 1163 (W.D. Wash. 2018), and DHS's efforts to change its regulations to adjust the time periods for adjudicating such applications have also been enjoined, *Casa de Md.* v. *Wolf,*— F.Supp.3d—, 2020 WL 5500165 (D. Md. Sept. 11, 2020). Consequently, aliens retain very strong incentives to file complete asylum applications as soon as possible, and nothing about this rule or the relevant statutory framework reduces those incentives, particularly in light of the persistent litigation on this issue.

c. Submission of Form I–589 Fee

Comment: Many commenters broadly criticized the existence or requirement of a fee for asylum applications, regardless of the dollar amount of the fee. In addition, commenters objected to the rule's requirement that aliens must submit a required filing fee in connection with an asylum application at the time of filing. Commenters stated that the Department failed to provide any reasoning to justify the imposition of a fee or to consider the negative impact of the fee. At least one commenter argued that the Department must separately justify the inclusion of a fee for the submission of a Form I–589 and cannot just rely on DHS's determinations without independent analysis or justification.

The majority of commenters who discussed the fee for asylum applications raised concerns that asylum applicants would not be able to afford a $50 filing fee and that their applications would be rejected as a result.[51] Accordingly, commenters stated that the rule violates the United States' non-refoulement obligations. Commenters provided a wide range of reasons for why asylum seekers would not be able to afford the $50 fee, including asserting that asylum seekers do not have the funds to pay such a fee given that those seeking asylum are often fleeing conflict and arriving to the United States lacking any resources. Moreover, commenters stated that many asylum seekers are already severely impoverished, a condition which commenters claim has only been exacerbated by COVID–19. Several commenters were especially concerned that asylum seekers who are either detained or subject to the Migrant Protection Protocols (''MPP'') would be unable to pursue asylum applications due to an inability to afford the fee. Commenters explained that detained asylum seekers are only able to earn a trivial amount of income in detention facilities and noted that many are currently quarantined, and unable to work at all, during their first 14 days in detention due to the COVID–19 pandemic. Similarly, commenters explained that individuals subject to the MPP have limited access to funds. Several commenters also urged the Department to allow fee waivers for asylum seekers, particularly for individuals who are detained or subject to MPP.

Commenters were also concerned with the possible impact that other pending EOIR rules[52] would have on this provision. Commenters asserted that because these pending rules have not been published as final rules yet, it is impossible for them to be able to fully

[51] DHS recently established a $50 fee for Form I–589 submitted for the purposes of applying for asylum in most circumstances. *See* 85 FR at 46791. This fee would have entered into effect on October 2, 2020, but, as noted *supra,* it is currently enjoined as a result of litigation. *Immigrant Legal Res. Ctr.* v. *Wolf,* 2020 WL 5798269 (N.D. Cal. Sept. 29, 2020) (granting nationwide preliminary injunction barring DHS from implementing or enforcing any part of the rule).

[52] For example, some commenters were specifically concerned with the impact that the Department's pending fee rule would have on this provision. *See* Executive Office for Immigration Review Fee Review, 85 FR 11866 (Feb. 28, 2020).

comment on this rule's provisions regarding the requirement to pay a fee.

Commenters further voiced concern about the alleged difficulties that unrepresented detained asylum seekers would face in trying to ''fee in'' a Form I–589 with DHS due to the possible methods of payment. Similarly, commenters stated that asylum seekers in Mexico would not be able to visit a DHS office in the United States to ''fee in'' a Form I–589. Commenters further noted that children, who do not have bank accounts or their own funds, would have unique difficulties paying a fee to submit the I–589.

Response: Overall, commenters' concerns related to a fee for an asylum application were both beyond the scope of the rulemaking and misguided or inapposite in three principal respects. First, few, if any, commenters acknowledged that the INA authorizes charging a fee for an asylum application, provided that such a fee does not exceed the cost of adjudicating the application. INA 208(d)(3), 8 U.S.C. 1158(d)(3). Thus, to the extent that commenters oppose charging a fee for an asylum application under any circumstance and believe that such a fee is unauthorized or unlawful, their comments are both beyond the scope of this rulemaking and are more appropriately addressed to Congress.

Second, few, if any, commenters acknowledged that the fee for an asylum application is set by DHS because the asylum application is a DHS form. Longstanding EOIR regulations make clear that ''[t]he fees for applications published by the Department of Homeland Security and used in immigration proceedings are governed by [DHS regulations].'' 8 CFR 1103.7(b)(4)(ii). As stated in the proposed rule, given this longstanding cross-referenced fee provision, the inextricable nature of the two agencies' asylum processes and the benefit of not treating applicants differently for substantially similar benefits based on whether they file with DOJ or with DHS, the Department did not propose to alter that provision. See 85 FR 59698. Thus, this rule maintains the same provision as proposed regarding a fee for an asylum application and does not impose a new fee for such an application. To the extent that commenters challenge the propriety of DHS assessing a fee under INA 208(d)(3), 8 U.S.C. 1158(d)(3) for an asylum application, their concerns are more appropriately addressed to DHS. Third, and relatedly, this rule does not alter the longstanding procedures regarding how DHS forms are treated in immigration court. 8 CFR 1103.7(b)(4)(ii). Rather, this rule merely adds instructions regarding the submission of the Form I–589 fee, if any, to a provision of EOIR's regulations that is topically specific to the conditions and requirements for filing an asylum application. Although language already exists elsewhere in EOIR's regulations, *see, e.g.,* 8 CFR 1103.7(a)(3) (''The Department of Homeland Security shall return to the payer, at the time of payment, a receipt for any fee paid, and shall also return to the payer any documents, submitted with the fee, relating to any immigration proceeding. The fee receipt and the application or motion shall then be submitted to the Executive Office for Immigration Review.''), this amendment is meant as an aid to the public should a fee be enforced at a future date. Thus, to the extent that commenters challenge the appropriateness of the prior promulgation of 8 CFR 1103.7(b)(4)(ii), those concerns are also well beyond the scope of this rulemaking.

To reiterate, as a general matter, commenters' broad concerns regarding the appropriateness of requiring a fee for asylum applications, the specific amount of the fee, and whether to allow for a fee waiver for the Form I–589 are outside the scope of this rule.[53] DHS determines the fee amounts for DHS-maintained forms such as the Form I–589, and the Department did not change this longstanding practice in this rule. *See, e.g.,* 8 CFR 1103.7(b)(4)(ii) (''The fees for applications published by the Department of Homeland Security and used in immigration proceedings are governed by 8 CFR 103.7.'') and 1103.7(c) (''No waiver may be granted with respect to the fee prescribed for a Department of Homeland Security form or action that is identified as non-waivable in regulations of the Department of Homeland Security.'').

Overall the imposition of a non-waivable $50 fee for the Form I–589 for the purposes of asylum is a decision made by DHS following publication of a proposed rule and the consideration of the public comments received thereon. *See* 84 FR 62280 (proposed rule), 85 FR 46788 (final rule). This rule does not amend the well-established regulatory provisions distinguishing between fees for DHS forms and fees for EOIR forms, and fees for DHS forms adjudicated by EOIR, including the Form I–589, continue to be set by DHS. Rather, this rule merely clarifies when the Form I–589 fee, as determined by DHS, must be paid in the course of EOIR adjudications.

Nevertheless, even though these concerns are outside the scope of this rulemaking, the Department disagrees with commenters' concerns that a $50 filing fee is inappropriate or would be unaffordable, thus discouraging or preventing individuals from filing meritorious asylum claims. *Cf. Ayuda, Inc.* v. *Att'y Gen.,* 661 F. Supp. 33, 35 (D.D.C. 1987) (rejecting concern that increased fees would limit access to courts), *aff'd sub nom. Ayuda, Inc.* v. *Att'y Gen.,* 848 F.2d 1297 (D.C. Cir. 1988). The Department has no evidence—and commenters did not provide any—to dispute DHS's assessment that a $50 fee ''could be paid in one payment, would not require an alien an unreasonable amount of time to save, would generate some revenue to offset costs, discourage frivolous filings, and not be so high as to be unaffordable to even an indigent alien.'' 84 FR at 62320. Almost by definition, aliens seeking asylum have demonstrated access to financial resources by the very nature of their ability to travel to the United States, further suggesting that $50 is not an unreasonable amount to charge for an asylum application.[54] For

[53] As noted *supra,* the $50 asylum application fee established by DHS is currently enjoined as the result of litigation. *Immigrant Legal Res. Ctr.* v. *Wolf,* 2020 WL 5798269 (N.D. Cal. Sept. 29, 2020) (granting a nationwide preliminary injunction barring DHS from implementing or enforcing any part of the rule). Nevertheless, the response to commenters' concerns in this section discusses the enjoined $50 fee, as discussed by commenters, given the possibility of its future application as litigation proceeds.

[54] The Department also observes that most, if not all, aliens seeking asylum have, almost by definition, already demonstrated access to financial resources in order to travel to the United States, further suggesting that $50 is not an unreasonable amount to charge for such an application:

While there's no fee to apply for asylum, it's not the case that there are no resources involved in the process. Those migrating from Europe or Asia need to pay for transit to the United States, as well as for visas allowing them onto U.S. soil. (You can't apply for asylum unless you're in the United States.) Those fees start at about $160.

If you're migrating from Central America, you may need to pay to ensure you make it to the border safely.

The New York Times reported last year that a family from El Salvador paid $6,000 to smugglers to transport them to the U.S.-Mexico border. Part of the goal of the migrant caravans that have come north in recent months is to provide a low-cost, safe way for migrants to get north.

Philip Bump, *Most migration to the U.S. costs money. There's a reason asylum doesn't.* Wash. Post (Apr. 30, 2019) (referencing a New York Times report about an El Salvadorean family who paid $6,000 to smugglers to transport them to the U.S. southern land border). Similarly, the Department also notes that 85 percent of pending asylum applicants in immigration proceedings, more than 507,000 cases, have representation. EOIR, *Workload and Adjudication Statistics, Current Representation Rates,* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1062991/download*). Although some of those approximately 507,000 cases with representation may have obtained representation pro bono, most did not. As of September 30, 2020, EOIR records identified approximately 14,400 asylum cases with pro bono representation, out of

similar reasons, the Department sees no reason for DHS not to assess a $50 fee for asylum applications filed by categories of aliens cited by commenters: Aliens in detention, aliens in removal proceedings who were returned to Mexico pursuant to the MPP, and children.[55] The Department also notes that unverified generalized statements and anecdotal reports about asylum seekers' financial status do not provide information about actual hardship, particularly when they do not also address or account for how the alien obtained financial resources to make the journey to the United States in the first instance.

The Department further notes that an application for statutory withholding of removal under section 241 of the Act, 8 U.S.C. 1231, or protection under the regulations implementing the CAT does not require a fee. *See* 8 CFR 106.2(a)(20) (establishing a $50 fee when the Form I–589 is submitted ''[f]or filing an application for asylum status''). Accordingly, commenters are incorrect that the rule violates the United States' non-refoulement obligations set forth in the 1951 Refugee Convention, the 1967 Protocol, and the CAT. *See R–S–C–* v. *Sessions,* 869 F.3d 1176, 1188 n.11 (10th Cir. 2017) (explaining that ''the Refugee Convention's non-refoulement principle—which prohibits the deportation of aliens to countries where the alien will experience persecution—is given full effect by the Attorney General's withholding-only rule''); *Cazun,* 856 F.3d at 257 & n.16; *Ramirez-Mejia,* 813 F.3d at 241; *Maldonado,* 786 F.3d at 1162 (explaining that Article 3 of the CAT, which sets out the non-refoulement obligations of signatories, was implemented in the United States by FARRA (Pub. L. 105–277, sec. 2242(b), 112 Stat. 2681, 2631–822) and its implementing regulations); *see also Cardoza-Fonseca,* 480 U.S. at 429, 441 (''[Withholding of removal] corresponds to Article 33.1 of the Convention. . . . [Asylum] by contrast, is a discretionary mechanism which gives the Attorney General the *authority* to grant the broader relief of asylum to refugees. As such, it does not correspond to Article 33 of the Convention, but instead corresponds to Article 34.'') (emphasis in original).

Regarding commenters concerns that the Department must separately justify the establishment of an asylum application fee, the Department reiterates that it is not altering its longstanding treatment of fees related to DHS applications. 8 CFR 1103.7(b)(4)(ii). DHS has assessed a fee for most asylum applications, and concerns about the justifications for that fee are beyond the scope of this rulemaking.

Regarding commenters' concerns about the interplay between this rule and other rules proposed by the Department, none of the Department's pending rules would impact this provision. As noted in other rules, and as discussed above, DHS determines whether or not to impose filing fees for asylum applications. None of the Department's pending rules, including its fee review, propose to change this regulatory scheme. As such, commenters' concerns over not being able to fully comment on this provision without seeing certain pending rules published as final rules are unpersuasive.

In addition, regarding commenters' concerns about the ability of aliens to pay the $50 fee given USCIS's available methods of payment and commenters' concerns regarding the supposed difficulties that detained unrepresented asylum seekers and aliens subject to MPP will face in paying the fee, although such concerns are far beyond the scope of this rulemaking and more appropriately addressed to DHS, the Department does note that aliens who submit payments to DHS for forms, applications, or motions for EOIR adjudications may submit a wide range of payment methods to USCIS, including personal check, cashier's check, certified bank check, bank international money order, or foreign draft drawn on a financial institution in the United States and payable to the ''Department of Homeland Security'' in United States currency. In addition, aliens may have a third party provide the payment on their behalf. Nevertheless, as with the determination of whether to charge a fee for the Form I–589, the available methods of payment are determined by USCIS as the payment processing entity for the immigration courts. *See* 8 CFR 103.7(a)(1), 1103.7(a)(3).[56]

d. Impact on Discrete Populations [57]

Comment: Commenters raised a broad range of concerns with respect to the rule's impact on various populations that commenters have identified as uniquely vulnerable groups, including, *inter alia,* alleged victims of gender-based persecution, detained individuals, familyasylum applicants, indigenous language speakers or non-English speakers, children, teenagers in custody, individuals with disabilities, LGBTQ individuals, and individuals with mental-competency issues. Commenters were primarily concerned with the ability of these categories of aliens to meet the 15-day filing deadline or 30-day re-filing correction deadlines.

Commenters expressed concerns that members of such groups need more time than other applicants to prepare, submit, and present their cases in support of their applications for a variety of reasons. For example, commenters stated that due to severe trauma or post-traumatic stress, some of these populations might need additional time and the assistance of medical and mental health services to articulate their claims. Additionally, commenters stated, certain populations might face unique difficulties obtaining corroborative evidence to support their claims; for example, commenters stated that victims of gender-based violence may have been prevented by their traffickers or perpetrators from owning items that might serve as evidence. Commenters also asserted that some populations, such as children, might need additional time to familiarize themselves with processes and become comfortable with their advocates.

Commenters asserted that some groups faced other unique challenges in preparing, submitting, and presenting their applications that may require additional time. For example, applicants submitting family-based claims might need child care during proceedings because they may not want to speak about the harm they have suffered in front of their children. Additionally, commenters stated, indigenous-language speakers may be unable to find an interpreter to translate the Form I–589 or documents for submission within the regulatory deadlines. Commenters anecdotally asserted that some indigenous-language speakers did not receive credible fear interviews before

over 507,000 asylum cases with representation overall. The ability of most aliens applying for asylum to retain representation at cost further suggests that a $50 fee is not unreasonable.

[55] As mentioned in note 18, *supra,* DHS has determined to exempt UAC in removal proceedings from the $50 fee.

[56] The Department further notes that USCIS accepts electronic payments in certain contexts, and the Department expects that the availability of electronic payment methods will continue to expand over time. USCIS, *Forms Available to File Online* (June 11, 2020), *https://www.uscis.gov/file-online/forms-available-to-file-online.*

[57] The Department notes that many of the concerns commenters raised with respect to the effect that this rule would have on discrete populations are similar to concerns that commenters also raised with respect to asylum applicants, generally. To the extent there is overlap, the Department reiterates the discussion above in section II.C.2.

being placed into proceedings because the government was unable to find an interpreter within the requisite period of time.

Commenters also asserted that some applicants, such as children or those with mental competency issues, need or require counsel to assist with preparation, submission, and presentation of their claims. For example, commenters explained that the deadline would present challenges for counsel working with children because their age, development, dependence on adults, particular vulnerabilities, and experienced traumas (if any) typically increase the time necessary to develop and corroborate their asylum claims. Further, commenters explained that children in government custody would have a particularly difficult time discussing the persecution they faced. Accordingly, commenters stated that immigration judges should have discretion to set and extend deadlines pursuant to children's specific and unique needs.

Additionally, commenters asserted that recent changes to the law, such as *Matter of A–B–,* 27 I&N Dec. 316 (A.G. 2018), have rendered certain claims uniquely complex. Some commenters asserted that Congress had recognized a specific obligation to treat children humanely and fairly, and EOIR had recognized that cases involving children could be uniquely complex. Commenters asserted that some uniquely situated applicants, such as detained individuals and children, already face logistical barriers to access to counsel and legal information. Accordingly, commenters asserted, such applicants may be especially disadvantaged by the rule to the extent that it would limit or further exacerbate their already limited access to counsel.

Furthermore, with respect to individuals with mental competency issues, some commenters expressed concerns that issues of incompetence might not be identified until an individual had made several court appearances. One organization anecdotally stated that it had accepted National Qualified Representative Program (NQRP) cases, *see* EOIR, *National Qualified Representative Program* (Feb. 18, 2020) (hereinafter ''EOIR, NQRP''), *available at https://www.justice.gov/eoir/national-qualified-representative-program-nqrp,* in which detained clients had appeared in court for months before anyone raised the issue of incompetence. Commenters also generally asserted that the 15-day deadline for submitting applications might would proceed in violation of their rights such rights would be violated. Lastly, commenters alleged that the rule would violate the Rehabilitation Act of 1973. *See* 29 U.S.C. 794(a).

Response: The Department reiterates its response to similar comments, *supra,* and adds the following further response. In general, commenters on this point misapprehended the rule; provided speculative hypothetical generalizations that do not account for the case-by-case, individualized decision-making associated with adjudicating asylum applications; and made assertions rooted in the rule's failure to align with the commenters' policy preferences, rather than the identification of specific legal deficiencies or other factors the Department should consider. *See Home Box Office,* 567 F.2d at 35 n.58 (''In determining what points are significant, the 'arbitrary and capricious' standard of review must be kept in mind. Thus only comments which, if true, raise points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule cast doubt on the reasonableness of a position taken by the agency. Moreover, comments which themselves are purely speculative and do not disclose the factual or policy basis on which they rest require no response. There must be some basis for thinking a position taken in opposition to the agency is true.'').

Asylum seekers come from a wide range of backgrounds and personal circumstances, and the Department recognizes that no rule can account for the backgrounds and circumstances of the hundreds of thousands of aliens who seek asylum. Nevertheless, the Department disagrees that the sorts of speculative challenges raised by the commenters are sufficient to outweigh the benefits obtained from this rule's implementation, including benefits that would inure to those with meritorious asylum claims. Further, in a vacuum, the Department has difficulty responding to commenters' generalized statements about various populations, trauma experienced by those populations, and other asserted difficulties because asylum applications are adjudicated based on their specific facts, not on generalized speculative assertions.[58] The Department believes that the timelines set are generally appropriate for the majority of cases for the reasons discussed above, and that determinations about extending such deadlines are more appropriately made on a case-by-case basis rather than providing a categorical exception for certain types of applicants, as commenters suggest.

Neither the 15-day filing deadline nor the 30-day correction deadline imposes one-size-fits-all deadlines. In cases where applicants' unique circumstances necessitate additional time to prepare, submit, or present their asylum applications, the Department reiterates that the immigration judge is authorized to consider extending these timelines on a case-by-case basis. *See* 8 CFR 1208.3(c)(3) (stating that failure to correct deficiencies within 30 days will result in abandonment of an application and waiver of the opportunity to file such application ''absent exceptional circumstances as defined in § 1003.10(b)''); 8 CFR 1208.4(d) (stating, with respect to the 15-day filing deadline, that ''[t]he immigration judge may extend the deadline for good cause.''). In general, determining whether ''good cause'' or ''exceptional circumstances'' exist would likely include consideration of the factors that commenters asserted arise with respect to the broad types of asylum applicants identified by the commenters.

In addition, the Department notes that an immigration judge's discretionary determination with respect to whether an alien merits either an extension of the 15-day deadline or demonstrated exceptional circumstances to extend the 30-day refiling deadline may be appealed to the Board in cases where the issue has been properly preserved for appeal. Accordingly, further review and protection is available for these classes of applicants.

In short, the Department acknowledges commenters' concerns about discrete groups of individuals and has fully considered them; however, the rule does not single out any discretely-labeled groups, nor does it preclude the groups identified by commenters from pursuing their claims. To the extent that aliens within those groups have meritorious claims, the rule will, in fact, ensure that those claims are adjudicated expeditiously, especially for aliens in detention. The rule also provides sufficient safeguards in situations in which individuals may need additional time, and commenters' unfounded

[58] For example, commenters' concerns about mental illness, trauma, and developmental challenges may certainly fall within the rule's good-cause exception for the filing deadline or within the exceptional circumstances exception to the statutory 180-day adjudication deadline in particular cases if those concerns are credible. However, the Department cannot make a blanket determination based solely on generalizations without context that such situations will always constitute exceptions because each case is considered on its own merits. Moreover, the credibility of such assertions will always be at issue because they provide an exception to the general rule, and it is difficult, if not impossible, for the Department to make generalized credibility determinations in a rulemaking.

assertions to the contrary are not persuasive. The rule is consistent with due process, aids in the protection of the groups identified, and provides benefits that far outweigh any concrete concerns raised by commenters.

With respect to commenter concerns regarding mental competency issues, the Department notes that there is existing agency protocol for ensuring that proceedings involving such individuals are fair, including forensic competency evaluations and implementing safeguards, where appropriate. *See Matter of M–A–M–,* 25 I&N Dec. 474, 474, 477, 480–81 (BIA 2011); EOIR, NQRP. The Department acknowledges, as commenters stated, that mental competency issues might arise after numerous hearings. However, as case law has always considered, mental competency ''is not a static condition.'' *Matter of M–A–M–,* 25 I&N Dec. at 480. ''It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways.'' *Id.* (quotation omitted). Thus, immigration judges must ''consider indicia of incompetency throughout the course of proceedings to determine whether an alien's condition has deteriorated or, on the other hand, whether competency has been restored.'' *Id.* The Department notes that ''neither party bears a formal burden of proof to establish the respondent's mental competency or incompetency.'' *Matter of J–S–S–,* 26 I&N Dec. 679, 681 (BIA 2015). Thus, if an immigration judge observes indicia of incompetency, regardless of whether a party argues that such indicia are present, an immigration judge must make a competency determination and implement the appropriate safeguards, where necessary. *Id.* at 680, 681 (citing *Matter of M–A–M–,* 25 I&N Dec. at 474, 477, 480–81).

Although an immigration judge must make a competency determination when indicia of competency are present, this does not mean that an immigration judge should delay proceedings indefinitely simply because indicia might arise later in any particular case. The Department believes that the existing protocols, in conjunction with the immigration judge's authority to extend filing deadlines in appropriate situations and the various exceptions provided by the rule, are sufficient to ensure fairness towards applicants with mental competency issues. Moreover, the Department disagrees with commenter concerns that this rule would violate the Rehabilitation Act of 1973. *See* 29 U.S.C. 794(a). This rule is broadly applicable to all applicants, does not impose any particular requirements on applicants with disabilities, does not prevent applicants with disabilities from participating in immigration proceedings, and provides that immigration judges may extend regulatory timelines in appropriate situations.

e. Impact on Pro Se Aliens

Comment: Commenters were concerned that the filing deadlines would disproportionately and detrimentally affect pro se aliens and interfere with the ability of those aliens to seek and obtain counsel. As a result, commenters alleged that the Department was engaging in a pattern or practice of discrimination against a discrete and insular minority comprised of current and future pro se asylum applicants. The commenters alleged that the deadline deprived pro se asylum seekers equal protection under the law and therefore violated the Fifth Amendment's equal protection guarantee. *See* U.S. Const. amend. V.

Further, for pro se aliens, commenters were concerned that the rule's deadlines were too short for pro se aliens to complete the complex application on their own, particularly considering language barriers, trauma, education levels, and lack of familiarity or understanding of complex immigration laws.

Response: The Department reiterates its response to similar comments, *supra,* and adds the following further response. In general, commenters on this point again misapprehended the rule; provided speculative, hypothetical generalizations that do not account for the case-by-case and individualized decision-making used to adjudicate asylum applications; and, made assertions rooted in the rule's failure to align with the commenters' policy preferences rather than the identification of specific legal deficiencies or other factors the Department should consider.

The rule does not harm pro se aliens and does not impact the availability of pro bono representation. To the contrary, expeditious consideration of the asylum applications that detained aliens file may increase pro bono representation. *See, e.g.,* HRF Report *supra.* To the extent that commenters posited hypothetical scenarios about particular characteristics of pro se aliens, the Department notes that if such scenarios are reflected by actual applicants, then the immigration judge can consider whether any factors referenced by the commenters warrant an extension of the filing deadline.

Given the limited available avenues for relief or protection; the common goal of providing relief or protection to aliens with meritorious claims as quickly as possible, especially those who are detained; and the risk of loss or degradation of evidence with the passing of time, the Department believes the benefits of the rule, on balance, far outweigh the speculative concerns raised by commenters.

The Department further notes that nothing in the rule prohibits nonprofit organizations, pro bono groups, or any other class of representatives from taking an alien's case at a later point in the proceedings. An alien who obtains counsel may also choose a representative at any point in the proceedings, including after filing an application. Thus, pro se aliens have more opportunities to obtain assistance that many commenters suggested.

The Department also notes that 85% of aliens with pending asylum cases have representation. EOIR, *Adjudication Statistics: Current Representation Rates* (Oct. 13, 2020), *available at https://www.justice.gov/eoir//file/1062991/download.* For those who do not, there are multiple avenues they may pursue to obtain representation. *See* EOIR, *Find Legal Representation* (Oct. 1, 2020), *available at https://www.justice.gov/eoir/find-legal-representation.*[59] Nevertheless, the Department has fully considered the possible impacts of this rule on the relatively small pro se population of aliens who seek asylum before EOIR. However, the rule does not single such aliens out for particular treatment under EOIR's procedures. Moreover, immigration court procedures are generally not excused for pro se respondents, just as they are not excused generally for pro se civil litigants. *See, e.g., McNeil* v. *United States,* 508 U.S. 106, 113 (1993) (''[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.''); *Edwards* v. *INS,* 59 F.3d 5, 8–9 (2d Cir. 1995) (rejecting a pro se alien litigant's arguments for being excused from Federal court procedural

[59] Although the Department acknowledges that nonprofit organizations and pro bono volunteers, like all legal representatives, may face unforeseen challenges confronting new rules or procedures, the Department is confident that such representatives will be able to handle such changes, just as they do in any other court system, and will continue to be able to provide assistance and resources to aliens in proceedings before EOIR. Moreover, as discussed throughout this rule, most of this rule's provisions are simply codifications of longstanding principles that have been applicable to practitioners for years, including the ability of an immigration judge to establish and extend filing deadlines, to introduce evidence, and to ensure asylum applications are adjudicated consistent with regulatory and statutory authorities.

requirements due to his pro se status). Although the Department acknowledges the challenges faced by pro se litigants and recommends that all aliens obtain representation, nothing in the rule singles out pro se aliens or has the effect of exacerbating their situation.[60]

Further, there is at least a rational basis for the rule's deadline. Establishing a deadline, as explained in 85 FR at 59694, reduces the risk of delayed filing, which, in turn, reduces the risk of delayed grants of protection or relief for meritorious claims and reduces the risk of degradation or loss of evidence over time. *Cf. DeSousa* v. *Reno,* 190 F.3d 175, 184 (3d Cir. 1999) (''[D]isparate treatment of different groups of aliens triggers only rational basis review under equal protection doctrine. . . . Under this minimal standard of review, a classification is accorded 'a strong presumption of validity' and the government has no obligation to produce evidence to sustain its rationality.'') (citing *Francis* v. *Immigration and Naturalization Serv.,* 532 F.2d 268, 272 (2d Cir. 1976) (internal citations omitted). It is also consistent with a similar existing deadline in 8 CFR 1208.5(b), a regulatory directive in 8 CFR 1208.5(a) to adjudicate cases of detained aliens expeditiously, and the longstanding authority in 8 CFR 1003.31(c) of immigration judges to set deadlines. In short, the rule does not violate due process for pro se aliens, just as it does not violate due process for any category of aliens.

Additionally, the Department disagrees that pro se aliens cannot meet the 15-day filing deadline or cure any deficiencies in their applications within 30 days. The Form I–589 spans eight pages—plus an additional page for signatures and supplemental pages, as needed—and DHS estimates the time necessary to review the instructions and complete and submit the form is 12 hours. *See* U.S. Citizenship and Immigration Services, *Form I–589, Application for Asylum and for Withholding of Removal, OMB No. 1615–0067* (Aug. 25, 2020), *available at https://www.uscis.gov/sites/default/files/document/forms/i-589.pdf;* U.S. Citizenship and Immigration Services, *Form I–589, Application for Asylum and for Withholding of Removal, Instructions, OMB No. 1615–0067* (Aug. 25, 2020), *available at https://www.uscis.gov/sites/default/files//forms/i-589instr.pdf.* Instructions to Form I–589 are available and written to assist applicants with or without representation. *See id.; see also* note 26, *supra* (discussing the wide availability of information on applying for asylum, including information in multiple languages).

Further, apart from seeking representation, many pro se aliens may access various resources to assist them in completing this form. Within the Department's Office of Legal Access Programs, a wide variety of self-help materials and legal centers, workshops, and orientations are available to assist aliens if they so choose. *See* Executive Office for Immigration Review, *Office of Legal Access Programs* (Feb. 19, 2020), *available at https://www.justice.gov/eoir/office-of-legal-access-programs.* Considering that aliens in asylum-and-withholding-only proceedings are only eligible for relief available through Form I–589, *see* 8 CFR 1208.2(c)(3)(i), the Department believes that the 15-day deadline is sufficient to complete the Form I–589 and that 30 days is sufficient to correct any deficiencies, including for a pro se alien. The existence of the possibility of an extension of those deadlines further provides a safety net for pro se aliens to ensure that their applications are completed in a timely and accurate manner.

5. Concerns With Form I–589 Procedures

a. Supplementing the Record

i. Evidence From Non-Governmental Sources

Comment: Commenters raised concerns with the rule's clarification on the evidentiary standards for the admission of non-governmental source evidence. Commenters claimed that the rule would create a double standard by treating governmental sources as automatically reliable while requiring foreign government and non-governmental sources to meet a ''credible and probative'' standard. Commenters stated that this was particularly problematic because United States governmental sources are subject to political pressures and often do not present accurate or complete depictions of conditions in other countries. One commenter claimed that this would violate the Refugee Act, which aimed to remove political or foreign policy influence from asylum determinations.

Commenters were also concerned that the ''credible and probative'' standard was a new, higher standard than the existing probative standard for evidentiary submissions and that the term ''credible'' only exists in asylum law as it relates to oral testimony. Commenters further claimed that requiring a ''credible and probative'' standard would limit or exclude the evidence that an alien could submit, which would in turn violate an alien's due process right to present evidence.

Moreover, commenters expressed concern that the ''credible and probative standard'' could be used in conjunction with a separate proposed rulemaking which would establish that evidence promoting cultural stereotypes was inadmissible, to inappropriately exclude evidence that would support an applicant's claim. *See* 85 FR at 36264. Specifically, commenters expressed concern that immigration judges would mischaracterize the ''quality'' of submitted evidence in order to bar admission of evidence that might support an applicant's claim and, under the other proposed rule, refuse to submit evidence based on the substance. Commenters suggested that it would be inappropriate for immigration judges to bar the admission of evidence that might in substance support an applicant's claim based on the ''quality of the messenger.'' Additionally, commenters stated that the standard would minimize the value of non-governmental sources such as non-governmental organization reports, which commenters claimed were very reliable, and would thereby diminish the credibility of such sources.

Lastly, commenters requested the Department provide a definition of ''credible and probative,'' claiming that the standard was unclear and could fail a vagueness challenge.

Response: As an initial point, commenters did not generally explain why it would be appropriate for an immigration judge to consider evidence from non-credible source or that is not probative, and the Department is aware of no such reason. Evidence from non-credible sources of that is not probative provides no assistance to an adjudicator almost by definition, and the Department is unaware of any justification for allowing the consideration of such evidence. Similarly, commenters' assertions that immigration judges would mischaracterize evidence rest on the tacit suggestion that immigration judges are incompetent or unethical and are either incapable or unwilling to adhere

[60] There is no evidence that the shorter filing deadline in 8 CFR 1208.5(b) has discriminated against pro se aliens in any way, and commenters did not allege that it had. Further, even if that deadline had a discriminatory impact, as commenters alleged the rule will, it would not—and the rule does not—violate the Fifth Amendment's equal protection guarantee, *see* U.S. Const. amend. V., because it does not burden fundamental rights. *See Heller* v. *Doe,* 509 U.S. 312, 319 (1993) (affording a strong presumption of validity to a classification that does not involve fundamental rights or proceedings along suspect lines).

to applicable law. As discussed elsewhere in this final rule, that assertion is unsupported and appears to stem from the personal biases or policy preferences of commenters, rather than any objective evaluation of immigration judges. *Chem. Found., Inc.,* 272 U.S. at 14–15 (''The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.''). Moreover, such unsupported and tendentious assertions provide no basis for the Department to alter the NPRM.

Further, this rule does not change the longstanding standards for the admission of evidence in immigration proceedings—whether the evidence is probative and its admission is fundamentally fair. *See Matter of Y–S–L–C–,* 26 I&N Dec. 688, 690 (BIA 2015) (explaining that ''the test for admitting evidence is whether it is probative and its admission is fundamentally fair''); *Nyama* v. *Ashcroft,* 357 F.3d 812, 816 (8th Cir. 2004) (stating that the ''traditional rules of evidence do not apply to immigration proceedings'' and that the ''sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair'') (quoting *Espinoza* v. *INS,* 45 F.3d 308, 310 (9th Cir. 1995)). Once admitted, the immigration judge must then weigh the evidence to determine whether the burden of proof has been met. *See, e.g., Le Bin Zhu* v. *Holder,* 622 F.3d 87, 92 (1st Cir. 2010) (affording less evidentiary weight to an unauthenticated foreign local government notice); *Song Wang* v. *Keisler,* 505 F.3d 615, 622 (7th Cir. 2007) (giving ''little weight'' to an unauthenticated foreign certificate). In weighing the evidence, the immigration judge may look to the credibility of the source. The rule simply clarifies that foreign government and non-governmental [61] sources are not automatically presumed credible, and evidence from these sources is not presumed probative, as the prior regulatory language may have unintentionally implied.

Contrary to commenters' claims, this clarification has no effect on the ability of aliens to present evidence. *See, e.g., Colmenar* v. *INS,* 210 F.3d 967, 971 (9th Cir. 2000) (finding a due process violation when the alien was not provided a reasonable opportunity to present evidence). Instead, immigration judges will continue to review all evidence presented and determine admissibility and weight accordingly. The rule is also not intended to make any implicit negative judgments on the general credibility of foreign government or non-governmental sources and does not change the immigration judges' process of weighing evidence in applying burdens of proof. *See, e.g.,* 8 CFR 1240.8 (burdens of proof in removal proceedings).

Moreover, the rule does not mean that evidence from governmental sources is always admissible, as such evidence must still be relevant or probative. For example, in an asylum case involving an alien from Guatemala, the State Department report on conditions in Australia would not be probative of conditions in Guatemala. In general, however, State Department reports are considered ''highly probative evidence and are usually the best source of information on conditions in foreign nations.'' *Matter of H–L–H– & Z–Y–Z–,* 25 I&N Dec. 209, 213 (BIA 2010) (*abrogated on other grounds by Hui Lin Huang* v. *Holder,* 677 F.3d 130 (2d Cir. 2012)); *see also Sowe* v. *Mukasey,* 538 F.3d 1281, 1285 (9th Cir. 2008) (''U.S. Department of State country reports are the 'most appropriate and perhaps the best resource for information on political situations in foreign nations.' '') (quoting *Kazlauskas* v. *INS,* 46 F.3d 902, 906 (9th Cir. 1995)); *accord* 8 CFR 1208.11 (expressly allowing immigration judges to seek comments from the State Department regarding asylum applications). In particular, State Department reports offer both a country-wide perspective and localized comparisons that are particularly relevant for internal relocation determinations, 8 CFR 1208.13(b)(1)(i)(B), (2)(ii), and are often missing from reports from other sources. *See, e.g.,* Department of State, Bureau of Conflict and Stabilization Operations, *Northern Triangle Country Conditions: Ranking the Highest and Lowest Areas of Reported Homicides, Disappearances, and Extortion* (May 2019), *https://www.justice.gov/eoir/page/file/1180706/download* (discussing rates of homicides, disappearances, and extortion at a municipality level in countries with high rates of asylum applications).

Despite commenters' concerns, once admitted as evidence, State Department reports warrant particular consideration because of their credible source: The ''collective expertise and experience of the Department of State, which has diplomatic and consular representatives throughout the world.'' *Matter of H–L–H– & Z–Y–Z–,* 25 I&N Dec. at 213. The same logic applies to documents from other United States governmental agencies within their areas of expertise.

Based on this assessment, the Department believes that immigration judges should continue to rely on United States governmental sources, if relevant or probative, and should generally consider them as evidence when deciding an asylum case. The Department notes that the rule does not prevent asylum applicants from submitting additional probative evidence from credible sources if they believe that evidence from a United States governmental source has not provided a complete account of conditions in a foreign country or from arguing why, in a particular case, an immigration judge should afford less weight to any particular evidence, including evidence from government sources. Similarly, the rule does not prevent the immigration judge from weighing such information together in making the judge's final determination on whether the parties have met their burden of proof.

The Department disagrees with commenters that this rule could be used in conjunction with an earlier proposed rule which, if finalized, would bar admission of pernicious, unfounded evidence that is predicated upon harmful stereotypes from being entered into the record, to improperly reject evidence that may support an applicant's claim. 85 FR at 6282; *cf. Matter of A–B–,* 27 I&N Dec. at 336 n. 9 (''On this point, I note that conclusory assertions of countrywide negative cultural stereotypes, such as *A–R–C–G–*'s broad charge that Guatemala has a 'culture of machismo and family violence' based on an unsourced partial quotation from a news article eight years earlier, neither contribute to an analysis of the particularity requirement nor constitute appropriate evidence to support such asylum determinations.''). Both rules are ultimately about barring admission of baseless, incredible, and non-probative evidence, whether because of the source or the content of the evidence. To the extent that commenters suggest that immigration judges would choose to bar evidence that does not support a particular narrative, *i.e.,* suggesting that immigration judges are partial to a particular narrative or disposition, the Department strongly disagrees. As discussed at length, *infra,* section II.C.5.a.ii, EOIR's immigration judges are impartial adjudicators, and are not

[61] The Department notes that, consistent with common understanding and typical linguistic usage, an alien testifying in support of his or her own application is not considered a ''non-governmental source.'' Whether an alien's testimony in support of his or her own application is credible will continue to be assessed based on applicable law. *See, e.g.,* INA 208(b)(1)(B)(iii), 8 U.S.C. 1158(b)(1)(B)(iii) (outlining the bases for the credibility determination of an asylum applicant).

expected to predetermine the admissibility of evidence based upon whether it supports a particular narrative.

Finally, the Department does not believe that the credible and probative standards require any additional definitional language, as these have been part of the evidentiary standards for decades without apparent confusion. *See, e.g., Trias-Hernandez* v. *INS,* 528 F.2d 366, 369–70 (9th Cir. 1975) (applying the probative evidence test).

ii. Authority of the Immigration Judge To Supplement the Record

Comment: Commenters expressed concerns that the rule would undermine the immigration judge's neutrality or exacerbate an existing lack of neutrality. Specifically, commenters stated that the rule would improperly expand an immigration judge's power and that allowing immigration judges to introduce evidence into the record conflicts with their role as neutral arbiters of the law. Other commenters complained that immigration judges are already biased, citing some immigration judges' previous employment history with DHS, decisions from the Federal courts that acknowledge biased decisions from immigration judges, and records alleging EOIR misconduct. Commenters stated that allowing immigration judges to submit their own evidence would put them in the posture of a prosecutor or defense attorney rather than a judge. Some commenters suggested that immigration judges would work in tandem with DHS attorneys to deny asylum claims. Commenters stated that a rule that undermined an adjudicator's impartiality would undermine aliens' due process rights. Commenters expressed concerns that immigration judges would have pre-prepared country conditions evidence packets to submit during removal proceedings, which they alleged would be improper.

Commenters generally stated that this rule would be harmful to aliens, and several commenters alleged that the rule would be particularly harmful to certain discrete populations or pro se aliens. Commenters asserted that pro se aliens may be less able to present evidence on their own behalf in support of their claims. Additionally, commenters stated that the rule does not explicitly state whether pro se aliens will be told that they have a right to object to the evidence.

Commenters expressed concern that the rule did not provide sufficient guidance or protections for aliens in proceedings in which the immigration judge introduces evidence into the record. For example, commenters expressed concern that the rule did not specify the period of time in which parties must respond to evidence submitted by the immigration judge or provide guidance that parties could respond to such evidence. Commenters suggested that the rule's language stating that parties should have an opportunity to respond or object to evidence was at odds with the chapter 3.1(b) of the Immigration Court Practice Manual, which requires parties to submit evidence at least 15 days before a hearing.

Commenters suggested that immigration judges would not fairly hear challenges to the evidence the immigration judge may have submitted. Some commenters speculated that parties, particularly pro se immigrants and vulnerable populations, would be too intimidated to raise objections to evidence submitted by the immigration judge. Other commenters expressed concerns that the rule failed to provide guidance regarding what types of evidence immigration judges may include. Further, commenters opposed the rule because they claimed it failed to specify whether parties would have the opportunity to submit comments or objections in writing to evidence submitted by the immigration judge.

Commenters were concerned that non-English speakers would not understand English-language documents submitted by an immigration judge. Commenters stated that there was no provision allowing for a continuance for the parties to review and respond to the newly introduced evidence.

Commenters stated that the rule would violate section 240(b)(1) of the Act, 8 U.S.C. 1229a(b)(1), which provides that ''[t]he immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses.'' Specifically, commenters asserted that Congress did not intend to confer authority on immigration judges to submit evidence because the statute specified only that the immigration judge may receive evidence but was silent with respect to whether the immigration judge could submit evidence. Commenters further stated that, prior to the IIRIRA amendments, the Act authorized immigration judges to ''present and receive evidence,'' which commenters believed further demonstrated that Congress did not intend for immigration judges to have the authority to submit evidence into the record. Commenters similarly stated that the rule conflicts with the regulations at 8 CFR 1003.10(b) (stating that immigration judges may ''receive evidence'') and 8 CFR 1240.1(c) (stating that immigration judges may ''receive and consider material and relevant evidence'').

Some commenters suggested that the rule was at odds with other recent agency rulemakings, such as 85 FR 36264 (addressing admissibility of stereotype evidence) (proposed), and 85 FR 52491 (limiting immigration judges' discretion by restricting their sua sponte authority to reopen cases) (proposed).

Some commenters stated that the rule would be ineffective at addressing inconsistencies and defects in immigration courts, such as, the commenters claimed, disparate patterns in immigration-judge decisions. Commenters stated that the rule would similarly be ineffective at achieving its purpose of allowing decisions to be made after full consideration of the evidence.

Some commenters stated that the rule would be inefficient at reducing overloaded dockets because immigration judges would be responsible for searching for evidence and consulting with parties about such evidence, which the commenter opined would require a great deal of time and resources and result in more appeals to the Federal circuit courts.

Commenters recommended a number of changes to the rule, including allowing immigration judges to submit only favorable evidence to the alien. Commenters suggested that such a rule would be similar to procedures already in place at other government agencies, such as the Social Security Administration and Department of Veterans Affairs.

Commenters were concerned that the rule did not provide sufficient guidance regarding how immigration judges should consider and respond to objections to their admission of evidence on the record.

Response: The Department reiterates its response to similar comments, *supra,* and adds the following further response. As an initial point, few, if any, commenters acknowledged that immigration judges have been tasked with developing the record in asylum cases for many years, including by submitting evidence on their own authority, with no noted concerns, challenges, or complaints. *See* 85 FR at 59695 (collecting authorities). Indeed, ''various guidelines for asylum adjudicators,'' including ones such as the UNHCR whose views most commenters otherwise supported, ''recommend the introduction of evidence by the adjudicator.'' *Matter of S–M–J–,* 21 I&N Dec. at 729 (citing UNHCR, *Handbook on Procedures and*

Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees paras. 203, 204, at 48 (1992)). Thus, the rule merely codifies a long-accepted and well-recognized practice.

As discussed, *supra,* the Department strongly disagrees with commenters' suggestions that immigration judges are biased or incompetent and will ignore applicable law or make decisions on factors outside of the record and the law. The Department is confident that EOIR's immigration judge corps adheres to the highest levels of professionalism and will continue to apply their independent judgment and discretion, 8 CFR 1003.10(b), when evaluating asylum applications. Generalized, ad hominem allegations of bias or impropriety are insufficient to ''overcome a presumption of honesty and integrity in those serving as adjudicators.'' *Withrow* v. *Larkin,* 421 U.S. at 47. As such, the Department declines to accept commenters' broad and unfounded asseverations that immigration judges are biased against aliens and will utilize this rule to effectuate those biases. *Chem. Found., Inc.,* 272 U.S. at 14–15 (''The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'').

Relatedly, most commenters failed to recognize or acknowledge the inherent neutrality and impartiality of immigration judges. *See* Executive Office for Immigration Review, *Ethics and Professionalism Guide for Immigration Judges,* sec. V (Jan. 26, 2011), *available at https://www.justice.gov/eoir/sibpages/IJConduct/EthicsandProfessionalismGuideforIJs.pdf* (''An Immigration Judge shall act impartially and shall not give preferential treatment to any organization or individual when adjudicating the merits of a particular case.''); *see also* 5 CFR 2635.101(b)(8) (''[Federal Government] [e]mployees shall act impartially and not give preferential treatment to any private organization or individual.''). Further, commenters failed to understand that evidence is designed to assist the factfinder—*i.e.,* the immigration judge—rather than to benefit one party over another. In short, commenters' tendentious views that immigration judges are routinely biased against aliens and that the rule will promote their biases is wholly unfounded in law and practice [62] and completely inapposite to the purposes served by evidentiary submissions in an immigration hearing.

The Department disagrees with commenters' concerns that this rule would undermine the immigration judge's role as a neutral arbiter. The rule amends the regulations so that immigration judges may, in their discretion, consider evidence that has not been presented by the parties in order to make their determinations. Nothing in the rule has any bearing on judicial interpretations of such evidence. The Department fully expects, as mandated by regulation, that in complying with this rule, immigration judges to continue to conduct themselves as neutral arbiters of the law. *See* 8 CFR 1003.10(b); *see also* 5 CFR 2635.101(b)(8).

Notably, immigration judges have long had the authority and duty to manage immigration court hearings, including creating and controlling the record of proceeding, and to fully develop the record, while impartially adjudicating cases before them. 8 CFR 1003.10(b); *see also* 8 CFR 1003.36 (''The Immigration Court shall create and control the Record of Proceeding.''). It is also consistent with an immigration judge's duty to develop the record. *See* 85 FR at 59695 (collecting authorities).

Commenters' suggestions that immigration judges might create standard country conditions packets of evidence that they might enter into the record did not explain why such evidence would be inappropriate or improper. As a matter of standard practice, both parties already submit standard (and voluminous) packets of country conditions evidence of varying degrees of probative value. In cases where country conditions evidence is lacking—*e.g.,* the most recent relevant State Department Country Report on Human Rights Practices—many immigration judges already provide copies of such evidence to both parties. Commenters did not explain why allowing immigration judges to provide standard country conditions reports—longstanding and credible sources of directly relevant information that frequently require the submitting party to print out hundreds of pages—would be improper, and the Department is unaware of any reason to conclude that it would be. Further, such a procedure, which, again, is already commonly employed by immigration judges, particularly pursuant to *Matter of S–M–J–,* would not undermine the immigration judge's neutrality or the fairness of proceedings. The immigration judge would weigh such evidence, like any evidence submitted into the record pursuant to this rule, against all other evidence of record in issuing a final determination. Moreover, to the extent that commenters' concerns are actually rooted in a tacit belief that additional probative evidence exists that has not been submitted by an asylum applicant and would call into doubt the validity of the applicant's claim, the Department finds the suggestions that immigration judges should decide cases without as much probative evidence as possible or that it is preferable for immigration judges to decide cases with less probative evidence utterly unpersuasive.

The Department reiterates its rejection of any implication that EOIR's corps of immigration judges is biased. Immigration judges, who have been selected based on merit, are required to adjudicate cases in an ''impartial manner,'' 8 CFR 1003.10(b), exercise ''independent judgment and discretion,'' *id.,* and ''should not be swayed by partisan interests or public clamor,'' Executive Office for Immigration Review, *Ethics and Professionalism Guide for Immigration Judges,* sec. VIII (Jan. 26, 2011), *available at https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf.* Regardless of previous experience, immigration judges are sworn in and governed by the same regulations and ethical standards to be neutral and impartial. Nothing in this rule affects those obligations, and commenters' unfounded accusations of bias leading to due process violations are insufficient to ''overcome a presumption of honesty and integrity in those serving as adjudicators.'' *Withrow* v. *Larkin,* 421 U.S. at 47.[63]

[62] The Department further notes that complaints of misconduct against immigration judges have declined for three consecutive fiscal years, even as the size of the corps has grown to its largest level in the Department's history. *See* EOIR, *Adjudication Statistics* (Oct. 23, 2019), *https://www.justice.gov/eoir/page/file/1163621/download; Immigration Judge (IJ) Complaints* (Oct. 2020), *available at https://www.justice.gov/eoir/page/file/1104851/download.*

[63] Although the Department acknowledges prior high-profile criticisms of immigration judge bias by circuit courts, *see, e.g., Islam* v. *Gonzales,* 469 F.3d 53, 56 (2d Cir. 2006) (''Unfortunately, this is not the first time that the courtroom conduct of IJ [Jeffrey] Chase has been later questioned by this Court. By our count, this is the seventh time that we have criticized IJ Chase's conduct during hearings. Our recent opinion . . . described IJ Chase's 'apparent bias against [the applicant] and perhaps other Chinese asylum applicants,' . . . and five summary orders in our Circuit have expressed similar concerns about IJ Chase's remarks and demeanor while conducting hearings.'') (internal citations omitted), and notes that commenters also cited to

Continued

The Department rejects commenters' insinuations that immigration judges would not be impartial in entering evidence to the record or would only introduce evidence that would be damaging to an alien's claim. Immigration judges are bound by regulation to ''resolve the questions before them in a timely and *impartial* manner.'' 8 CFR 1003.10(b) (emphasis added); *see also* 5 CFR 2635.101(b)(8) (''[Immigration judges] shall act impartially and not give preferential treatment to any private organization or individual.''). The rule permits immigration judges to submit probative evidence from credible sources into the record. Such evidence may benefit either party, depending on the larger context and facts of the case, but the purpose of the rule is not to assist either party. The purpose is to allow the adjudicator, consistent with current practice and case law, to develop the record sufficiently to make an informed decision regarding the merits of the case. Allegations regarding whether such procedures, which are already well-established, will benefit one party over another are both grossly speculative and wholly inapposite. Additionally, this rulemaking does not bar parties from submitting their own evidence, so long as it is admissible. It merely permits the immigration judge to submit additional evidence where necessary and in an exercise of discretion, so that the immigration judge may render a decision based upon a fully developed and probative record.

The Department disagrees with commenters' concerns that authorizing the immigration judge to supplement the record would harm pro se aliens. To the contrary, immigration judges already have a well-established obligation to develop the record in cases of pro se aliens. *See Mendoza-Garcia* v. *Barr,* 918 F.3d 498, 504 (6th Cir. 2019) (collecting cases); *see also Al Khouri* v. *Ashcroft,* 362 F.3d 461, 464–65 (8th Cir. 2004) (''[I]t is the IJ's duty to fully develop the record. Because aliens appearing pro se often lack the legal knowledge to navigate their way successfully through the morass of immigration law, and because their failure to do so successfully might result in their expulsion from this country, it is critical that the IJ scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.'') (citations and internal quotation marks omitted). Further, this rule will ensure pro se aliens, who may not be as aware as an immigration judge of available probative evidence from credible sources of country conditions, receive due process and full consideration of their claims. This provision of the rule is consistent with an immigration judge's regulatory directive to ''take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of [individual cases before them],'' 8 CFR 1003.10(b); *see also* 85 FR at 59695, and the immigration judge's unique role to ensure full consideration of all relevant evidence and full development of the record for cases involving a pro se respondent, *see Matter of S–M–J–,* 21 I&N Dec. at 729 (noting that ''various guidelines for asylum adjudicators recommend the introduction of evidence by the adjudicator'').

Commenters' concerns that, under this rule, parties would not have the opportunity to respond to evidence that the immigration judge submits, are plainly refuted by the regulatory language, which requires that the parties ''have had an opportunity to comment on or object to the evidence prior to the issuance of the immigration judge's decision.'' 8 CFR 1208.12(a). Additionally, the Department has previously explained that requiring the immigration judge to provide a copy of submitted evidence to both parties was specifically intended to ''give the parties an opportunity to respond to or address the information appropriately.'' 85 FR at 59695.[64]

The Department disagrees with commenters' concerns that immigration judges would be unable to adequately address objections to evidence that they submit. Immigration judges have been hired based upon their merit and receive ''comprehensive, continuing training and support'' directed at ''promot[ing] the quality and consistency of adjudications.'' 8 CFR 1003.0(b)(1)(vii). The Department believes that immigration judges are well-equipped to address any arguments raised with respect to evidence that they submit, including how to weigh that evidence against all other evidence of record and, if appropriate, acknowledging successful challenges to its admission.

Further, parties will have the opportunity to object to the evidence, and the Department expects that if parties have an objection, they will make it contemporaneously when the immigration judge submits the evidence in order to preserve the issue for appeal. The Department believes that existing appellate procedures would mitigate commenter concerns, though unfounded as an initial matter, that immigration judges may be unwilling to fairly consider objections to evidence that they submitted or that parties may not have sufficient time to respond to such evidence.

With respect to commenter concerns that non-English speakers may not be able to understand English documents that the immigration judge may choose to submit into the record, the Department notes that there is no existing requirement for immigration judges to translate documents submitted into evidence into an alien's native language when developing the record. *See Matter of S–M–J–,* 21 I&N Dec. at 727 (observing that ''if background information is central to an alien's claim, and the Immigration Judge relies on the country conditions in adjudicating the alien's case, the source of the Immigration Judge's knowledge of the particular country must be made

federal court cases that discuss or touch upon immigration judge bias, *Ali* v. *Mukasey,* 529 F.3d 478 (2d Cir. 2008); *Wang* v. *Att'y Gen. of U.S.,* 423 F.3d 260 (3d Cir. 2005); *Zuh* v. *Mukasey,* 547 F.3d 504 (4th Cir. 2008); *Floroiu* v. *Gonzales,* 481 F.3d 970 (7th Cir. 2007); *Tun* v. *Gonzales,* 485 F.3d 1014 (8th Cir. 2007), the concerns reflected by these cases are more than a decade old. More recent information reflects that complaints of misconduct against immigration judges have fallen for three consecutive fiscal years despite a significant increase in the size of the corps. *See* Executive Office for Immigration Review, *Adjudication Statistics: Immigration Judge (IJ) Complaints* (Oct. 202*0), available at https://www.justice.gov/eoir/page/file/1104851/download.* Nevertheless, to the extent that commenters remain concerned about the bias or other conduct of immigration judges, the Department notes that EOIR has developed a mechanism for raising such complaints specifically for the purpose of addressing bias by EOIR adjudicators. *See* Executive Office for Immigration Review, *EOIR Adjudicator Complaint Process Summary* (rev. Oct. 15, 2018), *available at https://www.justice.gov/eoir/page/file//download* (''In instances where concerns regarding the conduct of an immigration judge, board member, or administrative law judge (collectively, adjudicator) arise, EOIR is committed to ensuring that any allegations of judicial misconduct are investigated and resolved in a fair and expeditious manner.'').

[64] The NPRM declined to propose a bright line rule for precisely how a party may have an opportunity to comment on the evidence because the reasonableness of a party's opportunity to comment will vary based on the overall context of the case and the nature of the evidence the immigration judge proposes to submit. For example, if the record already contains thousands of pages of country conditions evidence submitted by attorneys for both parties and the immigration judge merely submits the most recent State Department Country Report on Human Rights Practices that the parties simply forgot to submit, the opportunity to comment should not be lengthy. In contrast, if an immigration judge submits hundreds of pages of country conditions evidence in a proceeding involving a pro se alien who does not speak English, then a continuance may be warranted to allow the alien an opportunity to comment on the evidence. The Department recognizes that the nature of the opportunity to comment will vary from case to case based on the particular facts of each case, and it expects immigration judges to address such situations consistent with applicable laws and policies.

part of the record'' but nowhere requiring that such information be submitted in the alien's native language). Further, most commenters failed to acknowledge that all evidence submitted in an immigration hearing, regardless of who submits it, is to be submitted in English or with an English translation. 8 CFR 1003.33.[65] Additionally, nothing in the statute or regulations requires that evidence of record be written or explained in the respondent's native language. *Cf. Singh* v. *Holder,* 749 F.3d 622, 626 (7th Cir. 2014) (''[i]n the immigration context, personal service in English to a non-English-speaker typically satisfies due process because it puts the alien on notice that further inquiry is needed, leaving the alien to seek help from someone who can overcome the language barrier.'''); *Ojeda-Calderon* v. *Holder,* 726 F.3d 669, 675 (5th Cir. 2013) (''Due process allows notice of a hearing to be given solely in English to a non-English speaker if the notice would put a reasonable recipient on notice that further inquiry is required.''). Finally, as discussed *supra,* and notwithstanding the longstanding rule that evidence must be submitted in English or with a certified translation, the Department also expects immigration judges to account for an alien's native language when considering what opportunity to provide to the alien to respond to evidence submitted by an immigration judge, particularly for the small minority of aliens who are pro se.[66]

The Department disagrees with comments alleging that the rule is inconsistent with section 240(b)(1) of the Act, 8 U.S.C. 1229a(b)(1), which provides that ''[i]mmigration judges shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses,'' and commenters did not reconcile their interpretation of that provision with case law allowing, if not also requiring, immigration judges to submit evidence in order to develop the record, *see* 85 FR at 59695 (collecting cases). As commenters noted, the statute does not explicitly direct immigration judges to submit evidence into the record, but it does not purport to represent the complete and exclusive scope of immigration judge authority with regard to proceedings. Further, the Department disagrees with commenters that the amendments to the statutory language from ''present and receive evidence'' to simply ''receive evidence'' indicate a prohibition on the ability of immigration judges to introduce evidence, given the continued duty of immigration judges to develop the record. *See Constanza-Martinez* v. *Holder,* 739 F.3d at 1102 (''The parties agree it is unclear why 'present' was removed from the INA. Even so, IJs maintain an affirmative duty to develop the record.'').[67]

Commenters' concerns that the regulations do not allow immigration judges to submit evidence into the record need not be addressed because this rule, enacted through the appropriate APA procedures, amends the Department's regulations to specifically authorize immigration judges to do so. Moreover, as discussed, *supra,* ample case law already provides a basis, independent of regulatory one, for immigration judges to submit evidence. And, as also discussed elsewhere, the Department does not believe that this rule would undermine the neutrality of immigration judges and accordingly rejects commenters' arguments that this rule conflicts with the regulations requiring immigration judges to act with impartiality.

The Department disagrees with commenter's concerns that this rulemaking will overburden immigration judges and exacerbate docket-management issues. To the contrary, this rule empowers immigration judges with additional tools to resolve the cases before them based on a full and complete record. It does not mandate immigration judges introduce evidence in any case or otherwise require additional work if an immigration judge determines it is not needed or would be inefficient in a particular case.

Commenters made a number of recommendations regarding changes or alternatives to this provision of the rule, including incorporating a checklist for immigration judges to follow to prevent bias in assessing country conditions evidence; altering the rule so that immigration judges do not submit evidence themselves but instead suggest to the parties the inclusion of evidence, such as country conditions evidence from the EOIR database, they would like to consider; or only permitting immigration judges to submit evidence that is favorable to the alien. The Department appreciates the recommendations submitted by commenters, but each one is problematic, and none is preferable to the rule.

For example, the suggestion for a checklist is premised on the assertion that immigration judges may be biased, but as discussed previously, that assertion is wholly unfounded. Moreover, immigration judges are well-versed in assessing the admissibility and weight of evidence, and there is no indication that a checklist would aid them in that regard. Suggesting that the parties introduce particular evidence, rather than allowing the immigration judge to introduce it, would not aid pro se aliens who may lack the resources or access to print tens or hundreds of pages of country conditions reports. Finally, the suggestion that immigration judges only submit evidence favorable to aliens would be anathema to an immigration judge's role as a neutral adjudicator and would violate both an immigration judge's ethical and professional responsibility obligations, *see Ethics and Professionalism Guide for Immigration Judges,* sec. V (Jan. 26, 2011), *available at https://www.justice.gov/eoir/sibpages/IJConduct/EthicsandProfessionalismGuideforIJs.pdf* (''An Immigration Judge shall act impartially and shall not give preferential treatment to any organization or individual when adjudicating the merits of a particular case.''); *see also* 5 CFR 2635.101(b)(8) (''[Immigration judges] shall act impartially and not give preferential treatment to any private organization or individual.''), and an immigration

[65] The Department notes that there is no existing requirement that evidence submitted by DHS be translated into an alien's native language or even that an alien's representative translate all evidence submitted on the alien's behalf into the alien's native language.

[66] The Department notes that the State Department Country Reports on Human Rights Practices, which are the most common evidence submitted by immigration judges, are available in multiple languages, including Spanish. *See,* Department of State, *2019 Country Reports on Human Rights Practices Translations, available at https://www.state.gov/2019-country-reports-on-human-rights-practices-translations/* (last visited Nov. 20, 2020). Nothing in this rule precludes an immigration judge from providing a translated copy of the Country Report to an alien in addition to the English-language version.

[67] *See also* 8 CFR 1003.10(b) (''In deciding the individual cases before them, . . . immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases.''); 8 CFR 1003.36 (''The Immigration Court shall create and control the Record of Proceeding.''); *Yang* v. *McElroy,* 277 F.3d 158, 162 (2d Cir. 2002) (per curiam) (''[T]he IJ whose decision the Board reviews, unlike an Article III judge, is not merely the fact finder and adjudicator but also has an obligation to establish the record.''); *Richardson* v. *Perales,* 402 U.S. 389, 410 (1971) (finding that an administrative law judge ''acts as an examiner charged with developing the facts''); Charles H. Koch, Jr. & Richard Murphy, Administrative Law and Practice § 5.25 (3d ed. 2020) (noting that ''[t]he administrative judge is pivotal to the fact-finding function of an evidentiary hearing and hence, unlike the trial judge, an administrative judge has a well-established affirmative duty to develop the record''); *Matter of S–M–J–,* 21 I&N Dec. at 729 (noting that ''various guidelines for asylum adjudicators recommend the introduction of evidence by the adjudicator'').

judge's regulatory duty of impartiality, 8 CFR 1003.10(b) (''In all cases, immigration judges shall seek to resolve the questions before them in a timely and impartial manner'').

The Department also disagrees with commenters' concerns that this provision of the rule conflicts with recent rules proposed—and now finalized—by the Department, specifically those (1) limiting EOIR adjudicators' sua sponte authority, 85 FR 52491 (''The Board shall not *sua sponte* remand a case unless the basis for such a remand is solely a question of jurisdiction over an application or the proceedings.'') (proposed)), and (2) barring admissibility of stereotype evidence, 85 FR 36264.

Regarding stereotype evidence, the Department proposed to exclude the admission of pernicious, unfounded evidence that is predicated upon harmful stereotypes from being entered into the record, 85 FR at 36282; *cf. Matter of A–B–,* 27 I&N Dec. at 336 n.9, and finalized that proposal with some minor, non-substantive edits for clarity in response to commenters' concerns, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, signed by the Attorney General and the Acting Secretary of Homeland Security on December 2, 2020. Nothing in this rule would encourage immigration judges to submit pernicious, unfounded evidence that is predicated upon harmful stereotypes. As plainly noted in the regulation, evidence submitted by an immigration judge must be ''relevant . . . if the source is credible and the evidence is probative,'' *see* 8 CFR 1208.12(a), and evidence of pernicious stereotypes about a country would not meet those criteria.

Commenters' concerns with respect to EOIR adjudicators' sua sponte authority is unrelated to this rulemaking. Indeed, the rule focuses on the adjudication of asylum applications in pending cases, whereas sua sponte authority is used to reopen a case in which a decision has already been rendered. Nothing in the present rule interacts with or is connected to the Department's proposal to limit the Attorney General's delegation of sua sponte authority to EOIR adjudicators.

b. Asylum Adjudication Clock

Comment: Commenters stated that, despite recognizing the statutory 180-day asylum adjudication deadline in the Act, INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), it was unreasonable for the Department to implement this regulation due to the significant number of pending cases at EOIR. Commenters explained that requiring asylum applications to be completed within 180 days would not allow attorneys and aliens sufficient time to prepare cases for adjudication, would require immigration judges to unfairly delay non-asylum cases on their dockets, would strip immigration judges of the ability to manage their dockets, would prevent asylum seekers from fully presenting their cases due to a lack of individual hearing slots, would result in a significant number of suddenly advanced hearings, would lessen the ability of asylum seekers to obtain counsel, and would cause unsuccessful applicants to be removed before pending ancillary relief with USCIS could be adjudicated.

Commenters claimed that Congress's use of the word ''shall'' when discussing the 180-day asylum adjudication deadline was permissive rather than mandatory and, therefore, EOIR should not issue regulations indicating a mandatory deadline.

Commenters also raised concerns about the 180-day asylum adjudication deadline's effect on child asylum applicants. Commenters stated that child applicants face unique challenges in presenting their claims and are deserving of enhanced procedural protections, such as an exception to the adjudication deadline. In addition, commenters questioned whether the 180-day adjudication deadline would apply to USCIS's initial adjudication of asylum applications filed by UAC.

Commenters were separately concerned about the 180-day asylum adjudication deadline and its effect on work authorization. Commenters stated that the rule would prevent asylum seekers from obtaining work authorization, particularly in light of recent DHS regulatory changes increasing the minimum wait time, which would result in the inability of asylum seekers to afford representation.[68] Commenters recommended that the Department replace 8 CFR 1208.7 with language clarifying EOIR's role in the work authorization process rather than remove and reserve the section entirely, which would remove guidance for the parties and the court from the regulations.

Response: The Department reiterates its response to similar comments, *supra,* and adds the following further response. To the extent that commenters disagreed with the general existence of a 180-day adjudication deadline for asylum applications absent exceptional circumstances, the Department notes that deadline is established by statute, INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), and cannot be altered by rulemaking. Accordingly, such concerns are beyond the scope of this rulemaking and the Department's rulemaking authority and therefore more appropriately addressed to Congress.

Specifically, as commenters recognize, adjudicating asylum applications within 180 days of filing is a statutory requirement set by Congress. *See* INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii). Therefore, issuing regulations to implement this requirement effectuates congressional intent that asylum applications be promptly adjudicated.[69] Complaints that the Department should not issue regulations implementing this deadline because immigration courts are overburdened is not a valid reason to simply ignore congressional mandates. Rather, ensuring that asylum applications are adjudicated within a 180-day timeframe will help to decrease immigration court backlogs and ensure that asylum applicants are not forced to wait in limbo in the United States for extended periods of time to receive a determination on their applications.

With regard to commenters' concerns about the effect of the 180-day asylum adjudication deadline on the ability of asylum seekers to obtain counsel and prepare their case, the Department again notes that Congress set the 180-day deadline. *See* INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii). By implementing this provision, Congress necessarily expressed their belief that 180 days is a reasonable time period for asylum seekers to prepare and present their case once they have filed their application. In addition, the Department emphasizes that this 180-day adjudication period does not begin until the asylum application is filed and not from when DHS serves the alien with a charging document or at some other earlier point in the proceeding. Once the

[68] This provision is currently subject to a preliminary injunction in *Casa de Maryland* v. *Wolf,* No. 8:20–cv–02118–PX (D. Md. Sept. 11, 2020), *appeal docketed,* No. 20–2217 (4th Cir. Nov. 12, 2020).

[69] To the extent commenters assert that the Department failed to previously adhere to the law regarding this adjudication period, the Department acknowledges a lack of prior diligence in maintaining compliance. Nevertheless, there is no reason to continue to ignore a clear statutory directive, and the Department has maintained a policy that seeks to comply with that directive for more than two years. EOIR Policy Memorandum 19–05, *Guidance Regarding the Adjudication of Asylum Applications Consistent with INA § 208(d)(5)(A)(iii)* (Nov. 19, 2018), *available at https://www.justice.gov/eoir/page/file/1112581/download.* This rule will bolster that policy and further emphasize the importance of adhering to statutory directives.

asylum application is filed, applicants and their attorneys would have additional time within the 180 days to obtain any additional necessary supporting evidence and to prepare for any hearings on the application, which the Department believes is a reasonable time period, as reflected by the congressional enactment.

The Department disagrees with commenters that this rule will prevent immigration judges from managing their dockets or providing sufficient hearing time to asylum applicants or that it will result in the unfair delay of non-asylum cases. As an initial point, immigration judge authority is circumscribed by both the Act and applicable regulations. 8 CFR 1003.10(b) (providing that ''immigration judges . . . may take any action *consistent with their authorities under the Act and regulations* that is appropriate and necessary for the disposition of such cases'') (emphasis added)), 1240.1(a)(1)(iv) (providing that immigration judges have the authority in removal proceedings ''[t]o take any other action consistent *with applicable law and regulations* as may be appropriate'') (emphasis added)). Thus, the codification of a statutory requirement in the Act in applicable regulations does not alter the pre-existing limits on an immigration judge's authority. Further, this rule makes no changes to immigration judges' authority to manage their dockets, and commenters have not adequately explained how implementing a statutorily-required adjudication deadline, which immigration judges are already expected to follow as a matter of both law and policy would alter this authority. *See* 8 CFR 1003.10(b). The Department has no concerns that immigration judges will fail to provide sufficient hearing time to asylum applicants as necessary to the adjudication of the application. *See, e.g.,* INA 240(b)(1), 8 U.S.C. 1229a(b)(1) (providing immigration judges with authority to ''receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses''); 8 CFR 1240.11(c)(3) (requiring a hearing on an asylum application only ''to resolve factual issues in dispute'').

In regard to commenters' concerns that adjudicating asylum applications within the statutorily-mandated timeframe will prevent immigration judges from adjudicating other cases, the Department notes that this rule does not prioritize any application or case over another. Rather, the rule merely implements a statutorily-mandated adjudication deadline for asylum applications. To the extent that implementing this deadline may affect the adjudication of other cases, the Department believes that the timely adjudication of asylum applications will help to reduce the immigration court backlog, thereby allowing immigration judges to more quickly adjudicate the cases before them.

Regarding concerns about EOIR advancing hearings, the Department notes that such concerns are speculative, particularly in the current operational environment in which many hearings are postponed due to the outbreak of COVID–19. Nevertheless, there is no reason to expect this rule to result in an overwhelming number of advanced hearings once EOIR's operating posture returns to normal, as most immigration judges already have a significant number of deadline-eligible asylum applications pending on their immediate dockets. And, in the event that an immigration judge does choose to advance a case, practitioners can request a continuance as appropriate, 8 CFR 1003.29, although as the Department has discussed, *supra,* it is not clear why aliens with valid asylum claims would desire further delay in the adjudication of their case.

The Department also disagrees with commenters that this provision raises due process concerns. In immigration proceedings, due process concerns are only implicated if proceedings are ''so fundamentally unfair that the alien was prevented from reasonably presenting his case.'' *Gutierrez* v. *Holder,* 662 F.3d 1083, 1091 (9th Cir. 2011) (citations omitted). Requiring asylum applications to be adjudicated within 180 days of filing, as explicitly required by statute, does not itself make proceedings fundamentally unfair or prevent an alien from exercising the statutory right to present evidence. *See* INA 240(b)(4)(B), 8 U.S.C. 1229a(b)(4)(B). For example, detained applicants routinely have their applications adjudicated within 180 days without apparent due process concerns stemming from this timeframe.

In regard to concerns about the asylum adjudication deadline and its effect on pending non-asylum applications with USCIS, the Department notes that this rule does not make any changes for non-asylum applications, including those pending with USCIS. Moreover, a separate pending application with USCIS does not prevent the immigration court from proceeding on the asylum application to ensure its timely adjudication. In addition, once the immigration court has timely adjudicated the asylum application, this rule does not prohibit applicants from requesting a continuance under the ''good cause'' standard or working with DHS counsel to file a motion to dismiss based on a pending application with USCIS. *See* 8 CFR 1003.29, 1239.2(c).

The Department understands and has considered the comments related to UAC but finds them either largely inapplicable to the rule, insufficiently persuasive, or outweighed by the rule's benefits to warrant changing the rule. First, the timeframes applied by USCIS to adjudicating asylum applications filed by genuine UAC are beyond the scope of this rulemaking because USCIS is a DHS component, and the Department offers no opinion regarding USCIS's views on section 208(d)(5)(A)(iii) of the Act, 8 U.S.C. 1158(d)(5)(A)(iii). Second, for purposes of immigration judge adjudication, the provisions of section 208(d)(5)(A)(iii) of the Act, 8 U.S.C. 1158(d)(5)(A)(iii), apply to ''final administrative adjudication of the asylum application, not including administrative appeal'' and, thus, would only become applicable to the asylum application filed by a UAC in removal proceedings after that application has been returned by USCIS back to the immigration court following USCIS's decision not to grant it. In other words, the 180-day adjudication deadline in immigration proceedings for an asylum application filed by a UAC in removal proceedings would not be triggered until after USCIS has made its initial determination on that application under section 208(b)(3)(C) of the Act, 8 U.S.C. 1158(b)(3)(C). Moreover, nothing in this rule affects USCIS's initial adjudication of asylum applications filed by UAC. *Id.*

Significantly, Congress did not exempt UAC asylum applications from the provisions of section 208(d)(5)(A)(iii) of the Act, 8 U.S.C. 1158(d)(5)(A)(iii), as it did for other provisions. *Compare* INA 208(a)(2)(E), 8 U.S.C. 1158(a)(2)(E) (exempting UAC asylum applications from limitations imposed by asylum cooperative agreements and the one-year filing deadline). This evinces congressional judgment that all asylum applicants should have their applications adjudicated within 180 days of filing, regardless of the applicant's individual characteristics or status. This also makes particular sense for UAC asylum applications, as USCIS will already have adjudicated their asylum application, and the child applicant will only be renewing that application with EOIR, as opposed to submitting an entirely new claim.

In short, the Department has fully considered the issues raised by commenters pertaining to UAC. As noted, most of the concerns reflect a

misapprehension of the rule's contents, are directed at statutory provisions that cannot be changed by rulemaking, or confuse adjudications by the Department with those by USCIS. The Department is aware of the special circumstances and needs of genuine UAC and maintains clear policies to ensure that their cases are adjudicated efficiently and consistent with due process. *See* EOIR, *Operating Policies and Procedures Memorandum 17–03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children* (Dec. 20, 2017), *available at.gov/eoir/file/oppm17-03/download.* Nothing in the rule alters those policies, and the Department finds that the rule will not have any greater effect on UAC than on any other group of aliens. If anything, the rule will have minimal to no effect on UAC because they are unlikely to fall within the classes of aliens in 8 CFR 1208.2(c) and their asylum applications are subject to INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), regardless of this rule. Accordingly, on balance, commenters' assertions regarding the rule's impact on UAC are unfounded and ultimately unpersuasive.

In response to commenters' concerns about this rule's effect on the ability of aliens to receive work authorization, particularly in light of recent DHS regulatory changes, the Department notes that Congress explicitly intended for asylum applications to be adjudicated before the asylum seeker is eligible for work authorization. *Compare* INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii) (requiring adjudication of asylum applications within 180 days of filing), *with* INA 208(d)(2), 8 U.S.C. 1158(d)(2) (permitting work authorization only after a minimum of 180 days has elapsed from the filing of an asylum application). In this manner, eligibility for worth authorization is meant to be the exception for aliens whose cases exceed the reasonable period of time for adjudication, as set by Congress, but not the standard or expectation for asylum seekers as a matter of course.

Relatedly, and contrary to commenters' assertions, this rule does not interfere with an asylum seeker's statutory right to representation, INA 240(b)(4)(A), 8 U.S.C. 1229a(b)(4)(A), due to an inability to receive work authorization and thus afford an attorney. Rather, aliens who are unable to afford fee-based counsel may seek pro bono representation or avail themselves of other programs to obtain information to prepare their cases. Moreover, as noted *supra,* this statutory provision has been in effect for more than 20 years, and the current representation rate of 85% strongly suggests it has not impacted an alien's ability to obtain representation.

Lastly, the Department considered the commenters' suggestion that, rather than remove and reserve existing 8 CFR 1208.7, the Department should amend 8 CFR 1208.7 with clarified regulatory language regarding EOIR's role related to work authorization. After consideration, the Department continues to believe that regulatory language regarding work authorization is better located solely within DHS's regulations because DHS has sole authority over work authorization. Further, as discussed in the NPRM, removing and reserving 8 CFR 1208.7 would avoid any potential future conflict should DHS amend 8 CFR 208.7. *See* 85 FR at 59695. In short, EOIR plays no part in adjudicating applications for alien EADs, and there is no reason to maintain vestigial regulations related to a process in which EOIR has no role.[70]

Comment: Commenters were opposed to the rule's ''exceptional circumstances'' definition, stating that there are many situations that may not rise to the level of exceptional circumstances as defined in the rule but nevertheless should be sufficient to grant additional time beyond 180 days. As examples, commenters pointed to asylum seekers requiring mental health services before they can fully discuss their asylum claim or the need to obtain corroborating evidence from their home countries. Commenters stated that the definition as drafted would result in increased appeals and remands. Similarly, commenters stated that the Department should not mirror the statutory ''exceptional circumstances'' definition in section 240(e)(5) of the Act, 8 U.S.C. 1229a(e)(5), because failing to appear at a hearing has different equities than needing more time to support an asylum application. Commenters also stated that the exceptional circumstances requirement should apply to DHS attorneys and the immigration judge as well. One commenter likewise requested that the Department modify the final rule to explicitly include immigration judge requests for Department of State comments to qualify as an exceptional circumstance.

Response: In regard to concerns with the ''exceptional circumstances'' standard, the Department first notes that Congress mandated this standard. *See* INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii). The Department has reasonably chosen to interpret this language in accordance with its explicit definition elsewhere in the statute to ensure consistency within the statute and the long-held definition used by parties and the courts. *See* INA 240(e)(1), 8 U.S.C. 1229a(e)(1). The Department acknowledges commenters' concerns that there may be circumstances in which an alien may not meet the standard, but that is true of any standard. Congress provided an undefined standard in the Act, and the Department has determined that an existing statutory definition elsewhere in that statute is a reasonable interpretation of a phrase connoting circumstances that are generally considered ''severe impediments.'' *See Chevron,* 467 U.S at 844 (requiring deference to an agency's reasonable interpretation of an ambiguous statute); *see also Singh-Bhathal* v. *INS,* 170 F.3d 943, 947 (9th Cir. 1999) (interpreting exceptional circumstances to involve ''severe impediment[s]''). Commenters have not provided support for the contention that implementing such a definition will result in increased appeals or remands or explained why the Department should not adopt a compelling existing statutory definition, particularly one that comports with common-sense notions of ''exceptional circumstances.''

The Department declines to create any specific exceptions to the definition, and it recognizes that no rule can cover every possible factual scenario, particularly when considering the existence of more than 500,000 pending asylum applications currently. *See* Executive Office for Immigration Review, *Adjudication Statistics: Total Asylum Applications* (Oct. 13, 2020),

[70] The Department notes that retaining 8 CFR 1208.7 would have no effect on EOIR operations—other than risking confusion by the parties regarding which agency is responsible for adjudicating an EAD application—because its previous provisions simply do not apply to EOIR. To the contrary, EOIR already excludes applicant-caused delays that meet the exceptional circumstances standard from calculating the statutory 180-day asylum adjudication clock as noted in 8 CFR 1208.7(a)(2). *See* EOIR Policy Memorandum 19–05, *Guidance Regarding the Adjudication of Asylum Applications Consistent with INA § 208(d)(5)(A)(iii)* at 2–3 (Nov. 19, 2018) (''But, absent delays that qualify as exceptional circumstances, 8 CFR 1208.7(a)(2) does not relieve Immigration Judges of their obligation to adjudicate asylum claims within 180 days.''), *https://www.justice.gov/eoir/page/file/1112581/download.* Further, although EOIR provides DHS with access to a separate ''clock'' for purposes of adjudicating EAD applications, EOIR does not adjudicate EAD applications themselves and, thus, does not interpret the time period related to EAD applications in INA 208(d)(2), 8 U.S.C. 1158(d)(2). Accordingly, although retention of 8 CFR 1208.7 would not alter EOIR's existing processes, its superfluousness and the risk of confusion related to maintaining it regarding which agency is responsible for adjudicating EAD applications militate strongly in favor of removing it.

available at https://www.justice.gov/eoir/page/file/1106366/download. Thus, although the Department has considered commenters' suggestion to list Department of State comment requests as constituting an extraordinary circumstance, *see* 8 CFR 1208.11, the Department declines to provide that specific exception. Rather, the Department will allow immigration judges, who are better positioned to evaluate the specific facts in each case, to make a case-by-case determination on whether extraordinary circumstances exist. *See, e.g., Arredondo* v. *Lynch,* 824 F.3d 801, 805 (9th Cir. 2016) (explaining that, in the failure to appear context, the court must look to the particularized facts in each case when determining whether exceptional circumstances exist).

Similarly, in a vacuum, the Department cannot respond to commenters' generalized statements about various proposed exceptions because asylum applications are adjudicated based on their specific facts, not on generalized speculative assertions or extrapolations. For example, a commenter's suggestion that a need for mental health services is an exceptional circumstance may be true in some cases because it may be indicative of ''serious illness of the alien;'' however, unmoored from any larger context, the Department cannot say that it would be exceptional in all cases, particularly if it is unrelated to the claim at issue.[71] Further, some aliens with valid claims who are receiving mental health treatment may not wish to use that treatment as a basis to delay adjudication of their case because they seek to obtain relief as quickly as possible. The Department cannot make a blanket determination based solely on generalizations without context that such situations will always constitute an exceptional circumstance because each case is different and considered on its own merits. Moreover, the credibility of such assertions will always be at issue because they provide an exception to the general rule, and it is difficult, if not impossible, for the Department to make generalized credibility determinations in a rulemaking. Rather, the Department believes that the definition established by the rule is appropriate and determinations regarding which facts may meet the standard are more appropriately made on a case-by-case basis by an immigration judge.

Finally, in response to other commenters' concerns, the Department notes that the definition of exceptional circumstances is not limited to circumstances faced by aliens. Although the rule provides examples of exceptional circumstances that may affect the alien, which the Department excepts will be the most common situation, the rule explicitly states that exceptional circumstances are those ''beyond the control of the *parties or the immigration court.*'' 8 CFR 1003.10(b) (final rule) (emphasis added). Consequently, exceptional circumstances may involve those affecting DHS, an immigration judge, or the alien.

6. Retroactivity

Comment: Several commenters were concerned with the rule's silence on the issue of retroactive applicability. Commenters asserted that the rule should not apply to anyone whose latest entry into the United States was prior to the rule's effective date or to any case where an NTA has been filed. Commenters also urged the Department to explicitly specify that the rule does not have any retroactive effect or, in the alternative, specifically identify the individuals and claims to which the rule would apply.

Commenters believed that applying the rule retroactively would create waste, uncertainty, and inefficiency in the immigration court system and overburden DHS. For example, commenters stated that DHS trial attorneys, immigration judges, court staff, and asylum officers would be immediately overwhelmed if they were forced to adjudicate all current pending cases within the rule's 180-day timeframe. Moreover, commenters noted that work may need to be repeated to conform to the rule's new evidentiary standards. Commenters raised concerns that court staff would have to spend an inordinate amount of unnecessary hours going through recently submitted I–589 forms that have not yet been deemed complete to see whether every box is filled.

Moreover, commenters claimed that thousands of asylum seekers have relied on and structured their lives around the current asylum system and would be seriously harmed if the rule was applied retroactively. For example, commenters pointed out that many asylum seekers have spent significant amounts of money on legal representation to prepare and file asylum applications that, according to commenters, would be unprovable if the rule is applied retroactively. Furthermore, commenters asserted that asylum seekers likely would have made different decisions when pursuing immigration relief had they known the rules would change before their claims were adjudicated. Commenters stated that the Department failed to adequately consider such reliance interests on the current legal structure. Several commenters were also specifically concerned with the impact that retroactivity would have on pro se asylum seekers.

Furthermore, commenters stated that applying the rule retroactively would violate both the APA and aliens' due process rights. In addition, commenters asserted that the rule's retroactive application would conflict with congressional intent.

Other commenters questioned whether the 180-day asylum adjudication deadline provisions apply retroactively to pending cases. Commenters stated that the rule would create difficulties if applied retroactively because large numbers of pending cases would need to be advanced at the same time. Alternatively, commenters stated that prospective application of the rule would result in existing cases being indefinitely delayed as new asylum applications are required to be adjudicated within 180 days of filing.

Response: The Department recognizes that the potential retroactivity of the rule was not clear in the NPRM. To the extent that the rule changes any existing law, the Department intends to apply it prospectively to apply to all asylum applications—as well as applications for statutory withholding of removal and protection under the CAT regulations where applicable—that are filed[72] on or after the rule's effective date and, for purposes of the 15-day filing deadline, to all proceedings initiated under 8 CFR 1208.2(c) on or after the rule's effective date.

To the extent that the rule merely codifies existing law or authority, however, it will apply to pending cases. For example, the provisions of the rule incorporating section 208(d)(5)(A)(iii) of the Act, 8 U.S.C. 1158(d)(5)(A)(iii), into the regulations are simply adoptions of existing law. In fact, as statutory provisions in effect for decades, the Department has already been applying them to asylum cases, independently of

[71] For instance, the Department notes that individuals may receive treatment for a variety of mental health conditions—*e.g.,* obstructive sleep apnea hypopnea; caffeine intoxication; tobacco withdrawal; gambling disorders—that are not normally associated with grounds for asylum and would ordinarily not be considered exceptional circumstances. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM–5)* (5th ed. 2013).

[72] For purposes of the 30-day correction period for an incomplete or deficient asylum application, this rule will apply to any asylum application that is attempted to be filed on or after the effective date.

the rule.[73] Accordingly, they do not have an impermissible retroactive effect applied to pending cases. *See Sterling Holding Co., LLC,* 544 F.3d at 506 (''Thus, where a new rule constitutes a clarification—rather than a substantive change—of the law as it existed beforehand, the application of that new rule to pre-promulgation conduct necessarily does *not* have an impermissible retroactive effect, regardless of whether Congress has delegated retroactive rulemaking power to the agency.'' (emphasis in original)).

Similarly, the dictates of *Matter of S–M–J–* and applicable case law, *e.g.,* 85 FR at 59695, regarding an immigration judge's authority to submit evidence and develop the record are pre-existing authorities that are merely incorporated into the regulations by this rule. Accordingly, the provisions incorporating that authority also apply to pending cases. In fact, as with section 208(d)(5)(A)(iii) of the Act, 8 U.S.C. 1158(d)(5)(A)(iii), the Department has already been applying these principles to asylum cases independently of this rule.

Otherwise, the Department declines to adopt commenters' assertions about potential implications of the rule's application to pending cases because those comments are wholly speculative due to the case-by-case and fact-intensive nature of many asylum adjudications. *See Home Box Office,* 567 F.2d at 35 n.58 (''In determining what points are significant, the 'arbitrary and capricious' standard of review must be kept in mind . . . Moreover, comments which themselves are purely speculative and do not disclose the factual or policy basis on which they rest require no response. There must be some basis for thinking a position taken in opposition to the agency is true.''). Moreover, as noted, the Department is applying much of the rule prospectively, and the provisions that are not prospective are already applicable to pending cases through either the Act itself or binding precedent. Thus, the alleged underlying factual premise of the commenters' concerns is erroneous.

[73] The Department recognizes that the precise regulatory definition of ''exceptional circumstances'' in 8 CFR 1003.10(b) for purposes of section 208(d)(5)(A)(iii) of the Act, 8 U.S.C. 1158(d)(5)(A)(iii), is new. Accordingly, that precise definition will apply only to asylum applications filed on or after the effective date of the rule, even though the provisions of section 208(d)(5)(A)(iii) of the Act, 8 U.S.C. 1158(d)(5)(A)(iii), continue to apply to all asylum applications currently pending that were filed on or after April 1, 1997.

7. Miscellaneous

a. Independent Immigration Courts

Comment: Commenters generally expressed concerns that the rule undermines the independence of the immigration courts from political or other inappropriate influence. At least one commenter stated that the rule highlighted the need for the immigration courts and immigration judges to be ''independent'' and outside the executive branch.

Response: These commenters' recommendations are both beyond the scope of this rulemaking and the Department's authority. Congress has provided for a system of administrative hearings for immigration cases, and the Department believes that system should be maintained. *See generally* INA 240, 8 U.S.C. 1229a (establishing administrative procedures for removal proceedings); *cf. Strengthening and Reforming America's Immigration Court System: Hearing before the Subcomm. on Border Sec. & Immigration of the S. Comm. on the Judiciary,* 115th Cong. 1 (2018) (written response to Questions for the Record of James McHenry, Director, Executive Office for Immigration Review) (''The financial costs and logistical hurdles to implementing an Article I immigration court system would be monumental and would likely delay pending cases even further.''). Only Congress has the authority to create a new Article I court or other framework for the adjudication of immigration cases.

Moreover, the Department reiterates that immigration judges already exercise ''independent judgment and discretion'' in deciding cases, 8 CFR 1003.10(b), and are prohibited from considering political influences in their decision-making, *Ethics and Professionalism Guide for Immigration Judges,* sec. VIII (''An Immigration Judge should not be swayed by partisan interests or public clamor.'') (Jan. 26, 2011). Thus, contrary to commenters' assertions, immigration judges are already independent adjudicators who do not render decisions based on political influence or political interests. As commenters' claims are unfounded in law or practice and well beyond the scope of this rulemaking, the Department declines to base revisions to the rule on them.

b. Requests for Data

Comment: Multiple commenters included specific requests for further information or data points together with their comments. For example, one commenter requested, *inter alia,* the ''[n]umber of successful asylum claims as a percentage of total asylum claims filed, broken down by immigration court, broken down by represented v. pro se applicants.''

Response: The Department believes that it is has provided the relevant needed justifications and explanations for this rule in both the preamble to the proposed rule and the discussion above. To the extent commenters seek further specific information, the Department first notes that raw data from EOIR's case management database is available online, EOIR, *FOIA Library: EOIR Case Data* (Nov. 12, 2020), *available at https://www.justice.gov/eoir/foia-library-0,* and that EOIR maintains a number of publicly-available statistics and reports, including those related to asylum applications, *see* EOIR, *EOIR Workload and Adjudication Statistics* (Oct. 30, 2020), *available at https://www.justice.gov/eoir/workload-and-adjudication-statistics.* The Department also reminds commenters of the ability to submit requests to the Department pursuant to the Freedom of Information Act (FOIA). Such requests should be submitted to the EOIR Office of General Counsel: U.S. Department of Justice, Executive Office for Immigration Review, Office of General Counsel—FOIA Service Center, 5107 Leesburg Pike, Suite 2150, Falls Church, VA 22041; Email address: *EOIR.FOIARequests@usdoj.gov; FOIA Public Liaison: Crystal Souza; Telephone: 703–605–1297.* Further information regarding EOIR's FOIA request procedures is available on the EOIR website at: *https://www.justice.gov/eoir/freedom-information-act-foia.*

8. Concerns With Regulatory Requirements

Comment: Commenters generally expressed concern that the Department did not comply with Executive Orders 12866 and 13563 because the Department did not adequately consider the costs and possible alternatives to the provisions in the rule due to the significance of many of the rule's provisions. For example, commenters asserted that the rule's effects on filing deadlines, the availability of continuances, and evidentiary submissions would in fact impact aliens in proceedings, particularly pro se individuals, and immigration practitioners, contrary to the Department's assertions in the proposed rule.

Similarly, commenters disagreed with the Department's assertion, pursuant to the Regulatory Flexibility Act requirements, that the rule would ''not have a significant economic impact on a substantial number of small entities''

and that the rule only regulates individuals and not small entities. 85 FR at 59697. For example, commenters stated that the combined effect of the rule's provisions would, *inter alia,* affect how practitioners accept cases, manage dockets, or assess fees. Commenters asserted that these effects would, in turn, impact the overall ability of practitioners to provide services and affect aliens' access to representation. In addition, commenters stated that these changes demonstrate the rule would in fact regulate small entities, namely law firms or other organizations that appear before EOIR. Commenters compared the rule to other recent proposed rule where the Department acknowledged the effect on practitioners,[74] which the commenters stated is further evidence of the rule's effect.

At least one commenter argued that the rule should be considered a ''major rule'' under the Congressional Review Act (''CRA'') because the rule's effect will exceed the $100 million threshold. The commenter explained that the rule's economic effect would result from increased DHS detention costs due to increased application rejections, effects on reduced employment authorization availability, and increased costs to government agencies or subsidized entities that administer social services programs.

Response: The Department reiterates its response to similar comments regarding the rule's alleged effects on particular groups, *supra,* and adds the following further response. Overall, the Department disagrees with commenters' contention that it did not comply with Executive Orders 12866 and 13653. The Department considered all costs and possible alternatives to the provisions in the rule, and the fact that the Department did not adopt an alternative suggested by commenters—or did not retain the status quo—does not mean that such alternatives were not considered.

As noted in the NPRM, the Department believes that the rule will provide a significant net benefit by allowing for the expeditious and efficient resolution of asylum cases. 85 FR at 59698. These benefits will ensure that the Department's case volume does not increase to an insurmountable degree, which in turn will leave additional resources available for a greater number of asylum seekers. Contrary to commenters' claims, the rule will not prevent aliens from submitting asylum applications, requesting continuances, or presenting evidence in immigration court. Moreover, the rule is not imposing any new costs on asylum seekers. Respondents are already required to submit completed asylum applications in order to have them adjudicated, and immigration judges already have the authority to set deadlines. Additionally, any costs imposed on attorneys or entities will be minimal and limited to the time it will take to become familiar with the rule.[75] Immigration practitioners are already subject to professional responsibility rules regarding workload management, 8 CFR 1003.102(q)(1), and are already accustomed to preparing and filing documents related to asylum claims according to deadlines established by immigration judges. Further, the Department notes that attorneys have been aware of the 180-day adjudication deadline for asylum applications for over two decades. Finally, the generally prospective application of the rule—other than the parts that are already established by statute or precedent and under which practitioners have been practicing for over 20 years—further diminishes the already-minimal effect of the rule on practitioners, as no practitioners will be required to reevaluate any cases or arguments that they are currently pursuing.

The Department also rejects the assertion that the rule would have a significant impact on small entities. The rule applies to asylum applicants, who are individuals, not entities. *See* 5 U.S.C. 601(6). The rule does not limit in any way the ability of practitioners to accept cases, manage dockets, or assess fees. Indeed, nothing in the rule in any fashion regulates the legal representatives of such individuals or the organizations by which those representatives are employed, and the Department is unaware of cases in which the RFA's requirements have been applied to legal representatives of entities subject to its provisions, in addition to or in lieu of the entities themselves. *See* 5 U.S.C. 603(b)(3) (requiring that an RFA analysis include a description of and, if feasible, an estimate of the number of ''small entities'' to which the rule ''will apply''). To the contrary, case law indicates that indirect effects on entities not regulated by a proposed rule are not subject to an RFA analysis. *See, e.g., Mid-Tex Elec. Co-op, Inc.* v. *FERC,* 773 F.2d 327, 342–43 (D.C. Cir. 1985) (''[W]e conclude that an agency may properly certify that no regulatory flexibility analysis is necessary when it determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule. . . . Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy. That is a very broad and ambitious agenda, and we think that Congress is unlikely to have embarked on such a course without airing the matter.''); *Cement Kiln Recycling Coalition* v. *EPA,* 255 F.3d 855, 869 (D.C. Cir. 2001) (''Contrary to what [petitioner] supposes, application of the RFA does turn on whether particular entities are the 'targets' of a given rule. The statute requires that the agency conduct the relevant analysis or certify 'no impact' for those small businesses that are 'subject to' the regulation, that is, those to which the regulation 'will apply.' . . . The rule will doubtless have economic impacts in many sectors of the economy. But to require an agency to assess the impact on all of the nation's small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected.'' (citing *Mid-Tex,* 773 F.2d 327 at 343)); *see also White Eagle Co-op Ass'n* v. *Conner,* 553 F.3d 467, 480 (7th Cir. 2009) (''The rule that emerges from this line of cases is that small entities directly regulated by the proposed [rulemaking]—whose conduct is circumscribed or mandated—may bring a challenge to the RFA analysis or certification of an agency. . . . However, when the regulation reaches small entities only indirectly, they do not have standing to bring an RFA challenge.'').

Further, no commenters on this point acknowledged or recognized that the Department reached a similar conclusion in 1997 involving a far more sweeping and comprehensive rulemaking regarding asylum adjudications. *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of

[74] *See, e.g.,* 85 FR at 52491.

[75] As discussed, *supra,* substantial parts of the rule merely incorporate existing law, including principles enshrined in statute or binding precedent. The new portions include: A new filing deadline for aliens in proceedings under 8 CFR 1208.2(c), a new deadline for returning asylum applications rejected as incomplete or deficient, a new definition of ''exceptional circumstances'' for purposes of section 208(d)(5)(A)(iii) of the Act, 8 U.S.C. 1158(d)(5)(A)(iii), and clarification of the evidentiary status of government and non-government reports. None of what is new should require an extensive amount of time to review or understand by practitioners who are already experienced at meeting deadlines, correcting incomplete applications, and arguing both whether a particular circumstance meets the definition of an exceptional circumstance and the weight that an adjudicator should accord to various evidentiary submissions.

Removal Proceedings; Asylum Procedures, 62 FR 444, 453 (Jan. 3, 1997) (certifying that the rule would not have a significant impact on a substantial number of small entities because it ''affects only Federal government operations'' by revising the procedures for the ''examination, detention, and removal of aliens''). That conclusion was reiterated in the interim rule, 62 FR 10312, 10328 (Mar. 6, 1997), which was adopted with no noted challenge or dispute.

This final rule is far less significant in scope than the 1997 rulemaking, and part of the rule simply incorporates principles that are already in effect through statutory enactment or binding precedent. Moreover, this final rule is similar to previous rules, in that it, too, affects only the operations of the Federal government by amending a subset of the procedures the government uses to process certain aliens.[76] The Department thus believe that the experience of implementing prior rules supports its conclusion that there is no evidence that the current rule will have a significant impact on small entities as contemplated by the RFA or an applicable executive order.

The rule does not limit in any way the ability of practitioners to accept cases, manage dockets, or assess fees. Nothing in the rule directly, or indirectly, regulates practitioners or entities; rather, the rule regulates individual asylum seekers. Practitioners remain free to accept cases, manage dockets, and charge fees as they see fit. Moreover, commenters' concerns regarding how practitioners will be affected by the rule either are wholly speculative due to the case-by-case nature of asylum adjudication, fail to account for the provisions of the rule that have already been in effect for decades, or are beyond the scope of this rulemaking. As such, the Department finds that further analysis under the Regulatory Flexibility Act is not warranted. In short, there is no evidence that the rule will have a significant impact on small entities as contemplated by the Regulatory Flexibility Act or an applicable executive order.

Furthermore, the Department does not believe that the rule should be considered a ''major rule'' under the CRA. Assertions that the rule will result in increased DHS detention costs, decreased employment authorization availability, and increased costs to government agencies and subsidized entities are purely speculative. In fact, the rule will likely reduce costs to the government by allowing for a more streamlined and efficient asylum process. Additionally, the commenter who raised this concern presented no evidence that the rule would result in an annual effect on the economy of $100 million or more, and the Department is aware of no such evidence.

[76] The Department's position for decades has been that for purposes of the RFA and rulemakings related to EOIR proceedings, rulemakings which directly regulate aliens—rather than directly regulating practitioners—do not regulate small entities. *See, e.g.,* Powers and Duties of Service Officers; Availability of Service Records, 51 FR 2895 (Jan. 22, 1986) (proposed rule for changes to EOIR's fee schedule for appeals and motions and stating, ''In accordance with 5 U.S.C. 605(b), the Attorney General certifies that the rule will not have a significant economic impact on a substantial number of small entities.'') and 51 FR 39993, 39994 (Nov. 4, 1986) (final rule adopting in pertinent part the proposed changes to the fee schedule and maintaining the position that changes to the fee schedule will not have a significant impact on a substantial number of small entities). Even when the Department has directly regulated practitioners, it has found no significant impact on a substantial number of small entities when the rule is simply similar to existing regulatory procedures. *See, e.g.,* Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances, 73 FR 76914, 76922 (Dec. 18, 2008) (''The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule affects only those practitioners who practice immigration law before EOIR. This rule will not affect small entities, as that term is defined in 5 U.S.C. 601(6), because the rule is similar in substance to the existing regulatory process.''). The Department is unaware of any reasonable dispute or challenge to this longstanding position and finds no reason to depart from its previous well-established and accepted view.

III. Regulatory Requirements

A. Administrative Procedure Act

This final rule is being published with a 30-day effective date as required by the Administrative Procedure Act. 5 U.S.C. 553(d).

B. Regulatory Flexibility Act

The Department has reviewed this rule in accordance with the Regulatory Flexibility Act and has determined that it will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). The rule will not regulate ''small entities'' as that term is defined in 5 U.S.C. 601(6). Only individuals, rather than entities, are eligible to apply for asylum, and only individuals are placed in immigration proceedings. The Department also incorporates by reference herein the discussion in Section II.C.8, *supra.*

C. Unfunded Mandates Reform Act of 1995

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

D. Congressional Review Act

This rule would not be a major rule as defined by section 804 of the Congressional Review Act. 5 U.S.C. 804(2). This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

E. Executive Orders 12866, 13563 and 13771

The Office of Information and Regulatory Affairs of the Office of Management and Budget (''OMB'') has determined that this rule is a ''significant regulatory action'' under section 3(f) of Executive Order 12866. Accordingly, the regulation has been submitted to OMB for review. The Department certifies that this regulation has been drafted in accordance with the principles of Executive Order 12866, section 1(b), Executive Order 13563, and Executive Order 13771.

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 using the best available methods to quantify costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

The Department believes that this rule will effectuate congressional intent to resolve cases in an expeditious manner and will provide significant net benefits relating to EOIR proceedings by allowing the agency to resolve cases more quickly. Section 1(b)(6) of Executive Order 12866 states that ''[e]ach agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs,'' As of October 13, 2020, EOIR had over

580,000 pending cases with an application for asylum and withholding of removal, and the median processing time for a non-detained case with an asylum application is 1133 days. EOIR, *Adjudication Statistics: Total Asylum Applications* (Oct. 13, 2020), *available at https://www.justice.gov/eoir/page/file/1106366/download.* This rule will assist EOIR in adjudicating new asylum cases more efficiently to ensure that this volume does not increase to an insurmountable degree. No costs to the Department or to respondents are expected. Respondents are already required to submit complete asylum applications to have them adjudicated, and immigration judges already have authority to set deadlines.

The Department notes that this rule will not impose any new fees. Consistent with the treatment of other applications referred by USCIS that are renewed in immigration proceedings, an alien filing a USCIS Form I–589 with USCIS who is then referred to DOJ for immigration proceedings would pay the application fee only once. The Department's fees for applications published by DHS are established in accordance with 8 CFR 1103.7(b)(4)(ii), which, in turn, cross-references the DHS fee schedule. Given the inextricable nature of the two agencies' asylum processes and the benefit of not treating applicants for substantially similar benefits differently if they file with DOJ or with DHS, the Department's regulations have included this cross-reference for several years, and this rule does not alter it. The Department is also not authorized, per regulation, to waive the application fee for an application published by DHS if DHS identifies that fee as non-waivable. 8 CFR 1103.7(c). The proposed rule does not alter that regulatory structure.

The Department believes that this rule will impose only minimal, if any, direct costs on the public. Any new minimal cost would be limited to the cost of the public familiarizing itself with this rule, though because parts of the rule merely codify longstanding statutory provisions and certain precedents or otherwise reflect longstanding pre-existing regulatory provisions, there is little new in the rule that requires familiarization. An immigration judge's ability to set filing deadlines is already established by regulation, and filing deadlines for both applications and supporting documents are already a well-established aspect of immigration court proceedings guided by regulations and the Immigration Court Practice Manual. *See generally* EOIR, *Immigration Court Practice Manual* (Nov. 25, 2020), *available at https://www.justice.gov/eoir/office-chief-immigration-judge-0.* The rule also does not require an immigration judge to schedule a merits hearing at any particular time after the application is filed, as long as the application is adjudicated within 180 days absent exceptional circumstances, which is an existing and longstanding statutory requirement, *see* INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii).

Moreover, this rule does not require that an alien wait until the immigration judge sets a filing deadline before filing an application, and an alien remains free to file his or her asylum application with the immigration court before the first hearing. Asylum applications are frequently filed prior to or at an initial immigration court hearing already, and existing regulations allow for supplementing an initial application as appropriate, subject to an immigration judge's discretion. Most aliens filing asylum applications in pending immigration proceedings—85 percent—have representation, *see* EOIR, *Current Representation Rates* (Oct. 13, 2020), *available at https://www.justice.gov/eoir/page/file/1062991/download,* and the proposed rule is not expected to increase any burdens on practitioners, who are already subject to professional responsibility rules regarding workload management, 8 CFR 1003.102(q)(1), and who are already accustomed to preparing and filing documents related to asylum claims according to deadlines established by an immigration judge. The Department acknowledges that establishing a fixed deadline to file an asylum application in some types of immigration proceedings may reduce the availability of prior dilatory tactics as a matter of strategy, though it also recognizes that attorneys have been aware of the 180-day adjudication deadline for asylum applications for over two decades and are familiar with the similar existing 10-day deadline for alien crewmember asylum applications in 8 CFR 1208.5(b)(1)(ii).

No costs to the Department are associated with the rule. The changes do not create an incentive that would cause DHS to file more cases and, thus, are not expected to result in an increase in the number of cases to be adjudicated by EOIR. Further, the changes provide guidance for administrative decision-making but do not require immigration judges to make more decisions or to prolong immigration proceedings. This costs of this rule are considered *de minimis* for purposes of Executive Order 13771.

F. Executive Order 13132 (Federalism)

This rule 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. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

H. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. This rule may require edits to the USCIS Form I–589, Application for Asylum and for Withholding of Removal, because the filing of an asylum application now requires submission, for any required fee, of a fee receipt or alternate proof of payment. If necessary, a separate notice will be published in the **Federal Register** requesting comments on the information collection impacts of this rule and the revised USCIS Form I–589.

List of Subjects

8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal services, Organization and functions (Government agencies).

8 CFR Part 1103

Administrative practice and procedure, Authority delegations (Government agencies), Reporting and recordkeeping requirements.

8 CFR Part 1208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 1240

Administrative practice and procedure, Aliens.

Accordingly, for the reasons set forth in the preamble, and by the authority vested in the Director, Executive Office for Immigration Review, by the Attorney

General Order Number 4910–2020, the Department amends 8 CFR parts 1003, 1103, 1208, and 1240 as follows:

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

■ 1. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

■ 2. In § 1003.8, revise paragraph (a)(1) to read as follows:

§ 1003.8 Fees before the Board.

(a) * * *

(1) *When a fee is required.* Except as provided in paragraph (a)(2) of this section and 8 CFR 1208.4(d)(3), a filing fee prescribed in 8 CFR 1103.7, or a fee waiver request pursuant to paragraph (a)(3) of this section, is required in connection with the filing of an appeal, a motion to reopen, or a motion to reconsider before the Board.

* * * * *

■ 3. In § 1003.10, add three sentences at the end of paragraph (b) to read as follows:

§ 1003.10 Immigration judges.

* * * * *

(b) * * * In the absence of exceptional circumstances, an immigration judge shall complete administrative adjudication of an asylum application within 180 days after the date an application is filed. For purposes of this paragraph (b) and of §§ 1003.29 and 1240.6 of this chapter, the term *exceptional circumstances* refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the party or immigration judge, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the parties or the immigration court. A finding of good cause does not necessarily mean that an exceptional circumstance has also been established.

* * * * *

■ 4. In § 1003.24, revise paragraph (c)(1) to as follows:

§ 1003.24 Fees pertaining to matters within the jurisdiction of an immigration judge.

* * * * *

(c) * * *

(1) *When filed during proceedings.* When an application for relief is filed during the course of proceedings, the fee for that application must be paid in advance to the Department of Homeland Security in accordance with 8 CFR 103.7 and 8 CFR part 106. The fee receipt must accompany the application when it is filed with the immigration court except as provided by 8 CFR 1208.4(d)(3).

* * * * *

■ 5. Revise § 1003.29 to read as follows:

§ 1003.29 Continuances.

The immigration judge may grant a motion for continuance for good cause shown, provided that nothing in this section shall authorize a continuance that causes the adjudication of an asylum application to exceed 180 days in the absence of exceptional circumstances, consistent with section 208(d)(5)(A)(iii) of the Act and § 1003.10(b).

■ 6. In § 1003.31, revise paragraphs (b) and (c) to read as follows:

§ 1003.31 Filing documents and applications.

* * * * *

(b) Except as provided in 8 CFR 1240.11(f) and 1208.4(d)(3), all documents or applications requiring the payment of a fee must be accompanied by a fee receipt from the Department of Homeland Security, an alternate proof of payment consistent with § 1208.4(d)(3), or by an application for a waiver of fees pursuant to § 1003.24. Except as provided in § 1003.8(a) and (c), any fee relating to Immigration Judge proceedings shall be paid to, and accepted by, any Department of Homeland Security office authorized to accept fees for other purposes pursuant to § 1103.7(a) of this chapter.

(c) Subject to § 1208.4(d) of this chapter, the immigration judge may set and extend time limits for the filing of applications and related documents and responses thereto, if any, provided that nothing in this section shall authorize setting or extending time limits for the filing of documents after an asylum application has been filed that would cause the adjudication of an asylum application to exceed 180 days in the absence of exceptional circumstances, consistent with section 208(d)(5)(A)(iii) of the Act and § 1003.10(b). If an application or document is not filed within the time set by the immigration judge, the opportunity to file that application or document shall be deemed waived.

* * * * *

PART 1103—APPEALS, RECORDS, AND FEES

■ 7. The authority citation for part 1103 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1304, 1356; 31 U.S.C. 9701; 28 U.S.C. 509, 510.

■ 8. In § 1103.7, revise paragraph (a)(3) to read as follows:

§ 1103.7 Fees.

(a) * * *

(3) *All other fees payable in connection with immigration proceedings.* Except as provided in 8 CFR 1003.8, the Executive Office for Immigration Review does not accept the payment of any fee relating to Executive Office for Immigration Review proceedings. Instead, such fees, when required, shall be paid to, and accepted by, an office of the Department of Homeland Security authorized to accept fees, as provided in 8 CFR 103.7(a)(1) and 8 CFR part 106. The Department of Homeland Security shall return to the payer, at the time of payment, a receipt for any fee paid, and shall also return to the payer any documents, submitted with the fee, relating to any immigration proceeding. The fee receipt and the application or motion shall then be submitted to the Executive Office for Immigration Review except as provided by 8 CFR 1208.4(d)(3). Remittances to the Department of Homeland Security for applications, motions, or forms filed in connection with immigration proceedings shall be payable subject to the provisions of 8 CFR 103.7(a)(2) and 8 CFR part 106.

* * * * *

PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 9. The authority citation for part 1208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110–229; Pub. L. 115–218.

■ 10. In § 1208.3, revise paragraph (c)(3) to read as follows:

§ 1208.3 Form of application.

* * * * *

(c) * * *

(3) An asylum application must be properly filed in accordance with the form instructions and with §§ 1003.24, 1003.31(b), and 1103.7(a)(3) of this chapter, including payment of a fee, if any, as explained in the instructions to the application. For purposes of filing with an immigration court, an asylum application is incomplete if it does not include a response to each of the

required questions contained in the form, is unsigned, is unaccompanied by the required materials specified in paragraph (a) of this section, is not completed and submitted in accordance with the form instructions, or is unaccompanied by any required fee receipt or other proof of payment as provided in § 1208.4(d)(3). The filing of an incomplete application shall not commence the period after which the applicant may file an application for employment authorization. An application that is incomplete shall be rejected by the immigration court. If an applicant wishes to have his or her application for asylum considered, he or she shall correct the deficiencies in the incomplete application and refile it within 30 days of rejection. Failure to correct the deficiencies in an incomplete application or failure to timely refile the application with the deficiencies corrected, absent exceptional circumstances as defined in § 1003.10(b) of this chapter, shall result in a finding that the alien has abandoned that application and waived the opportunity to file such an application;

* * * * *

■ 11. In § 1208.4, add paragraph (d) to read as follows:

§ 1208.4 Filing the application.

* * * * *

(d) *Filing deadline.* (1) For any alien in asylum-and-withholding-only proceedings pursuant to § 1208.2(c)(1) and paragraph (b)(3)(iii) of this section, the immigration judge shall comply with the requirements of § 1240.11(c)(1)(i) through (iii) of this chapter and shall set a deadline of fifteen days from the date of the alien's first hearing before an immigration judge by which the alien must file an asylum application, which includes an application for withholding of removal under section 241(b)(3) of the Act and protection under §§ 1208.16 through 1208.18. The immigration judge may extend the deadline for good cause. If the alien does not file an asylum application by the deadline set by the immigration judge, the immigration judge shall deem the opportunity to file such an application waived, and the case shall be returned to the Department of Homeland Security. For any alien in proceedings pursuant to § 1208.2(c)(2), the immigration judge shall comply with the requirements of § 1240.11(c)(1)(i) through (iii) and shall set a deadline of fifteen days from the date of the alien's first hearing before an immigration judge by which the alien must file an application for withholding of removal under section 241(b)(3) of the Act, which includes an application for protection under §§ 1208.16 through 1208.18. The immigration judge may extend the deadline for good cause. If the alien does not file an application by the deadline set by the immigration judge, the immigration judge shall deem the opportunity to file such an application waived, and the case shall be returned to the Department of Homeland Security.

(2) If the alien must pay a fee for submission of the asylum application, the alien must submit the DHS-issued fee receipt together with the application by the deadline set by the immigration judge in paragraph (d)(1) of this section.

(3) If the alien has paid any required fee but has not received the fee receipt from DHS by the deadline set by the immigration judge, the alien must instead provide to the immigration court a copy of proof of the payment to DHS with the asylum application. The alien must then submit a copy of the fee receipt by a new deadline set by the immigration judge. If the immigration judge does not set a deadline, the alien must submit the fee receipt no later than 45 days after the date of filing of the application.

§ 1208.7 [Removed and Reserved]

■ 12. Remove and reserve § 1208.7.

§ 1208.9 [Removed and Reserved]

■ 13. Remove and reserve § 1208.9.

■ 14. In § 1208.12, revise paragraph (a) to read as follows:

§ 1208.12 Reliance on information compiled by other sources.

(a) In deciding an asylum application, which includes an application for withholding of removal under 241(b)(3) of the Act and protection under §§ 1208.16 through 1208.18, or in deciding whether the alien has a credible fear of persecution or torture pursuant to § 1208.30, or a reasonable fear of persecution or torture pursuant to § 1208.31, an immigration judge may rely on material provided by the Department of State, other Department of Justice offices, the Department of Homeland Security, or other U.S. Government agencies, and may rely on foreign government and non-governmental sources if those sources are determined by the judge to be credible and the material is probative. On his or her own authority, an immigration judge may submit relevant evidence into the record, if the source is credible and the evidence is probative, and may consider it in deciding an asylum application, which includes an application for withholding of removal under section 241(b)(3) of the Act and protection under §§ 1208.16 through 1208.18, provided that a copy of the evidence has been provided to both parties and both parties have had an opportunity to comment on or object to the evidence prior to the issuance of the immigration judge's decision.

* * * * *

PART 1240—PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES

■ 15. The authority citation for part 1240 continues to read as follows:

Authority: 8 U.S.C. 1103, 1158, 1182, 1186a, 1186b, 1225, 1226, 1227, 1228, 1229a, 1229b, 1229c, 1252 note, 1361, 1362; secs. 202 and 203, Pub. L. 105–100 (111 Stat. 2160, 2193); sec. 902, Pub. L. 105–277 (112 Stat. 2681).

■ 16. Revise § 1240.6 to read as follows:

§ 1240.6 Postponement and adjournment of hearing.

After the commencement of the hearing, the immigration judge may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Department of Homeland Security, provided that nothing in this section shall authorize an adjournment that causes the adjudication of an asylum application to exceed 180 days in the absence of exceptional circumstances, consistent with section 208(d)(5)(A)(iii) of the Act and § 1003.10(b) of this chapter.

James R. McHenry III,

Director, Executive Office for Immigration Review, Department of Justice.

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FEDERAL REGISTER

Vol. 85 Wednesday,
No. 242 December 16, 2020

Part VI

The President

Memorandum of December 9, 2020—The National Space Policy
Memorandum of December 10, 2020—Providing an Order of Succession Within the Office of Personnel Management

Federal Register
Vol. 85, No. 242
Wednesday, December 16, 2020

Presidential Documents

Title 3—

The President

Memorandum of December 9, 2020

The National Space Policy

Memorandum for the Vice President[,] the Secretary of State[,] the Secretary of Defense[,] the Attorney General[,] the Secretary of the Interior[,] the Secretary of Commerce[,] the Secretary of Transportation[,] the Secretary of Energy[,] the Secretary of Homeland Security[,] the Director of the Office of Management and Budget[,] the Director of National Intelligence[,] the Assistant to the President for National Security Affairs[,] the Administrator of the National Aeronautics and Space Administration[,] the Director of the Office of Science and Technology Policy[, and] the Chairman of the Joint Chiefs of Staff

Section 1. *References.* This directive supersedes Presidential Policy Directive–4 (June 29, 2010) and references, promotes, and reemphasizes the following policy directives and memoranda:

a) Presidential Policy Directive 26—National Space Transportation Policy (November 21, 2013)

b) Executive Order 13803—Reviving the National Space Council (June 30, 2017)

c) Space Policy Directive 1—Reinvigorating America's Human Space Exploration Program (December 11, 2017)

d) The National Space Strategy (March 23, 2018)

e) Space Policy Directive 2—Streamlining Regulations on Commercial Use of Space (May 24, 2018)

f) Space Policy Directive 3—National Space Traffic Management Policy (June 18, 2018)

g) Space Policy Directive 4—Establishment of the United States Space Force (February 19, 2019)

h) National Security Presidential Memorandum 20—Launch of Spacecraft Containing Space Nuclear Systems (August 20, 2019)

i) Executive Order 13906—Amending Executive Order 13803—Reviving the National Space Council (February 13, 2020)

j) Executive Order 13905—Strengthening National Resilience Through Responsible Use of Positioning, Navigation, and Timing Services (February 12, 2020)

k) Executive Order 13914—Encouraging International Support for the Recovery and Use of Space Resources (April 6, 2020)

l) Space Policy Directive 5—Cybersecurity Principles for Space Systems (September 4, 2020)

Sec. 2. *Principles.* It is the policy of the United States to ensure that space operations are consistent with the following principles.

1. It is the shared interest of all nations to act responsibly in space to ensure the safety, stability, security, and long-term sustainability of space activities. Responsible space actors operate with openness, transparency, and predictability to maintain the benefits of space for all humanity.

2. A robust, innovative, and competitive commercial space sector is the source of continued progress and sustained United States leadership in

space. The United States remains committed to encouraging and facilitating the continued growth of a domestic commercial space sector that is globally competitive, supports national interests, and advances United States leadership in the generation of new markets and innovation-driven entrepreneurship.

3. In this resurgent era of space exploration, the United States will expand its leadership alongside nations that share its democratic values, respect for human rights, and economic freedom. Those values will extend with us to all space destinations as the United States once again steps beyond Earth, starting with the Moon and continuing to Mars.

4. As established in international law, outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means. The United States will pursue the extraction and utilization of space resources in compliance with applicable law, recognizing those resources as critical for sustainable exploration, scientific discovery, and commercial operations.

5. All nations have the right to explore and to use space for peaceful purposes and for the benefit of all humanity, in accordance with applicable law. Consistent with that principle, the United States will continue to use space for national security activities, including for the exercise of the inherent right of self-defense. Unfettered access and freedom to operate in space is a vital national interest.

6. The United States considers the space systems of all nations to have the right to pass through and conduct operations in space without interference. Purposeful interference with space systems, including supporting infrastructure, will be considered an infringement of a nation's rights. Consistent with the defense of those rights, the United States will seek to deter, counter, and defeat threats in the space domain that are hostile to the national interests of the United States and its allies. Any purposeful interference with or an attack upon the space systems of the United States or its allies that directly affects national rights will be met with a deliberate response at a time, place, manner, and domain of our choosing.

Sec. 3. *Goals.* The United States shall:

1. **Promote and incentivize private industry** to facilitate the creation of new global and domestic markets for United States space goods and services, and strengthen and preserve the position of the United States as the global partner of choice for international space commerce.

2. **Encourage and uphold the rights of nations to use space responsibly and peacefully** by developing and implementing diplomatic, economic, and security capabilities and strategies to identify and respond to behaviors that threaten those rights.

3. **Lead, encourage, and expand international cooperation** on mutually beneficial space activities that broaden and extend the benefits of space for all humanity; further the exploration and use of space for peaceful purposes; protect the interests of the United States, its allies, and partners; advance United States interests and values; and enhance access to space-derived information and services.

4. **Create a safe, stable, secure, and sustainable environment for space activities**, in collaboration with industry and international partners, through the development and promotion of responsible behaviors; improved practices for the collection and sharing of information on space objects; protection of critical space systems and supporting infrastructures, with special attention to cybersecurity and supply chains; and measures to mitigate orbital debris.

5. **Increase the assurance of national critical functions** enabled by commercial, civil, scientific, and national security spacecraft and supporting infrastructure against disruption, degradation, and destruction through the development and fielding of materiel and non-materiel capabilities and rehearsal of continuity of operations practices.

6. **Extend human economic activity into deep space** by establishing a permanent human presence on the Moon, and, in cooperation with private industry and international partners, develop infrastructure and services that will enable science-driven exploration, space resource utilization, and human missions to Mars.

7. **Increase the quality of life for all humanity** through the cultivation, maturation, and development of space-enabled scientific and economic capabilities, including space and Earth resource discovery, management, and utilization; space and Earth weather and environmental monitoring and prediction; disaster monitoring, prediction, response, and recovery; and planetary defense.

8. **Preserve and expand United States leadership** in the development of innovative space technologies, services, and operations. Work with likeminded international and private partners, to prevent the transfer of sensitive space capabilities to those who threaten the interests of the United States, its allies, and its supporting industrial base.

Sec. 4. *Cross-sector Space Policy Guidelines.* The heads of all executive departments and agencies (agencies), consistent with their respective missions and authorities, shall execute the guidance provided in this section consistent with applicable law.

Heads of agencies with representation on the National Space Council shall designate a senior official with responsibility for overseeing their respective agency's implementation of the National Space Policy. This official shall periodically report to the National Space Council on the progress of implementation of this policy within respective agencies.

1. *Foundational Activities and Capabilities.* Foundational activities and capabilities enable the United States to fulfill the principles and goals directed in this policy.

(a) **Strengthen United States Leadership in Space-related Science and Technology**. Heads of agencies shall:

i. Reinforce United States technological leadership by promoting technology development; improved industrial capacity; a robust supplier base; and science, technology, engineering, and mathematics (STEM) education opportunities necessary to support United States leadership in space innovation;

ii. Conduct basic and applied research that increases space capabilities and decreases costs, if such research is best supported by the Government; and

iii. Encourage commercial space innovation and entrepreneurship through targeted investment in promising technologies that improve the Nation's leadership in space operations.

(b) **Strengthen and Secure the United States Space Industrial Base**. To further foster the security and resilience of the domestic space industrial base, heads of agencies, to the maximum extent practicable and consistent with applicable law, shall:

i. Promote the availability of space-related industrial capabilities in support of national critical functions;

ii. Identify suppliers and manufacturers key to the United States space-related science, technology, and industrial bases and incentivizing them to remain in, or return to, the United States;

iii. Support innovative entrepreneurial space companies through appropriate deregulatory actions;

iv. Strengthen the security, integrity, and reliability of the supply chains of United States space-related science, technology, and industrial bases by identifying and eliminating dependence on suppliers owned by, controlled by, or subject to the jurisdiction or direction of foreign adversaries,

and engaging with United States and international industrial partners to improve processes and effectively manage and secure supply chains; and

v. Incorporate cybersecurity principles across all phases of space systems design, development, acquisition, and deployment.

(c) **Enhance Capabilities for Assured Access to Space**. United States access to space depends in the first instance on assured launch capabilities. To the extent consistent with applicable law, United States Government payloads shall be launched on vehicles manufactured in the United States, unless approved for foreign launch in support of:

i. No-exchange-of-funds agreements involving international scientific programs, launches of scientific instruments on international spacecraft, or other cooperative government-to-government agreements;

ii. Launches of secondary-technology demonstrators or scientific payloads for which no United States launch service is available;

iii. Hosted payload arrangements on spacecraft not owned by the United States Government; or

iv. Other circumstances on a case-by-case exemption as coordinated by the Assistant to the President for National Security Affairs and the Director of the Office of Science and Technology Policy, consistent with established interagency standards and coordination guidelines.

v. To the maximum extent practicable and consistent with their responsibilities and applicable law, the heads of agencies shall:

1. Work collaboratively to acquire space launch services and hosted Government payload arrangements that are secure, reliable, cost-effective, and responsive to United States Government needs;

2. Enhance operational efficiency, increase capacity, and reduce launch costs by investing in the modernization of space launch infrastructure;

3. Permit the launch of United States Government spacecraft manufactured in the United States from territories of allied and likeminded nations when launched on vehicles manufactured in the United States; and

4. When sufficient United States commercial capabilities and services do not exist, support industry-led efforts to rapidly develop new and modernized launch systems and technologies necessary to assure and to sustain future reliable, resilient, and efficient access to space.

(d) **Safeguard Space Components of Critical Infrastructure**. The space domain is important to the function of critical infrastructure vital to the security, economy, resilience, public health, and safety of the United States. Multiple infrastructure sectors depend on reliable access to space-based systems to perform their functions.

i. The United States will develop strategies, capabilities, and options to respond to any purposeful interference with or attack on the space systems of the United States or its allies that directly affects national rights, especially those necessary for the operation of the Nation's critical infrastructure. Such strategies, capabilities, and options will allow for a deliberate response at a time, place, manner, and domain of its choosing.

ii. The Secretary of Defense, the Secretary of Homeland Security, and the Director of National Intelligence, in consultation with other heads of agencies, as appropriate, shall develop and maintain focused threat and risk assessments on the effect of deleterious actions in the space domain to the Nation's critical infrastructure.

(e) **Maintain and Enhance Space-based Positioning, Navigation, and Timing (PNT) Systems**. The United States must maintain its leadership in the service, provision, and responsible use of global navigation satellite systems (GNSS). To that end, the United States shall:

i. Provide continuous worldwide access, for peaceful civil uses, to the Global Positioning System (GPS) and its Government-provided augmentations, free of direct user fees;

ii. Engage with international GNSS providers to ensure compatibility, encourage interoperability with likeminded nations, promote transparency in civil service provision, and enable market access for United States industry;

iii. Operate and maintain the GPS constellation to satisfy civil and national security needs, consistent with published performance standards and interface specifications;

iv. Improve the cybersecurity of GPS, its augmentations, and federally owned GPS-enabled devices, and foster commercial space sector adoption of cyber-secure GPS enabled systems consistent with cybersecurity principles for space systems;

v. Allow for the continued use of allied and other trusted international PNT services in conjunction with GPS in a manner that ensures the resilience of PNT services and is consistent with applicable law;

vi. Invest in domestic capabilities and support international activities to detect, analyze, mitigate, and increase resilience to harmful interference to GNSS;

vii. Identify and promote, as appropriate, multiple and diverse complementary PNT systems or approaches for critical infrastructure and mission-essential functions; and

viii. Promote the responsible use of United States space-based PNT services and capabilities in civil and commercial sectors at the Federal, State, and local levels, including the utilization of multiple and diverse complementary PNT systems or approaches for national critical functions.

(f) **Develop and Retain Space Professionals**. The primary goals of space professional development are to achieve mission success in space operations and acquisition; stimulate innovation to improve commercial, civil, and national security space capabilities; and advance science, exploration, and discovery. Toward these ends, the heads of agencies, in cooperation with industry and academia, as appropriate, shall:

i. Establish standards for accession and career progression;

ii. Seek to create educational and professional development opportunities for the current space workforce, including internships and fellowships, and to implement measures to recruit, develop, maintain, and retain skilled space professionals, including engineering and scientific personnel and experienced space system developers and operators, across Government and commercial sectors;

iii. Promote and expand public-private partnerships within space and technology industries to foster transdisciplinary educational achievement in STEM programs, supported by targeted investments in such initiatives;

iv. Promote the exchange of scientists, engineers, and technologists among Federal laboratories, universities, and the commercial space sector to facilitate the exchange of diverse ideas and to build capacity in space technical knowledge and skills;

v. Develop the means to recruit and to employ qualified and skilled space professionals from likeminded nations to increase United States leadership in space commerce, science, exploration, and security; and

vi. Support training and education in key enabling scientific and engineering disciplines, including: artificial intelligence and machine learning, autonomy, orbital mechanics, collision avoidance methods, robotics, computer science and engineering, digital design and engineering, electromagnetics, materials science, hypersonics, geoscience, quantum-related technologies and applications, and cybersecurity.

(g) **Improve Space System Development and Procurement**. The heads of agencies shall:

i. Improve timely acquisition and deployment of space systems through enhancements in estimating costs, assessing technological risk and maturity, and leveraging and understanding emerging industrial base capabilities and capacity;

ii. Reduce programmatic risk through improved management of program requirements, reduce the use of cost-plus contracts, where appropriate, and take advantage of cost-effective opportunities to test high-risk components, payloads, and technologies in digital, space, or other relevant environments;

iii. Create opportunities to strengthen and to develop pertinent expertise in the Government workforce through internships and fellowships with the commercial space sector;

iv. Pursue and endorse cooperative research and development agreements;

v. Incorporate rapid prototyping, experimentation, and other efforts to accelerate development cycles to improve performance and to reduce costs;

vi. Embrace innovation to cultivate and to sustain an entrepreneurial United States research and development environment;

vii. Engage with the industrial base to improve processes and effectively manage and secure supply chains; and

viii. Promote, where consistent with applicable rules and regulations concerning Government contracting, procurement of critical materials and sub-tier components, such as solar cells and microelectronics, from domestic and other trusted sources of supply.

(h) **Strengthen Interagency and Commercial Partnerships**. As facilitated by the Executive Secretary of the National Space Council, the heads of agencies shall, consistent with applicable law:

i. Strengthen existing partnerships and pursue new partnerships among interagency members, the United States commercial space and related sectors, and United States academic institutions through cooperation, collaboration, information sharing, innovative procurements, and alignment of common pursuits to achieve United States goals;

ii. Encourage the sharing of capabilities and the exchange of expertise among agencies and, to the maximum extent practicable, with the United States commercial sectors to strengthen the Nation's ability to pursue its strategic goals;

iii. Develop implementation and response strategies and leverage United States capabilities to increase technology innovation and achieve desired outcomes involving space operations relating to science, public safety, national security, and economic growth.

2. *International Cooperation.*

(a) **Strengthen United States Leadership in Space**. The heads of agencies, in collaboration with the Secretary of State, shall:

i. Demonstrate United States leadership in space-related fora and activities to strengthen deterrence and assure allies and partners of its commitment to preserving the safety, stability, security, and long-term sustainability of space activities;

ii. Identify areas of mutual interest and benefit, such as collective self-defense and the promotion of secure and resilient space-related infrastructure;

iii. Lead the enhancement of safety, stability, security, and long-term sustainability in space by promoting a framework for responsible behavior in outer space, including the pursuit and effective implementation of best practices, standards, and norms of behavior;

iv. Encourage other nations to adopt United States space regulatory approaches and commercial space sector practices;

v. Encourage interoperability among United States, allied, and partner space systems, services, and data;

vi. Facilitate new market opportunities for United States commercial space capabilities and services, including commercial applications that rely on United States Government-provided space systems;

vii. Promote the adoption of policies and practices internationally that facilitate full, open, and timely access to Government space-derived environmental data on a reciprocal basis;

viii. Promote appropriate burden-, cost-, and risk-sharing among international partners; and

ix. Augment United States capabilities by leveraging existing and planned space capabilities of allies and partners.

(b) **Identify and Expand Areas for International Cooperation**. The heads of agencies shall identify potential areas for international cooperation across the spectrum of commercial, civil, and national security space activities that increase the understanding of Earth and space sciences, expand the detection of hazardous near-Earth objects, ensure the freedom of operation in and through space, increase the quality and safety of life on Earth, extend human presence and economic activity beyond low Earth orbit, and reduce the cost of achieving the Nation's goals.

i. The Secretary of State, in coordination with the heads of agencies, shall:

1. Carry out diplomatic and public diplomacy efforts to strengthen the understanding of, and support for, United States national space policies and programs and to promote the international use of United States space capabilities, systems, and services;

2. Encourage international support for the recovery and use of outer space resources;

3. Lead the consideration of proposals and concepts for arms control measures if they are equitable, effectively verifiable, and enhance the national security of the United States and its allies;

4. Pursue bilateral and multilateral transparency and confidence-building measures to encourage responsible actions in, and the peaceful use of, outer space to strengthen the safety, stability, security, and long-term sustainability of space activities, to increase predictability and reduce the risk of misunderstanding and inadvertent conflict escalation; and

5. Cooperate with likeminded international partners to establish standards of safe and responsible behavior, including openness, transparency, and predictability, to facilitate the detection, identification, and attribution of actions in space that are inconsistent with the safety, stability, security, and long-term sustainability of space activities.

ii. The Director of the Office of Science and Technology Policy, in coordination with the Administrator of the National Aeronautics and Space Administration (NASA), the Secretary of Commerce, and the heads of other agencies as appropriate, shall lead the development of national and international planetary protection guidelines, working with scientific, commercial, and international partners, for the appropriate protection of planetary bodies and Earth from harmful biological contamination.

3. *Preserving the Space Environment to Enhance the Long-term Sustainability of Space Activities.*

(a) **Preserve the Space Environment**. To preserve the space environment for responsible, peaceful, and safe use, and with a focus on minimizing space debris the United States shall:

i. Continue leading the development and adoption of international and industry standards and policies, such as the Guidelines for the Long-

term Sustainability of Outer Space Activities and the Space Debris Mitigation Guidelines of the United Nations Committee on the Peaceful Uses of Outer Space;

ii. Continue to make available basic space situational awareness (SSA) data, and provide for basic space traffic coordination (including conjunction and reentry notifications), free of direct user fees while supporting new opportunities for United States commercial and non-profit products and services;

iii. Develop, maintain, and use SSA information from commercial, civil, and national security sources in an open architecture data repository to detect, identify, and attribute actions in space that are inconsistent with the safety, stability, security, and the long-term sustainability of space activities;

iv. Develop and maintain space flight safety standards and best practices to coordinate space traffic;

v. Ensure that, consistent with international obligations, timely and accurate information concerning United States space objects launched into Earth orbit or beyond is entered into the United States domestic space object registry maintained by the Secretary of State and internationally registered with the United Nations as soon as practicable;

vi. Limit the creation of new debris, consistent with mission requirements and cost effectiveness, during the procurement and operation of spacecraft, launch services, and conduct of tests and experiments in space by following and periodically updating the United States Government Orbital Debris Mitigation Standard Practices;

vii. Regularly assess existing guidelines for non-government activities in or beyond Earth orbit, and maintain a timely and responsive regulatory environment for licensing those activities, consistent with United States law and international obligations;

viii. Pursue research and development of technologies and techniques to characterize and to mitigate risks from orbital debris, reduce hazards, and increase understanding of the current and future debris environment;

ix. Evaluate and pursue, in coordination with allies and partners, active debris removal as a potential long-term approach to ensure the safety of flight in key orbital regimes;

x. Require approval of exceptions to the United States Government Orbital Debris Mitigation Standard Practices from the head of the sponsoring agency and notification to the Secretary of State; and

xi. Continue to foster the development of best practices to prevent on-orbit collisions by collaborating with the commercial space sector and likeminded nations to: maintain and improve space object databases; pursue common international data standards and integrity measures; provide services and disseminate orbital tracking information, including predictions of space-object conjunctions, to commercial and international entities; and expand SSA to deep space.

(b) **Effective Export Policies**.

i. The United States will work to stem the flow of advanced space technology to unauthorized parties while ensuring the competitiveness of the United States space industrial base. The heads of agencies are responsible for protecting against adverse technology transfer in the conduct of their programs.

ii. The United States Government shall:

1. Consider letters of request and the issuance of licenses for space-related exports on a case-by-case basis, pursuant to, and in accordance with, the International Traffic in Arms Regulations (ITAR), the Conventional Arms Transfer Policy, the Export Administration Regulations, and other applicable laws and commitments;

2. Encourage the export of space-related items when doing so would not threaten the national interest;

3. Make eligible for streamlined authorization the export of space-related items that are generally available in the global marketplace, do not provide critical military functions, and are destined for certain allied or partner countries.

iii. Consistent with the foregoing, and consistent with existing law and regulation, license applications for exports of space-related items will be subject to a presumption of denial when destined for arms-embargoed destinations or other embargoed destinations.

iv. Sensitive or advanced spacecraft-related exports may require government-to-government transfers through the Foreign Military Sales process. The Secretary of State shall determine whether current arms transfer and nonproliferation policy directives provide sufficient guidance for the transfer of emerging technologies and space capabilities.

(c) **Space Nuclear Power and Propulsion**.

i. The United States will develop and use space nuclear power and propulsion (SNPP) systems where such systems enable achievement of United States scientific, national security, and commercial objectives. The United States will adhere to principles of safety, stability, security, and long-term sustainability in its development and utilization of space nuclear systems. In accordance with the National Security Policy Memorandum–20 Presidential Memorandum on Launch of Spacecraft Containing Space Nuclear Systems (August 20, 2019), authorization for launches of spacecraft containing space nuclear systems shall follow a tiered process based on the characteristics of the system, level of potential hazard, and national security considerations.

ii. The Administrator of NASA and the Secretary of Defense shall conduct and support design, development, and utilization of space nuclear systems, as appropriate, to enable and achieve their respective mission objectives.

iii. The Secretary of Energy shall support the design, development, and utilization of SNPP systems to enable and achieve the scientific, exploration, and national security objectives of the United States, in coordination with sponsoring agencies and other entities, as appropriate. The Secretary of Energy shall maintain, on a full cost recovery basis, the capability and infrastructure to develop, furnish, and conduct safety analyses for space nuclear systems for use in United States Government space systems.

iv. The Secretary of Energy, in cooperation with the Secretary of Homeland Security and the heads of appropriate agencies, shall provide technical and operational support to the launch of SNPP systems to prepare for and respond to any potential radiological impacts of a launch to ensure the protection of public health and safety.

v. The Secretary of Commerce, in coordination with other appropriate agencies, shall promote responsible United States commercial space nuclear system investment, innovation, and operations.

vi. The Secretary of Transportation shall, in consultation with other applicable agencies, serve as the licensing authority for commercial launches of space nuclear systems.

(d) **Protection of Electromagnetic Spectrum**. In matters pertaining to the electromagnetic spectrum the United States shall:

i. Seek to protect access to, and operation in, the electromagnetic spectrum and related orbital assignments required to support the use of space by the United States Government, its allies, and partners, and United States commercial users;

ii. Preserve and protect the electromagnetic spectrum required to sustain existing and emergent space-based capabilities, including communications, navigation, and Earth observation;

iii. Explicitly address requirements for electromagnetic spectrum and orbital assignments prior to approving acquisition of space capabilities;

iv. Coordinate stable and predictable national and international regulatory frameworks to enable and support the competitiveness of space services and systems licensed by the United States;

v. Seek to remove or to streamline regulatory impediments that may discourage commercial space communications providers from obtaining licenses from the United States;

vi. Conduct and publish thorough operational, technical, and policy impact assessments, in coordination with Government space system operators, prior to reallocating spectrum for commercial, Government, or shared use;

vii. Enhance capabilities and techniques, in cooperation with commercial, civil, and international partners, to detect, identify, locate, and attribute sources of radio frequency interference, and to take necessary measures to sustain the electromagnetic environment in which critical United States space systems operate;

viii. Seek appropriate regulatory approval under United States domestic regulations for United States Government Earth stations operating with commercially owned satellites, consistent with the regulatory approvals granted to analogous commercial Earth stations; and

ix. Prioritize research and development of advanced technologies, innovative spectrum-utilization methods, and spectrum-sharing tools and techniques that increase spectrum access, efficiency, and effectiveness.

(e) **Cybersecurity for United States Space Systems**. In matters relating to cybersecurity for space systems the United States Government shall:

i. Seek to ensure space systems and their supporting infrastructure, including software, are designed, developed, and operated using risk-based, cybersecurity-informed engineering;

ii. Collaborate with industry and encourage development and integration of cybersecurity plans for space systems that mitigate unauthorized access to critical space system functions, reduce vulnerabilities, protect ground systems, promote cybersecurity hygiene practices, and manage supply chain risks;

iii. Collaborate with interagency, allied, partner, and commercial space system operators to promote the development and adoption of best practices and mitigations;

iv. Leverage widely adopted best practices and standards in the creation of rules and regulations, as appropriate; and

v. Determine appropriate cybersecurity measures for Government space systems through a mission risk assessment specific to a space system's design and operations.

(f) **Assurance of National Critical Functions**. The United States Government, in cooperation with private and public sectors, shall:

i. Assure space-enabled national critical functions by developing the techniques, measures, relationships, and capabilities necessary to maintain continuity of services;

ii. Pursue efforts to enhance the protection, cybersecurity, and resilience of selected spacecraft and supporting infrastructure;

iii. Periodically conduct operationally-focused exercises to test the continuity of national critical functions and Federal mission assurance in a degraded or denied space environment due to natural or manmade disruptions;

iv. Incorporate the simulated disruption of space systems into interagency and national exercises; and

v. Address mission assurance and architectural resilience through the design, acquisition, command and control, exercise, and operation of materiel and non-materiel space and non-space capabilities.

Sec. 5. *Sector Guidelines.* The United States conducts space activities in three distinct but interdependent sectors: commercial, civil, and national security. Consistent with all applicable legal obligations agencies shall comply with the following guidance.

1. *Commercial Space Guidelines.*

The term ''commercial,'' for the purposes of this policy, refers to goods, services, or activities provided by private sector enterprises that bear a reasonable portion of the investment risk and responsibility for the activity, operate in accordance with typical market-based incentives for controlling cost and optimizing return on investment, and have the legal capacity to offer those goods or services to existing or potential non-governmental customers.

A United States commercial space sector that leads in the global space marketplace is foundational to national strategic objectives that include increased and sustained prosperity, free market principles, enhanced international partnerships and collaboration, technological innovation, and scientific discovery, and is vital to United States and allied security.

(a) **Promoting a Robust Commercial Space Industry**. To promote a robust domestic commercial space industry and strengthen United States leadership as the country of choice for conducting commercial space activities, the heads of agencies shall:

i. Purchase and use United States commercial space capabilities and services, to the maximum practical extent under existing law, when such capabilities and services meet United States Government requirements;

ii. Prioritize partnerships with commercial industry to meet Government requirements through the modification of existing commercial space capabilities and services when potential system modifications represent a cost-effective and timely acquisition approach for the Government and are consistent with system and mission-security practices and principles;

iii. Consider inventive, nontraditional arrangements for acquiring commercial space goods and services to meet United States Government requirements, including measures such as hosting Government capabilities on commercial spacecraft, purchasing scientific or operational data from commercial satellite operators in support of Government missions, leveraging satellite servicing or on-orbit manufacturing, and public-private partnerships;

iv. Develop Government space systems only when in the national interest and no suitable or cost-effective United States commercial or, as appropriate, international commercial capability or service is available or could be available in time to meet Government requirements;

v. Refrain from conducting United States Government space activities that preclude, discourage, or compete with United States commercial space activities, unless required by national security or public safety;

vi. Pursue opportunities for transferring routine operational space functions to the commercial space sector where beneficial and cost-effective and consistent with legal, security, or safety needs;

vii. Cultivate increased technological innovation and entrepreneurship and provide alternatives to predatory foreign investment in the commercial space sector through the use of incentives such as prizes, competitions, and competitive grants;

viii. Ensure that United States Government space technology and infrastructure are made available for commercial use on a reimbursable, non-interference and equitable basis to the maximum practical extent, consistent with applicable laws and national security interests;

ix. Promote continued commercial United States leadership in space by making available, consistent with applicable laws and national security, commercially relevant technologies developed by Federal research and development programs to United States industry;

x. Create transparent regulatory processes that minimize, consistent with national security and public safety, the regulatory burden and uncertainty for commercial space activities and that are flexible so as to accommodate and to adapt to technical development, business innovation, and market demands;

xi. Encourage State and local governments to support the commercial space sector for the purposes of cultivating a technically skilled work force, diversifying innovation potential, and stimulating economic growth;

xii. Foster fair and open global trade and commerce through the promotion of standards and regulations that have been developed with input from United States industry;

xiii. Encourage the purchase and use of United States commercial space services and capabilities in international cooperative arrangements;

xiv. Encourage the growth of United States commercial human space exploration, including logistical provisioning, delivery, and the continued commercialization of operations in and beyond low Earth orbit, and the use of microgravity as a domain for research and development; and

xv. Promote the export of United States commercial space goods and services, including those developed by small and medium-sized enterprises, for use in international markets, consistent with United States export controls and national security objectives.

(b) **International Trade Agreements**. The United States Trade Representative (USTR) has the primary responsibility for international trade agreements to which the United States is a party. USTR, in consultation with other relevant heads of agencies, will lead any effort relating to the negotiation and implementation of trade disciplines governing trade in goods and services related to space.

(c) **Mission Authorization of Novel Activities**. The Secretary of Commerce, in coordination with the National Space Council, shall:

i. Identify whether any planned space activities fall beyond the scope of existing authorization and supervision processes necessary to meet international obligations; and

ii. Lead, if necessary, the development of minimally burdensome, responsive, transparent, and adaptive review, authorization, and supervision processes for such activities, consistent with national security and public safety interests, with a presumption of approval and prompt appeals process.

(d) **Foster the Development of Space Collision Warning Measures**. The Secretary of Commerce, in consultation with the Secretaries of State, Defense, and Transportation, the Administrator of NASA, and the heads of other agencies, shall collaborate, consistent with applicable law, with industry and foreign nations to:

i. Maintain and improve space object identification databases;

ii. Pursue common international data standards and data integrity measures;

iii. Disseminate orbital tracking information to commercial and international entities, including predictions of space object conjunctions;

iv. Enhance the common understanding of resident space objects;

v. Develop and implement standard practices for conjunction assessment operations to ensure the safety of flight of all space operations, across all orbital regimes; and

vi. Develop common commercial operating guidelines and propose licensing requirements, consistent with respective agency mission and authorities, for large constellations, rendezvous and proximity operations, satellite servicing, small satellites, end-of-mission planning, and other classes of space operations.

2. *Civil Space Guidelines.*

(a) **Space Science, Exploration, and Discovery**. The United States shall lead an innovative and sustainable program of scientific discovery, technology development, and space exploration with commercial and international partners to enable human expansion across the solar system and to bring back to Earth new knowledge and opportunities. Beginning with missions beyond low Earth orbit, the United States will lead the return of humans to the Moon for long-term exploration and utilization, followed by human missions to Mars and other destinations.

(b) The Administrator of NASA, in collaboration with other appropriate agencies, Federal laboratories, and commercial partners, shall, consistent with applicable law:

i. Lead a program to land the next American man and the first American woman on the Moon by 2024, followed by a sustained presence on the Moon by 2028, and the subsequent landing of the first human on Mars;

ii. Continue the operation of the International Space Station (ISS) in cooperation with international partners for scientific, technological, commercial, diplomatic, and educational purposes while developing separate commercial platforms to sustain continuous United States presence in and utilization of low Earth orbit and to transition beyond ISS operations;

iii. Develop partnerships to foster new economic activities in and beyond low Earth orbit that enable NASA and other customers to purchase services and capabilities at lower cost;

iv. In consultation with international and commercial partners as appropriate, support activities that include the presence of humans in space; maintain continuous human presence in Earth orbit by transitioning from ISS to commercial platforms and services; and continue to support future objectives in human space exploration;

v. Continue as the launch agent for the civil space sector while utilizing commercial space capabilities and services to the maximum practical extent;

vi. Continue to grow partnerships with the commercial space sector to enable safe, reliable, and cost-effective transport of crew and cargo to destinations in low Earth and cislunar orbits, and to the lunar surface;

vii. Lead space exploration technology development efforts in collaboration with industry, academia, and international partners to increase capabilities for future human and robotic space exploration missions while decreasing mission costs;

viii. Maintain a sustained robotic presence in the solar system with international and commercial partners to: prepare for future human missions; conduct scientific investigations; map and characterize water, mineral, and elemental resources; and demonstrate new technologies;

ix. Conduct space science for observations, research, and analysis of the Sun, space weather, the solar system, and the universe to enhance knowledge of the cosmos, advance scientific understanding, understand the conditions that may support the development of life, and search for planetary bodies and Earth-like planets in orbit around other stars;

x. Pursue capabilities, in cooperation with other agencies, commercial, and international partners, to detect, track, catalog, and characterize near Earth objects to warn of any predicted Earth impact and to identify potentially resource-rich planetary objects; and

xi. Develop options, in collaboration with other agencies, and international partners, for planetary defense actions both on Earth and in space to mitigate the potential effects of a predicted near Earth object impact or trajectory.

(c) **Observation of the Earth's Surface, Environment, and Weather**. To continue and to enhance a broad array of programs of space-based observation, research, and analysis of the Earth's surface, oceans, and atmosphere and their interactions, and to improve life on Earth:

i. The Administrator of NASA, in coordination with the heads of other appropriate agencies, shall conduct a program of research to understand Earth's interconnected systems, including the development of new Earth observing satellites for other agencies to use for operational purposes.

ii. The Secretary of Commerce, through the Administrator of the National Oceanic and Atmospheric Administration (NOAA), shall be responsible for the requirements, funding, and operation of civil environmental satellites and data-gathering in support of atmospheric and space weather forecasting. NOAA may utilize NASA as the acquisition agent for operational environmental satellites for those activities and programs.

iii. The Secretary of Commerce, through the Administrator of NOAA, and the Secretary of Defense, through the Secretary of the Air Force, in coordination with the Administrator of NASA and the heads of other appropriate agencies, shall:

1. Continue existing coverage responsibilities;
2. Develop a plan to provide Earth environmental satellite observation capabilities, including ground systems for operations, that meet current and future civil and national security requirements; and
3. Ensure the continued sharing of data from all systems.

iv. In support of operational requirements the Secretary of Commerce, in coordination with the Secretary of Defense, the Administrator of NASA, and the heads of other appropriate agencies, shall:

1. Collaborate with academia, the commercial sector, and international partners to ensure uninterrupted operational environmental satellite observations using cost-effective, resilient methods to acquire global meteorological satellite data;
2. Coordinate, as practicable, on future satellite and ground system architectures to reduce duplication of space acquisition processes and capabilities;
3. Utilize international partnerships to sustain and enhance a robust Earth observations program that meets civil and national security requirements, including weather, climate, ocean, and coastal observations; and
4. Purchase commercial environmental data for use in meteorological and space weather models when appropriate.

v. The Director of the Office of Science and Technology Policy, in consultation with the Assistant to the President for National Security Affairs, shall coordinate the implementation of the National Space Weather Strategy and Action Plan. The goals of this strategy are to: enhance the protection of Government and commercial systems against the effects of space weather; disseminate accurate and timely space weather characterization and forecasts; and establish plans and procedures for responding to and recovering from space weather events. Agencies contributing to the United States Government Earth science enterprise shall pursue innovative partnerships with the commercial sector to make their agency's Earth observation data more easily discoverable, accessible, and usable to the public.

(d) **Land Remote Sensing**.

i. The Secretary of the Interior, through the Director of the United States Geological Survey (USGS), shall:

1. Conduct integrated predictive science, which includes research, monitoring, assessments, and modeling, on natural and human-induced changes to Earth's land, land cover, and inland surface waters, and manage a national global land surface data archive and its distribution;

2. Determine the operational requirements for collecting, processing, archiving, and distributing land surface data to the United States Government and other users;

3. Use international and commercial partnerships to help sustain and enhance land surface observations from space; and

4. Utilize, consistent with national security classification guidelines and sharing agreements and in coordination with the Secretary of Defense and the Director of National Intelligence, remote sensing information related to the environment and to disasters that is acquired from national security space systems.

ii. The Secretary of the Interior, through the Director of the USGS, and the Administrator of NASA shall work together to maintain a sustainable land-imaging program for operational land remote sensing observations that meets the needs of core United States users and leverages government, commercial, and international capabilities.

iii. The Administrators of NASA and NOAA, and the Director of the USGS shall:

1. Collaborate, as practicable, on future satellite and ground system architectures to ensure that civil space acquisition processes and capabilities are not unnecessarily duplicated; and

2. Continue to develop civil applications and information tools based on data collected by Earth observation satellites. They shall, to the maximum extent practicable, develop those applications and tools using known standards and open protocols and make data and applications from United States Government satellites openly available to the public.

i. The Secretary of Commerce shall license and regulate private remote sensing systems consistent with the recognition that long-term United States national security and foreign policy interests are best served by ensuring that United States industry continues to lead the rapidly maturing and highly competitive commercial space-based remote sensing market. The Secretary of Commerce shall consult with the Secretary of State and Secretary of Defense in these matters in accordance with applicable law.

3. *National Security Space Guidelines.*

(a) The United States seeks a secure, stable, and accessible space domain, which has become a warfighting domain as a result of competitors seeking to challenge United States and allied interests in space.

(b) Strength and security in space contribute to United States and international security and stability. It is imperative that the United States adapt its national security organizations, policies, strategies, doctrine, security classification frameworks, and capabilities to deter hostilities, demonstrate responsible behaviors, and, if necessary, defeat aggression and protect United States interests in space through:

i. Robust space domain awareness of all activities in space with the ability to characterize and attribute potentially threatening behavior;

ii. Communicating to competitors which space activities the United States considers undesirable or irresponsible, while promoting, demonstrating, and communicating responsible norms of behavior;

iii. Assured, credible, and demonstrable responses to defend vital national interests in space;

iv. Resilient space-enabled missions that reduce the impact or deny the effectiveness of adversaries' actions; and

v. Synchronized diplomatic, information, military, and economic strategies that:

1. Deter adversaries and other actors from conducting activities that may threaten the peaceful use of space by the United States, its allies, and partners; and

2. Compel and impose costs on adversaries to cease behaviors that threaten the peaceful use of space by the United States, its allies, and partners.

(c) The United States Space Force will pursue these objectives as the primary branch of the United States Armed Forces responsible for organizing, training, and equipping forces capable of projecting power in, from, and to space to defend United States national interests; protecting the freedom of operation in, from, and to the space domain; and enhancing the lethality and effectiveness of the Joint Force. The United States Space Force, and other branches of the Armed Forces as appropriate, will also present forces to the United States Space Command, and to the other Combatant Commands as appropriate, to deliver combat and combat support capabilities necessary to enable prompt and sustained offensive and defensive space operations, and to provide space support to joint operations in all domains.

(d) **Synchronized National Security Space**.

i. The space domain is a priority intelligence and military operational domain for the United States. The United States Intelligence Community and Department of Defense use space capabilities to provide strategic, operational, and tactical intelligence and decisive military advantages to the Nation.

ii. The Secretary of Defense and the Director of National Intelligence, in consultation with the heads of other appropriate agencies, Federal laboratories, and, as appropriate, in partnership with United States industry, shall:

1. Develop, acquire, and operate space systems and supporting information systems and networks to aid United States national security interests and to enable defense and intelligence operations;

2. Procure resilient space capabilities and services to provide defense and intelligence operations during times of competition and armed conflict;

3. Develop and apply advanced technologies, capabilities, and concepts that anticipate and rapidly respond to changes in the threat environment and improve the timeliness and quality of intelligence and data to support operations;

4. Identify and characterize current and future threats to United States space missions for the purposes of enabling effective deterrence and defense;

5. Develop resilient, cost-effective architectures and accelerate acquisition and fielding of space capabilities with sufficient capacity to increase the resilience of space-enabled missions and to expand the ability to field or to rapidly reconstitute space capabilities based on the strategic environment;

6. Develop, implement, and exercise plans, procedures, techniques, and capabilities necessary to assure critical national security space-enabled missions;

7. Protect and defend United States national security space assets through integration and synchronization of operational command and control capabilities and activities that foster seamless execution between the Intelligence Community and Department of Defense;

8. Promote, in collaboration with the Secretary of State, norms of behavior for responsible national security space activities that protect United States, allied, and partner interests in space;

9. Ensure cost-effective resilience of space capabilities and assurance of space-enabled missions, including supporting information systems and networks, commensurate with their planned use and taking into

account the value these systems provide in countering or mitigating threats, the consequences of their loss or degradation, and the availability of other means to perform the mission;

10. Expand and increase emphasis on disruptive and emerging commercial space capabilities and provide assessments to United States and allied leadership on the effects of these capabilities on national security;

11. Integrate cybersecurity into space operations and capabilities to retain positive control of space systems and verify the integrity of critical functions, missions, and services they provide;

12. Improve, develop, integrate, demonstrate, and proliferate in cooperation with relevant interagency, international, intergovernmental, and commercial entities, space domain awareness capabilities to predict, detect, warn, characterize, and attribute human-caused and naturally occurring activities that pose threats to space systems of United States interest;

13. Provide to the Department of Commerce and other agencies, as necessary, SSA information that supports national security, civil, and human space flight activities, planetary defense from hazardous near-Earth objects, and commercial and allied space operations;

14. Collaborate with allies and partners actively engaging in space security and intelligence operations to incentivize and institute mechanisms for the exchange of relevant space, and space-related information; and

15. Collaborate with the Secretaries of Commerce and Energy, the Administrator of NASA, and the heads of other relevant agencies to periodically review the health and competitiveness of the United States space industrial base to determine whether the domestic space industry can meet the technical requirements, production, and service of national security space programs.

(e) **Department of Defense**.

i. The Secretary of Defense shall:

1. Defend the use of space for United States national security purposes, the United States economy, allies, and partners;

2. Protect freedom of navigation and preserve lines of communication that are open, safe, and secure in the space domain;

3. Ensure that space capabilities are of sufficient capability and capacity to enable decisive offensive and defensive space operations vital to defending United States, allied, and partner interests in space while continuing to sustain support to joint operations;

4. Conduct operations in, from, and through space to deter conflict, and if deterrence fails, to defeat aggression while protecting and defending United States vital interests with allies and partners;

5. Provide, as launch agent for the Department of Defense and the Intelligence Community, affordable and timely space access for national security purposes while using commercial space capabilities and services to the maximum practical extent;

6. Develop, as launch agent for the Department of Defense and the Intelligence Community, rapid launch options to reinforce or to reconstitute priority national security space capabilities in times of crisis and conflict and that, when practicable and appropriate, leverage commercial capabilities;

7. Detect, characterize, warn, attribute, and respond to, in coordination with the Secretary of State and other relevant agencies, space-related behaviors and activities that threaten the space interests of the United States, its allies, or partners, international peace and security, or the long-term sustainability of the space environment;

8. Periodically conduct policy-driven, threat-informed, strategically-focused space posture reviews and assessments that encompass military, diplomatic, informational, and economic aspects of posture, including evaluation of the suitability of U.S. Government, commercial industry,

and international space architectures to deliver effective and integrated deterrence and compellence solutions; and

9. Develop, acquire, and operate space intelligence capabilities to support joint operations.

(f) **Intelligence Community**.

i. The Director of National Intelligence shall:

1. Enhance foundational scientific and technical intelligence collection and single and all-source intelligence analysis;

2. Coordinate with the Secretary of Defense to ensure necessary and sufficient intelligence support for acquisition, operations, and defense of space capabilities;

3. Develop, obtain, and operate space intelligence capabilities to support strategic goals, intelligence priorities, and assigned tasks;

4. Provide robust, timely, and effective collection, processing, analysis, and dissemination of information on foreign space capabilities and threats and supporting information system activities;

5. Integrate all-source intelligence of foreign space capabilities and intentions to produce enhanced intelligence products that support space domain awareness;

6. Support monitoring, compliance, and verification for transparency and confidence-building measures and, if applicable, arms control agreements;

7. Ensure Intelligence Community equities are represented and reviewed in United States Government radio frequency deliberations; and

8. Promote counterintelligence and security partnerships and practices within the commercial, civil, and national security space communities.

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

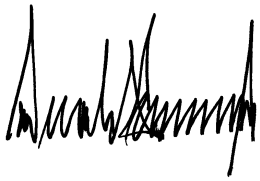
(i) the authority granted by law to an executive department or agency, or the head thereof; or

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

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

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

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



THE WHITE HOUSE,
Washington, December 9, 2020

[FR Doc. 2020–27892
Filed 12–15–20; 11:15 am]
Billing code 3510–07–P

Presidential Documents

Memorandum of December 10, 2020

Providing an Order of Succession Within the Office of Personnel Management

Memorandum for the Director of the Office of Personnel Management

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, as amended, 5 U.S.C. 3345 *et seq.* (the ''Act''), it is hereby ordered that:

Section 1. *Order of Succession.* Subject to the provisions of section 2 of this memorandum and to the limitations set forth in the Act, the following officials of the Office of Personnel Management (OPM), in the order listed, shall act as and perform the functions and duties of the office of Director of OPM (Director) during any period in which both the Director and the Deputy Director of OPM have died, resigned, or otherwise become unable to perform the functions and duties of the office of Director:

(a) Chief of Staff;

(b) General Counsel;

(c) Associate Director, Employee Services;

(d) Chief Management Officer;

(e) Chief Financial Officer;

(f) Associate Director, Retirement Services; and

(g) other Associate Directors in the order in which they have been appointed as such.

Sec. 2. *Exceptions.* (a) No individual who is serving in an office listed in section 1 of this memorandum in an acting capacity, by virtue of so serving, shall act as Director pursuant to this memorandum.

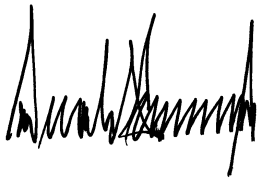
(b) No individual listed in section 1 of this memorandum shall act as Director unless that individual is otherwise eligible to so serve under the Act.

(c) Notwithstanding the provisions of this memorandum, the President retains discretion, to the extent permitted by law, to depart from this memorandum in designating an acting Director.

Sec. 3. *Revocation.* The Presidential Memorandum of August 12, 2016 (Designation of Officers of the Office of Personnel Management to Act as Director of the Office of Personnel Management), is hereby revoked.

Sec. 4. *General Provisions.* (a) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(b) You are authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, December 10, 2020

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