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NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 747

RIN 3133–AF34

Civil Monetary Penalty Inflation Adjustment

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board (Board) is amending its regulations to adjust the maximum amount of each civil monetary penalty (CMP) within its jurisdiction to account for inflation. This action, including the amount of the adjustments, is required under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

DATES: This final rule is effective January 7, 2021.

FOR FURTHER INFORMATION CONTACT: Gira Bose, Staff Attorney, at 1775 Duke Street, Alexandria, VA 22314, or telephone: (703) 518–6562.

SUPPLEMENTARY INFORMATION:

I. Legal Background

A. Statutory Requirements

Every Federal agency, including the NCUA, is required by law to adjust its maximum CMP amounts each year to account for inflation. Prior to this being an annual requirement, agencies were required to adjust their CMPs at least once every four years. The previous four-year requirement stemmed from the Debt Collection Improvement Act of 1996,[1] which amended the Federal Civil Penalties Inflation Adjustment Act of 1990.[2]

The current annual requirement stems from the Bipartisan Budget Act of 2015,[3] which contains the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 amendments).[4] This legislation provided for an initial ''catch-up'' adjustment of CMPs in 2016, followed by annual adjustments. The catch-up adjustment reset CMP maximum amounts by setting aside the inflation adjustments that agencies made in prior years and instead calculated inflation with reference to the year when each CMP was enacted or last modified by Congress. Agencies were required to publish their catch-up adjustments in an interim final rule by July 1, 2016 and make them effective by August 1, 2016.[5] The NCUA complied with these requirements in a June 2016 interim final rule, followed by a November 2016 final rule to confirm the adjustments as final.[6]

The 2015 amendments also specified how agencies must conduct annual inflation adjustments after the 2016 catch-up adjustment. Following the catch-up adjustment, agencies must make the required adjustments and publish them in the **Federal Register** by January 15 each year.[7] For 2017, the NCUA issued an interim final rule on January 6, 2017,[8] followed by a final rule issued on June 23, 2017.[9] For 2018, 2019, and 2020, the NCUA issued a final rule in each year to satisfy the agency's annual requirements.[10] This final rule satisfies the agency's requirement for the 2021 annual adjustment.

The law provides that the adjustments shall be made notwithstanding the section of the Administrative Procedure Act (APA) that requires prior notice and public comment for agency rulemaking.[11] The 2015 amendments also specify that each CMP maximum must be increased by the percentage by which the consumer price index for urban consumers (CPI–U) [12] for October of the year immediately preceding the year the adjustment is made exceeds the CPI–U for October of the prior year.[13] Thus, for the adjustment to be made in 2021, an agency must compare the October 2019 and October 2020 CPI–U figures.

An annual adjustment under the 2015 amendments is not required if a CMP has been amended in the preceding 12 months pursuant to other authority. Specifically, the statute provides that an agency is not required to make an annual adjustment to a CMP if in the preceding 12 months it has been increased by an amount greater than the annual adjustment required by the 2015 amendments.[14] The NCUA did not make any adjustments in the preceding 12 months pursuant to other authority. Therefore, this rulemaking adjusts the NCUA's CMPs pursuant to the 2015 amendments.

B. Application to the 2021 Adjustments and Office of Management and Budget Guidance

This section applies the statutory requirements and the Office of Management and Budget's (OMB) guidance to the NCUA's CMPs and sets forth the Board's calculation of the 2021 adjustments.

The 2015 amendments directed OMB to issue guidance to agencies on implementing the inflation adjustments.[15] OMB is required to issue its guidance each December and, with respect to the 2021 annual adjustment, did so on December 23, 2020.[16] For 2021, Federal agencies must adjust the maximum amounts of their CMPs by the percentage by which the October 2020 CPI–U (260.388) exceeds the October 2019 CPI–U (257.346). The resulting increase can be expressed as an inflation

[1] Public Law 104–134, Sec. 31001(s), 110 Stat. 1321–373 (Apr. 26, 1996). The law is codified at 28 U.S.C. 2461 note.

[2] Public Law 101–410, 104 Stat. 890 (Oct. 5, 1990), codified at 28 U.S.C. 2461 note.

[3] Public Law 114–74, 129 Stat. 584 (Nov. 2, 2015).

[4] 129 Stat. 599.

[5] Public Law 114–74, Sec. 701(b)(1), 129 Stat. 584, 599 (Nov. 2, 2015).

[6] 81 FR 40152 (June 21, 2016); 81 FR 78028 (Nov. 7, 2016).

[7] Public Law 114–74, Sec. 701(b)(1), 129 Stat. 584, 599 (Nov. 2, 2015).

[8] 82 FR 7640 (Jan. 23, 2017).

[9] 82 FR 29710 (June 30, 2017).

[10] 83 FR 2029 (Jan. 16, 2018); 84 FR 2055 (Feb. 6, 2019); 85 FR 2009 (Jan. 14, 2020).

[11] Public Law 114–74, Sec. 701(b)(1), 129 Stat. 584, 599 (Nov. 2, 2015).

[12] This index is published by the Department of Labor, Bureau of Labor Statistics, and is available at its website: *http://www.bls.gov/cpi/*.

[13] Public Law 114–74, Sec. 701(b)(2)(B), 129 Stat. 584, 600 (Nov. 2, 2015).

[14] Public Law 114–74, Sec. 701(b)(1), 129 Stat. 584, 600 (Nov. 2, 2015).

[15] Public Law 114–74, Sec. 701(b)(4), 129 Stat. 584, 601 (Nov. 2, 2015).

[16] See OMB Memorandum M–21–10, Implementation of Penalty Inflation Adjustments for 2021, pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (December 23, 2020).

multiplier (1.01182) to apply to each current CMP maximum amount to determine the adjusted maximum. The OMB guidance also addresses rulemaking procedures and agency reporting and oversight requirements for CMPs.[17]

The table below presents the adjustment calculations. The current maximums are found at 12 CFR 747.1001, as adjusted by the final rule that the Board approved in January 2020. This amount is multiplied by the inflation multiplier to calculate the new maximum in the far-right column. Only these adjusted maximum amounts, and not the calculations, will be codified at 12 CFR 747.1001 under this final rule. The adjusted amounts will be effective upon publication in the **Federal Register** and can be applied to violations that occurred on or after November 2, 2015, the date the 2015 amendments were enacted.[18]

TABLE—CALCULATION OF MAXIMUM CMP ADJUSTMENTS

Citation	Description and tier[19]	Current maximum ($)	Multiplier	Adjusted maximum ($) (current maximum × Multiplier, rounded to nearest dollar)
12 U.S.C. 1782(a)(3)	Inadvertent failure to submit a report or the inadvertent submission of a false or misleading report.	4,098	1.01182	4,146.
12 U.S.C. 1782(a)(3)	Non-inadvertent failure to submit a report or the non-inadvertent submission of a false or misleading report.	40,979	1.01182	41,463.
12 U.S.C. 1782(a)(3)	Failure to submit a report or the submission of a false or misleading report done knowingly or with reckless disregard.	Lesser of 2,048,915 or 1% of total CU assets.	1.01182	Lesser of 2,073,133 or 1% of total CU assets.
12 U.S.C. 1782(d)(2)(A)	Tier 1 CMP for inadvertent failure to submit certified statement of insured shares and charges due to the National Credit Union Share Insurance Fund (NCUSIF), or inadvertent submission of false or misleading statement.	3,747	1.01182	3,791.
12 U.S.C. 1782(d)(2)(B)	Tier 2 CMP for non-inadvertent failure to submit certified statement or submission of false or misleading statement.	37,458	1.01182	37,901.
12 U.S.C. 1782(d)(2)(C)	Tier 3 CMP for failure to submit a certified statement or the submission of a false or misleading statement done knowingly or with reckless disregard.	Lesser of 1,872,957 or 1% of total CU assets.	1.01182	Lesser of 1,895,095 or 1% of total CU assets.
12 U.S.C. 1785(a)(3)	Non-compliance with insurance logo requirements.	127	1.01182	129.
12 U.S.C. 1785(e)(3)	Non-compliance with NCUA security requirements.	297	1.01182	301.
12 U.S.C. 1786(k)(2)(A)	Tier 1 CMP for violations of law, regulation, and other orders or agreements.	10,245	1.01182	10,366.
12 U.S.C. 1786(k)(2)(B)	Tier 2 CMP for violations of law, regulation, and other orders or agreements and for recklessly engaging in unsafe or unsound practices or breaches of fiduciary duty.	51,222	1.01182	51,827.
12 U.S.C. 1786(k)(2)(C)	Tier 3 CMP for knowingly committing the violations under Tier 1 or 2 (natural person).	2,048,915	1.01182	2,073,133.
12 U.S.C. 1786(k)(2)(C)	Tier 3 (same) (CU)	Lesser of 2,048,915 or 1% of total CU assets.	1.01182	Lesser of 2,073,133 or 1% of total CU assets.
12 U.S.C. 1786(w)(5)(A)(ii)	Non-compliance with senior examiner post-employment restrictions.	337,016	1.01182	341,000.
15 U.S.C. 1639e(k)	Non-compliance with appraisal independence standards (first violation).	11,767	1.01182	11,906.
15 U.S.C. 1639e(k)	Subsequent violations of the same	23,533	1.01182	23,811.
42 U.S.C. 4012a(f)(5)	Non-compliance with flood insurance requirements.	2,226	1.01182	2,252.

III. Regulatory Procedures

A. Final Rule Under the APA

In the 2015 amendments, Congress provided that agencies shall make the required inflation adjustments in 2017 and subsequent years notwithstanding 5 U.S.C. 553,[20] which generally requires agencies to follow notice-and-comment procedures in rulemaking and to make rules effective no sooner than 30 days after publication in the **Federal Register**. The 2015 amendments provide a clear exception to these requirements.[21] In addition, as an

[17] *Id.*

[18] Public Law 114–74, 129 Stat. 600 (Nov. 2, 2015).

[19] The table uses condensed descriptions of CMP tiers. Refer to the U.S. Code citations for complete descriptions.

[20] Public Law 114–74, Sec. 701(b)(1), 129 Stat. 584, 599 (Nov. 2, 2015).

[21] See 5 U.S.C. 559; *Asiana Airlines* v. *Fed. Aviation Admin.,* 134 F.3d 393, 396–99 (D.C. Cir. 1998).

independent basis, the Board finds that notice-and-comment procedures would be impracticable and unnecessary under the APA because of the largely ministerial and technical nature of the rule, which affords agencies limited discretion in promulgating the rule, and the statutory deadline for making the adjustments.[22] In these circumstances, the Board finds good cause to issue a final rule without issuing a notice of proposed rulemaking or soliciting public comments. The Board also finds good cause to make the final rule effective upon publication because of the statutory deadline. Accordingly, this final rule is issued without prior notice and comment and will become effective immediately upon publication.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule or a final rule pursuant to the APA [23] or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**.[24] Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. For purposes of the RFA, the Board considers FICUs with assets less than $100 million to be small entities.[25]

As discussed previously, consistent with the APA,[26] the Board has determined for good cause that general notice and opportunity for public comment is unnecessary, and therefore the Board is not issuing a notice of proposed rulemaking. Rules that are exempt from notice and comment procedures are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. Accordingly, the Board has concluded that the RFA's requirements relating to initial and final regulatory flexibility analysis do not apply.

Nevertheless, the Board notes that this final rule will not have a significant economic impact on a substantial number of small credit unions because it affects only the maximum amounts of CMPs that may be assessed in individual cases, which are not numerous and generally do not involve assessments at the maximum level. In addition, several of the CMPs are limited to a percentage of a credit union's assets. Finally, in assessing CMPs, the Board generally must consider a party's financial resources.[27] Because this final rule will affect few, if any, small credit unions, the Board certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency creates a new paperwork burden on regulated entities or modifies an existing burden.[28] For purposes of the PRA, a paperwork burden may take the form of either a reporting or a recordkeeping requirement, both referred to as information collections. This final rule adjusts the maximum amounts of certain CMPs that the Board may assess against individuals, entities, or credit unions but does not require any reporting or recordkeeping. Therefore, this final rule will not create new paperwork burdens or modify any existing paperwork burdens.

D. Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, the NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the Executive order. This final rule adjusts the maximum amounts of certain CMPs that the Board may assess against individuals, entities, and federally insured credit unions, including state-chartered credit unions. However, the final rule does not create any new authority or alter the underlying statutory authorities that enable the Board to assess CMPs. Accordingly, this final rule will not have a substantial direct effect on the States, on the connection between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. The Board has determined that this final rule does not constitute a policy that has federalism implications for purposes of the Executive order.

E. Assessment of Federal Regulations and Policies on Families

The Board has determined that this final rule will not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act, 1999.[29]

F. Congressional Review Act

For purposes of the Congressional Review Act,[30] the OMB makes a determination as to whether a final rule constitutes a ''major'' rule. If OMB deems a rule to be a ''major rule,'' the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.

The Congressional Review Act defines a ''major rule'' as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in (A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions, or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.[31]

For the same reasons set forth above, the Board is adopting the final rule without the delayed effective date generally prescribed under the Congressional Review Act. The delayed effective date required by the Congressional Review Act does not apply to any rule for which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.[32]

The Board believes this final rule is not a major rule. As required by the Congressional Review Act, the Board will submit the final rule and other appropriate reports to OMB, Congress, and the Government Accountability Office for review.

[22] 5 U.S.C. 553(b)(3)(B); see *Mid-Tex Elec. Co-op., Inc.* v. *Fed. Energy Regulatory Comm'n,* 822 F.2d 1123 (D.C. Cir. 1987).

[23] 5 U.S.C. 553(b).

[24] 5 U.S.C. 603, 604.

[25] NCUA Interpretive Ruling and Policy Statement 15–1. 80 FR 57512 (Sept. 24, 2015).

[26] 5 U.S.C. 553(b)(3)(B).

[27] 12 U.S.C. 1786(k)(2)(G)(i).

[28] 44 U.S.C. 3507(d); 5 CFR part 1320.

[29] Public Law 105–277, 112 Stat. 2681 (Oct. 21, 1998).

[30] 5 U.S.C. 801–808.

[31] 5 U.S.C. 804(2).

[32] 5 U.S.C. 808.

List of Subjects in 12 CFR Part 747

Civil monetary penalties, Credit unions.

Melane Conyers-Ausbrooks,

Secretary of the Board.

For the reasons stated in the preamble, the Board amends 12 CFR part 747 as follows:

PART 747—ADMINISTRATIVE ACTIONS, ADJUDICATIVE HEARINGS, RULES OF PRACTICE AND PROCEDURE, AND INVESTIGATIONS

■ 1. The authority for part 747 continues to read as follows:

Authority: 12 U.S.C. 1766, 1782, 1784, 1785, 1786, 1787, 1790a, 1790d; 15 U.S.C. 1639e; 42 U.S.C. 4012a; Pub. L. 101–410; Pub. L. 104–134; Pub. L. 109–351; Pub. L. 114–74.

■ 2. Revise § 747.1001 to read as follows:

§ 747.1001 Adjustment of civil monetary penalties by the rate of inflation.

(a) The NCUA is required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, 104 Stat. 890, as amended (28 U.S.C. 2461 note)), to adjust the maximum amount of each civil monetary penalty (CMP) within its jurisdiction by the rate of inflation. The following chart displays those adjusted amounts, as calculated pursuant to the statute:

U.S. Code citation	CMP description	New maximum amount
(1) 12 U.S.C. 1782(a)(3)	Inadvertent failure to submit a report or the inadvertent submission of a false or misleading report.	$4,146.
(2) 12 U.S.C. 1782(a)(3)	Non-inadvertent failure to submit a report or the non-inadvertent submission of a false or misleading report.	$41,463.
(3) 12 U.S.C. 1782(a)(3)	Failure to submit a report or the submission of a false or misleading report done knowingly or with reckless disregard.	$2,073,133 or 1 percent of the total assets of the credit union, whichever is less.
(4) 12 U.S.C. 1782(d)(2)(A)	Tier 1 CMP for inadvertent failure to submit certified statement of insured shares and charges due to the National Credit Union Share Insurance Fund (NCUSIF), or inadvertent submission of false or misleading statement.	$3,791.
(5) 12 U.S.C. 1782(d)(2)(B)	Tier 2 CMP for non-inadvertent failure to submit certified statement or submission of false or misleading statement.	$37,901.
(6) 12 U.S.C. 1782(d)(2)(C)	Tier 3 CMP for failure to submit a certified statement or the submission of a false or misleading statement done knowingly or with reckless disregard.	$1,895,095 or 1 percent of the total assets of the credit union, whichever is less.
(7) 12 U.S.C. 1785(a)(3)	Non-compliance with insurance logo requirements	$129.
(8) 12 U.S.C. 1785(e)(3)	Non-compliance with NCUA security requirements	$301.
(9) 12 U.S.C. 1786(k)(2)(A)	Tier 1 CMP for violations of law, regulation, and other orders or agreements.	$10,366.
(10) 12 U.S.C. 1786(k)(2)(B)	Tier 2 CMP for violations of law, regulation, and other orders or agreements and for recklessly engaging in unsafe or unsound practices or breaches of fiduciary duty.	$51,827.
(11) 12 U.S.C. 1786(k)(2)(C)	Tier 3 CMP for knowingly committing the violations under Tier 1 or 2 (natural person).	$2,073,133.
(12) 12 U.S.C. 1786(k)(2)(C)	Tier 3 CMP for knowingly committing the violations under Tier 1 or 2 (insured credit union).	$2,073,133 or 1 percent of the total assets of the credit union, whichever is less.
(13) 12 U.S.C. 1786(w)(5)(A)(ii)	Non-compliance with senior examiner post-employment restrictions	$341,000.
(14) 15 U.S.C. 1639e(k)	Non-compliance with appraisal independence requirements	First violation: $11,906. Subsequent violations: $23,811.
(15) 42 U.S.C. 4012a(f)(5)	Non-compliance with flood insurance requirements	$2,252.

(b) The adjusted amounts displayed in paragraph (a) of this section apply to civil monetary penalties that are assessed after the date the increase takes effect, including those whose associated violation or violations pre-dated the increase and occurred on or after November 2, 2015.

[FR Doc. 2020–29181 Filed 1–6–21; 8:45 am]

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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 710, 712, and 745

[Docket No. 201211–0336]

RIN 0694–AH94

Chemical Weapons Convention Regulations and the Export Administration Regulations: Additions to Schedule 1(A) of the Annex on Chemicals to the Chemical Weapons Convention

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: The Bureau of Industry and Security (BIS) is publishing this final rule to amend the Chemical Weapons Convention Regulations (CWCR) and the Export Administration Regulations (EAR) to reflect recent additions to Schedule 1(A) of the Annex on Chemicals to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, also known as the Chemical Weapons Convention (CWC). This final rule also amends the definition of ''production'' in the CWCR to clarify the scope of this term as it applies to declarations regarding the production of ''Schedule 1,'' ''Schedule 2,'' or ''Schedule 3'' chemicals.

DATES: This rule is effective January 7, 2021.

FOR FURTHER INFORMATION CONTACT: For questions on the CWCR requirements for ''Schedule 1'' chemicals, contact Erica Sunyog, Treaty Compliance Division, Office of Nonproliferation and Treaty Compliance, Bureau of Industry and Security, U.S. Department of Commerce, Phone: (202) 482–6237.

SUPPLEMENTARY INFORMATION:

Background

The Chemical Weapons Convention (hereinafter, ''CWC'' or ''Convention''), which entered into force on April 29, 1997, is an international arms control treaty whose object and purpose is to eliminate an entire category of weapons of mass destruction by prohibiting the development, production, acquisition, stockpiling, retention, transfer or use of chemical weapons by States Parties. The CWC States Parties have agreed to destroy any stockpiles of chemical weapons they may hold and any facilities that produced them, as well as any chemical weapons they have abandoned on the territory of other States Parties. The CWC States Parties also have agreed to implement a comprehensive data declaration, notification, and inspection regime for those toxic chemicals and their precursors listed in Schedule 1, 2 or 3 in the CWC Annex on Chemicals to provide transparency and to verify that their public and private sectors are not engaged in activities prohibited under the CWC.

In addition, each State Party has agreed to adopt domestic legislation to implement its obligations under the Convention and to designate or establish a National Authority to serve as the national focal point for effective liaison with the Organization for the Prohibition of Chemical Weapons (OPCW) and other States Parties. The designated U.S. National Authority is the Bureau of Arms Control, Verification and Compliance, U.S. Department of State. The OPCW was established by the States Parties to achieve the object and purpose of the Convention, to ensure the implementation of its provisions (including those pertaining to international verification of compliance), and to provide a forum for consultation and cooperation among the States Parties. All CWC States Parties are members of the OPCW, which includes the Conference of the States Parties, the Executive Council, and the Technical Secretariat.

The provisions of the CWC that affect commercial activities involving scheduled chemicals (including ''Schedule 1'' chemicals) are implemented, pursuant to the Chemical Weapons Convention Implementation Act of 1998 (CWCIA) (22 U.S.C. 6701 *et seq.*) and Executive Order 13128 (64 FR 34703, June 28, 1999), by the Chemical Weapons Convention Regulations (CWCR) (see 15 CFR parts 710–722) and the Export Administration Regulations (EAR) (see 15 CFR 742.18 and 15 CFR part 745), both of which are administered by the Bureau of Industry and Security (BIS). Specifically, BIS maintains the list of ''Schedule 1'' chemicals identified in the CWC Annex on Chemicals in Supplement No. 1 to part 712 of the CWCR and as part of Supplement No. 1 to part 745 of the EAR. BIS also administers the CWC ''Schedule 1'' chemical declaration, reporting, notification, and verification requirements that are described in part 712 of the CWCR. In addition, § 745.1 of the EAR describes the advance notification and annual report requirements that apply to exports of ''Schedule 1'' chemicals.

The CWC identifies the toxic chemicals and immediate precursors listed under ''Schedule 1'' in the CWC Annex on Chemicals as posing a high risk to the object and purpose of the Convention. Consistent with Part VI of the CWC Verification Annex, the CWCR restrict commercial production of ''Schedule 1'' chemicals to research, medical, or pharmaceutical purposes only. See 15 CFR 710.1, at definition of *Purposes not prohibited by the CWC,* and 15 CFR 710.2(b), *Activities subject to the CWCR.* The CWCR prohibit commercial production of ''Schedule 1'' chemicals for ''protective purposes'' (see 15 CFR 712.2(a)) consistent with Presidential Decision Directive (PDD) 70 (December 17, 1999), which effectively limits production for such purposes to facilities operated by the Department of Defense. These CWCR restrictions and prohibitions apply to all persons and facilities located in the United States, except certain U.S. Government facilities—see 15 CFR 710.2(a). In addition to these general requirements and prohibitions pertaining to ''Schedule 1'' chemicals, the CWCR:

(1) Prohibit the import of ''Schedule 1'' chemicals from States not Party to the CWC (15 CFR 712.2(b));

(2) Require annual declarations by facilities engaged in the production of ''Schedule 1'' chemicals in excess of 100 grams aggregate per calendar year (*i.e.,* declared ''Schedule 1'' facilities) for purposes not prohibited by the CWC (15 CFR 712.5(a)(1) and (a)(2));

(3) Provide for government approval of declared ''Schedule 1'' facilities (15 CFR 712.5(f));

(4) Provide that declared ''Schedule 1'' facilities are subject to initial and routine inspection by the OPCW (15 CFR 712.5(e) and 716.1(b)(1));

(5) Require 200 days advance notification of establishment of new ''Schedule 1'' production facilities producing greater than 100 grams aggregate of ''Schedule 1'' chemicals per calendar year (15 CFR 712.4);

(6) Require advance notification and annual reporting to the Technical Secretariat of the OPCW of all imports and exports of ''Schedule 1'' chemicals to, or from, other States Parties to the CWC (15 CFR 712.6, 742.18(a)(1) and 745.1); and

(7) Prohibit the export of ''Schedule 1'' chemicals to States not Party to the CWC (15 CFR 742.18(a)(1) and (b)(1)(ii)).

This final rule amends part 712 of the CWCR and part 745 of the EAR to reflect recent additions to Schedule 1(A) of the CWC Annex on Chemicals, as described below. In addition, this rule amends the definition of ''production'' in part 710 of the CWCR to clarify the scope of this term as it applies to declarations regarding the production of ''Schedule 1,'' ''Schedule 2,'' or ''Schedule 3'' chemicals.

This rule amends part 712 of the CWCR and part 745 of the EAR to add three ''Schedule 1'' chemical families and one individual ''Schedule 1'' chemical to both sets of regulations, consistent with two decisions adopted by the States Parties to the CWC during the OPCW's 24th Conference of the States Parties, held in The Hague, the Netherlands, from November 25–29, 2019. Based on two separate proposals submitted to the Director-General of the OPCW, one by the United States, Canada and the Netherlands, and the other by the Russian Federation, these decisions added three chemical families and one individual chemical to ''Schedule 1'' in the CWC Annex on Chemicals. The OPCW agreements are documented in OPCW Decisions C–24/DEC.4 and C–24/DEC.5 and may be obtained from the OPCW website (*http://www.opcw.org*). On December 10, 2019, the Director-General notified all States Parties and the Depositary of the CWC (*i.e.,* the Secretary-General of the United Nations) of the adoption of these decisions by the Conference of the States Parties. Pursuant to subparagraph 5(g) of Article XV of the CWC, these changes to the Annex on Chemicals entered into force for all States Parties 180 days after the date of this notification, that is, on June 7, 2020.

The additions to ''Schedule 1'' of the CWC Annex on Chemicals are as follows:

Schedule 1

A. Toxic chemicals:

(1) P-alkyl (H or ≤C_{10}, incl. cycloalkyl) N-(1-(dialkyl(≤C_{10}, incl. cycloalkyl)amino))alkylidene(H or ≤C_{10}, incl. cycloalkyl) phosphonamidic fluorides and corresponding alkylated or protonated salts

e.g. N-(1-(di-n-decylamino)-n-decylidene)-P-decylphosphonamidic fluoride (CAS No. 2387495–99–8)

Methyl-(1-(diethylamino)ethylidene) phosphonamidofluoridate (CAS No. 2387496–12–8)

(2) O-alkyl (H or ≤C_{10}, incl. cycloalkyl) N-(1-(dialkyl(≤C_{10}, incl. cycloalkyl)amino))alkylidene(H or ≤C_{10}, incl. cycloalkyl) phosphoramidofluoridates and corresponding alkylated or protonated salts

e.g. O-n-Decyl N-(1-(di-n-decylamino)-n-decylidene)phosphoramidofluoridate (CAS No. 2387496–00–4)

Methyl (1-(diethylamino)ethylidene) phosphoramidofluoridate (CAS No. 2387496–04–8)

Ethyl (1-(diethylamino)ethylidene) phosphoramidofluoridate (CAS No. 2387496–06–0)

(3) Methyl-(bis(diethylamino)methylene) phosphonamidofluoridate (CAS No. 2387496–14–0)

(4) Carbamates (quaternaries and bisquaternaries of dimethylcarbamoyloxypyridines)

Quaternaries of dimethylcarbamoyloxypyridines:

1-[N,N-dialkyl(≤C_{10})-N-(n-(hydroxyl, cyano, acetoxy)alkyl(≤C_{10})) ammonio]-n-[N-(3-dimethylcarbamoxy-α-picolinyl)-N,N-dialkyl(≤C_{10}) ammonio]decane dibromide (n=1–8)

e.g. 1-[N,N-dimethyl-N-(2-hydroxy)ethylammonio]-10-[N-(3-dimethylcarbamoxy-α-picolinyl)-N,N-dimethylammonio]decane dibromide (CAS No. 77104–62–2)

Bisquaternaries of dimethylcarbamoyloxypyridines:

1,n-Bis[N-(3-dimethylcarbamoxy-α-picolyl)-N,N-dialkyl(≤C_{10}) ammonio]-alkane-(2,(n-1)-dione) dibromide (n=2–12)

e.g. 1,10-Bis[N-(3-dimethylcarbamoxy-α-picolyl)-N-ethyl-N-methylammonio]decane-2,9-dione dibromide (CAS No. 77104–00–8).

Notice of Inquiry on the Impact of Proposed Additions to CWC ''Schedule 1''

Pursuant to Condition 23 to Senate Resolution 75 (S. Res. 75, April 24, 1997), and as delegated from the President, the Secretary of State, in coordination with other U.S. Government departments and agencies, including the Department of Commerce, must submit a report to the Senate Committee on Foreign Relations detailing, *inter alia,* the likely impact on United States industry of the proposed addition of a chemical or biological substance to a schedule in the CWC Annex on Chemicals. Consistent with Condition 23, on August 14, 2019, BIS published a notice of inquiry (84 FR 40389) that requested public comments as to whether the legitimate commercial activities and interests of chemical, biotechnology, and pharmaceutical firms in the United States would be significantly harmed by the limitations that would be imposed on access to, and production of, the compounds included in certain chemical families that had been proposed for addition to ''Schedule 1'' in the CWC Annex on Chemicals.

BIS did not receive any public comments in response to this notice of inquiry. Of the chemical families at issue, three families of chemicals and one individual chemical from a fourth family, as described above, were added to ''Schedule 1'' by the decisions adopted at the Conference of the States Parties in November 2019. These additions to ''Schedule 1'' are reflected in the amendments to the CWCR and the EAR described below.

Amendments to Supplement No. 1 to Part 712 of the CWCR (Schedule 1 Chemicals)

Supplement No. 1 to part 712 of the CWCR identifies ''Schedule 1'' chemicals listed in the CWC Annex on Chemicals. This rule amends Supplement No. 1 to: (1) Include the three chemical families and one individual chemical that were added to ''Schedule 1;'' and (2) add a Note 3 following the list of chemicals to explain that the numerical sequence of the ''Schedule 1'' Toxic Chemicals and Precursors specified therein is not consecutive so as to align with the December 23, 2019, consolidated textual changes to the Annex on Chemicals, which reflect the decisions adopted by the CWC Conference of the States Parties in November 2019. Specifically, the chemicals listed in ''Schedule 1(A),'' Toxic Chemicals, are numbered 1–8 and 13–16 (the latter includes 16.1 and 16.2), while the chemicals listed in ''Schedule 1(B),'' Precursors, are numbered 9–12.

This rule does not amend any of the declaration, advance notification, reporting or verification requirements in part 712 of the CWCR that apply to ''Schedule 1'' chemicals or facilities involved in the production of such chemicals. Although the newly added ''Schedule 1'' chemicals are now subject to these requirements, BIS estimates that the amendments made by this rule will not significantly affect the public burden imposed by these requirements because very few (if any) commercial facilities in the United States produce these chemicals. Consistent with this estimate, BIS did not receive any responses to its August 2019 notice of inquiry requesting public comments on the impact on U.S. industry of the proposed addition of the families of chemicals at issue to ''Schedule 1'' of the CWC Annex on Chemicals. As further evidence of the limited scope of any potential commercial applications, these chemicals are defense articles subject to the export licensing jurisdiction of the U.S. Department of State (as described below).

Amendments to Supplement No. 1 to Part 745 of the EAR (Schedules of Chemicals)

Supplement No. 1 to part 745 of the EAR includes the three schedules of Chemicals (Schedules 1, 2 and 3) contained in the CWC Annex on Chemicals. This rule amends ''Schedule 1'' in Supplement No. 1 to reflect the decisions adopted at the November 2019 CWC Conference of the States Parties to add three chemical families and one individual chemical to ''Schedule 1'' in the CWC Annex on Chemicals. In addition, this rule revises the formats of ''Schedule 2 and ''Schedule 3'' for consistency with the format of ''Schedule 1,'' as amended by this rule. This rule also adds a Note following the list of chemicals in Supplement No. 1 to explain that the numerical sequence of the ''Schedule 1'' Toxic Chemicals and Precursors specified therein is not consecutive so as to align with the December 23, 2019, consolidated textual changes to the Annex on Chemicals, which reflect the decisions adopted by the CWC Conference of the States Parties in November 2019. Specifically, the chemicals listed in ''Schedule 1(A),'' Toxic Chemicals, are numbered 1–8 and 13–16 (the latter includes 16.1 and 16.2), while the chemicals listed in ''Schedule 1(B),'' Precursors, are numbered 9–12.

This rule does not amend the advance notification and reporting requirements for exports of ''Schedule 1'' chemicals described in § 745.1 of the EAR, which are, for all practical purposes, a cross-reference to (or general restatement of) the requirements in § 712.6 of the CWCR (except that the CWCR requirements

also apply to imports of ''Schedule 1'' chemicals). Furthermore, these newly added ''Schedule 1'' chemicals are not subject to the export licensing jurisdiction of BIS under the EAR. All ''Schedule 1'' chemicals, except ricin and saxitoxin (which are controlled under Export Control Classification Number 1C351 on the Commerce Control List in Supplement No. 1 to part 774 of the EAR), are subject to the export licensing jurisdiction of the Directorate of Defense Trade Controls, Department of State, under the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120–130). Consequently, the conforming amendments made by this rule will not affect the burden imposed on the public by the ''Schedule 1'' chemical advance notification and reporting requirements described in § 745.1 of the EAR.

Clarification of the Definition of ''Production'' in Part 710 of the CWCR

This final rule amends the definition of ''*production*'' in § 710.1 of the CWCR to clarify its application to the CWCR's declaration requirements concerning the production of ''Schedule 1,'' ''Schedule 2,'' or ''Schedule 3'' chemicals. Specifically, this rule clarifies the definition consistent with §§ 712.5(d), 713.2(a)(2)(ii) and 714.1(a)(2)(ii) of the CWCR (as amended by the April 27, 2006, CWCR final rule (81 FR 24918)), whereby ''Schedule 1,'' ''Schedule 2,'' or ''Schedule 3'' chemicals that are intermediates, but not transient intermediates, must be considered when determining if a chemical is subject to the declaration requirements in the CWCR. (See the OPCW Conference of the States Parties Decisions that form the basis of this treatment of such intermediates: C–10/DEC.12, November 10, 2005, ''Understanding Relating to the Concept of 'Captive Use' in Connection with Declarations of Production and Consumption Under Part VI of the Verification Annex to the Convention;'' and C–9/DEC.6, November 30, 2004, ''Understanding of the Concept of 'Captive Use' in Connection with Declarations of Production and Consumption Under Parts VII and VIII of the Verification Annex to the Chemical Weapons Convention.'')

As amended by this rule, the definition of ''production'' in § 710.1 of the CWCR is understood (for purposes of the ''Schedule 1,'' ''Schedule 2,'' and ''Schedule 3'' chemical declaration requirements in the CWCR) to include intermediates, by-products, or waste products that are produced and consumed within a defined chemical manufacturing sequence, where such intermediates, by-products, or waste products are chemically stable and therefore exist for a sufficient time to make isolation from the manufacturing stream possible, but where, under normal or design operating conditions, isolation does not occur.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including: Potential economic, environmental, public health and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits and of reducing costs, harmonizing rules, and promoting flexibility. This final rule has been determined to be not significant for purposes of Executive Order 12866. This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

2. Notwithstanding any other provision of 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 Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This rule contains the following collections of information subject to the requirements of the PRA. These collections have been approved by OMB under control numbers 0694–0091 (Chemical Weapons Convention Declaration and Report Handbook and Forms & Chemical Weapons Convention Regulations (CWCR)) and 0694–0117 (Chemical Weapons Convention Provisions of the Export Administration Regulations (EAR)). The approved information collection under OMB control number 0694–0091 includes CWCR declarations, reports, notifications, and on-site inspections of chemical facilities and carries a total burden estimate of 14,813 hours. The approved information collection under OMB control number 0694–0117 includes Schedule 1 chemical advance notifications and annual reports, Schedule 3 chemical End-Use Certificates, and exports of ''technology'' to produce certain Schedule 2 and Schedule 3 chemicals and carries a total burden estimate of 42 burden hours.

BIS estimates that the overall increase in costs and burdens due to the implementation of the changes made by this final rule will be minimal, based on the fact that there are very few, if any, commercial applications for the ''Schedule 1'' chemicals added by this rule to Supplement No. 1 to part 712 of the CWCR and Supplement No. 1 to part 745 of the EAR. Consistent with this estimate, BIS did not receive any responses to its August 2019 notice of inquiry described herein. Additional evidence of the limited scope of potential commercial applications is that the chemicals at issue are defense articles subject to the export licensing jurisdiction of the Department of State. Also, pursuant to § 710.2(a) of the CWCR, certain U.S. Government facilities (*e.g.,* Department of Defense and Department of Energy facilities) are not subject to the CWCR and, consequently, the costs and burdens of the requirements described therein do not apply to such facilities.

In addition, although the newly added ''Schedule 1'' chemicals are subject to the declaration, advance notification, reporting or verification requirements in part 712 of the CWCR, the fact that these chemicals have few potential commercial applications will, as a practical matter, limit the impact of these requirements. Consequently, the amendments made by this rule will not significantly alter the costs and burdens imposed on the public by such CWCR requirements. Furthermore, because these newly added ''Schedule 1'' chemicals are defense articles subject to the export licensing jurisdiction of the Department of State under the ITAR, the conforming amendments made by this rule do not add to, or otherwise affect, any export licensing requirements in the EAR; nor, as a practical matter, will they significantly alter the costs and burdens imposed on the public by the reporting and advance notification requirements described in § 745.1 of the EAR.

Written comments and recommendations for the information collections referenced above should be sent within 30 days of the publication of this final rule to: *www.reginfo.gov/public/do/PRAMain.* The public may locate these particular information collections by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

3. This rule does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed

rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a military and foreign affairs function of the United States (see 5 U.S.C. 553(a)(1)). Immediate implementation of these amendments is non-discretionary and fulfills the United States' international obligations under the CWC. The CWC is an international arms control treaty prohibiting the development, production, acquisition, stockpiling, retention, transfer or use of chemical weapons by States Parties in order to eliminate an entire category of weapons of mass destruction. The 193 CWC States Parties have agreed to, among other things, implement a comprehensive data declaration, notification, and inspection regime for those toxic chemicals and their precursors listed in Schedules 1, 2 or 3 in the CWC Annex on Chemicals (the Annex). The amendments set forth in this rule implement two decisions adopted by the States Parties during the OPCW's 24th Conference of the States Parties, held in The Hague, the Netherlands, from November 25–29, 2019, and clarify a definition in the CWCR to ensure consistency with the CWCR's declaration requirements regarding the production of ''Schedule 1,'' ''Schedule 2,'' or ''Schedule 3'' chemicals.

These provisions of the Administrative Procedure Act also are waived for good cause, as unnecessary and contrary to the public interest (see 5 U.S.C. 553(b)(B)). This rule brings the CWCR and the EAR into conformity with recent updates to ''Schedule 1'' in the Annex by amending Supplement No. 1 to part 712 of the CWCR and Supplement No. 1 to part 745 of the EAR. These changes to the Annex entered into force, with respect to all States Parties to the CWC, on June 7, 2020. As a State Party, the United States became obligated to apply the declaration, advance notification, reporting and verification requirements in part 712 of the CWCR to these newly added ''Schedule 1'' chemicals as of that date.

Because these obligations will have already come into effect by the time this rule is published, a delay of this rulemaking to allow for notice and opportunity for public comment would be unnecessary. As indicated above, the U.S. has no discretion in this matter—it must implement these changes as a State Party.

Even if these changes were discretionary, a delay of this rulemaking to allow for notice and opportunity for public comment would be unnecessary. Based on the lack of any responses to BIS's August 14, 2019, notice of inquiry requesting public comments on the impact of the addition of these chemicals (together with others) to the Annex, it does not appear that there any many (if any) chemical, biotechnology, or pharmaceutical firms in the U.S. that would be adversely affected by the substance of this rule. Moreover, these chemicals are defense articles subject to the export licensing jurisdiction of the Department of State under the ITAR and, consequently, have few potential commercial applications.

Similarly, a delay of this rulemaking to provide notice and opportunity for public comment would be contrary to the public interest, as would a 30-day delay in effective date, given the fact that the restrictions associated with the addition of these chemicals to the Annex have already come into force for CWC States Parties as of June 7, 2020. Providing notice and opportunity for public comment and a 30-day delay in effectiveness would not only impair the ability of the United States to fulfill its obligations as a State Party in a timely manner, it also might lead the public to mistakenly assume that these changes are discretionary. Such measures might also have a significant adverse impact upon the ability of U.S. companies to comply in a timely fashion with the declaration, advance notification, reporting, and other requirements that apply to these newly added ''Schedule 1'' chemicals, as they would have to wait until the amendments adding these chemicals to the CWCR and the EAR have taken effect. Consequently, any further delay in implementation would adversely impact the ability of the United States to meet its ''Schedule 1'' chemical declaration, notification, and reporting obligations to the OPCW with respect to these newly added ''Schedule 1'' chemicals. Conversely, timely publication of these regulatory changes, with immediate effectiveness, would provide U.S. companies with adequate time to adjust their recordkeeping and other activities in advance of any deadlines that would apply to the submission of declarations, advance notifications, or reports associated with the newly added ''Schedule 1'' chemicals, thereby making it possible for the U.S. to meet its CWC obligations in this regard.

For similar reasons, application of the APA's notice and comment and 30-day delay in effectiveness requirements to the clarification to the definition of ''production'' set forth in § 710.1 of the CWCIA made as part of this rule would be unnecessary and contrary to the public interest. The clarification merely conforms the definition to language already set forth in the CWCIA's declaration requirements that apply to ''Schedule 1,'' ''Schedule 2,'' and ''Schedule 3'' chemicals.

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by the APA or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

List of Subjects

15 CFR Part 710

Chemicals, Exports, Foreign trade, Imports, Treaties.

15 CFR Part 712

Chemicals, Exports, Foreign trade, Imports, Reporting and recordkeeping requirements.

15 CFR Part 745

Administrative practice and procedure, Chemicals, Exports, Foreign trade, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, parts 710 and 712 of the Chemical Weapons Convention Regulations (15 CFR parts 710–722) and part 745 of the Export Administration Regulations (15 CFR parts 730–774) are amended as follows:

PART 710—GENERAL INFORMATION AND OVERVIEW OF THE CHEMICAL WEAPONS CONVENTION REGULATIONS (CWCR)

■ 1. The authority citation for 15 CFR part 710 continues to read as follows:

Authority: 22 U.S.C. 6701 *et seq.;* E.O. 13128, 64 FR 36703, 3 CFR 1999 Comp., p. 199.

■ 2. In § 710.1, the definition of ''Production'' is revised to read as follows:

§ 710.1 Definitions of terms used in the Chemical Weapons Convention Regulations (CWCR).

* * * * *

Production. Means the formation of a chemical through chemical reaction, including biochemical or biologically mediated reaction (see supplement no. 2 to this part).

(1) Production of Schedule 1 chemicals means formation through chemical synthesis as well as processing to extract and isolate Schedule 1 chemicals.

(2) Production of a Schedule 2 or Schedule 3 chemical means all steps in

the production of a chemical in any units within the same plant through chemical reaction, including any associated processes (*e.g.,* purification, separation, extraction, distillation, or refining) in which the chemical is not converted into another chemical. The exact nature of any associated process (*e.g.,* purification, etc.) is not required to be declared.

(3) Production of a Schedule 1, Schedule 2 or Schedule 3 chemical is understood, for declaration purposes, to include intermediates, by-products, or waste products that are produced and consumed within a defined chemical manufacturing sequence, where such intermediates, by-products, or waste products are chemically stable and therefore exist for a sufficient time to make isolation from the manufacturing stream possible, but where, under normal or design operating conditions, isolation does not occur.

* * * * *

PART 712—ACTIVITIES INVOLVING SCHEDULE 1 CHEMICALS

■ 3. The authority citation for 15 CFR part 712 continues to read as follows:

Authority: 22 U.S.C. 6701 *et seq.;* 50 U.S.C. 1601 *et seq.;* 50 U.S.C. 1701 *et seq.;* E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950, as amended by E.O. 13094, 63 FR 40803, 3 CFR, 1998 Comp., p. 200; E.O. 13128, 64 FR 36703, 3 CFR 1999 Comp., p. 199.

■ 4. Supplement No. 1 to part 712 is amended by revising the table and adding a Note 3 to the Notes to Supplement No. 1 to read as follows:

SUPPLEMENT NO. 1 TO PART 712—SCHEDULE 1 CHEMICALS

	CAS registry No.
A. Toxic Chemicals:	
1. *Family:* O-Alkyl(≤C_{10}, incl. cycloalkyl) alkyl (Me, Et, n-Pr or i-Pr)- phosphonofluoridates	
Not limited to the following examples:	
Sarin: O-Isopropyl methylphosphonofluoridate	107–44–8
Soman: O-Pinacolyl methylphosphonofluoridate	96–64–0
2. *Family:* O-Alkyl (≤C_{10}, incl. cycloalkyl) N,N-dialkyl (Me, Et, n-Pr or i-Pr) phosphoramidocyanidates	
Not limited to the following example:	
Tabun: O-Ethyl N,N-dimethyl phosphoramidocyanidate	77–81–6
3. *Family:* O-Alkyl (H or ≤C_{10}, incl. cycloalkyl) S-2-dialkyl (Me, Et, n-Pr or i-Pr)-aminoethyl alkyl (Me, Et, n-Pr or i-Pr) phosphonothiolates and corresponding alkylated or protonated salts	
Not limited to the following example:	
VX: O-Ethyl S-2-diisopropylaminoethyl methyl phosphonothiolate	50782–69–9
4. Sulfur mustards:	
2-Chloroethylchloromethylsulfide	2625–76–5
Mustard gas: Bis(2-chloroethyl)sulfide	505–60–2
Bis(2-chloroethylthio)methane	63869–13–6
Sesquimustard: 1,2-Bis(2-chloroethylthio)ethane	3563–36–8
1,3-Bis(2-chloroethylthio)-n-propane	63905–10–2
1,4-Bis(2-chloroethylthio)-n-butane	142868–93–7
1,5-Bis(2-chloroethylthio)-n-pentane	142868–94–8
Bis(2-chloroethylthiomethyl)ether	63918–90–1
O-Mustard: Bis(2-chloroethylthioethyl)ether	63918–89–8
5. Lewisites:	
Lewisite 1: 2-Chlorovinyldichloroarsine	541–25–3
Lewisite 2: Bis(2-chlorovinyl)chloroarsine	40334–69–8
Lewisite 3: Tris(2-chlorovinyl)arsine	40334–70–1
6. Nitrogen mustards:	
HN1: Bis(2-chloroethyl)ethylamine	538–07–8
HN2: Bis(2-chloroethyl)methylamine	51–75–2
HN3: Tris(2-chloroethyl)amine	555–77–1
7. Saxitoxin	35523–89–8
8. Ricin	9009–86–3
13. *Family:* P-alkyl (H or ≤C_{10}, incl. cycloalkyl) N-(1-(dialkyl(≤C_{10}, incl. cycloalkyl)amino))alkylidene(H or ≤C_{10}, incl. cycloalkyl) phosphonamidic fluorides and corresponding alkylated or protonated salts	
Not limited to the following examples:	
N-(1-(di-n-decylamino)-n-decylidene)-P-decylphosphonamidic fluoride	2387495–99–8
Methyl-(1-(diethylamino)ethylidene)phosphonamidofluoridate	2387496–12–8
14. *Family:* O-alkyl (H or ≤C_{10}, incl. cycloalkyl) N-(1-(dialkyl(≤C_{10}, incl. cycloalkyl)amino))alkylidene(H or ≤C_{10}, incl. cycloalkyl) phosphoramidofluoridates and corresponding alkylated or protonated salts	
Not limited to the following examples:	
O-n-Decyl N-(1-(di-n-decylamino)-n decylidene)phosphoramidofluoridate	2387496–00–4
Methyl (1-(diethylamino)ethylidene)phosphoramidofluoridate	2387496–04–8
Ethyl (1-(diethylamino)ethylidene)phosphoramidofluoridate	2387496–06–0
15. Methyl-(bis(diethylamino)methylene)phosphonamidofluoridate	2387496–14–0
16. Carbamates (quaternaries and bisquaternaries of dimethylcarbamoyloxypyridines)	
16.1. *Family:* Quaternaries of dimethylcarbamoyloxypyridines: 1-[N,N-dialkyl(≤C_{10})-N-(n-(hydroxyl, cyano, acetoxy)alkyl(≤C_{10})) ammonio]-n-[N-(3-dimethylcarbamoxy-α-picolinyl)-N,N-dialkyl(≤C_{10}) ammonio]decane dibromide (n=1-8)	
Not limited to the following example:	
1-[N,N-dimethyl-N-(2-hydroxy)ethylammonio]-10-[N-(3-dimethylcarbamoxy-α-picolinyl)-N,N-dimethylammonio]decane dibromide	77104–62–2
16.2. *Family:* Bisquaternaries of dimethylcarbamoyloxypyridines:1,n-Bis[N-(3-dimethylcarbamoxy-α-picolyl)-N,N-dialkyl(≤C_{10}) ammonio]-alkane-(2,(n-1)-dione) dibromide (n=2-12)	
Not limited to the following example:	

SUPPLEMENT NO. 1 TO PART 712—SCHEDULE 1 CHEMICALS—Continued

	CAS registry No.
1,10-Bis[N-(3-dimethylcarbamoxy-α-picolyl)-N-ethyl-N- methylammonio]decane-2,9-dione dibromide	77104–00–8
B. Precursors:	
9. *Family:* Alkyl (Me, Et, n-Pr or i-Pr) phosphonyldifluorides	
Not limited to the following example:	
DF: Methylphosphonyldifluoride	676–99–3
10. *Family:* O-Alkyl (H or ≤C_{10}, incl. cycloalkyl) O-2-dialkyl (Me, Et, n-Pr or i-Pr)-aminoethyl alkyl (Me, Et, n-Pr or i-Pr) phosphonites and corresponding alkylated or protonated salts	
Not limited to the following example:	
QL: O-Ethyl O-2-diisopropylaminoethyl methylphosphonite	57856–11–8
11. Chlorosarin: O-Isopropyl methylphosphonochloridate	1445–76–7
12. Chlorosoman: O-Pinacolyl methylphosphonochloridate	7040–57–5

Notes to Supplement No. 1

* * * * *

NOTE 3: The numerical sequence of the ''Schedule 1'' Toxic Chemicals and Precursors is not consecutive so as to align with the December 23, 2019, consolidated textual changes to ''Schedule 1'' of the Annex on Chemicals to the Chemical Weapons Convention (CWC), which reflect the decisions adopted by the CWC Conference of the States Parties in November 2019.

PART 745—CHEMICAL WEAPONS CONVENTION REQUIREMENTS

■ 5. The authority citation for 15 CFR part 745 is revised to read as follows:

Authority: 50 U.S.C. 1701 *et seq.;* E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950); 22 U.S.C. 6701 *et seq.;* E.O. 13128, 64 FR 36703, 3 CFR 1999 Comp., p. 199; 50 U.S.C. 4801–4852; Notice of November 12, 2019, 84 FR 61817 (November 13, 2019).

■ 6. Supplement No. 1 to part 745 is revised to read as follows:

SUPPLEMENT NO. 1 TO PART 745—SCHEDULES OF CHEMICALS

	CAS registry No.
Schedule 1	
A. Toxic Chemicals:	
1. *Family:* O-Alkyl(≤C_{10}, incl. cycloalkyl) alkyl (Me, Et, n-Pr or i-Pr)- phosphonofluoridates	
Not limited to the following examples:	
Sarin: O-Isopropyl methylphosphonofluoridate	107–44–8
Soman: O-Pinacolyl methylphosphonofluoridate	96–64–0
2. *Family:* O-Alkyl (≤C_{10}, incl. cycloalkyl) N,N-dialkyl (Me, Et, n-Pr or i-Pr) phosphoramidocyanidates	
Not limited to the following example:	
Tabun: O-Ethyl N,N-dimethyl phosphoramidocyanidate	77–81–6
3. *Family:* O-Alkyl (H or ≤C_{10}, incl. cycloalkyl) S-2-dialkyl (Me, Et, n-Pr or i-Pr)-aminoethyl alkyl (Me, Et, n-Pr or i-Pr) phosphonothiolates and corresponding alkylated or protonated salts	
Not limited to the following example:	
VX: O-Ethyl S-2-diisopropylaminoethyl methyl phosphonothiolate	50782–69–9
4. *Sulfur mustards:*	
2-Chloroethylchloromethylsulfide	2625–76–5
Mustard gas: Bis(2-chloroethyl)sulfide	505–60–2
Bis(2-chloroethylthio)methane	63869–13–6
Sesquimustard: 1,2-Bis(2-chloroethylthio)ethane	3563–36–8
1,3-Bis(2-chloroethylthio)-n-propane	63905–10–2
1,4-Bis(2-chloroethylthio)-n-butane	142868–93–7
1,5-Bis(2-chloroethylthio)-n-pentane	142868–94–8
Bis(2-chloroethylthiomethyl)ether	63918–90–1
O-Mustard: Bis(2-chloroethylthioethyl)ether	63918–89–8
5. *Lewisites:*	
Lewisite 1: 2-Chlorovinyldichloroarsine	541–25–3
Lewisite 2: Bis(2-chlorovinyl)chloroarsine	40334–69–8
Lewisite 3: Tris(2-chlorovinyl)arsine	40334–70–1
6. *Nitrogen mustards:*	
HN1: Bis(2-chloroethyl)ethylamine	538–07–8
HN2: Bis(2-chloroethyl)methylamine	51–75–2
HN3: Tris(2-chloroethyl)amine	555–77–1
7. Saxitoxin	35523–89–8
8. Ricin	9009–86–3
13. *Family:* P-alkyl (H or ≤C_{10}, incl. cycloalkyl) N-(1-(dialkyl(≤C_{10}, incl. cycloalkyl)amino))alkylidene(H or ≤C_{10}, incl. cycloalkyl) phosphonamidic fluorides and corresponding alkylated or protonated salts	
Not limited to the following examples:	
N-(1-(di-n-decylamino)-n-decylidene)-P-decylphosphonamidic fluoride	2387495–99–8
Methyl-(1-(diethylamino)ethylidene)phosphonamidofluoridate	2387496–12–8
14. *Family:* O-alkyl (H or ≤C_{10}, incl. cycloalkyl) N-(1-(dialkyl(≤C_{10}, incl. cycloalkyl)amino))alkylidene(H or ≤C_{10}, incl. cycloalkyl) phosphoramidofluoridates and corresponding alkylated or protonated salts	
Not limited to the following examples:	

SUPPLEMENT NO. 1 TO PART 745—SCHEDULES OF CHEMICALS—Continued

	CAS registry No.
O-n-Decyl N-(1-(di-n-decylamino)-n decylidene)phosphoramidofluoridate	2387496–00–4
Methyl (1-(diethylamino)ethylidene)phosphoramidofluoridate	2387496–04–8
Ethyl (1-(diethylamino)ethylidene)phosphoramidofluoridate	2387496–06–0
15. Methyl-(bis(diethylamino)methylene)phosphonamidofluoridate	2387496–14–0
16. Carbamates (quaternaries and bisquaternaries of dimethylcarbamoyloxypyridines)	
16.1. *Family:* Quaternaries of dimethylcarbamoyloxypyridines: 1-[N,N-dialkyl($\leq C_{10}$)-N-(n-(hydroxyl, cyano, acetoxy)alkyl($\leq C_{10}$)) ammonio]-n-[N-(3-dimethylcarbamoxy-α-picolinyl)-N,N-dialkyl($\leq C_{10}$) ammonio]decane dibromide (n=1–8)	
Not limited to the following example:	
1-[N,N-dimethyl-N-(2-hydroxy)ethylammonio]-10-[N-(3-dimethylcarbamoxy-α-picolinyl)-N,N-dimethylammonio]decane dibromide	77104–62–2
16.2. *Family:* Bisquaternaries of dimethylcarbamoyloxypyridines:1,n-Bis[N-(3-dimethylcarbamoxy-α-picolyl)-N,N-dialkyl($\leq C_{10}$) ammonio]-alkane-(2,(n-1)-dione) dibromide (n=2–12).	
Not limited to the following example:	
1,10-Bis[N-(3-dimethylcarbamoxy-α-picolyl)-N-ethyl-N- methylammonio]decane-2,9-dione dibromide	77104–00–8
B. Precursors:	
9. *Family:* Alkyl (Me, Et, n-Pr or i-Pr) phosphonyldifluorides	
Not limited to the following example:	
DF: Methylphosphonyldifluoride	676–99–3
10. *Family:* O-Alkyl (H or $\leq C_{10}$, incl. cycloalkyl) O-2-dialkyl (Me, Et, n-Pr or i-Pr)-aminoethyl alkyl (Me, Et, n-Pr or i-Pr) phosphonites and corresponding alkylated or protonated salts	
Not limited to the following example:	
QL: O-Ethyl O–2-diisopropylaminoethyl methylphosphonite	57856–11–8
11. *Chlorosarin:* O-Isopropyl methylphosphonochloridate	1445–76–7
12. *Chlorosoman:* O-Pinacolyl methylphosphonochloridate	7040–57–5
Schedule 2	
A. Toxic Chemicals:	
1. *Amiton:* O,O-Diethyl S-[2-(diethylamino)ethyl] phosphorothiolate and corresponding alkylated or protonated salts	78–53–5
2. PFIB: 1,1,3,3,3-Pentafluoro-2-(trifluoromethyl)-1-propene	382–21–8
3. *BZ:* 3-Quinuclidinyl benzilate	6581–06–2
B. Precursors:	
4. *Family:* Chemicals, except for those listed in Schedule 1, containing a phosphorus atom to which is bonded one methyl, ethyl or propyl (normal or iso) group but not further carbon atoms,	
Not limited to the following examples:	
Methylphosphonyl dichloride	676–97–1
Dimethyl methylphosphonate	756–79–6
Exemption: Fonofos: O-Ethyl S-phenyl ethylphosphonothiolothionate	944–22–9
5. *Family:* N,N-Dialkyl (Me, Et, n-Pr or i-Pr) phosphoramidic dihalides	
6. *Family:* Dialkyl (Me, Et, n-Pr or i-Pr) N,N-dialkyl (Me, Et, n-Pr or i-Pr)-phosphoramidates	
7. Arsenic trichloride	7784–34–1
8. 2,2-Diphenyl-2-hydroxyacetic acid	76–93–7
9. Quinuclidine-3-ol	1619–34–7
10. *Family:* N,N-Dialkyl (Me, Et, n-Pr or i-Pr) aminoethyl-2-chlorides and corresponding protonated salts	
11. *Family:* N,N-Dialkyl (Me, Et, n-Pr or i-Pr) aminoethane-2-ols and corresponding protonated salts	
Exemptions: N,N-Dimethylaminoethanol and corresponding protonated salts	108–01–0
N,N-Diethylaminoethanol and corresponding protonated salts	100–37–8
12. *Family:* N,N-Dialkyl (Me, Et, n-Pr or i-Pr) aminoethane-2-thiols and corresponding protonated salts	
13. Thiodiglycol: Bis(2-hydroxyethyl)sulfide	111–48–8
14. *Pinacolyl alcohol:* 3,3-Dimethylbutane-2-ol	464–07–3
Schedule 3	
A. Toxic Chemicals:	
1. *Phosgene:* Carbonyl dichloride	75–44–5
2. Cyanogen chloride	506–77–4
3. Hydrogen cyanide	74–90–8
4. *Chloropicrin:* Trichloronitromethane	76–06–2
B. Precursors:	
5. Phosphorus oxychloride	10025–87–3
6. Phosphorus trichloride	7719–12–2
7. Phosphorus pentachloride	10026–13–8
8. Trimethyl phosphite	121–45–9
9. Triethyl phosphite	122–52–1
10. Dimethyl phosphite	868–85–9
11. Diethyl phosphite	762–04–9
12. Sulfur monochloride	10025–67–9
13. Sulfur dichloride	10545–99–0
14. Thionyl chloride	7719–09–7
15. Ethyldiethanolamine	139–87–7

SUPPLEMENT NO. 1 TO PART 745—SCHEDULES OF CHEMICALS—Continued

	CAS registry No.
16. Methyldiethanolamine	105–59–9
17. Triethanolamine	102–71–6

Note to Supplement 1: The numerical sequence of the ''Schedule 1'' Toxic Chemicals and Precursors is not consecutive so as to align with the December 23, 2019, consolidated textual changes to ''Schedule 1'' of the Annex on Chemicals to the Chemical Weapons Convention (CWC), which reflect the decisions adopted by the CWC Conference of the States Parties in November 2019.

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 742 and 774

[Docket No. 201208–0330]

RIN 0694–AI09

Commerce Control List: Clarifications to the Scope of Export Control Classification Number 1C991 To Reflect Decisions Adopted at the June 2019 Australia Group Plenary Meeting

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: The Bureau of Industry and Security (BIS) publishes this final rule to amend the Export Administration Regulations (EAR) to clarify the scope of the export controls that apply to certain vaccines and medical products, consistent with the release (*i.e.,* exclusion) notes contained in the Australia Group (AG) ''Human and Animal Pathogens and Toxins for Export Control'' common control list.

DATES: This rule is effective January 7, 2021.

FOR FURTHER INFORMATION CONTACT: Dr. Kimberly Orr, Chemical and Biological Controls Division, Office of Nonproliferation and Treaty Compliance, Bureau of Industry and Security, Telephone: (202) 482–4201, Email: *Kimberly.Orr@bis.doc.gov.*

SUPPLEMENTARY INFORMATION: The Bureau of Industry and Security (BIS) is amending the Export Administration Regulations (EAR) to clarify the scope of the export controls that apply to certain vaccines, consistent with the vaccine release (*i.e.,* exclusion) note contained in the Australia Group (AG) ''List of Human and Animal Pathogens and Toxins for Export Control'' common control list, as updated by a decision made at the AG Plenary meeting held in Paris, France, in June 2019. The AG is a multilateral forum consisting of 42 participating countries and the European Union that maintain export controls on a list of chemicals, biological agents, and related equipment and technology that could be used in a chemical or biological weapons program. The AG periodically reviews items on its control list to enhance the effectiveness of participating governments' national controls and to achieve greater harmonization among these controls.

The AG specifically excludes certain vaccines from control under its ''List of Human and Animal Pathogens and Toxins for Export Control'' and the associated Warning List. However, prior to the June 2019 Plenary changes to this AG common control list, it was not clear if the release note therein applied not only to vaccines containing those human and animal pathogens and toxins identified on the list, but also to vaccines containing the genetic elements and genetically modified organisms identified therein. Recent changes to this AG common control list, based in part on a decision made at the June 2019 Plenary meeting, clarify that this release note applies to vaccines containing the genetic elements and genetically modified organisms identified on this list, as well as vaccines containing the viruses, bacteria, and toxins identified on this list.

Specifically, this rule amends Export Control Classification Number (ECCN) 1C991 on the Commerce Control List (CCL) to indicate that it includes vaccines containing, or designed for use against, any of the items identified in ECCN 1C351, 1C353 or 1C354. Prior to the effective date of this final rule, ECCN 1C991 indicated that it controlled vaccines ''against'' such items, but was not specific about whether all vaccines ''containing'' such items were controlled, irrespective of whether the vaccines were designed for use ''against'' such items.

This rule also expands the scope of medical products controlled under ECCN 1C991 to include those containing genetically modified organisms and genetic elements described in ECCN 1C353.a.3. In addition, this rule clarifies the definition of 'immunotoxin' that appears in ECCN 1C351 and ECCN 1C991 and removes the definition of 'subunit' from ECCN 1C351.

Finally, this rule renumbers ECCN 1C991.c and .d by listing medical products that are subject to chemical/biological (CB) controls, as well as anti-terrorism (AT) controls, under ECCN 1C991.c and listing medical products that are subject only to AT controls under ECCN 1C991.d. A conforming amendment is made to § 742.2(a)(3) of the EAR to reflect this change in paragraph sequencing.

ECCN 1C991 (Vaccines, Immunotoxins, Medical Products, Diagnostic and Food Testing Kits)

This final rule amends ECCN 1C991 on the Commerce Control List (CCL) (Supplement No. 1 to part 774 of the EAR) to make the description of the vaccines controlled by this ECCN more closely reflect the scope of the vaccine release note contained in the AG ''List of Human and Animal Pathogens and Toxins for Export Control.'' ECCN 1C991 does not control any of the human and animal pathogens and toxins or genetic elements and genetically modified organisms identified on this AG list; however, it does control vaccines, immunotoxins, medical products, and diagnostic and food testing kits that contain certain of these AG-listed items.

The amendments contained in this final rule are intended to clarify the scope of the vaccine controls described in ECCN 1C991. Prior to the effective date of this final rule, the control text for vaccines described in ECCN 1C991.a indicated that this ECCN controlled ''vaccines against items controlled by ECCN 1C351, 1C353 or 1C354.'' The use of the term ''against'' in the control text created some uncertainty concerning the extent to which ECCN 1C991.a applied to vaccines that ''contain'' items controlled by ECCN 1C351, 1C353 or

1C354, but that act against agents (or other disease causing organisms) that are not identified in any of these ECCNs. This uncertainty caused some concern among manufacturers and exporters about the correct classification and licensing policies for such vaccines.

The clarifications in this rule to the scope of the vaccine controls in ECCN 1C991.a are also in response to recent scientific and medical developments. For example, viruses controlled under ECCN 1C351 (*e.g.,* vesicular stomatitis virus, yellow fever virus, and Newcastle disease virus) are being modified to express surface proteins of other target organisms or cells for stimulating immune response to the surface protein, thus acting as vaccines against those targets. These medical products can be designed for the following purposes: (1) Vaccination against agents controlled by ECCN 1C351 (*e.g.,* Ebolavirus or Chikungunya virus); (2) to protect against uncontrolled agents; or (3) as oncolytic medical products for treating specific cancers (oncolytic virotherapy is an emerging treatment that uses replication competent viruses to destroy cancers).

This final rule addresses industry's concerns and the recent scientific and medical developments described above by revising ECCN 1C991.a to read as follows: ''Vaccines containing, or designed for use against, items controlled by ECCN 1C351, 1C353 or 1C354.'' As a result of this change, ECCN 1C991.a now clearly indicates that it controls all vaccines that ''contain'' items controlled by ECCN 1C351, 1C353 or 1C354, as well as those vaccines that are designed for use ''against'' these items.

This rule also amends ECCN 1C991 by expanding the scope of medical products controlled under this ECCN, consistent with the release (*i.e.,* exclusion) note for such products in the ''List of Human and Animal Pathogens and Toxins for Export Control,'' to include medical products containing genetically modified organisms or genetic elements controlled under ECCN 1C353.a.3. In addition, the control text for medical products in ECCN 1C991 is renumbered by listing medical products that are subject to chemical/biological (CB) controls, as well as anti-terrorism (AT) controls, under ECCN 1C991.c and listing medical products that are subject only to AT controls, under ECCN 1C991.d. Prior to the effective date of this final rule, the former were listed under ECCN 1C991.d, while the latter were listed under ECCN 1C991.c. This change is intended to emphasize the more stringent controls that apply to the medical products now described in ECCN 1C991.c (*i.e.,* CB controls, in addition to AT controls) and to clearly indicate that the CB controls that apply to most of the medical products controlled under this ECCN do not apply to the medical products now controlled under ECCN 1C991.d, which are subject only to AT controls (the controls that apply to items in ECCN 1C991 are described in more detail, below). A conforming amendment is made to § 742.2(a)(3) of the EAR to reflect this change in paragraph sequencing.

This rule also makes a technical correction to the definition of 'medical products' in the ''Related Definitions'' paragraph under the List of Items Controlled for ECCN 1C991 by adding the parenthetical phrase ''(or veterinary)'' to the criterion describing pharmaceutical formulations. The criterion, as corrected, reads as follows: ''(1) pharmaceutical formulations designed for testing and human (or veterinary) administration in the treatment of medical conditions.'' In addition, the definition of 'immunotoxins' in the ''Related Definitions'' paragraph of ECCN 1C351 and ECCN 1C991 is clarified to read as follows: ''immunotoxins are monoclonal antibodies linked to a toxin with the intention of destroying a specific target cell while leaving adjacent cells intact.''

This rule also adds a *Technical Note* at the beginning of the ''*Items*'' paragraph in the List of Items Controlled under ECCN 1C991 to clarify that, for purposes of the controls described in this ECCN, 'toxins' means those toxins, or their subunits, controlled under ECCN 1C351.d.

Note that all items controlled by ECCN 1C991, including the vaccines described in ECCN 1C991.a, require a license for AT reasons to the destinations indicated under AT Column 1 on the Commerce Country Chart in Supplement No. 1 to part 738 of the EAR (also see the AT license requirements described in part 742 of the EAR that apply to Iran, North Korea, Sudan and Syria). In addition, the medical products now controlled by ECCN 1C991.c (as renumbered by this rule) require a license for CB reasons, as well as AT reasons, to the destinations indicated under CB Column 3 and AT Column 1, respectively, on the Commerce Country Chart. A license also is required to certain destinations in accordance with the embargoes and other special controls described in part 746 of the EAR.

Anticipated Impact of This Final Rule

Prior to the publication of this final rule, paragraph (a) of ECCN 1C991 included only those vaccines designed to protect against biological agents controlled under ECCN 1C351, 1C353 or 1C354 on the CCL. For example, the vaccine for protection against Ebola was previously (and continues to be) classified for control under ECCN 1C991, because Ebola, itself, is a controlled biological agent. The Ebola vaccine also contains genetic elements for recombinant vesicular stomatitis virus (VSV), a controlled virus, and a common vector for vaccine development.

However, ECCN 1C991 did not previously include vaccines containing controlled biological agents that were not also designed to protect against a controlled agent. Other VSV-based vaccines against EAR99 agents (*i.e.,* agents not controlled on the CCL), such as SARS-CoV–2, were controlled to all destinations under ECCN 1C353, because they did not act against a controlled agent as previously required by the ECCN 1C991 vaccine control text.

This rule amends the vaccine controls in paragraph (a) of ECCN 1C991 to more accurately reflect the scope of the AG release note for vaccines, which exempts vaccines from control under the AG List of Human and Animal Pathogens and Toxins. Specifically, the AG release note exempts from control all vaccines containing one or more of the biological agents identified on this AG common control list.

Although certain COVID vaccines are not affected by this rule, the development of an unknown number of other vaccines, COVID and otherwise, is expected to be greatly facilitated as a result of these amendments to the vaccine controls in ECCN 1C991.

Effective with the publication of this rule, COVID vaccines containing genetic elements of items controlled by ECCN 1C353 (such as VSV) are now controlled under ECCN 1C991, instead of ECCN 1C353. Consequently, instead of requiring a license for export or reexport to all destinations, a license is required only to a much more limited number of destinations (*i.e.,* countries of concern for anti-terrorism (AT) reasons).

A specific example of the impact of this rule is a VSV–SARS-CoV–2 vaccine, which is a vesicular stomatitis virus modified by adding the gene for the coronavirus spike protein. Because this vaccine acts against SARS-CoV–2, which is not controlled under ECCN 1C351, it was not classified as an ECCN 1C991 vaccine, prior to the publication of this rule. Instead, it was controlled under ECCN 1C353, in spite of having received FDA approval and being packaged for patient use, because it contains genetic elements from VSV (a

controlled virus). Consequently, this vaccine previously required a license to all destinations. Effective with the publication of this final rule, this vaccine is now controlled under ECCN 1C991 and requires a license only to designated countries of concern for AT reasons.

Saving Clause

Shipments of items removed from eligibility for export, reexport or transfer (in-country) under a license exception or without a license (*i.e.,* under the designator ''NLR'') as a result of this regulatory action that were on dock for loading, on lighter, laden aboard an exporting carrier, or en route aboard a carrier to a port of export, on January 7, 2021, pursuant to actual orders for export, reexport or transfer (in-country) to a foreign destination, may proceed to that destination under the previously applicable license exception or without a license (NLR) so long as they are exported, reexported or transferred (in-country) before March 8, 2021. Any such items not actually exported, reexported or transferred (in-country) before midnight, on March 8, 2021, require a license in accordance with this regulation.

''Deemed'' exports of ''technology'' and ''source code'' removed from eligibility for export under a license exception or without a license (under the designator ''NLR'') as a result of this regulatory action may continue to be made under the previously available license exception or without a license (NLR) before March 8, 2021. Beginning at midnight on March 8, 2021, such ''technology'' and ''source code'' may no longer be released, without a license, to a foreign national subject to the ''deemed'' export controls in the EAR when a license would be required to the home country of the foreign national in accordance with this regulation.

Export Control Reform Act of 2018

The Export Control Reform Act of 2018 (ECRA), as amended, codified at 50 U.S.C. 4801–4852, serves as the authority under which BIS issues this rule.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including: Potential economic, environmental, public health and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits and of reducing costs, harmonizing rules, and promoting flexibility. This rule has been designated a ''significant regulatory action,'' although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

The cost-benefit analysis required pursuant to Executive Orders 13563 and 12866, as described below, indicates that this rule is intended to improve national security as its primary direct benefit and that this benefit significantly outweighs the costs of this rule. Specifically, implementation, in a timely manner, of the Australia Group (AG) agreements described herein will enhance the national security of the United States by reducing the risk that international trade involving dual-use chemical and biological items would contribute to the proliferation of chemical and biological weapons of mass destruction. The principal objective of AG participating countries is to use licensing measures to ensure that exports of certain chemicals, biological agents, and dual-use chemical and biological manufacturing facilities and equipment, do not contribute to the proliferation of chemical and biological weapons of mass destruction, which has been identified as a threat to domestic and international peace and security. The AG achieves this objective by harmonizing participating countries' national export licensing measures. These controls are essential, given that the international chemical and biotechnology industries are a target for proliferators as a source of materials for chemical and biological weapons programs.

In calculating what costs (if any) will be imposed by this rule, BIS estimates that 10 fewer license applications will need to be submitted to BIS, annually, as a result of the implementation of the amendments described in this rule (see Rulemaking Requirements #2, below). By applying the cost-benefit analysis required under Executive Orders 13563 and 12866 to this rule, as described herein, BIS has determined that the benefits of this rule (*i.e.,* the enhancement of our national security through the fulfillment our multilateral obligations as an AG participating country, together with the anticipated reduction in the number of license applications that would have to be submitted to export certain items affected by this rule) significantly outweigh any potential costs (*i.e.,* the incidental costs to exporters of adjusting their export control procedures for certain items affected by this rule). Furthermore, consistent with the stated purpose of the amendments to ECCN 1C991 (*i.e.,* to enhance the national security of the United States), this rule meets the requirements set forth in the April 5, 2017, Office of Management and Budget (OMB) guidance implementing Executive Order 13771 (82 FR 9339, February 3, 2017), regarding what constitutes a regulation issued ''with respect to a national security function of the United States,'' and it is, therefore, exempt from the requirements of E.O. 13771.

2. Notwithstanding any other provision of 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 Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid OMB Control Number. This rule contains the following collections of information subject to the requirements of the PRA. These collections have been approved by OMB under control numbers 0694–0088 (Simplified Network Application Processing System) and 0694–0096 (Five Year Records Retention Period). The approved information collection under OMB control number 0694–0088 includes license applications, among other things, and carries a burden estimate of 29.6 minutes per manual or electronic submission for a total burden estimate of 31,833 hours. The approved information collection under OMB control number 0694–0096 includes recordkeeping requirements and carries a burden estimate of less than 1 minute per response for a total burden estimate of 248 hours.

This rule contains minor clarifications to the EAR for certain vaccines controlled by ECCN 1C991.a for anti-terrorism (AT) reasons. Specifically, BIS expects the burden hours associated with these collections will decrease by 5 hours and 6 minutes (*i.e.,* 10 applications × 30.6 minutes per response) for a total estimated decrease in cost of $153 (*i.e.,* 5 hours and 6 minutes × $30 per hour). The $30 per hour cost estimate for OMB control numbers 0694–0088 and 0694–0096 is consistent with the salary data for export compliance specialists currently available through *glassdoor.com* (*glassdoor.com* estimates that an export compliance specialist makes $55,280 annually, which computes to roughly $26.58 per hour). Consequently, the burden hours associated with exports of the items affected by this rule will remain within the range of the existing

estimates currently associated with OMB control numbers 0694–0088 and 0694–0096.

Written comments and recommendations for the information collections referenced above should be sent within 30 days of the publication of this final rule to: *www.reginfo.gov/public/do/PRAMain.* Find these particular information collections by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

3. This rule does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

4. Pursuant to section 1762 of the Export Control Reform Act of 2018 (50 U.S.C. Sec. 4821), this action is exempt from the Administrative Procedure Act (APA) (5 U.S.C. 553) requirements for notice of proposed rulemaking, opportunity for public participation and delay in effective date.

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by the APA or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

List of Subjects

15 CFR Part 742

Exports, Terrorism.

15 CFR Part 774

Exports, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, parts 742 and 774 of the Export Administration Regulations (15 CFR parts 730–774) are amended as follows:

PART 742—CONTROL POLICY—CCL BASED CONTROLS

■ 1. The authority citation for 15 CFR part 742 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 3201 *et seq.;* 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; Sec. 1503, Pub. L. 108–11, 117 Stat. 559; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Presidential Determination 2003–23, 68 FR 26459, 3 CFR, 2004 Comp., p. 320; Notice of November 12, 2019, 84 FR 61817 (November 13, 2019).

■ 2. In § 742.2, paragraph (a)(3) is revised to read as follows:

§ 742.2 Proliferation of chemical and biological weapons.

(a) * * *

(3) If CB Column 3 of the Country Chart (Supplement No. 1 to part 738 of the EAR) is indicated in the appropriate ECCN, a license is required to Country Group D:3 (see Supplement No. 1 to part 740 of the EAR) for medical products identified in ECCN 1C991.c.

* * * * *

PART 774—THE COMMERCE CONTROL LIST

■ 3. The authority citation for 15 CFR part 774 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 10 U.S.C. 8720; 10 U.S.C. 8730(e); 22 U.S.C. 287c, 22 U.S.C. 3201 *et seq.;* 22 U.S.C. 6004; 42 U.S.C. 2139a; 15 U.S.C. 1824; 50 U.S.C. 4305; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

■ 4. In Supplement No. 1 to part 774, Category 1, ECCN 1C351 is revised to read as follows:

Supplement No. 1 to Part 774—The Commerce Control List

* * * * *

1C351 Human and animal pathogens and ''toxins,'' as follows (see List of Items Controlled).

License Requirements

Reason for Control: CB, CW, AT

Control(s)	*Country chart (see supp. No. 1 to part 738)*
CB applies to entire entry.	CB Column 1.

CW applies to 1C351.d.11 and d.12 and a license is required for CW reasons for all destinations, including Canada, as follows: CW applies to 1C351.d.11 for ricin in the form of (1) Ricinus communis AgglutininII (RCAII), also known as ricin D or Ricinus Communis LectinIII (RCLIII) and (2) Ricinus communis LectinIV (RCLIV), also known as ricin E. CW applies to 1C351.d.12 for saxitoxin identified by C.A.S. #35523–89–8. See § 742.18 of the EAR for licensing information pertaining to chemicals subject to restriction pursuant to the Chemical Weapons Convention (CWC). The Commerce Country Chart is not designed to determine licensing requirements for items controlled for CW reasons.

Control(s)	*Country chart (see supp. No. 1 to part 738)*
AT applies to entire entry.	AT Column 1.

License Requirement Notes: *1. All vaccines and 'immunotoxins' are excluded from the scope of this entry. Certain medical products and diagnostic and food testing kits that contain biological toxins controlled under paragraph (d) of this entry, with the exception of toxins controlled for CW reasons under d.11 and d.12, are excluded from the scope of this entry. Vaccines, 'immunotoxins,' certain medical products, and diagnostic and food testing kits excluded from the scope of this entry are controlled under ECCN 1C991.*

2. For the purposes of this entry, only saxitoxin is controlled under paragraph d.12; other members of the paralytic shellfish poison family (e.g., neosaxitoxin) are designated EAR99.

3. Clostridium perfringens strains, other than the epsilon toxin-producing strains of Clostridium perfringens described in c.12, are excluded from the scope of this entry, since they may be used as positive control cultures for food testing and quality control.

4. Unless specified elsewhere in this ECCN 1C351 (e.g., in License Requirement Notes 1–3), this ECCN controls all biological agents and ''toxins,'' regardless of quantity or attenuation, that are identified in the List of Items Controlled for this ECCN, including small quantities or attenuated strains of select biological agents or ''toxins'' that are excluded from the lists of select biological agents or ''toxins'' by the Animal and Plant Health Inspection Service (APHIS), U.S. Department of Agriculture (USDA), or the Centers for Disease Control and Prevention (CDC), U.S. Department of Health and Human Services (HHS), in accordance with their regulations in 9 CFR part 121 and 42 CFR part 73, respectively.

5. Biological agents and pathogens are controlled under this ECCN 1C351 when they are an isolated live culture of a pathogen agent, or a preparation of a toxin agent that has been isolated or extracted from any source or material, including living material that has been deliberately inoculated or contaminated with the agent. Isolated live cultures of a pathogen agent include live cultures in dormant form or in dried preparations, whether the agent is natural, enhanced or modified.

List Based License Exceptions (See Part 740 for a Description of All License Exceptions)

LVS: N/A
GBS: N/A

Special Conditions for STA

STA: (1) Paragraph (c)(1) of License Exception STA (§ 740.20(c)(1)) may be used for items in 1C351.d.1 through 1C351.d.10 and 1C351.d.13 through 1C351.d.18. See § 740.20(b)(2)(vi) for restrictions on the quantity of any one toxin that may be exported in a single shipment and the number of shipments that may be made to any one end user in a single calendar year. Also see the Automated Export System (AES) requirements in § 758.1(b)(4) of the EAR. (2) Paragraph (c)(2) of License Exception STA (§ 740.20(c)(2) of the EAR) may not be used for any items in 1C351.

List of Items Controlled

Related Controls: (1) Certain forms of ricin and saxitoxin in 1C351.d.11. and d.12 are CWC Schedule 1 chemicals (see § 742.18 of the EAR). The U.S. Government must provide advance notification and annual reports to the OPCW of all exports of Schedule 1 chemicals. See § 745.1 of the EAR for notification procedures. See 22 CFR part 121, Category XIV and § 121.7 for CWC Schedule 1 chemicals that are ''subject to the ITAR.'' (2) The Animal and Plant Health Inspection Service (APHIS), U.S. Department of Agriculture, and the Centers for Disease Control and Prevention (CDC), U.S. Department of Health and Human Services, maintain controls on the possession, use, and transfer within the United States of certain items controlled by this ECCN (for APHIS, see 7 CFR 331.3(b), 9 CFR 121.3(b), and 9 CFR 121.4(b); for CDC, see 42 CFR 73.3(b) and 42 CFR 73.4(b)). (3) See 22 CFR part 121, Category XIV(b), for modified biological agents and biologically derived substances that are ''subject to the ITAR.''

Related Definitions: For the purposes of this entry, 'immunotoxins' are monoclonal antibodies linked to a toxin with the intention of destroying a specific target cell while leaving adjacent cells intact.

Items:

a. Viruses identified on the Australia Group (AG) ''List of Human and Animal Pathogens and Toxins for Export Control,'' as follows:

a.1. African horse sickness virus;

a.2. African swine fever virus;

a.3. Andes virus;

a.4. Avian influenza (AI) viruses identified as having high pathogenicity (HP), as follows:

a.4.a. AI viruses that have an intravenous pathogenicity index (IVPI) in 6-week-old chickens greater than 1.2; *or*

a.4.b. AI viruses that cause at least 75% mortality in 4- to 8-week-old chickens infected intravenously.

Note: *Avian influenza (AI) viruses of the H5 or H7 subtype that do not have either of the characteristics described in 1C351.a.4 (specifically, 1C351.a.4.a or a.4.b) should be sequenced to determine whether multiple basic amino acids are present at the cleavage site of the haemagglutinin molecule (HA0). If the amino acid motif is similar to that observed for other HPAI isolates, then the isolate being tested should be considered as HPAI and the virus is controlled under 1C351.a.4.*

a.5. Bluetongue virus;

a.6. Chapare virus;

a.7. Chikungunya virus;

a.8. Choclo virus;

a.9. Classical swine fever virus (Hog cholera virus);

a.10. Crimean-Congo hemorrhagic fever virus;

a.11. Dobrava-Belgrade virus;

a.12. Eastern equine encephalitis virus;

a.13. Ebolavirus (includes all members of the Ebolavirus genus);

a.14. Foot-and-mouth disease virus;

a.15. Goatpox virus;

a.16. Guanarito virus;

a.17. Hantaan virus;

a.18. Hendra virus (Equine morbillivirus);

a.19. Japanese encephalitis virus;

a.20. Junin virus;

a.21. Kyasanur Forest disease virus;

a.22. Laguna Negra virus;

a.23. Lassa virus;

a.24. Louping ill virus;

a.25. Lujo virus;

a.26. Lumpy skin disease virus;

a.27. Lymphocytic choriomeningitis virus;

a.28. Machupo virus;

a.29. Marburgvirus (includes all members of the Marburgvirus genus);

a.30. Middle East respiratory syndrome-related coronavirus (MERS-related coronavirus);

a.31. Monkeypox virus;

a.32. Murray Valley encephalitis virus;

a.33. Newcastle disease virus;

a.34. Nipah virus;

a.35. Omsk hemorrhagic fever virus;

a.36. Oropouche virus;

a.37. Peste-des-petits ruminants virus;

a.38. Porcine Teschovirus;

a.39. Powassan virus;

a.40. Rabies virus and all other members of the Lyssavirus genus;

a.41. Reconstructed 1918 influenza virus;

Technical Note: *1C351.a.41 includes reconstructed replication competent forms of the 1918 pandemic influenza virus containing any portion of the coding regions of all eight gene segments.*

a.42. Rift Valley fever virus;

a.43. Rinderpest virus;

a.44. Rocio virus;

a.45. Sabia virus;

a.46. Seoul virus;

a.47. Severe acute respiratory syndrome-related coronavirus (SARS-related coronavirus);

a.48. Sheeppox virus;

a.49. Sin Nombre virus;

a.50. St. Louis encephalitis virus;

a.51. Suid herpesvirus 1 (Pseudorabies virus; Aujeszky's disease);

a.52. Swine vesicular disease virus;

a.53. Tick-borne encephalitis virus (Far Eastern subtype, formerly known as Russian Spring-Summer encephalitis virus—see 1C351.b.3 for Siberian subtype);

a.54. Variola virus;

a.55. Venezuelan equine encephalitis virus;

a.56. Vesicular stomatitis virus;

a.57. Western equine encephalitis virus; *or*

a.58. Yellow fever virus.

b. Viruses identified on the APHIS/CDC ''select agents'' lists (see Related Controls paragraph #2 for this ECCN), but not identified on the Australia Group (AG) ''List of Human and Animal Pathogens and Toxins for Export Control,'' as follows:

b.1. [Reserved];

b.2. [Reserved]; *or*

b.3. Tick-borne encephalitis virus (Siberian subtype, formerly West Siberian virus—see 1C351.a.53 for Far Eastern subtype).

c. Bacteria identified on the Australia Group (AG) ''List of Human and Animal Pathogens and Toxins for Export Control,'' as follows:

c.1. Bacillus anthracis;

c.2. Brucella abortus;

c.3. Brucella melitensis;

c.4. Brucella suis;

c.5. Burkholderia mallei (Pseudomonas mallei);

c.6. Burkholderia pseudomallei (Pseudomonas pseudomallei);

c.7. Chlamydia psittaci (Chlamydophila psittaci);

c.8. Clostriduim argentinense (formerly known as Clostridium botulinum Type G), botulinum neurotoxin producing strains;

c.9. Clostridium baratii, botulinum neurotoxin producing strains;

c.10. Clostridium botulinum;

c.11. Clostridium butyricum, botulinum neurotoxin producing strains;

c.12. Clostridium perfringens, epsilon toxin producing types;

c.13. Coxiella burnetii;

c.14. Francisella tularensis;

c.15. Mycoplasma capricolum subspecies capripneumoniae (''strain F38'');

c.16. Mycoplasma mycoides subspecies mycoides SC (small colony) (a.k.a. contagious bovine pleuropneumonia);

c.17. Rickettsia prowazekii;

c.18. Salmonella enterica subspecies enterica serovar Typhi (Salmonella typhi);

c.19. Shiga toxin producing Escherichia coli (STEC) of serogroups O26, O45, O103, O104, O111, O121, O145, O157, and other shiga toxin producing serogroups;

Note: *Shiga toxin producing Escherichia coli (STEC) includes, inter alia, enterohaemorrhagic E. coli (EHEC), verotoxin producing E. coli (VTEC) or verocytotoxin producing E. coli (VTEC).*

c.20. Shigella dysenteriae;

c.21. Vibrio cholerae; *or*

c.22. Yersinia pestis.

d. ''Toxins'' identified on the Australia Group (AG) ''List of Human and Animal Pathogens and Toxins for Export Control,'' as follows, or their subunits:

d.1. Abrin;

d.2. Aflatoxins;

d.3. Botulinum toxins;

d.4. Cholera toxin;

d.5. Clostridium perfringens alpha, beta 1, beta 2, epsilon and iota toxins;

d.6. Conotoxins;

d.7. Diacetoxyscirpenol;

d.8. HT-2 toxin;

d.9. Microcystins (Cyanginosins);

d.10. Modeccin;

d.11. Ricin;

d.12. Saxitoxin;

d.13. Shiga toxins (shiga-like toxins, verotoxins, and verocytotoxins);

d.14. Staphylococcus aureus enterotoxins, hemolysin alpha toxin, and toxic shock syndrome toxin (formerly known as Staphylococcus enterotoxin F);

d.15. T-2 toxin;

d.16. Tetrodotoxin;

d.17. Viscumin (Viscum album lectin 1); *or*

d.18. Volkensin.

e. ''Fungi'', as follows:

e.1. Coccidioides immitis; *or*

e.2. Coccidioides posadasii.

■ 5. In Supplement No. 1 to part 774, Category 1, ECCN 1C991 is revised to read as follows:

1C991 Vaccines, immunotoxins, medical products, diagnostic and food testing kits, as follows (see List of Items Controlled).

License Requirements

Reason for Control: CB, AT

Control(s)	*Country chart (see supp. No. 1 to part 738)*
CB applies to 1C991.c.	CB Column 3.
AT applies to entire entry.	AT Column 1.

List Based License Exceptions (See Part 740 for a Description of All License Exceptions)

LVS: N/A
GBS: N/A

List of Items Controlled

Related Controls: (1) Medical products containing ricin or saxitoxin, as follows, are controlled for CW reasons under ECCN 1C351:

(a) Ricinus communis AgglutininII (RCAII), also known as ricin D, or Ricinus Communis LectinIII (RCLIII);

(b) Ricinus communis LectinIV (RCLIV), also known as ricin E; or

(c) Saxitoxin identified by C.A.S. #35523–89–8.

(2) The export of a ''medical product'' that is an ''Investigational New Drug'' (IND), as defined in 21 CFR 312.3, is subject to certain U.S. Food and Drug Administration (FDA) requirements that are independent of the export requirements specified in this ECCN or elsewhere in the EAR. These FDA requirements are described in 21 CFR 312.110 and must be satisfied in addition to any requirements specified in the EAR.

(3) Also see 21 CFR 314.410 for FDA requirements concerning exports of new drugs and new drug substances.

Related Definitions: For the purpose of this entry, 'immunotoxins' are monoclonal antibodies linked to a toxin with the intention of destroying a specific target cell while leaving adjacent cells intact. For the purpose of this entry, 'medical products' are: (1) Pharmaceutical formulations designed for testing and human (or veterinary) administration in the treatment of medical conditions, (2) prepackaged for distribution as clinical or medical products, and (3) approved by the U.S. Food and Drug Administration either to be marketed as clinical or medical products or for use as an ''Investigational New Drug'' (IND) (see 21 CFR part 312). For the purpose of this entry, 'diagnostic and food testing kits' are specifically developed, packaged and marketed for diagnostic or public health purposes. Biological toxins in any other configuration, including bulk shipments, or for any other end-uses are controlled by ECCN 1C351. For the purpose of this entry, 'vaccine' is defined as a medicinal (or veterinary) product in a pharmaceutical formulation, approved by the U.S. Food and Drug Administration or the U.S. Department of Agriculture to be marketed as a medical (or veterinary) product or for use in clinical trials, that is intended to stimulate a protective immunological response in humans or animals in order to prevent disease in those to whom or to which it is administered.

Items:

Technical Note: *For purposes of the controls described in this ECCN, 'toxins' refers to those toxins, or their subunits, controlled under ECCN 1C351.d.*

a. Vaccines containing, or designed for use against, items controlled by ECCN 1C351, 1C353 or 1C354.

b. Immunotoxins containing toxins controlled by 1C351.d;

c. Medical products that contain any of the following:

c.1. Toxins controlled by ECCN 1C351.d (*except for* botulinum toxins controlled by ECCN 1C351.d.3, conotoxins controlled by ECCN 1C351.d.6, or items controlled for CW reasons under ECCN 1C351.d.11 or .d.12); *or*

c.2. Genetically modified organisms or genetic elements controlled by ECCN 1C353.a.3 (*except for* those that contain, or code for, botulinum toxins controlled by ECCN 1C351.d.3 or conotoxins controlled by ECCN 1C351.d.6);

d. Medical products not controlled by 1C991.c that contain any of the following:

d.1. Botulinum toxins controlled by ECCN 1C351.d.3;

d.2. Conotoxins controlled by ECCN 1C351.d.6; *or*

d.3. Genetically modified organisms or genetic elements controlled by ECCN 1C353.a.3 that contain, or code for, botulinum toxins controlled by ECCN 1C351.d.3 or conotoxins controlled by ECCN 1C351.d.6;

e. Diagnostic and food testing kits containing toxins controlled by ECCN 1C351.d (*except for* items controlled for CW reasons under ECCN 1C351.d.11 or .d.12).

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

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COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 39 and 140

RIN 3038–AE65

Exemption From Derivatives Clearing Organization Registration

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (Commission) is adopting policies and procedures that the Commission will follow with respect to granting exemptions from registration as a derivatives clearing organization (DCO). In addition, the Commission is amending certain related delegation provisions in its regulations.

DATES: Effective February 8, 2021.

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SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

A. Introduction

Section 5b(a) of the Commodity Exchange Act (''CEA'') provides that a clearing organization [1] may not ''perform the functions of'' a clearing organization with respect to swaps [2] unless the clearing organization is a DCO registered with the Commission.[3] However, the CEA also permits the Commission to conditionally or unconditionally exempt a clearing organization from DCO registration for the clearing of swaps if the Commission determines that the clearing organization is subject to ''comparable, comprehensive supervision and regulation'' by its home country regulator.[4] The Commission issued the first exemption from DCO registration in 2015 and, to date, has exempted four clearing organizations organized outside of the United States (hereinafter referred to as ''non-U.S. clearing organizations'') from DCO registration.[5]

In August 2018, the Commission proposed to codify the policies and procedures it implemented in 2015 with respect to granting exemptions from DCO registration, including permitting exempt DCOs to clear only proprietary swap positions of U.S. persons and futures commission merchants (FCMs), and not customer positions (2018 Proposal).[6] The Commission received four substantive comment letters on the 2018 Proposal.[7]

In response to a specific request for comment as to whether the Commission should consider permitting an exempt DCO to clear swaps for U.S. customers,[8] three commenters expressed support.[9] In light of these comments, the Commission further proposed in July 2019 to permit foreign intermediaries to clear swaps for U.S. customers at exempt DCOs (2019 Proposal).[10]

After considering the comments received in response to the 2019 Proposal,[11] the Commission is adopting the 2018 Proposal and, with limited exceptions,[12] declining to adopt the 2019 Proposal at this time. The Commission may consider permitting U.S. customer clearing at exempt DCOs or establishing a substantial risk test for exempt DCOs at a later time.

B. Existing Exempt DCO Orders

As previously noted, a clearing organization must be subject to comparable, comprehensive supervision and regulation by appropriate government authorities in the clearing organization's home country to be eligible for an exemption from registration as a DCO for the clearing of swaps. To date, the Commission has issued four exempt DCO orders, subject to conditions, consistent with the statute. In granting these exemptions, the Commission determined that a supervisory and regulatory framework that conforms to the PFMIs is comparable to, and as comprehensive as, the supervisory and regulatory requirements applicable to registered DCOs.[13] This conclusion is consistent

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[1] The term ''derivatives clearing organization'' is statutorily defined to mean a clearing organization in general. However, for purposes of the discussion in this release, the term ''registered DCO'' refers to a Commission-registered DCO, the term ''exempt DCO'' refers to a DCO that is exempt from registration, and the term ''clearing organization'' refers to a clearing organization that: (a) Is neither registered nor exempt from registration with the Commission as a DCO; and (b) falls within the definition of ''derivatives clearing organization'' under section 1a(15) of the CEA, 7 U.S.C. 1a(15), and ''clearing organization or derivatives clearing organization'' under § 1.3 of the Commission's regulations, 17 CFR 1.3.

[2] Section 5b(a) also provides that a clearing organization may not perform the functions of a clearing organization with respect to futures unless it is a registered DCO. This, however, is limited to futures executed on a designated contract market. Regulation 48.7 provides that a foreign board of trade registered with the Commission may clear its contracts through a registered DCO or a clearing organization that observes the Recommendations for Central Counterparties (RCCPs) or successor standards and is in good regulatory standing in its home country jurisdiction. 17 CFR 48.7. The Principles for Financial Market Infrastructures (PFMIs) are the successor standards to the RCCPs. *See* Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions, Principles for financial market infrastructures (Apr. 2012), available at *http://www.iosco.org/library/pubdocs/pdf/IOSCOPD377-PFMI.pdf*. Because an exempt DCO is required to observe the PFMIs and be in good regulatory standing it its home country, it is eligible to clear contracts executed on a foreign board of trade.

[3] 7 U.S.C. 7a–1(a). Under section 2(i) of the CEA, 7 U.S.C. 2(i), activities outside of the United States are not subject to the swap provisions of the CEA, including any rules prescribed or regulations promulgated thereunder, unless those activities either have a direct and significant connection with activities in, or effect on, commerce of the United States, or contravene any rule or regulation established to prevent evasion of a CEA provision enacted under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (Dodd-Frank Act). Therefore, pursuant to section 2(i), the DCO registration requirement extends to any clearing organization whose clearing activities outside of the United States have a direct and significant connection with activities in, or effect on, commerce of the United States.

[4] Section 5b(h) of the CEA, 7 U.S.C. 7a–1(h). Section 5b(h) also permits the Commission to exempt from DCO registration a securities clearing agency registered with the Securities and Exchange Commission; however, the Commission has not granted, nor developed a framework for granting, such exemptions.

[5] *See* ASX Clear (Futures) Pty Amended Order of Exemption from Registration (Jan. 28, 2016), available at *http://www.cftc.gov/idc/groups/public/@otherif/documents/ifdocs/asxclearamdorderdcoexemption.pdf;* Korea Exchange, Inc. Order of Exemption from Registration (Oct. 26, 2015), available at *http://www.cftc.gov/idc/groups/public/@otherif/documents/ifdocs/krxdcoexemptorder10-26-15.pdf;* Japan Securities Clearing Corporation Order of Exemption from Registration (Oct. 26, 2015), available at *http://www.cftc.gov/idc/groups/public/@otherif/documents/ifdocs/jsccdcoexemptorder10-26-15.pdf;* OTC Clearing Hong Kong Limited Order of Exemption from Registration (Dec. 21, 2015), available at *http://www.cftc.gov/idc/groups/public/@otherif/documents/ifdocs/otccleardcoexemptorder12-21-15.pdf.*

[6] *See* Exemption From Derivatives Clearing Organization Registration, 83 FR 39923 (Aug. 13, 2018).

[7] The Commission received comment letters from the following in 2018: Japan Securities Clearing Corporation (JSCC); ASX Clear (Futures) Pty (ASX); Futures Industry Association (FIA) and Securities and Financial Markets Association (SIFMA); and International Swaps and Derivatives Association, Inc. (ISDA).

[8] 2018 Proposal, 83 FR at 39930.

[9] *See* ASX Clear (Futures) Pty comment letter at 1 (stating that ''ASXCF supports the CFTC permitting exempt DCOs to clear swaps for U.S. person customers. ASXCF believes it would be beneficial to allow U.S. person customers to access the broadest possible range of central clearing facilities (''CCPs'') as this would provide U.S. person customers with flexibility and choice in accessing the best commercial solutions for the products that they use subject to those CCPs meeting global QCCP standards under the CPMI–IOSCO Principles for Financial Market Infrastructures (PFMIs).''); JSCC comment letter at 5 (stating that ''JSCC would like the CFTC to consider the potential benefits of allowing U.S. customers to access exempt DCOs, using a similar approach to the correspondent clearing structure adopted for foreign futures markets, by permitting . . . non-U.S. clearing members in an exempt DCO to clear for U.S. customers, without the necessity to register as a FCM, as long as those non-U.S. clearing members can demonstrate that they are properly supervised, regulated, and licensed to provide customer clearing services in their home countries, where the regulatory authority maintains appropriate cooperative arrangements with the CFTC.''); and ISDA comment letter at 3 (stating ''[i]n response to the Commission's question about customer clearing, ISDA strongly believes that the CFTC should permit exempt DCOs to clear swaps for customers.'').

[10] *See* Exemption From Derivatives Clearing Organization Registration, 84 FR 35456 (Jul. 23, 2019).

[11] The Commission received comment letters from the following in 2019: ASX; Americans for Financial Reform Education Fund (AFR Ed Fund); Better Markets, Inc. (Better Markets); CCP12; Citadel; CME Group, Inc. (CME); FIA; OTC Clearing Hong Kong Limited (OTC Clear); Intercontinental Exchange, Inc. (ICE); International Bankers Association of Japan (IBA Japan) and Japan Financial Markets Council (JFMC); ISDA; JSCC; LCH Group (LCH); Milbank LLP (Milbank); SIFMA; and World Federation of Exchanges (WFE).

[12] As discussed further below, the Commission is adopting § 39.6(b)(6), as modified in the 2019 Proposal, to specify the information that an exempt DCO must provide to the Commission if it is unable to provide an unconditional certification that it continues to observe the PFMIs in all material respects; § 39.6(b)(9) (renumbered as § 39.6(b)(8)), which provides that the Commission may condition an exemption from DCO registration on any other facts and circumstances it deems relevant; and § 39.6(f), which establishes a process for modification or termination of an exemption from DCO registration upon Commission initiative.

[13] The Commission holds systemically important DCOs and subpart C DCOs to requirements that are

with previous Commission determinations.[14] Under exempt DCO orders granted to date, an exempt DCO is required to observe the PFMIs in all material respects and be in good regulatory standing in its home country, as evidenced by an annual written representation by its home country regulator. A memorandum of understanding (MOU) must be in effect between the Commission and the home country regulator.

The existing exempt DCO orders also require the exempt DCO to supply the Commission with certain reports and information, some on a periodic basis and others based on the occurrence of specified events. For example, exempt DCOs are required to provide daily and quarterly reporting of certain information regarding the clearing activity of U.S. persons and FCMs. An exempt DCO also is required to report to the Commission if there is any change in its licensure, registration or authorization to act as a clearing organization in its home country; if the exempt DCO takes action against a U.S. person or FCM; if there is a default by a U.S. person or FCM; or if there is any change in the home country regulatory regime that is material to the exempt DCO's continuing observance of the PFMIs or compliance with the requirements of the Commission's order. In addition, existing exempt DCO orders require the exempt DCO to make its books and records available for inspection by the Commission and, where a clearing member has reported information regarding a swap to a swap data repository (SDR), to also report information regarding that swap to the SDR.

Because the regulations being adopted herein are consistent with existing exempt DCO orders, the Commission does not anticipate amending any of the exempt DCO orders it has issued to date.

II. Amendments to Part 39

A. Regulation 39.1—Scope

The Commission proposed to amend § 39.1 to expand the scope of subpart A of part 39 to include a clearing organization applying for an exemption from DCO registration. This change was meant to address the inclusion in subpart A of new § 39.6 (discussed below), which sets forth the requirements for an exemption from DCO registration. The Commission did not receive any comments on this provision and is adopting it as proposed.

B. Regulation 39.2—Definitions

In connection with the proposed regulations, the Commission proposed to add five definitions to § 39.2, which apply only for purposes of part 39.

1. Exempt Derivatives Clearing Organization

The Commission proposed to define ''exempt derivatives clearing organization'' to mean a clearing organization that the Commission has exempted from registration under section 5b(a) of the CEA, pursuant to section 5b(h) of the CEA and § 39.6. The Commission did not receive any comments on this proposed definition and is adopting it as proposed.

2. Good Regulatory Standing

The Commission proposed that, to be eligible for an exemption from registration, a clearing organization would have to be in good regulatory standing in its home country. The Commission proposed to define ''good regulatory standing'' to mean either there has been no finding by the home country regulator of material non-observance of the PFMIs or other relevant home country legal requirements, or there has been such a finding by the home country regulator, but it has been or is being resolved to the satisfaction of the home country regulator by means of corrective action taken by the clearing organization.

Although the Commission proposed to reference ''material'' non-observance of the PFMIs or other relevant home country legal requirements, the Commission requested comment in the 2018 Proposal as to whether the definition should instead refer to all instances of non-observance. In their responses to the 2019 Proposal, ASX, JSCC, and CCP12 supported the proposed definition of ''good regulatory standing.'' CCP12 and JSCC commented that the proposed definition is appropriate, as individual regulators have taken differing approaches to how they apply the PFMIs in the context of the markets that they regulate and supervise. CCP12 and JSCC did not recommend extending the definition to all instances of non-observance of the PFMIs. JSCC further stated that regulatory changes in the home country of an exempt DCO affecting the exempt DCO's continuing observance of the PFMIs ''occur infrequently and are easily identifiable,'' due to the familiarity of exempt DCOs with the legal and regulatory framework in their home countries. ASX added that an exempt DCO is best placed to determine whether a change is material and advise the Commission accordingly.

The Commission is adopting the definition of ''good regulatory standing'' largely as proposed.[15] The Commission's supervisory experience with registered and exempt DCOs has shown that even well-functioning DCOs will experience instances of non-observance of applicable requirements—both material and immaterial. The Commission therefore seeks to refrain from adopting a mechanical or hyper-technical approach whereby isolated instances of non-observance would be disqualifying.[16] The Commission further believes that the definition provides adequate assurance of observance of the PFMIs or compliance with other relevant home country requirements, because any material non-observance must be resolved to the satisfaction of the home country regulator in order for the exempt DCO to be deemed to be in good standing.

3. Home Country

The Commission proposed to define ''home country'' to mean, with respect to a non-U.S. clearing organization, the jurisdiction in which the clearing organization is organized. The Commission did not receive any comments on this proposed definition and is adopting it as proposed.

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fully consistent with the PFMIs. *See* 17 CFR 39.30, 39.40.

[14] *See, e.g.,* § 50.52(b)(4)(i)(E), 17 CFR 50.52(b)(4)(i)(E) (permitting eligible affiliate counterparties that are located in certain jurisdictions to satisfy a condition to electing the exemption by clearing the swap through a DCO or a clearing organization that is subject to supervision by appropriate government authorities in the clearing organization's home country and that has been assessed to be in compliance with the PFMIs).

[15] In the 2018 Proposal, the Commission had proposed to define ''good regulatory standing'' in a way that would apply only to exempt DCOs. *See* Exemption From Derivatives Clearing Organization Registration, 83 FR at 39933. In a separate, subsequent proposal, the Commission proposed a definition of ''good regulatory standing'' that retained the previously proposed definition for exempt DCOs but added a separate provision that would apply only to DCOs subject to alternative compliance. *See* Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 84 FR 34819, 34831 (July 19, 2019); *see also* Exemption From Derivatives Clearing Organization Registration, 84 FR at 35471. The Commission has adopted the definition as it relates to DCOs subject to alternative compliance (*see* Registration with Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 85 FR 67160, 67186 (Oct. 21, 2020)); therefore, the Commission is adopting here only that portion of the definition that applies to exempt DCOs.

[16] While the Commission expects, in almost all cases, to defer to the home country regulator's determination of whether an instance of non-compliance is or is not material, it does retain the discretion, in the context of the application of these rules of the Commission, to make that determination itself, and, in order to make such a determination, to obtain information from the home country regulator pursuant to the relevant memorandum of understanding.

4. Home Country Regulator

The Commission proposed to define ''home country regulator'' to mean, with respect to a non-U.S. clearing organization, an appropriate government authority which licenses, regulates, supervises, or oversees the clearing organization's clearing activities in the home country. The Commission did not receive any comments on this proposed definition and is adopting it as proposed.

5. Principles for Financial Market Infrastructures

The Commission proposed to define ''Principles for Financial Market Infrastructures'' to mean the PFMIs published by the Committee on Payment and Settlement Systems (CPSS) and the Technical Committee of the International Organization of Securities Commissions (IOSCO) in April 2012, as updated, revised, or otherwise amended. The Commission proposed the ''as updated, revised, or otherwise amended'' language in the 2018 Proposal to recognize that CPMI–IOSCO [17] could offer further interpretation of or guidance on the PFMIs.[18] As proposed in the 2019 Proposal,[19] the Commission is striking ''as updated, revised, or otherwise amended'' from the definition to clarify that while a home country regulator may voluntarily adopt or amend its statutes, rules, regulations, policies or combination thereof to incorporate subsequent interpretations and guidance, the home country regulator is not required to do so to maintain a regulatory regime that is comparable to and as comprehensive as the PFMIs. The Commission believes that striking that portion of the proposed definition would provide exempt DCOs with greater regulatory certainty, as a DCO's eligibility to remain exempt from registration would not be contingent on whether a home country regulator has adopted CPMI–IOSCO's latest interpretations or guidance. The Commission also does not believe it is appropriate to allow any future change to the PFMIs themselves to be incorporated into the definition without the Commission and other regulators first having the opportunity to consider the change. However, the Commission reserves the ability to incorporate future amendments to the PFMIs within the definition if the Commission determines that such amendments are appropriate.

[17] The name of CPSS was changed to the Committee on Payment and Market Infrastructures (CPMI) in 2014.

[18] 2018 Proposal, 83 FR at 39925 n.14.

[19] 2019 Proposal, 84 FR at 35459.

The Commission did not receive any comments on this proposed definition and is adopting it as proposed.

C. Regulation 39.6—Exemption From DCO Registration

The Commission proposed new § 39.6 to establish a regulatory framework for the granting of exemptions from DCO registration consistent with the policies and procedures that the Commission has been following with respect to granting exemptions from DCO registration. The specific provisions of § 39.6 are discussed in greater detail below.

1. Regulation 39.6(a)—Eligibility for Exemption

The Commission proposed § 39.6(a) to provide that the Commission may exempt a non-U.S. clearing organization from registration as a DCO for the clearing of swaps for U.S. persons [20] and thereby exempt such clearing organization from compliance with the provisions of the CEA and Commission regulations applicable to registered DCOs, if the Commission determines that all of the eligibility requirements listed in § 39.6(a) are met, and that the clearing organization satisfies the conditions set forth in § 39.6(b).[21]

a. Subject to Comparable, Comprehensive Supervision and Regulation

The Commission proposed to codify in § 39.6(a)(1) the statutory authority in section 5b(h) of the CEA that the Commission may exempt a clearing organization from DCO registration for the clearing of swaps provided that the Commission determines that the clearing organization is subject to comparable, comprehensive supervision and regulation by a home country regulator. To satisfy this condition, the clearing organization would need to demonstrate that: (i) It is organized in a jurisdiction in which a home country regulator applies to the clearing organization, on an ongoing basis, statutes, rules, regulations, policies, or a combination thereof that, taken together, are consistent with the PFMIs; (ii) it observes the PFMIs in all material respects; (iii) and it is in good regulatory standing in its home country.

In determining that adherence to the PFMIs [22] satisfies the ''comparable, comprehensive supervision and regulation'' standard set forth in CEA section 5b(h), the Commission takes a holistic, outcomes-based approach. That is, the Commission has assessed whether, taken together in their entirety, the PFMIs provide a comprehensive framework for DCO supervision and regulation that is comparable to the statutory and regulatory requirements that comprise the DCO regulatory framework—focusing, in particular, on the core principles applicable to registered DCOs set forth in CEA section 5b (DCO Core Principles).[23] The use of the PFMIs as the benchmark in this context builds upon the global effort to develop an effective and consistent set of regulatory and supervisory standards for CCPs. More specifically, the PFMIs address major elements critical to the safe and efficient operation of CCPs, such as risk management, adequacy of financial resources, default management, margin, settlement, and participation requirements.[24]

The Commission recognizes that the requirements of the PFMI-compliant jurisdiction will not be identical to the Commission's regulations in every aspect. Nevertheless, a foreign jurisdiction's observance of the PFMIs provides assurance that its supervision and regulation are sufficiently similar in purpose and effect while avoiding a

[20] The Commission proposed to use the interpretation of ''U.S. person'' as set forth in the Cross-Border Guidance, as such definition may be amended or superseded by a definition of the term ''U.S. person'' that is adopted by the Commission and applicable to this final rule. *See* Cross-Border Guidance, 78 FR 45292, 45316–45317.

[21] The eligibility requirements listed in § 39.6(a) and the conditions set forth in § 39.6(b) are pre-conditions to the Commission's issuance of any order exempting a clearing organization from the DCO registration requirement of the CEA and Commission regulations. Additional conditions that are unique to the facts and circumstances specific to a particular clearing organization could be imposed upon that clearing organization in the Commission's order of exemption, as permitted by section 5b(h) of the CEA.

[22] In addition to the principles applicable to central counterparties (CCPs) and other financial market infrastructures, the PFMIs provide that central banks, market regulators, and other relevant authorities should observe five responsibilities. Consistent with this, the Commission expects that, in order to meet the standard of being subject to comparable, comprehensive supervision and regulation, a clearing organization's home country regulator will observe these responsibilities. In particular, Responsibility D, Explanatory Note 4.4.1 provides that the home country regulator should adopt the PFMIs, and, ''[w]hile the precise means through which the principles are applied may vary from jurisdiction to jurisdiction, all CPSS and IOSCO members are expected to apply the principles to the relevant [financial market infrastructures] in their jurisdictions to the fullest extent allowed by the legal framework in their jurisdiction.'' PFMIs, ¶ 4.4.1. Therefore, the Commission would not find a home country regulator's statement that it requires a clearing organization to observe the PFMIs to be sufficient to meet the above standard for exemption, if the home country regulator has not itself adopted a regulatory framework that is consistent with the PFMIs.

[23] 7 U.S.C. 7a–1(c)(2).

[24] *See, e.g.,* Derivatives Clearing Organizations and International Standards, 78 FR 72476 (Dec. 2, 2013) (adopting final rules).

demand for strict compliance with U.S. regulation that would subject CCPs to a patchwork of U.S. and foreign regulations. In summary, the PFMI-focused ''comparability'' framework strikes the proper balance by showing an appropriate level of deference to the legal and supervisory regime of the home country jurisdiction, while fulfilling the Commission's supervisory duty to ensure that foreign DCOs clearing for U.S. market participants are subject to a sound regulatory framework.

CME, ISDA, IBA Japan, and JFMC supported the Commission's reliance on the PFMIs as the standard for determining whether a non-U.S. clearing organization's home country regulatory regime is comparable and comprehensive. IBA Japan and JFMC believe this approach strikes the correct balance between addressing risk to the United States and promoting cross-border harmonization. ISDA encouraged the Commission to continue its dialogue with foreign regulators in the EU and other jurisdictions to ensure that supervision in each jurisdiction is based on deference to home country regulations and compliance with the PFMIs. ISDA argued that applying inconsistent and duplicative regulatory frameworks to clearing organizations will lead to the fragmentation of global cleared derivatives markets.

AFR Ed Fund, Citadel, and Better Markets opposed using the PFMIs to determine whether a clearing organization is subject to comparable, comprehensive supervision and regulation by its home country regulator. These commenters argued that section 5b(h) of the CEA requires that the Commission compare the CEA with the clearing organization's home country regime and that the Commission cannot use the fact that the foreign regulatory regime conforms to the PFMIs as a substitute for determining whether the regulatory regimes are comparable, as required by section 5b(h).

AFR Ed Fund argued that the Commission's decision to deem compliance with any foreign regulatory regime that conforms to the PFMIs as fulfilling the statutory requirements for exempting a clearing organization from registration under U.S. law means that a foreign clearing organization can be exempted from registration without any determination that it is subject to supervision and regulation that is ''in any way'' comparable to the relevant U.S. laws or regulations. AFR Ed Fund further argued that the Commission ''cannot substitute its judgement as to whether a foreign regime conforms to the PFMIs, a set of broad principles with no standing under U.S. law, for the statutory mandate to ensure that a DCO is subject to a regime comparable to U.S. regulation and supervision.''

Similarly, Better Markets argued that the proposal unlawfully treats the PFMIs as being the equivalent of U.S. law for purposes of making a comparability determination under section 5b(h). Better Markets also argued that the U.S. statutory and regulatory requirements for DCOs are not the equivalent of the PFMIs because the PFMIs do not have the force of law until they are incorporated into the home jurisdiction's laws or regulations, and because, even when the PFMIs are implemented, material differences may exist between the PFMI-compliant regulatory regime and the PFMI principles. Better Markets further argued that because section 5b(h) is only implicated if the non-U.S. clearing organization is subject to the DCO registration requirement of section 5b(a) in the first instance, Congress limited the Commission's comparability inquiry to determining whether the non-U.S. regime is comparable to the U.S. regulatory requirements that would otherwise apply to the clearing organization. Better Markets claimed that the 2018 Proposal and the four existing exemptive orders suffer from the same legal deficiencies alleged in its comment.

Citadel believes the Commission should directly compare its regulatory regime with that of the clearing organization's home country. Citadel pointed out that the PFMIs do not address a number of important elements of the Commission's regulatory framework for DCOs, including non-discriminatory access, straight-through processing, gross margining, public disclosure of rule filings, and public information. Lastly, Citadel stated that U.S. customer access should be considered as a part of the overall comparability assessment.

The Commission notes that section 5b(h) provides that the Commission may exempt a clearing organization from DCO registration ''if the Commission determines that the [ ] clearing organization is subject to comparable, comprehensive supervision and regulation . . . .'' Accordingly, the Commission may, and does, determine that a foreign regulatory regime that conforms to the PFMIs constitutes ''comparable, comprehensive supervision and regulation by . . . the appropriate government authorities in the home country of the organization,'' and therefore that a clearing organization subject to such a regime may be exempted from the DCO registration requirements.[25] As mentioned previously, the PFMIs are comparable to the DCO Core Principles and the implementing Commission regulations in purpose and scope. Both address major elements critical to the safe and efficient operations of clearing organizations, such as risk management, adequacy of financial resources, default management, margin, settlement, and participation requirements.[26] Regulation 39.40 expressly states that subpart C of part 39 of the Commission's regulations ''is intended to establish standards which, together with subparts A and B of [part 39], are consistent with'' section 5b(c) of the CEA and the PFMIs and should be interpreted in that context.

Regarding Citadel's comment, the Commission acknowledges that the PFMIs are not identical to, nor as detailed as, part 39. However, ''comparable and comprehensive'' does not mean identical. The Commission adopted the part 39 requirements for registered DCOs, which may generally clear futures, swaps, and other instruments for various U.S. persons to the extent permissible under the CEA. Here, in light of the scope of an exempt DCO's clearing activities, the PFMIs are sufficiently comparable and comprehensive to provide the appropriate framework for the supervision and regulation of exempt DCOs permitted to clear in accordance with this final rule and other relevant conditions contained within any exemptive order granted by the Commission. Application of the PFMIs in the context of U.S. customer clearing, which is not part of the final rule, can be considered if the Commission takes up the issue of customer clearing at exempt DCOs.

The Commission is adopting § 39.6(a)(1) as proposed.

b. Memorandum of Understanding

The Commission proposed § 39.6(a)(2) to require that, in order for a clearing organization to be eligible for an exemption from registration, an MOU or similar arrangement satisfactory to the Commission must be in effect between

[25] As stated previously, this conclusion is consistent with other previous Commission determinations. *See, e.g.,* Regulation 50.52(b)(4)(i)(E), 17 CFR 50.52(b)(4)(i)(E) (permitting eligible affiliate counterparties that are located in certain jurisdictions to satisfy a condition to electing the exemption by clearing the swap through a DCO or a clearing organization that is subject to supervision by appropriate government authorities in the clearing organization's home country and that has been assessed to be in compliance with the PFMIs).

[26] *See, e.g.,* Derivatives Clearing Organizations and International Standards, 78 FR 72476 (Dec. 2, 2013) (adopting final rules).

the Commission and the clearing organization's home country regulator, pursuant to which, among other things, the home country regulator agrees to provide to the Commission any information that the Commission deems necessary to evaluate the clearing organization's initial and continued eligibility for exemption or to review compliance with any conditions of such exemption.

ISDA commented that the Commission should identify the types of information that it expects to require under the MOU. ISDA argued that it is important for the Commission to provide additional clarity regarding the specific information it will require to evaluate the exempt DCO's initial and continued eligibility for exemption to ensure that providing such information would not violate any local laws. ISDA believes that doing so would allow the Commission to access necessary information while, at the same time, taking into account any prohibitions on providing certain types of information under local laws.

In response to ISDA's comment, the Commission notes that § 39.6(e)(2) sets forth the information that an applicant for exemption from DCO registration must provide to the Commission. That information would not be specified in an MOU because it must be provided by the applicant, not the applicant's home country regulator. However, an MOU between the Commission and the home country regulator would allow the Commission to seek the home country regulator's assistance in analyzing and interpreting the information as necessary to determine the applicant's eligibility for an exemption. If the applicant is granted an exemption, the MOU would allow the Commission to gather additional information from the home country regulator as necessary to determine the exempt DCO's continued eligibility. For example, if an exempt DCO provides notice to the Commission of a change in its home country regulatory regime pursuant to § 39.6(c)(2)(iii), the Commission may wish to discuss the change with the home country regulator to understand what impact, if any, the change may have on the exempt DCO's ability to comply with the conditions of its exemption.

The Commission notes that it already has several MOUs with other regulators in place, and those specific to the oversight of clearing organizations are generally similar in content and scope.[27] To the extent that local laws limit a regulator's ability to share information with the Commission, the Commission works closely with the regulator to resolve any issues.

The Commission is adopting § 39.6(a)(2) as proposed.

2. Regulation 39.6(b)—Conditions of Exemption

The Commission proposed § 39.6(b) to set forth the conditions to which an exempt DCO would be subject. These are the same conditions the Commission has imposed on exempt DCOs through the orders of exemption that it has issued to date.

a. Clearing by or for U.S. Persons and Futures Commission Merchants

The Commission proposed § 39.6(b)(1) to prohibit the clearing of U.S. customer positions at an exempt DCO. An FCM would be permitted to be a clearing member of an exempt DCO, or maintain an account with an affiliated broker that is a clearing member, for the purpose of clearing swaps only for the FCM itself and those persons identified in the definition of ''proprietary account'' in § 1.3 of the Commission's regulations.

The Commission requested comment in the 2018 Proposal as to whether the Commission should consider permitting an exempt DCO to clear swaps for U.S. customers. The Commission received four comments in response to that request. As noted above, the Commission responded to these comments by issuing the 2019 Proposal, which proposed to permit U.S. customers to clear at an exempt DCO, but only through foreign intermediaries, not FCMs. However, at this time, the Commission is adopting § 39.6(b)(1) largely as proposed in the 2018 Proposal, to permit an exempt DCO to clear only proprietary positions of U.S. persons and FCMs, and not customer positions. Specifically, § 39.6(b)(1) provides that an exempt DCO must have rules that limit swaps clearing services for U.S. persons and FCMs as follows: (i) A U.S. person that is a clearing member of the exempt DCO may clear swaps for itself and those persons identified in the definition of ''proprietary account'' set forth in § 1.3; [28] (ii) a non-U.S. person that is a clearing member of the exempt DCO may clear swaps for any affiliated U.S. person identified in the definition of ''proprietary account'' set forth in § 1.3 of this chapter; [29] and (iii) an FCM may be a clearing member of the exempt DCO, or otherwise maintain an account with an affiliated broker that is a clearing member, for the purpose of clearing only proprietary swaps positions for itself and those persons identified in the definition of ''proprietary account'' set forth in § 1.3.[30]

b. Open Access

The Commission proposed § 39.6(b)(2) to codify the ''open access'' requirements of section 2(h)(1)(B) of the CEA, which applies to both registered and exempt DCOs, with respect to swaps cleared by an exempt DCO to which one or more of the counterparties is a U.S. person.[31] Paragraph (b)(2)(i) would require an exempt DCO to maintain rules providing that all such swaps with the same terms and conditions (as defined by product specifications established under the exempt DCO's rules) submitted to the exempt DCO for clearing are economically equivalent and may be offset with each other, to the extent that offsetting is permitted by the exempt DCO's rules. Paragraph (b)(2)(ii) would require an exempt DCO to maintain rules providing for non-discriminatory clearing of such a swap executed either bilaterally or on or subject to the rules of an unaffiliated electronic matching platform or trade execution facility, *e.g.,* a swap execution facility. The Commission did not receive any comments on this provision. The Commission is adopting § 39.6(b)(2) as proposed.

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[27] CFTC Memoranda of Understanding: Cooperation for Supervisory, Prudential, and Risk Assessment Purposes, *https://www.cftc.gov/International/MemorandaofUnderstanding/mouInfo_Sharing_for_Supervisor.html.*

[28] The reference to ''those persons identified in the definition of 'proprietary account' set forth in § 1.3,'' refers to those persons associated with the U.S. person that is a clearing member in the manner provided in the definition of ''proprietary account'' as if the U.S. person is the ''individual, a partnership, corporation or other type of association'' that carries the proprietary account on its books and records, and not simply to such types of persons identified in the definition generally.

[29] This provision is intended to permit what would be considered clearing of ''proprietary'' positions under the Commission's regulations, even if the positions would qualify as ''customer'' positions under the laws and regulations of an exempt DCO's home country. This provision clarifies that an exempt DCO may clear positions for FCMs if the positions are not ''customer'' positions under the Commission's regulations.

[30] The reference to ''those persons identified in the definition of 'proprietary account' set forth in § 1.3,'' is intended to refer to those persons associated with the FCM in the manner provided in the definition of ''proprietary account'' as if the FCM is the individual, a partnership, corporation or other type of association that carries the proprietary account on its books and records, and not simply to such types of persons identified in the definition generally.

[31] 7 U.S.C. 2(h)(1)(B).

c. Consent to Jurisdiction; Designation of Service of Process

The Commission proposed § 39.6(b)(3) to require that an exempt DCO consent to jurisdiction in the United States and designate an agent in the United States, for notice or service of process, pleadings, or other documents issued by or on behalf of the Commission or the U.S. Department of Justice in connection with any actions or proceedings against, or any investigations relating to, the exempt DCO or any U.S. person or FCM that is a clearing member or that clears swaps through an affiliated clearing member. The name of the designated agent would be submitted as part of the clearing organization's application for exemption. If an exempt DCO appoints another agent to accept such notice or service of process, the exempt DCO would be required to promptly inform the Commission of this change. This is consistent with requirements currently imposed in the registration orders of DCOs that are organized outside of the United States as well as in each of the orders of exemption that the Commission has issued thus far. The Commission did not receive any comments on this provision. The Commission is adopting § 39.6(b)(3) as proposed.

d. Compliance

The Commission proposed § 39.6(b)(4) as a general provision that would require an exempt DCO to comply, and demonstrate compliance as requested by the Commission, with any condition of the exempt DCO's order of exemption. The Commission did not receive any comments on this provision. The Commission is adopting § 39.6(b)(4) as proposed.

e. Inspection of Books and Records

The Commission proposed § 39.6(b)(5) to require an exempt DCO to make all documents, books, records, reports, and other information related to its operation as an exempt DCO (books and records) open to inspection and copying by any Commission representative, and to promptly make its books and records available and provide them to Commission representatives upon request. This condition is consistent with section 5b(h) of the CEA, which provides that the Commission may exempt a DCO from registration with conditions that may include requiring that the DCO be available for inspection by the Commission and make available all information requested by the Commission.

ISDA believes that the proposed condition is too broad and that the Commission should specify how and when it would undertake inspections of exempt DCOs. ISDA also believes, to foster cross-border regulatory cooperation, the Commission should consider obtaining consent for inspections from an exempt DCO's home country regulator prior to conducting onsite inspections. ISDA suggested, at a minimum, the Commission should provide prior notice to an exempt DCO's home country regulator in connection with any inspection or ask the home country regulator for the required information. ISDA argued that, not only would this promote comity and coordination, but it would also ensure that such inspections are not overly burdensome or in violation of local laws. ISDA further suggested that the Commission should consider including an exempt DCO's home country regulator during inspections, which would assist the Commission in interpreting and analyzing the exempt DCO's books and records in the context of the regulatory requirements of a particular jurisdiction.

The Commission is adopting § 39.6(b)(5) as proposed. The Commission notes that it does not anticipate conducting routine site visits to exempt DCOs. However, the Commission may request a DCO's books and records to ensure that, among other things, the exempt DCO continues to meet the eligibility requirements for an exemption as well as the conditions of its exemption. The Commission further notes that it already follows many of ISDA's recommendations in the context of examining non-U.S. DCOs, and it would expect to do the same in the context of an exempt DCO; such interactions with the home country regulator would be addressed in the MOU.

f. Observance of the PFMIs

In the 2018 Proposal, the Commission proposed § 39.6(b)(6) to require that an exempt DCO provide an annual certification that it continues to observe the PFMIs in all material respects, within 60 days following the end of its fiscal year. In the 2019 Proposal, the Commission proposed to modify (and renumber) this condition to specify the information that an exempt DCO must provide to the Commission if it is unable to provide an unconditional certification that it continues to observe the PFMIs in all material respects. Specifically, the exempt DCO would be required to identify the underlying material non-observance of the PFMIs and explain whether and how such non-observance has been or is being resolved by the exempt DCO. The Commission proposed this modification in recognition of the fact that at some point an exempt DCO may not be able to certify that it observes the PFMIs in all material respects. The exempt DCO must disclose that information to the Commission and allow the Commission to consider its impact on the exempt DCO's standing.

The Commission did not receive comments on this provision. The Commission is adopting § 39.6(b)(6) as proposed.

g. Representation of Good Regulatory Standing

The Commission proposed § 39.6(b)(7) to require that the Commission receive an annual written representation from a home country regulator that an exempt DCO is in good regulatory standing, within 60 days following the end of the exempt DCO's fiscal year. The Commission received comments on the definition of ''good regulatory standing,'' as discussed above, but did not receive comments on this provision. The Commission is adopting § 39.6(b)(7) as proposed.

h. Other Conditions

Lastly, the Commission proposed § 39.6(b)(9) in the 2019 Proposal to provide that the Commission may condition an exemption from DCO registration on any other facts and circumstances it deems relevant.[32] The Commission stated that, in doing so, it would be mindful of principles of international comity. For example, the Commission could take into account the extent to which the relevant foreign regulatory authorities defer to the Commission with respect to oversight of registered DCOs organized in the United States.

CME strongly supported the Commission's retaining discretion to condition an exemption from DCO registration on principles of international comity and the extent to which the relevant home country regulator defers to the Commission with respect to oversight of registered DCOs organized in the United States that are accessed by local participants. CME believes the Commission's efforts to support mutual deference among regulators across the globe will foster efficient markets and cooperative behavior to the benefit of all. As a result, CME suggested that the Commission codify its ability to condition an

[32] *See* 7 U.S.C. 7a–1(h) (stating, in relevant part, that the Commission may exempt, conditionally or unconditionally, a DCO from registration under that section for the clearing of swaps).

exemption from DCO registration on matters of international comity and reciprocity within the regulatory text.

The Commission is declining to specifically condition an exemption from DCO registration on matters of international comity and reciprocity, but only because it believes § 39.6(b)(9) as proposed is sufficient for those purposes. As noted in the 2019 Proposal, the Commission could use its discretion under § 39.6(b)(9) to advance the goal of regulatory harmonization, consistent with the express directive of Congress that the Commission coordinate and cooperate with foreign regulatory authorities on matters related to the regulation of swaps.[33] The recognition that market participants and market facilities in a global swaps market are subject to multiple regulators and potentially duplicative regulations, and can therefore benefit from regulatory harmonization and mutual deference among regulators, underpins the exempt DCO framework. The framework is intended to encourage collaboration and coordination among U.S. and foreign regulators in establishing comprehensive regulatory standards for swaps clearing. In addition, the framework seeks to promote fair competition and a level playing field for all DCOs. As a result, the Commission will consider the degree of deference that a home country regulator extends to the Commission's oversight of U.S. DCOs in determining whether to extend the benefits of exemption from registration to DCOs in that jurisdiction, both at the point of initially exempting a non-U.S. DCO, and in determining whether compliance under that framework should continue. The Commission is adopting § 39.6(b)(9) as proposed (renumbered as § 39.6(b)(8)).

3. Regulation 39.6(c)—General Reporting Requirements

The Commission proposed § 39.6(c) to require an exempt DCO to report certain information that would assist the Commission in evaluating the continued eligibility of the exempt DCO for exemption, reviewing the exempt DCO's compliance with any conditions of its exemption, or monitoring the risk of U.S. persons and their affiliates clearing swaps at the exempt DCO.

Specifically, the Commission proposed § 39.6(c)(2)(i) to require that an exempt DCO compile a report as of the end of each trading day, and submit it to the Commission by 10:00 a.m. U.S. Central time on the following business day, containing with respect to swaps: (A) Initial margin requirements and initial margin on deposit for each U.S. person; and (B) daily variation margin, separately listing the mark-to-market amount collected from or paid to each U.S. person. However, if a clearing member margins on a portfolio basis its own positions and the positions of its affiliates, and either the clearing member or any of its affiliates is a U.S. person, the exempt DCO would be required to report initial margin requirements and initial margin on deposit for all such positions on a combined basis for each such clearing member on a combined basis and separately list the mark-to-market amount collected from or paid to each such clearing member, on a combined basis. These requirements are similar to certain reporting requirements applicable to registered DCOs in § 39.19(c)(1). These reports will provide the Commission with information regarding the cash flows associated with U.S. persons clearing swaps through exempt DCOs in order to analyze the risks presented by such U.S. persons and to assess the extent to which U.S. business is being cleared by each exempt DCO.

The Commission proposed § 39.6(c)(2)(ii)(A) and (B) to require an exempt DCO to compile a report as of the last day of each fiscal quarter, and submit it to the Commission no later than 17 business days after the end of the fiscal quarter, containing the aggregate clearing volume of U.S. persons during the fiscal quarter, and the average open interest of U.S. persons during the fiscal quarter, respectively. If a clearing member is a U.S. person, this data would include the transactions and positions of the clearing member and all affiliates for which the clearing member clears; if a clearing member is not a U.S. person, the data would only have to include the transactions and positions of affiliates that are U.S. persons. The Commission proposed § 39.6(c)(2)(ii)(C) to require that an exempt DCO's quarterly report to the Commission contain a list of U.S. persons and FCMs [34] that are either clearing members or affiliates of any clearing member, with respect to the clearing of swaps, as of the last day of the fiscal quarter. This information would enable the Commission, in conducting risk surveillance of U.S. persons and swaps markets more broadly, to better understand and evaluate the nature and extent of the cleared swaps activity of U.S. persons.

The Commission proposed paragraphs (c)(2)(iii) through (viii) of § 39.6 to require an exempt DCO to provide information to the Commission upon the occurrence of certain specified events. The Commission proposed § 39.6(c)(2)(iii) to require an exempt DCO to provide prompt notice to the Commission regarding any change in its home country regulatory regime that is material to the exempt DCO's continuing observance of the PFMIs or with any requirements set forth in § 39.6, or the order of exemption issued by the Commission.

The Commission proposed § 39.6(c)(2)(iv) to require an exempt DCO to provide to the Commission, to the extent that it is available to the exempt DCO, any assessment of the exempt DCO's or the home country regulator's observance of the PFMIs by a home country regulator or other national authority, or an international financial institution or international organization.[35]

The Commission proposed § 39.6(c)(2)(v) to require an exempt DCO to provide to the Commission, to the extent that it is available to the exempt DCO, any examination report, examination findings, or notification of the commencement of any enforcement or disciplinary action by a home country regulator.

The Commission proposed § 39.6(c)(2)(vi) to require an exempt DCO to provide immediate notice to the Commission of any change with respect to its licensure, registration, or other authorization to act as a clearing organization in its home country.

The Commission proposed § 39.6(c)(2)(vii) to require an exempt DCO to provide immediate notice to the Commission in the event of a default (as defined by the exempt DCO in its rules) by a U.S. person or FCM clearing swaps, including the name of the U.S. person

[33] In order to promote effective and consistent global regulation of swaps, section 752 of the Dodd-Frank Act directs the Commission to consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation of swaps, among other things. Section 752 of the Dodd-Frank Act, Public Law 111–203, 124 Stat. 1376 (2010), codified at 15 U.S.C. 8325.

[34] Such FCMs may or may not be U.S. persons. The Commission will not require that exempt DCOs provide daily information regarding initial margin requirements, initial margin on deposit, and daily variation margin, or quarterly aggregate clearing volume or average open interest, with respect to swaps, for FCMs that are not U.S. persons (unless reporting would otherwise be required because such FCMs are affiliates of U.S. persons). However, the Commission has a supervisory interest in receiving information regarding which of its registered FCMs are clearing members or affiliates of clearing members, with respect to the clearing of swaps at an exempt DCO.

[35] Such an international organization may include the International Monetary Fund or World Bank. *See* PFMIs, ¶ 1.33.

or FCM, a list of the positions held by the U.S. person or FCM, and the amount of the U.S. person's or FCM's financial obligation.

Finally, the Commission proposed § 39.6(c)(2)(viii) to require an exempt DCO to provide notice to the Commission of any action the exempt DCO has taken against a U.S. person or FCM, no later than two business days after taking such action.

The Commission requested comment in the 2018 Proposal, with regard to proposed § 39.6(c)(2)(iii), on whether, instead of requiring an exempt DCO to provide prompt notice to the Commission regarding any change in its home country regulatory regime that is material to the exempt DCO's continuing observance of the PFMIs, any requirements set forth in § 39.6, or the order of exemption issued by the Commission (thereby requiring the exempt DCO to determine whether a change is material), the Commission should require an exempt DCO to provide prompt notice of *any* change in its home country regulatory regime.

ASX and JSCC supported requiring an exempt DCO to determine whether a change to its home country regulatory regime constitutes a material change. ASX and JSCC believe an exempt DCO is best situated to easily identify changes to its home country regulatory regime as well as determine whether such changes are material. JSCC also commented that having the exempt DCO make this materiality determination would avoid redundant reporting and review for an exempt DCO and the Commission of *any* change to the home country regulatory regime.

The Commission agrees with the commenters that an exempt DCO should be required to determine whether a change to its home country regulatory regime would constitute a material change, especially as the Commission would otherwise need to review changes to home country regulatory regimes in multiple jurisdictions.

The Commission is adopting § 39.6(c) as proposed.

4. Regulation 39.6(d)—Swap Data Reporting Requirements

The Commission proposed § 39.6(d) to require an exempt DCO, if it accepts for clearing a swap that has been reported to an SDR pursuant to part 45 of the Commission's regulations, to report to an SDR data for the two swaps that result from the novation of the original swap. The exempt DCO would also be required to report the termination of the original swap to the same SDR that received the original swap report. To avoid duplicative reporting for such transactions, the Commission also proposed to require an exempt DCO to have rules that prohibit the reporting of the two new swaps by the counterparties to the original swap.

Citadel commented that the Commission should ensure that reporting requirements pursuant to parts 43 and 45 of the Commission's regulations continue to be fulfilled in an accurate manner for in-scope transactions, including the ''cleared or uncleared'' field in part 43 and the ''clearing indicator'' and ''clearing venue'' fields in part 45. JSCC supported clearly defining an exempt DCO's swap data reporting obligations within part 39. However, JSCC was concerned that the counterparties to the original swap would still be required to report the cleared transaction arising from the novation of the original swap at an exempt DCO to an SDR under part 45, which JSCC viewed as in conflict with proposed § 39.6(d). JSCC commented that proposed § 39.6(d) could create confusion about reporting expectations for exempt DCOs and their respective clearing members.[36] JSCC was hopeful that part 45 would be amended to address this issue.

CCP12 acknowledged that transparency in the swaps markets, which it believes is supported by SDR reporting, provides a number of benefits. However, CCP12 argued that the current SDR reporting requirements applied to exempt DCOs pose significant operational challenges, such as on-boarding with a U.S. SDR that has a different reporting format than that of the exempt DCO's home country. CCP12 also commented that SDR reporting fees are a burden based on the number of reported transactions. The Commission believes that transparency in the swaps market as provided by the swap data reporting requirements, which are applicable to all registered DCOs, including non-U.S. DCOs and existing exempt DCOs, strongly warrants requiring exempt DCOs to report such information pursuant to § 39.6(d).

In response to JSCC's concern that § 39.6(d) could cause confusion given the time-limited no-action relief provided in CFTC Letter 18–03, the Commission notes that § 39.6(d) specifically requires an exempt DCO to have rules that prohibit the counterparties to the original swap from reporting to an SDR pursuant to part 45 the two new swaps which result from novation of the original swap. As explained in the 2018 Proposal, the exempt DCO's rules prohibiting reporting by the counterparties to the original swap are intended to avoid duplicative reporting.[37]

In response to CCP12's concern related to onboarding with an SDR that uses a different reporting format than the exempt DCO's home country, the Commission notes that it recently adopted revisions to part 45 of the Commission's regulations that include standardized data fields that accommodate reporting for swaps cleared under either the ''agency'' clearing model or the ''principal'' clearing model.[38] In regards to SDR fees, the Commission notes that SDRs are required to provide their services on a fair, open, and equal basis and an SDR's fees must be equitable and applied in a uniform and non-discriminatory manner.[39] As such, the burdens associated with SDR fees for exempt DCOs will be no different than the burdens for other DCOs that clear swaps that must be reported to SDRs. The Commission is adopting § 39.6(d) as proposed.

5. Regulation 39.6(e)—Application Procedures

The Commission proposed § 39.6(e) to codify the procedures a non-U.S. clearing organization must follow when applying for an exemption from DCO registration.

Specifically, the Commission proposed § 39.6(e)(1) to require a clearing organization to file an application for exemption with the Secretary of the Commission in the format and manner specified by the Commission. After reviewing the application, the Commission may: (1) Grant an exemption without conditions; (2) grant an exemption with conditions; or (3) deny the application.

Proposed § 39.6(e)(2) requires an applicant to submit a complete application, including all applicable information and documentation as outlined therein, and provide that the Commission will not commence processing an application unless the

[36] JSCC cited CFTC Letter 18–03: Extension of No-Action Relief from Certain Reporting Obligations for Counterparties Clearing Swaps through Derivatives Clearing Organizations Acting Under Exemptive Orders or No-Action Relief (Feb. 20, 2018).

[37] *See* Exemption From Derivatives Clearing Organization Registration, 83 FR at 39928, n.32.

[38] *See* Swap Data Recordkeeping and Reporting Requirements, 85 FR 75503, 75567 (Nov. 25, 2020) (appendix 1 to part 45 contains the ''clearing member'' field, which contains instructions for reporting the field under the agency clearing model or the principal clearing model). *See also* Technical Specification Document: Parts 43 and 45 swap reporting and public dissemination requirements at 1–2, *available at https://www.cftc.gov/media/3496/DMO_Part43_45TechnicalSpecification022020/download* (containing the technical specifications for the ''clearing member'' field).

[39] *See* 17 CFR 49.27 (containing the SDR access and fees requirements).

application is complete. The application must include: (i) A cover letter providing general information identifying the applicant, its regulatory licenses or registrations, and relevant contact information; (ii) a description of the applicant's business plan, including swap asset classes that it would clear and whether the swaps are subject to a clearing requirement issued by the Commission or the applicant's home country regulator; (iii) documents that demonstrate that the applicant is held to requirements consistent with the PFMIs; (iv) a written representation from the applicant's home country regulator that the applicant is in good regulatory standing; (v) copies of the applicant's most recent disclosures necessary to observe the PFMIs, including the financial market infrastructure disclosure template set forth in Annex A to the Disclosure Framework and Assessment Methodology for the PFMIs;[40] (vi) a representation that the applicant will comply with each of the requirements and conditions of its exemption; (vii) a draft of the applicant's rules showing compliance with various requirements for an exemption; and (viii) the applicant's consent to jurisdiction in the United States, with contact information for the applicant's designated U.S. agent.

Proposed § 39.6(e)(3) provides that, at any time during the Commission's review of an application for exemption, the Commission may request that the applicant submit supplemental information in order for the Commission to process the application, and require an applicant to file such supplemental information in the format and manner specified by the Commission. Regulation 39.3(a)(4), which applies to applications for DCO registration, contains a similar provision.

Proposed § 39.6(e)(4) requires an applicant to promptly amend its application if it discovers a material omission or error, or if there is a material change in the information provided to the Commission in the application or other information provided in connection with the application. This provision is similar to § 39.3(a)(5), which addresses amendments to applications for DCO registration.

Proposed § 39.6(e)(5) identifies those sections of an application for exemption from registration that would be made public, including the cover letter required in proposed § 39.6(e)(2)(i); documents demonstrating that the applicant is organized in a jurisdiction in which its home country regulator applies to the applicant statutes, rules, regulations, and/or policies that are consistent with the PFMIs as proposed in § 39.6(e)(2)(iii); disclosures necessary to observe the PFMIs as proposed in § 39.6(e)(2)(v);[41] draft rules that meet the requirements of proposed § 39.6(b)(1) (U.S. persons clearing requirements), § 39.6(b)(2) (open access requirements); and § 39.6(d) (swap data reporting requirements), as applicable; and any other part of the application not covered by a request for confidential treatment, subject to § 145.9. This provision is similar to § 39.3(a)(6), which identifies those portions of an application for registration as a DCO that are made public.

The Commission did not receive comments on this aspect of the proposal. The Commission is adopting § 39.6(e) as proposed.

6. Regulation 39.6(f), (g), and (h)—Modification or Termination of Exemption; Notice to Clearing Members of Termination of Exemption

The Commission initially proposed to provide in § 39.6(f) that the Commission may modify the terms and conditions of an order of exemption, either at the request of the exempt DCO or on the Commission's own initiative, based on changes to or omissions in material facts or circumstances pursuant to which the order of exemption was issued, or for any reason in the Commission's discretion. This is a further expression of the Commission's discretionary authority under section 5b(h) of the CEA to exempt a clearing organization from registration ''conditionally or unconditionally,'' and it reflects the Commission's authority to act with flexibility in responding to changed circumstances affecting an exempt DCO. In the 2019 Proposal, the Commission proposed to also provide for the termination of an exemption upon the Commission's initiative, and to set forth the process by which the Commission would issue a modification or termination.

Under proposed § 39.6(f)(1), the Commission may modify or terminate an exemption from DCO registration, in its discretion and upon its own initiative, if the Commission determines that there are changes to or omissions in material facts or circumstances pursuant to which the order of exemption was issued. The Commission may also modify or terminate an exemption from DCO registration if any of the terms and conditions of the order of exemption are not met, including: (i) The exempt DCO observing the PFMIs in all material respects; and (ii) the exempt DCO being subject to comparable, comprehensive supervision and regulation by its home country regulator.[42]

The Commission proposed § 39.6(f)(2), (f)(3), and (f)(4) to set forth the process for modification or termination of an exemption upon the Commission's initiative. Under proposed § 39.6(f)(2), the Commission must first provide written notification to an exempt DCO that the Commission is considering whether to modify or terminate the DCO's exemption and the basis for that consideration.

Under proposed § 39.6(f)(3), an exempt DCO may respond to the notification in writing no later than 30 business days following receipt of the Commission's notification, or at such later time as the Commission may permit in writing. The Commission believes that a minimum 30-business day timeframe would allow the Commission to take timely action to protect its regulatory interests while providing the exempt DCO with sufficient time to develop its response.

The Commission proposed § 39.6(f)(4) to provide that, following receipt of a response from the exempt DCO, or after expiration of the time permitted for a response, the Commission may either: (i) Issue an order terminating the exemption as of a date specified in the order; (ii) issue an amended order of exemption that modifies the terms and conditions of the exemption; or (iii) provide written notification to the exempt DCO that the Commission has determined to neither modify nor terminate the exemption.

ASX, JSCC, and ISDA believe that an automatic termination of exemptions could result in market disruption and legal uncertainty, particularly for U.S. persons clearing through the exempt DCO. However, the commenters recognized that the Commission must ensure that exempt DCOs continue to operate safe and efficient clearing operations under a regime that is consistent with the PFMIs. Therefore, the commenters suggested that the Commission should first commit to working with the exempt DCO and its home country regulator(s) to resolve any issues with compliance with the terms and conditions of the order of exemption. If these efforts are not

[40] *See* CPSS–IOSCO, Principles for financial market infrastructures: Disclosure framework and Assessment methodology (Dec. 2012), at 82 *et seq.,* available at *http://www.iosco.org/library/pubdocs/pdf/IOSCOPD396.pdf.*

[41] The Disclosure Framework contemplates that CCPs will make public disclosures pursuant to the Disclosure Framework. *See id.* at 1.

[42] In the 2019 Proposal, proposed § 39.6(f)(1) included a subparagraph (iii) that is not being adopted at this time.

successful, the commenters suggested that the Commission allow for an appropriate transitional period so that affected clearing members and customers may migrate to other clearing organizations in an orderly manner.

The Commission agrees with the commenters that sufficient time for transition will be needed in the event that it terminates an exemption from registration. That is why the Commission proposed in § 39.6(f)(4)(i) that it would issue an order of termination with an effective date intended to provide the exempt DCO with a reasonable amount of time to wind down its swap clearing services for U.S. persons, including the liquidation or transfer of the positions and related collateral of U.S. persons, as necessary. The Commission is adopting § 39.6(f) as proposed.

Furthermore, the Commission proposed § 39.6(g) to set forth the framework under which an exempt DCO may petition the Commission to terminate its exemption and the applicable procedures. Specifically, pursuant to proposed § 39.6(g)(1), an exempt DCO may request that the Commission terminate its exemption if the exempt DCO: (i) No longer qualifies for an exemption as a result of changed circumstances; (ii) intends to cease clearing swaps for U.S. persons; or (iii) submits an application for registration in accordance with § 39.3(a)(2) or § 39.3(a)(3), as applicable. The Commission further proposed in § 39.6(g)(2) that the petition for termination must include a detailed explanation for the request and describe the exempt DCO's plans for liquidation or transfer of the positions and related collateral of U.S. persons, if applicable. Under proposed § 39.6(g)(3), the Commission would issue an order of termination within a reasonable time appropriate to the circumstances or in conjunction with the issuance of an order of registration, if applicable.

The Commission did not receive any comments on § 39.6(g). The Commission is adopting this provision as proposed.

Lastly, the Commission proposed § 39.6(h) to provide that, following the Commission's issuance of an order of termination (unless issued in conjunction with the issuance of an order of registration), the exempt DCO must provide immediate notice of such termination to its clearing members. The notice must include: (1) A Copy of the Commission's order of termination; (2) a description of the procedures for orderly disposition of any open swaps positions that were cleared for U.S. persons; and (3) an instruction to clearing members, requiring that they provide the exempt DCO's notice of such termination to all U.S. persons clearing swaps through such clearing members. The Commission did not receive any comments on this provision. The Commission is adopting § 39.6(h) as proposed.

D. Regulation 39.9—Scope

The Commission proposed to revise § 39.9 to make it clear that the provisions of subpart B apply to any DCO, as defined under section 1a(15) of the CEA and § 1.3, that is registered with the Commission as a DCO pursuant to section 5b of the CEA, but do not apply to any exempt DCO. This revision was intended to clarify that the subpart B regulations that address compliance with the DCO Core Principles applicable to registered DCOs do not impose any obligations upon exempt DCOs. The Commission did not receive any comments on this proposal. The Commission is adopting § 39.9 largely as proposed.[43]

III. Amendments to Part 140

The Commission initially proposed amendments to § 140.94(c) to delegate authority to the Director of the Division of Clearing and Risk (DCR) for all functions reserved to the Commission in proposed § 39.6, subject to certain exceptions. Specifically, the Commission did not propose to delegate its authority to grant, modify, or terminate an exemption or prescribe conditions to an exemption order. Consistent with that proposal, the Commission further proposed to supplement its delegation to DCR to include certain functions related to the modification or termination of an exemption order upon the Commission's initiative. These functions would include, but would not be limited to, sending an exempt DCO notice of an intention to modify or terminate its exemption order. However, the Commission alone would retain the authority to modify or terminate the exemption order. The Commission did not receive any comments on this proposal. The Commission is adopting the changes to § 140.94(c) as proposed.

[43] Subsequent to the 2018 Proposal, the Commission amended § 39.9 in the Alternative Compliance rulemaking to take into account a DCO registered subject to alternative compliance. *See* Registration with Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 85 FR at 67171. The Commission is adding to those amendments the changes it had originally proposed in the 2018 Proposal. *See* Exemption From Derivatives Clearing Organization Registration, 83 FR at 39929.

IV. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that agencies consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis on the impact.[44] The regulations being adopted by the Commission will affect clearing organizations. The Commission has previously established certain definitions of ''small entities'' to be used by the Commission in evaluating the impact of its regulations on small entities in accordance with the RFA. The Commission has previous determined that clearing organizations are not small entities for the purpose of the RFA.[45] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the regulations adopted herein will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA)[46] imposes certain requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring a collection of information as defined by the PRA. The regulations adopted herein would result in such a collection, as discussed below. A person is not required to respond to a collection of information unless it displays a currently valid control number issued by the Office of Management and Budget (OMB). The Commission requested a new OMB control number for the collection of information in connection with the proposal.

The Commission received one comment regarding its cost burden analysis in the preamble to the Proposal. JSCC stated in its October 2018 comment letter that the Commission's cost estimate of $10,500[47] for an application for exemption from DCO registration substantially underestimated an applicant's costs, which JSCC stated would require a significant amount of resources to understand any legal and/or regulatory implications arising from the DCO exemption, as well as to identify any potential conflicts with the applicant's

[44] 5 U.S.C. 601 *et seq.*

[45] *See* 66 FR 45604, 45609 (Aug. 29, 2001).

[46] 44 U.S.C. 3501 *et seq.*

[47] Due to minor adjustments to the burden estimate for an exempt DCO application due to consolidating the burden estimates for components of the application, the current estimated cost is $10,000 per application.

home country regulatory and supervisory frameworks. However, JSCC did not provide any estimate of what the expected cost of an application would be. As stated in the Proposal, the Commission based its cost estimate of $10,500 for the exempt DCO application on the significantly reduced requirements as compared to a DCO registration application, which the Commission estimated would cost $100,000. The Commission has not received any information indicating what the amount of additional costs over $10,500 would be, nor has it revised any of the elements of the proposal that would affect the cost estimate. Therefore, the Commission is retaining the burden estimates it included in the proposal.

1. Application for Exemption From DCO Registration Under § 39.6

Based on its experience in addressing petitions for exemption, the Commission anticipates receiving one application for exemption per year, and one request for termination of an exemption every three years.[48] Burden hours and costs were estimated based on existing information collections for DCO registration and reporting, adjusted to reflect the significantly lower burden of the proposed regulations. The Commission has estimated the burden hours for this collection of information as follows:

- Application for exemption, including all exhibits, supplements and amendments [49]
  Estimated number of respondents: 1
  Estimated number of reports per respondent: 1
  Average number of hours per report: 40
  Estimated gross annual reporting burden: 40
- Termination of exemption
  Estimated number of respondents: 1
  Estimated number of reports per respondent: 0.33
  Average number of hours per report: 2
  Estimated gross annual reporting burden: 0.66
- Notice to clearing members of termination of exemption
  Estimated number of respondents: 1
  Estimated number of reports per respondent: 8
  Average number of hours per report: 0.1
  Estimated gross annual reporting burden: 0.8

2. Reporting by Exempt DCOs

The number of respondents for the daily and quarterly reporting and annual certification requirements is conservatively estimated at a maximum of seven, based on the number of existing exempt DCOs (4) and one application for exemption each year. Reporting of specific events is expected to occur infrequently, and the estimated number of respondents reflects that not all exempt DCOs will experience events subject to the notification requirement:

- Daily reporting
  Estimated number of respondents: 7
  Estimated number of reports per respondent: 250
  Average number of hours per report: 0.1
  Estimated gross annual reporting burden: 175
- Quarterly reporting
  Estimated number of respondents: 7
  Estimated number of reports per respondent: 4
  Average number of hours per report: 1
  Estimated gross annual reporting burden: 28
- Event-specific reporting
  Estimated number of respondents: 4
  Estimated number of reports per respondent: 1
  Average number of hours per report: 0.5
  Estimated gross annual reporting burden: 2
- Annual certification
  Estimated number of respondents: 7
  Estimated number of reports per respondent: 1
  Average number of hours per report: 1.5
  Estimated gross annual reporting burden: 10.5

3. Reporting by Exempt DCOs in Accordance With Part 45

Regulation 39.6(d) requires an exempt DCO to report data regarding the two swaps resulting from the novation of an original swap to an SDR, if the original swap had been reported to an SDR pursuant to part 45 of the Commission's regulations. The Commission is revising the information collection for part 45 to include a separate information collection under OMB Control No. 3038–0096. The burden for exempt DCOs reporting in accordance with part 45 is estimated to be approximately one-fifth of the burden for registered DCOs because exempt DCOs will not be required to report all swaps, only those that result from the novation of original swaps that have been reported to an SDR. Consequently, the burden hours for the collection of information in this rulemaking have been estimated as follows:

- Reporting in accordance with part 45
  Estimated number of respondents: 7.
  Estimated number of reports per respondent: 8,074 [50]
  Average number of hours per report: 0.1
  Estimated gross annual reporting burden: 5649

C. Cost-Benefit Considerations

1. Introduction

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders.[51] Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

The baseline for the Commission's consideration of the costs and benefits of this rulemaking are: (1) The DCO Core Principles; (3) the general provisions applicable to registered DCOs under subparts A and B of part 39; (4) Form DCO in Appendix A to part 39; and (5) part 40 of the Commission's regulations.

This rulemaking codifies certain conditions and procedures that the

[48] The Commission has determined that one termination every three years is a more appropriate estimate than one per year, which was used in the information burden estimate for the 2018 Proposal.

[49] Although the 2018 Proposal included separate burden estimates for the application and for information requested by the Commission during its review, these estimates were combined in the 2019 Proposal and in this final rule. The estimated number of applications has been revised to one per year from two in the 2018 Proposal in response to the Commission's adoption of the Alternative Compliance framework, which had not been proposed at the time of the 2018 Proposal, and which provides an alternative that could lead to a reduced number of exemption applications. *See* Registration with Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 85 FR 67160 (Oct. 21, 2020). In addition, burden estimates for reporting by exempt DCOs have been updated based on recent observations of filing frequency by existing exempt DCOs.

[50] While updating the number of reports based on recent data, the Commission discovered that the estimated number in the NPRM—1987—inadvertently reflected a quarterly, rather than annual, number of reports. The estimate of 8074 reports per respondent represents the median number of swaps reported to SDRs by existing exempt DCOs during calendar year 2019.

[51] 7 U.S.C. 19(a).

Commission has been using to grant exemptions from DCO registration, with some modifications. To the extent that exemptions from DCO registration were already available to non-U.S. clearing organizations pursuant to these conditions and procedures, the actual costs and benefits of this rulemaking will likely be lower than the costs and benefits relative to the baseline.

The Commission notes that this consideration is based on its understanding that the swaps market functions internationally with (1) transactions that involve U.S. firms occurring across different international jurisdictions; (2) some entities organized outside of the United States that are prospective Commission registrants; and (3) some entities that typically operate both within and outside the United States and that follow substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the discussion of costs and benefits below refers to the effects of the final rule on all relevant swaps activity, whether based on their actual occurrence in the United States or on their connection with activities in, or effect on, U.S. commerce pursuant to section 2(i) of the CEA.[52]

The Commission recognizes that the final rule may impose costs. The Commission has endeavored to assess the expected costs and benefits of the final rule in quantitative terms, including PRA-related costs, where possible. In situations where the Commission is unable to quantify the costs and benefits, the Commission identifies and considers the costs and benefits of the applicable regulations in qualitative terms. The lack of data and information to estimate those costs is attributable in part to the nature of these final regulations. Additionally, the initial and recurring compliance costs for any particular exempt DCO will depend on the size, existing infrastructure, level of clearing activity, practices, and cost structure of the DCO.

Finally, the costs and benefits of this final rule may be affected by the Alternative Compliance framework[53] under which a non-U.S. clearing organization or an already registered non-U.S. DCO would have the option of applying for registration with alternative compliance, which would allow the DCO to comply with the DCO Core Principles through its home country regulatory regime. The Commission has compared these costs and benefits below.

2. Amendments to Part 39

a. Summary

Section 5b(h) of the CEA permits the Commission to exempt a non-U.S. clearing organization from DCO registration for the clearing of swaps to the extent that the Commission determines that such clearing organization is subject to comparable, comprehensive supervision by appropriate government authorities in the clearing organization's home country. Pursuant to this authority, the Commission has exempted four non-U.S. clearing organizations from DCO registration. The final rule generally codifies the policies and procedures that the Commission has followed with respect to granting exemptions from DCO registration. Specifically, these regulations set forth the process by which a non-U.S. clearing organization may obtain an exemption from DCO registration for the clearing of proprietary swaps for U.S. persons provided that it meets the specified eligibility standards and can meet the conditions of an exemption.

b. Benefits and Costs

With the Commission's adoption of this final rule, non-U.S. clearing organizations seeking to clear swaps for U.S. persons on a proprietary basis will have a choice between seeking an exemption from DCO registration and registering as a DCO, either under the Commission's original framework or the recently adopted Alternative Compliance framework. The Commission expects exemption from registration to be the least costly of the three options. The Commission estimates that it would take about 421 hours to prepare a traditional application for DCO registration[54] and 100 hours to prepare an application under the alternative procedures, as compared to 40 hours to prepare an application for an exemption.[55] The daily, quarterly, and event-specific reporting requirements are estimated to impose the same hourly burden for both registered and exempt DCOs with the exception of swap data reporting under part 45. Registered DCOs subject to Alternative Compliance will be subject to the same part 45 reporting requirements as other registered DCOs, while exempt DCOs will only have to report data regarding the two swaps resulting from the novation of an original swap previously reported to an SDR. In the PRA section for this release, the Commission estimates that the part 45 reporting burden for an exempt DCO would be about one fifth as much as the burden on a registered DCO. Both exempt DCOs and registered DCOs subject to Alternative Compliance are primarily subject to their home country regulatory regimes, but registered DCOs subject to Alternative Compliance will also be held to certain requirements set forth in the CEA and Commission regulations, including, for example, subpart A of part 39 and § 39.15. The extent to which these additional requirements will increase costs on registered DCOs subject to Alternative Compliance relative to the costs to exempt DCOs will depend on the extent to which these requirements exceed the legal requirements of their home countries and whether registered DCOs subject to Alternative Compliance have to change their practices more than they would if they had sought an exemption instead.

Given the lower costs of an exemption as compared to registration, and the greater clarity and regulatory certainty resulting from codification of the CFTC's existing procedures, the final regulation may promote competition among registered and exempt DCOs by encouraging more clearing organizations to seek an exemption. Lower costs and competition may, in turn, result in clearing members incurring lower costs to clear through exempt DCOs. In addition, access to more clearing organizations may also encourage voluntary clearing of swaps that are not required to be cleared, as certain swaps may not be cleared by any registered DCOs. This may, in turn, serve to diversify the potential risk of cleared swaps, because any such risk would become less concentrated if a larger number of registered and exempt DCOs were clearing swaps for U.S. persons, and the volume of those swaps could become more evenly distributed among those registered and exempt DCOs.

While an exemption from DCO registration would be less costly to obtain than any form of DCO registration, registration provides benefits that are not available to exempt

[52] Pursuant to section 2(i) of the CEA, activities outside of the United States are not subject to the swap provisions of the CEA, including any rules prescribed or regulations promulgated thereunder, unless those activities either have a direct and significant connection with activities in, or effect on, commerce of the United States; or contravene any rule or regulation established to prevent evasion of a CEA provision enacted under the Dodd-Frank Act, Public Law 111–203, 124 Stat. 1376. 7 U.S.C. 2(i).

[53] Registration with Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 85 FR 67160 (Oct. 21, 2020).

[54] *See* Derivatives Clearing Organization General Provisions and Core Principles, 85 FR 4800, 4829 (Jan. 27, 2020).

[55] To the extent that current procedures for seeking an exemption from DCO registration are similar to the procedures adopted in this release, these costs are currently being incurred.

DCOs or persons that clear through an exempt DCO. For example, a registered DCO is permitted to clear for U.S. customers. An eligible clearing organization may choose to register, particularly under the Alternative Compliance framework, over seeking an exemption if it determines that the benefits of customer clearing (including an enhanced ability to attract U.S. business) would justify the extra costs of registration relative to an exemption. Based on data submitted by registered DCOs to the Commission pursuant to § 39.19(c), customer clearing typically accounts for a majority of the initial margin at a DCO (about 70 percent on average), and this is likely true for other clearing organizations as well. Thus, the inability of exempt DCOs to clear for U.S. customers may create a significant disincentive to seeking exemption in lieu of registration.

Registered DCOs may face a competitive disadvantage as a result of the final rule. A registered DCO may have to compete with an exempt DCO for U.S. proprietary swap business, yet may have higher ongoing compliance costs than an exempt DCO. This competitive disadvantage is mitigated by the fact that exempt DCOs are, as a precondition of such exemption, required to be subject to comparable, comprehensive supervision and regulation by a home country regulator that is likely to impose costs similar to those associated with Commission regulation.

The Commission is codifying in § 39.6(a)(1) the statutory authority in section 5b(h) of the CEA that the Commission may exempt a clearing organization from DCO registration for the clearing of swaps provided that the Commission determines that the clearing organization is subject to comparable, comprehensive supervision and regulation by a home country regulator. To satisfy this standard, the clearing organization will need to demonstrate, among other things, that: (i) It is organized in a jurisdiction in which a home country regulator applies to the clearing organization, on an ongoing basis, statutes, rules, regulations, and/or policies that, taken together, are consistent with the PFMIs; and (ii) it observes the PFMIs in all material respects. New § 39.6(b)(6) requires an annual certification that an exempt DCO continues to observe the PFMIs in all material respects.

The Commission believes that the PFMIs provide numerous regulatory benefits and promote the protection of market participants and the public, the financial integrity of derivatives markets, and sound risk management practices. In this regard, the PFMIs include provisions that address DCOs establishing requirements and/or procedures designed to ensure that clearing members meet their obligations to DCOs and safeguard customer funds. For example, the PFMIs provide that DCOs should establish risk-related participation requirements adequate to ensure that participants meet operational, financial, and legal requirements to allow them to fulfill their obligations to DCOs. Financial requirements may include reasonable risk-related capital requirements for participants and appropriate indicators of participant creditworthiness.[56] In addition, the PFMIs provide that a DCO should monitor compliance with its participation requirements on an ongoing basis through the receipt of timely and accurate information.[57] The PFMIs further provide that collateral belonging to customers of clearing members should be segregated from the assets of the clearing member through which the customers clear.[58] Moreover, using the PFMIs may promote regulatory comity, since the PFMIs represent standards that have been agreed to by the G20 and are widely used in the regulation of clearing organizations. Although the PFMIs are already used to determine eligibility for receiving an exemption from DCO registration, the Commission believes that codifying the use of the PFMIs is beneficial from the perspectives of transparency and consistency.

The Commission acknowledges, as discussed in the preamble above, that the PFMIs are not identical to, nor as detailed as, part 39. Thus, market participants choosing to clear swaps through exempt DCOs may incur costs associated with forgoing certain regulatory protections that are not included in the PFMIs. However, these costs are mitigated by some of the conditions of exemption set out in § 39.6(b), as discussed below, as well as other Commission regulations applicable to exempt DCOs. These conditions (including, for example, the open access provision of § 39.6(b)(2)), provide additional regulatory protections beyond those required by the PFMIs. Additionally, the costs of using the PFMIs (as compared to some other means of determining that a clearing organization is subject to comparable, comprehensive supervision and regulation by a home country regulator) will vary depending on the home country regulatory regime.

Finally, since the PFMIs are already used to determine eligibility for receiving an exemption from DCO registration, these costs are currently being realized by exempt DCOs and U.S. persons who currently clear proprietary swaps on exempt DCOs.

New § 39.6(b) contain various conditions that the Commission is imposing for the granting of exemptions from DCO registration. These conditions are consistent with those that the Commission has been imposing on exempt DCOs prior to the adoption of this rule. Therefore, the costs and benefits of these conditions are currently being incurred by exempt DCOs and U.S. persons who currently clear proprietary swaps on such DCOs.

New § 39.6(b)(2) codifies the ''open access'' requirements of section 2(h)(1)(B) of the CEA with respect to swaps cleared by an exempt DCO to which one or more of the counterparties is a U.S. person.[59] Under § 39.6(b)(2), an exempt DCO is required to maintain rules providing that all such swaps with the same terms and conditions submitted to the exempt DCO for clearing are economically equivalent and may be offset with each other, to the extent that offsetting is permitted by the exempt DCO's rules. An exempt DCO is also required to maintain rules providing for non-discriminatory clearing whether a swap is executed bilaterally or is executed on or subject to the rules of an unaffiliated electronic matching platform or trade execution facility, *e.g.,* a swap execution facility. This should benefit market participants by ensuring that they are able to offset their positions to the extent that it is feasible and consistent with DCO rules and that they are not subject to discrimination based on whether or not they execute on a trading platform. The Commission believes that most or all non-U.S. clearing organizations have open access rules that comply with § 39.6(b)(2) and has received no comments suggesting otherwise. However, to the extent that a clearing organization seeking an exemption from DCO registration needs to change its rules to comply with this requirement, that clearing organization could incur costs.

New § 39.6(b)(3) requires an exempt DCO to consent to jurisdiction in the United States and designate an agent in the United States to receive notice or service of various documents issued by or on behalf of the Commission or the U.S. Department of Justice in connection with investigations or for certain other purposes. This will assist

[56] PFMIs at Principle 18, Explanatory Note 3.18.5.

[57] *Id.* at Principle 18, Explanatory Note 3.18.8.

[58] *Id.* at Principle 14, Explanatory Note 3.14.1.

[59] 7 U.S.C. 2(h)(1)(B).

the Commission and the Department of Justice in protecting market participants and the public and will impose on exempt DCOs the minor costs associated with retaining a U.S. agent.

New §§ 39.6(b)(4) and 39.6(b)(8) are general provisions that require an exempt DCO to comply, and demonstrate compliance as requested by the Commission, with any condition of the exempt DCO's order of exemption and to provide that the Commission may condition an exemption from DCO registration on any other facts and circumstances it deems relevant. These provisions do not provide any costs and benefits in and of themselves. The costs and benefits of any additional conditions that may be imposed pursuant to § 39.6(b)(8) can only be considered when such additional conditions are imposed.

New § 39.6(b)(5) requires an exempt DCO to promptly make all books and records related to its operation as an exempt DCO available to any Commission representative upon request. This provision will facilitate the Commission's mission, including the protection of market participants and the public. While the Commission does not anticipate making routine requests for books and records, providing or making available books and records pursuant to any such request will impose modest costs on exempt DCOs.

New § 39.6(b)(7) requires an exempt DCO's home country regulator to provide an annual certification that the exempt DCO is in good regulatory standing. That rule, along with § 39.6(a)(2) which requires an MOU or similar arrangement to be in effect between the Commission and the home country regulator, will assist the Commission in protecting market participants and the public, but will not impose any direct costs on exempt DCOs or market participants. Where no MOU between the Commission and a home country regulator is in effect, a clearing organization in that country wanting an exemption may incur costs associated with facilitating such an MOU, or it could incur the costs of either registering with the Commission or forgoing U.S. participation. The requirements regarding an MOU also exist in current procedures, so the costs and benefits of those requirements are currently being realized by exempt DCOs and U.S. persons who currently clear proprietary swaps on exempt DCOs.

Finally, new § 39.6(d) requires an exempt DCO to report swap data for the two cleared swaps that result from the novation of an original swap cleared through the exempt DCO. An exempt DCO would also need to report the termination of the original swap to the SDR that received the swap data for the original swap. To avoid duplicative reporting, the exempt DCO is also required to have rules that prohibit the part 45 reporting of the two new swaps by the counterparties to the original swap. CCP12 commented that transparency in the swaps markets, which is supported by SDR reporting, provides a number of benefits. However, CCP12 argued that the SDR reporting requirements would post significant operational challenges, such as onboarding with an SDR that has a different reporting format than that of the exempt DCO's home country. CCP12 also commented that SDR reporting fees would be a burden based on the number of reported transactions. The Commission agrees that SDR reporting enhances market transparency and thus provides benefits to the market. The Commission notes that SDR reporting costs would otherwise be borne by the counterparties to the swap, and because there are far more swap counterparties than exempt DCOs, it would be more efficient to require the relatively few exempt DCOs to bear the operational burdens of setting up and following reporting processes and procedures with the various SDRs. The costs and benefits of the reporting requirements are currently being realized to the extent that similar requirements are contained in existing orders of exemption for DCOs.

3. Section 15(a) Factors

a. Protection of Market Participants and the Public

For the most part, the final rule does not materially reduce the protections available to market participants and the public because, among other things, it: (i) Only permits exempt DCOs to clear swaps for U.S. persons for their proprietary accounts, and not for customers; (ii) requires that an exempt DCO be subject to comparable, comprehensive supervision and regulation by a home country regulator as provided by the PFMIs; (iii) requires an MOU or similar arrangement with the home country regulator that would enable the Commission to obtain any information that the Commission deems necessary to evaluate the initial and continued eligibility of the DCO for exemption from registration or to review its compliance with any conditions of such exemption; (iv) provides additional protections with the conditions of exemption set out in § 39.6(b), including open access and data reporting requirements; and (v) explicitly authorizes the Commission to modify or terminate an order of exemption on its own initiative if it determines that there are changes to or omissions in material facts or circumstances pursuant to which the order of exemption was issued, or that any of the terms and conditions of the order of exemption have not been met. Collectively, these provisions protect market participants and the public by ensuring that exempt DCOs are subject to the internationally recognized PFMIs. Although the Commission acknowledges the possibility that some foreign regulatory regimes may ultimately prove to be less effective than that of the United States, the Commission believes that this risk is mitigated for the reasons discussed above.

b. Efficiency, Competitiveness, and Financial Integrity

The final rule promotes operational efficiency by permitting exempt DCOs to clear swaps for U.S. persons without having to apply for DCO registration, which involves the submission of extensive documentation to the Commission. The final rule also mitigates duplicative compliance requirements by not requiring exempt DCOs to comply with the Commission's part 39 regulations (with the exception of § 39.6) in addition to the requirements of their home country regulator. In addition, adopting these regulations might prompt other regulators to adopt similar rules that would defer to the Commission in the regulation of U.S. registered DCOs operating outside the United States, which could increase competitiveness by reducing the regulatory burdens on such DCOs.

The exempt DCO framework may also promote competition for U.S. proprietary business among non-U.S. clearing organizations because it holds exempt DCOs to the internationally recognized standards set forth in the PFMIs. This will allow such clearing organizations to compete with each other for the proprietary business of U.S. clearing members under their own comparable regulatory regimes, which may potentially increase the number of DCOs available to clear for U.S. persons. The final rule is expected to maintain the financial integrity of swap transactions cleared by exempt DCOs because such DCOs are subject to supervision and regulation by their home country regulator within a legal framework that is comparable to that applicable to registered DCOs under the CEA and Commission regulations and as

comprehensive. In addition, the final rule may contribute to the financial integrity of the broader financial system by spreading the potential risk of particular swaps among a greater number of registered and exempt DCOs, thus reducing concentration risk.

c. Price Discovery

Price discovery is the process of determining the price level for an asset through the interaction of buyers and sellers and based on supply and demand conditions. The Commission has not identified any impact of the final rule on price discovery. This is because price discovery occurs before a transaction is submitted for clearing through the interaction of bids and offers on a trading system or platform, or in the over-the-counter market. The final rule does not impact requirements under the CEA or Commission regulations regarding price discovery.

d. Sound Risk Management Practices

The exempt DCO framework encourages sound risk management practices because exempt DCOs are subject to the risk management standards set forth in the PFMIs, which are comparable to standards imposed on registered DCOs.

e. Other Public Interest Considerations

The Commission notes the public interest in access to clearing organizations outside of the United States in light of the international nature of many swap transactions. The final rule codifies the exemption process for non-U.S. clearing organizations that will permit them to clear swap transactions for U.S. persons on a proprietary basis when such clearing organizations meet the eligibility requirements and conditions included therein, thus promoting transparency and consistency. Furthermore, the final rule might encourage international comity by deferring, under certain conditions, to regulators in other jurisdictions in the oversight of non-U.S. clearing organizations. The Commission expects that such regulators will defer to the Commission in the supervision and regulation of registered DCOs organized in the United States, thereby reducing the regulatory and compliance burdens to which such DCOs are subject.

4. Consideration of Alternatives

The final rule does not permit U.S. customers to clear through exempt DCOs. As the Commission noted in the 2018 Proposal, there is uncertainty as to how swaps customer funds would be treated under the U.S. Bankruptcy Code if the customer's swaps are cleared at an exempt DCO.[60] However, the Commission did request comment as to whether the Commission should consider permitting an exempt DCO to clear swaps for U.S. customers.[61]

In response, three commenters expressed support. ISDA stated that it ''strongly believes'' that the Commission should permit exempt DCOs to clear swaps for customers. ASX argued that it would be beneficial to allow U.S. customers to access the broadest possible range of clearing organizations, which would provide them with flexibility and choice in accessing the best commercial solutions for the products that they use. JSCC recommended that the Commission consider allowing U.S. customers to access exempt DCOs through non-U.S. clearing members that are not required to register as an FCM, as long as those non-U.S. clearing members can demonstrate that they are properly supervised, regulated, and licensed to provide customer clearing services in their home countries, and if the home regulatory authority maintains appropriate cooperative arrangements with the Commission.

Similarly, in response to the 2019 Proposal, several commenters, including ASX, FIA, SIFMA, JSCC, and CCP12, proposed a regime for swaps similar to that for futures, including a clearing structure in which a U.S. customer clears through an FCM that maintains the U.S. customer's positions and margin in a customer omnibus account held by a non-U.S. clearing member that is not registered as an FCM. The commenters argued that such a regime could potentially provide new business opportunities to FCMs while allowing customers to save money and improve efficiency by using the same FCMs to clear at both registered and exempt DCOs. This would permit customers to avoid the time and expense of executing documentation with multiple intermediaries, for example, and to realize operational efficiencies such as netting and offsetting within a single intermediary, receiving fewer position statements, and managing fewer cash transfers. The commenters noted that customers would also benefit from the various customer protections required of FCMs, such as those pertaining to disclosure, net capital, and reporting.

The Commission notes that, based on data submitted pursuant to § 39.19(c), as of October 2020, approximately 70 percent of initial margin at registered DCOs was in customer accounts, with the remainder in house (proprietary) accounts. It is likely that the majority of initial margin at exempt DCOs or clearing organizations that may seek an exemption is also in customer accounts. Thus, limiting clearing by U.S. persons at exempt DCOs to proprietary swaps will likely significantly reduce the number of U.S. persons who can benefit from clearing at exempt DCOs and may reduce the incentive for eligible clearing organizations to seek exemption.[62] However, there is uncertainty as to the extent to which U.S. customers would be protected under the Bankruptcy Code in the event of an FCM bankruptcy proceeding. The Commission is not adopting these alternatives at this time, but continues to weigh these risks against the potential benefits to U.S. customers and FCMs.

D. Antitrust Considerations

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA, in issuing any order or adopting any Commission rule or regulation.[63]

The Commission believes that the public interest to be protected by the antitrust laws is the promotion of competition. The Commission requested, but did not receive, any comments on whether the proposed rulemaking implicated any other specific public interest to be protected by the antitrust laws. The Commission has considered the proposed rulemaking to determine whether it is anticompetitive. The Commission believes that the final rule may promote greater competition in swap clearing because it might encourage more non-U.S. clearing organizations to seek an exemption from registration to clear the same types of swaps for U.S. persons that are currently cleared by registered DCOs.

The Commission has not identified any less anticompetitive means of achieving the purposes of the CEA. The Commission requested, but did not receive, any comments on whether there are less anticompetitive means of achieving the relevant purposes of the CEA that would otherwise be served by adopting the final rule.

[60] 2018 Proposal, 83 FR at 39926.

[61] 2018 Proposal, 83 FR at 39930.

[62] Clearing organizations could be incentivized to seek DCO registration instead, either under the Commission's original framework or the recently adopted Alternative Compliance framework.

[63] 7 U.S.C. 19(b).

List of Subjects

17 CFR Part 39

Clearing, Derivatives clearing organization, Exemption, Procedures, Registration, Swaps.

17 CFR Part 140

Authority delegations (Government agencies), Organization and functions (Government agencies).

For the reasons stated in the preamble, the Commodity Futures Trading Commission amends 17 CFR chapter I as follows:

PART 39—DERIVATIVES CLEARING ORGANIZATIONS

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

Authority: 7 U.S.C. 2, 6(c), 7a–1, and 12a(5); 12 U.S.C. 5464; 15 U.S.C. 8325; Section 752 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, title VII, sec. 752, July 21, 2010, 124 Stat. 1749.

■ 2. Revise § 39.1 to read as follows:

§ 39.1 Scope.

The provisions of this subpart A apply to any derivatives clearing organization, as defined under section 1a(15) of the Act and § 1.3 of this chapter, that is registered or is required to register with the Commission as a derivatives clearing organization pursuant to section 5b(a) of the Act, or that is applying for an exemption from registration pursuant to section 5b(h) of the Act.

■ 3. In § 39.2, add definitions of the terms ''Exempt derivatives clearing organization,'' ''Home country,'' ''Home country regulator,'' and ''Principles for Financial Market Infrastructures,'' in alphabetical order, and amend the definition of ''Good regulatory standing,'' to read as follows:

§ 39.2 Definitions.

* * * * *

Exempt derivatives clearing organization means a derivatives clearing organization that the Commission has exempted from registration under section 5b(a) of the Act, pursuant to section 5b(h) of the Act and § 39.6.

* * * * *

Good regulatory standing means, with respect to a derivatives clearing organization that is organized outside of the United States, and is licensed, registered, or otherwise authorized to act as a clearing organization in its home country, that:

(1) In the case of an exempt derivatives clearing organization, either there has been no finding by the home country regulator of material non-observance of the Principles for Financial Market Infrastructures or other relevant home country legal requirements, or there has been a finding by the home country regulator of material non-observance of the Principles for Financial Market Infrastructures or other relevant home country legal requirements but any such finding has been or is being resolved to the satisfaction of the home country regulator by means of corrective action taken by the derivatives clearing organization; or

(2) In the case of a derivatives clearing organization registered subject to compliance with subpart D of this part, either there has been no finding by the home country regulator of material non-observance of the relevant home country legal requirements, or there has been a finding by the home country regulator of material non-observance of the relevant home country legal requirements but any such finding has been or is being resolved to the satisfaction of the home country regulator by means of corrective action taken by the derivatives clearing organization.

Home country means, with respect to a derivatives clearing organization that is organized outside of the United States, the jurisdiction in which the derivatives clearing organization is organized.

Home country regulator means, with respect to a derivatives clearing organization that is organized outside of the United States, an appropriate government authority which licenses, regulates, supervises, or oversees the derivatives clearing organization's clearing activities in the home country.

* * * * *

Principles for Financial Market Infrastructures means the Principles for Financial Market Infrastructures jointly published by the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions in April 2012.

* * * * *

■ 4. Add § 39.6 to read as follows:

§ 39.6 Exemption from derivatives clearing organization registration.

(a) *Eligibility for exemption.* A derivatives clearing organization that is organized outside of the United States shall be eligible for an exemption from registration as a derivatives clearing organization for the clearing of swaps for U.S. persons, and thereby exempt from compliance with provisions of the Act and Commission regulations applicable to derivatives clearing organizations, if:

(1) The derivatives clearing organization is subject to comparable, comprehensive supervision and regulation by a home country regulator as demonstrated by the following:

(i) The derivatives clearing organization is organized in a jurisdiction in which a home country regulator applies to the derivatives clearing organization, on an ongoing basis, statutes, rules, regulations, policies, or a combination thereof that, taken together, are consistent with the Principles for Financial Market Infrastructures;

(ii) The derivatives clearing organization observes the Principles for Financial Market Infrastructures in all material respects; and

(iii) The derivatives clearing organization is in good regulatory standing in its home country; and

(2) A memorandum of understanding or similar arrangement satisfactory to the Commission is in effect between the Commission and the derivatives clearing organization's home country regulator, pursuant to which, among other things, the home country regulator agrees to provide to the Commission any information that the Commission deems necessary to evaluate the initial and continued eligibility of the derivatives clearing organization for exemption from registration or to review its compliance with any conditions of such exemption.

(b) *Conditions of exemption.* An exemption from registration as a derivatives clearing organization shall be subject to any conditions the Commission may prescribe including, but not limited to:

(1) *Clearing by or for U.S. persons and futures commission merchants.* The exempt derivatives clearing organization shall have rules that limit swaps clearing services for U.S. persons and futures commission merchants to the following circumstances:

(i) A U.S. person that is a clearing member of the exempt derivatives clearing organization may clear swaps for itself and those persons identified in the definition of ''proprietary account'' set forth in § 1.3 of this chapter;

(ii) A non-U.S. person that is a clearing member of the exempt derivatives clearing organization may clear swaps for any affiliated U.S. person identified in the definition of ''proprietary'' account set forth in § 1.3 of this chapter; and

(iii) An entity that is registered with the Commission as a futures commission merchant may be a clearing member of the exempt derivatives

clearing organization, or otherwise maintain an account with an affiliated broker that is a clearing member, for the purpose of clearing swaps only for itself and those persons identified in the definition of ''proprietary account'' set forth in § 1.3 of this chapter; and

(2) *Open access.* The exempt derivatives clearing organization shall have rules with respect to swaps to which one or more of the counterparties is a U.S. person that shall:

(i) Provide that all swaps with the same terms and conditions, as defined by product specifications established under the exempt derivatives clearing organization's rules, submitted to the exempt derivatives clearing organization for clearing are economically equivalent within the exempt derivatives clearing organization and may be offset with each other within the exempt derivatives clearing organization, to the extent offsetting is permitted by the exempt derivatives clearing organization's rules; and

(ii) Provide that there shall be non-discriminatory clearing of a swap executed bilaterally or on or subject to the rules of an unaffiliated electronic matching platform or trade execution facility.

(3) *Consent to jurisdiction; designation of agent for service of process.* The exempt derivatives clearing organization shall:

(i) Consent to jurisdiction in the United States;

(ii) Designate, authorize, and identify to the Commission, an agent in the United States who shall accept any notice or service of process, pleadings, or other documents, including any summons, complaint, order, subpoena, request for information, or any other written or electronic documentation or correspondence issued by or on behalf of the Commission or the United States Department of Justice to the exempt derivatives clearing organization, in connection with any actions or proceedings brought against, or investigations relating to, the exempt derivatives clearing organization or any U.S. person or futures commission merchant that is a clearing member, or that clears swaps through a clearing member, of the exempt derivatives clearing organization; and

(iii) Promptly inform the Commission of any change in its designated and authorized agent.

(4) *Compliance.* The exempt derivatives clearing organization shall comply, and shall demonstrate compliance as requested by the Commission, with any condition of its exemption.

(5) *Inspection of books and records.* The exempt derivatives clearing organization shall make all documents, books, records, reports, and other information related to its operation as an exempt derivatives clearing organization open to inspection and copying by any representative of the Commission; and in response to a request by any representative of the Commission, the exempt derivatives clearing organization shall, promptly and in the form specified, make the requested books and records available and provide them directly to Commission representatives.

(6) *Observance of the Principles for Financial Market Infrastructures.* On an annual basis, within 60 days following the end of its fiscal year, the exempt derivatives clearing organization shall provide to the Commission a certification that it continues to observe the Principles for Financial Market Infrastructures in all material respects. To the extent the exempt derivatives clearing organization is unable to provide to the Commission an unconditional certification, it must identify the underlying material non-observance of the Principles for Financial Market Infrastructures and identify whether and how such non-observance has been or is being resolved by means of corrective action taken by the exempt derivatives clearing organization.

(7) *Representation of good regulatory standing.* On an annual basis, within 60 days following the end of its fiscal year, an exempt derivatives clearing organization shall request and the Commission must receive from a home country regulator a written representation that the exempt derivatives clearing organization is in good regulatory standing.

(8) *Other conditions.* The Commission may condition an exemption on any other facts and circumstances it deems relevant.

(c) *General reporting requirements.* (1) An exempt derivatives clearing organization shall provide to the Commission the information specified in this paragraph and any other information that the Commission deems necessary, including, but not limited to, information for the purpose of the Commission evaluating the continued eligibility of the exempt derivatives clearing organization for exemption from registration, reviewing compliance by the exempt derivatives clearing organization with any conditions of the exemption, or conducting oversight of U.S. persons and their affiliates, and the swaps that are cleared by such persons through the exempt derivatives clearing organization. Information provided to the Commission under this paragraph shall be submitted in accordance with § 39.19(b).

(2) Each exempt derivatives clearing organization shall provide to the Commission the following information:

(i) A report compiled as of the end of each trading day and submitted to the Commission by 10:00 a.m. U.S. Central time on the following business day, containing:

(A) Initial margin requirements and initial margin on deposit for each U.S. person, with respect to swaps, *provided however* if a clearing member margins on a portfolio basis its own positions and the positions of its affiliates, and either the clearing member or any of its affiliates is a U.S. person, the exempt derivatives clearing organization shall report initial margin on deposit for all such positions on a combined basis for each such clearing member; and

(B) Daily variation margin, separately listing the mark-to-market amount collected from or paid to each U.S. person, with respect to swaps; *provided, however,* if a clearing member margins on a portfolio basis its own positions and the positions of its affiliates, and either the clearing member or any of its affiliates is a U.S. person, the exempt derivatives clearing organization shall separately list the mark-to-market amount collected from or paid to each such clearing member, on a combined basis.

(ii) A report compiled as of the last day of each fiscal quarter of the exempt derivatives clearing organization and submitted to the Commission no later than 17 business days after the end of the exempt derivatives clearing organization's fiscal quarter, containing:

(A) The aggregate clearing volume of U.S. persons during the fiscal quarter, with respect to swaps. If a clearing member is a U.S. person, the volume figure shall include the transactions of the clearing member and all affiliates. If a clearing member is not a U.S. person, the volume figure shall include only transactions of affiliates that are U.S. persons.

(B) The average open interest of U.S. persons during the fiscal quarter, with respect to swaps. If a clearing member is a U.S. person, the open interest figure shall include the positions of the clearing member and all affiliates. If a clearing member is not a U.S. person, the open interest figure shall include only positions of affiliates that are U.S. persons.

(C) A list of U.S. persons and futures commission merchants that are either clearing members or affiliates of any clearing member, with respect to the

clearing of swaps, as of the last day of the fiscal quarter.

(iii) Prompt notice regarding any change in the home country regulatory regime that is material to the exempt derivatives clearing organization's continuing observance of the Principles for Financial Market Infrastructures or compliance with any of the requirements set forth in this section or in the order of exemption issued by the Commission;

(iv) As available to the exempt derivatives clearing organization, any assessment of the exempt derivatives clearing organization's or the home country regulator's observance of the Principles for Financial Market Infrastructures, or any portion thereof, by a home country regulator or other national authority, or an international financial institution or international organization;

(v) As available to the exempt derivatives clearing organization, any examination report, examination findings, or notification of the commencement of any enforcement or disciplinary action by a home country regulator;

(vi) Immediate notice of any change with respect to the exempt derivatives clearing organization's licensure, registration, or other authorization to act as a derivatives clearing organization in its home country;

(vii) In the event of a default by a U.S. person or futures commission merchant clearing swaps, with such event of default determined in accordance with the rules of the exempt derivatives clearing organization, immediate notice of the default including the name of the U.S. person or futures commission merchant clearing swaps, a list of the positions held by the U.S. person or futures commission merchant, and the amount of the U.S. person's or futures commission merchant's financial obligation; and

(viii) Notice of action taken against a U.S. person or futures commission merchant clearing swaps by an exempt derivatives clearing organization, no later than two business days after the exempt derivatives clearing organization takes such action against a U.S. person or futures commission merchant.

(d) *Swap data reporting requirements.* If an exempt derivatives clearing organization accepts for clearing a swap that has been reported to a swap data repository pursuant to part 45 of this chapter, the exempt derivatives clearing organization shall report to a swap data repository data regarding the two swaps resulting from the novation of the original swap. The exempt derivatives clearing organization shall also report the termination of the original swap to the swap data repository to which the original swap was reported. In order to avoid duplicative reporting for such transactions, the exempt derivatives clearing organization shall have rules that prohibit the reporting, pursuant to part 45 of this chapter, of the two new swaps by the counterparties to the original swap.

(e) *Application procedures.* (1) An entity seeking to be exempt from registration as a derivatives clearing organization shall file an application for exemption with the Secretary of the Commission in the format and manner specified by the Commission. The Commission will review the application for exemption and may approve or deny the application or, if deemed appropriate, exempt the applicant from registration as a derivatives clearing organization subject to conditions in addition to those set forth in paragraph (b) of this section.

(2) *Application.* An applicant for exemption from registration as a derivatives clearing organization shall submit to the Commission the information and documentation described in this section. Such information and documentation shall be clearly labeled as outlined in this section. The Commission will not commence processing an application unless the applicant has filed a complete application. Upon its own initiative, an applicant may file with its completed application for exemption additional information that may be necessary or helpful to the Commission in processing the application. The application shall include:

(i) A cover letter containing the following information:

(A) Exact name of applicant as specified in its charter, and the name under which business will be conducted (including acronyms);

(B) Address of applicant's principal office;

(C) List of principal office(s) and address(es) where clearing activities are/will be conducted;

(D) A list of all regulatory licenses or registrations of the applicant (or exemptions from any licensing requirement) and the regulator granting such license or registration;

(E) Date of the applicant's fiscal year end;

(F) Contact information for the person or persons to whom the Commission should address questions and correspondence regarding the application; and

(G) A signature and date by a duly authorized representative of the applicant.

(ii) A description of the applicant's business plan for providing clearing services as an exempt derivatives clearing organization, including information as to the classes of swaps that will be cleared and whether the swaps are subject to a clearing requirement issued by the Commission or the applicant's home country regulator;

(iii) Documents that demonstrate that the applicant is organized in a jurisdiction in which its home country regulator applies to the applicant, on an ongoing basis, statutes, rules, regulations, policies, or a combination thereof that, taken together, are consistent with the Principles for Financial Market Infrastructures;

(iv) A written representation from the applicant's home country regulator that the applicant is in good regulatory standing;

(v) Copies of the applicant's most recent disclosures that are necessary to observe the Principles for Financial Market Infrastructures, including the financial market infrastructure disclosure template set forth in Annex A to the Disclosure Framework and Assessment Methodology for the Principles for Financial Market Infrastructures, any other such disclosure framework issued under the authority of the International Organization of Securities Commissions that is required for observance of the Principles for Financial Market Infrastructures, and the URL to the specific page(s) on the applicant's website where such disclosures may be found;

(vi) A representation that the applicant will comply with each of the requirements and conditions of exemption set forth in paragraphs (b), (c), and (d) of this section, and the terms and conditions of its order of exemption as issued by the Commission;

(vii) A copy of the applicant's rules that meet the requirements of paragraphs (b)(2) and (d) of this section, as applicable; and

(viii) The applicant's consent to jurisdiction in the United States, and the name and address of the applicant's designated agent in the United States, pursuant to paragraph (b)(3) of this section.

(3) *Submission of supplemental information.* At any time during its review of the application for exemption from registration as a derivatives clearing organization, the Commission may request that the applicant submit supplemental information in order for the Commission to process the application, and the applicant shall file such supplemental information in the

format and manner specified by the Commission.

(4) *Amendments to pending application.* An applicant for exemption from registration as a derivatives clearing organization shall promptly amend its application if it discovers a material omission or error, or if there is a material change in the information provided to the Commission in the application or other information provided in connection with the application.

(5) *Public information.* The following sections of an application for exemption from registration as a derivatives clearing organization will be public: The cover letter set forth in paragraph (e)(2)(i) of this section; the documentation required in paragraphs (e)(2)(iii) and (e)(2)(v) of this section; rules that meet the requirements of paragraphs (b)(2) and (d) of this section, as applicable; and any other part of the application not covered by a request for confidential treatment, subject to § 145.9 of this chapter.

(f) *Modification or termination of exemption upon Commission initiative.* (1) The Commission may, in its discretion and upon its own initiative, terminate or modify the terms and conditions of an order of exemption from derivatives clearing organization registration if the Commission determines that there are changes to or omissions in material facts or circumstances pursuant to which the order of exemption was issued, or that any of the terms and conditions of its order of exemption have not been met, including, but not limited to, the requirement that:

(i) The exempt derivatives clearing organization observes the Principles for Financial Market Infrastructures in all material respects; or

(ii) The exempt derivatives clearing organization is subject to comparable, comprehensive supervision and regulation by its home country regulator.

(2) The Commission shall provide written notification to an exempt derivatives clearing organization that it is considering whether to terminate or modify an exemption pursuant to this paragraph and the basis for that consideration.

(3) The exempt derivatives clearing organization may respond to the notification in writing no later than 30 business days following receipt of the notification, or at such later time as the Commission permits in writing.

(4) Following receipt of a response from the exempt derivatives clearing organization, or after expiration of the time permitted for a response, the Commission may:

(i) Issue an order of termination, effective as of a date to be specified therein. Such specified date shall be intended to provide the exempt derivatives clearing organization with a reasonable amount of time to wind down its swap clearing services for U.S. persons;

(ii) Issue an amended order of exemption that modifies the terms and conditions of the exemption; or

(iii) Provide written notification to the exempt derivatives clearing organization that the exemption will remain in effect without modification to the terms and conditions of the exemption.

(g) *Termination of exemption upon request by an exempt derivatives clearing organization.* (1) An exempt derivatives clearing organization may petition the Commission to terminate its exemption if:

(i) Changed circumstances result in the exempt derivatives clearing organization no longer qualifying for an exemption;

(ii) The exempt derivatives clearing organization intends to cease clearing swaps for U.S. persons; or

(iii) In conjunction with the petition, the exempt derivatives clearing organization submits an application for registration in accordance with § 39.3(a)(2) or § 39.3(a)(3), as applicable, to become a registered derivatives clearing organization pursuant to section 5b(a) of the Act.

(2) The petition for termination of exemption shall include a detailed explanation of the facts and circumstances supporting the request and the exempt derivatives clearing organization's plans for, as may be applicable, the liquidation or transfer of the swaps positions and related collateral of U.S. persons.

(3) The Commission shall issue an order of termination within a reasonable time appropriate to the circumstances or, as applicable, in conjunction with the issuance of an order of registration.

(h) *Notice to clearing members of termination of exemption.* Following the Commission's issuance of an order of termination (unless issued in conjunction with the issuance of an order of registration), the exempt derivatives clearing organization shall provide immediate notice of such termination to its clearing members. Such notice shall include:

(1) A copy of the Commission's order of termination;

(2) A description of the procedures for orderly disposition of any open swaps positions that were cleared for U.S. persons; and

(3) An instruction to clearing members, requiring that they provide the exempt derivatives clearing organization's notice of such termination to all U.S. persons clearing swaps through such clearing members.

■ 5. Revise § 39.9 to read as follows:

§ 39.9 Scope.

Except as otherwise provided by Commission order, the provisions of this subpart B apply to any derivatives clearing organization, as defined under section 1a(15) of the Act and § 1.3 of this chapter, that is registered with the Commission as a derivatives clearing organization pursuant to section 5b of the Act. The provisions of this subpart B do not apply to any exempt derivatives clearing organization, as defined under § 39.2.

PART 140—ORGANIZATION, FUNCTIONS, AND PROCEDURES OF THE COMMISSION

■ 6. The authority citation for part 140 continues to read as follows:

Authority: 7 U.S.C. 2(a)(12), 12a, 13(c), 13(d), 13(e), and 16(b).

■ 7. Amend § 140.94 by:

■ a. Redesignating paragraphs (c)(4) through (13) as paragraphs (c)(5) through (14); and

■ b. Adding new paragraph (c)(4).

The addition reads as follows:

§ 140.94 Delegation of authority to the Director of the Division of Swap Dealer and Intermediary Oversight and the Director of the Division of Clearing and Risk.

* * * * *

(c) * * *

(4) All functions reserved to the Commission in § 39.6 of this chapter, except for the authority to:

(i) Grant an exemption under § 39.6(a) of this chapter;

(ii) Prescribe conditions to an exemption under § 39.6(b) of this chapter;

(iii) Modify or terminate an exemption under § 39.6(f)(4) of this chapter; and

(iv) Terminate an exemption under § 39.6(g)(3) of this chapter.

* * * * *

Issued in Washington, DC, on November 25, 2020, by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendices to Exemption From Derivatives Clearing Organization Registration—Commission Voting Summary, Chairman's Statement, and Commissioners' Statements

Appendix 1—Commission Voting Summary

On this matter, Chairman Tarbert and Commissioners Quintenz, Behnam, Stump, and Berkovitz voted in the affirmative. No Commissioner voted in the negative.

Appendix 2—Statement of Support of Chairman Heath P. Tarbert

We are voting to approve a rule proposed in 2018 that codifies existing staff guidance by which the CFTC exempts derivatives clearing organizations (DCOs) from registration for the clearing of swaps.[1] Pursuant to that guidance, we have exempted four clearinghouses that we determined are subject to ''comparable, comprehensive supervision and regulation'' by the clearing organization's home country regulator.[2] Codifying this framework through a notice-and-comment rulemaking is, frankly, good government. And doing so is in keeping with my recent directive on the use of staff letters and guidance, in which I noted that staff guidance and letters should supplement rulemakings, rather than themselves function as rules.[3] This approach has many benefits, including providing increased transparency. It also furthers our strategic objective of enhancing the regulatory experience for market participants at home and abroad.

This rulemaking is a modest first step. As is the case in the existing staff guidance, the rule does not permit exempt DCOs to clear for U.S. customers, but rather only for proprietary swap transactions for U.S. clearing members and futures commission merchants (FCMs). It reflects the CFTC's continued efforts to foster cross-border cooperation and show deference to home country regulation that is deemed comparable to our own regulations.

In 2019, the Commission issued a supplemental proposal that would have gone further and permitted exempt DCOs to clear swaps for U.S. eligible contract participants (ECPs) through foreign intermediaries.[4] I would have supported finalizing that proposal for two reasons. First, the proposal would have provided greater flexibility and choice to our most sophisticated U.S. customers—ECPs—to access swaps cleared at non-U.S. clearinghouses. This would have given these sophisticated counterparties access to foreign-currency denominated instruments traded overseas that would enable them to hedge their various risks on a global basis. Second, exempting clearinghouses that do not pose a substantial risk to the U.S. financial system is consistent with principles of international comity.

Because we have not worked through all the issues raised by the 2019 supplemental proposal to the satisfaction of our Commission, today we are adopting only the 2018 proposal. Nonetheless, I support continued discussion on whether to permit Exempt DCOs additionally to clear certain non-U.S.-dollar denominated swaps for U.S. customers who are ECPs, either directly through foreign intermediaries or through U.S. FCMs. Although registration as a DCO—under either our traditional or recently-established alternative framework [5]—should be the preferred route for most non-U.S. clearinghouses, there are likely circumstances where U.S. customers would benefit from access to additional risk-mitigating instruments offered overseas.

Appendix 3—Supporting Statement of Commissioner Brian D. Quintenz

I support today's final rule to codify the CFTC's existing practice of exempting non-U.S. derivatives clearing organizations (DCOs) from registration, pursuant to a provision of the Commodity Exchange Act that allows for U.S. swap market participants to access comparably regulated foreign DCOs.[1] That provision authorizes the Commission to defer to its counterparts abroad, which I believe properly conserves the Commission's resources and enables firms to avoid duplicative regulation, while providing U.S. market participants with greater choice. I am proud that today's final rule provides yet another example of the CFTC deferring to foreign regulators that provide comparable regulation and supervision. During my tenure as a Commissioner, the CFTC has properly provided such deference in many areas, including swap dealer (SD) registration,[2] uncleared swap margin requirements,[3] swap execution facilities (SEFs),[4] registered DCOs,[5] and foreign futures.[6] Like these other actions, today's final rule holds exempt DCO to a high regulatory standard. Under the final rule, a DCO is only eligible for an exemption if its home country regulator ensures the clearinghouse complies with rules consistent with the internationally accepted ''Principles for Financial Market Infrastructures'' (PFMIs) issued by CPMI–IOSCO.[7] Moreover, the exempt DCO must regularly provide the CFTC with margin information concerning U.S. clearing members, among other key information.[8]

I note that under the final rule, an exempt DCO will only be authorized to clear the proprietary positions of its U.S. clearing members. I had supported and still support the Commission's 2019 proposal that would have expanded the exempt DCO framework to allow for U.S. customers, like asset managers and insurance companies, to clear at exempt DCOs directly to better manage and hedge their risk.[9] I continue to believe that all participants meeting the Commodity Exchange Act's definition of ''eligible contract participant'' [10] have the resources, sophistication, and incentives to adequately assess how customer protections provided by an exempt DCO may differ from protections established by CFTC regulations for registered DCOs. The CFTC should provide these market participants with the choice befitting their status, not only as sophisticated market participants, but as complex international organizations who

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[1] *See* Exemption From Derivatives Clearing Organization Registration, 83 FR 39923 (Aug. 13, 2018). The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376, amended the Commodity Exchange Act (''CEA'') to permit the Commission to exempt conditionally or unconditionally a DCO from registration for the clearing of swaps if the Commission determines that the clearing organization is subject to ''comparable, comprehensive supervision and regulation'' by appropriate government authorities in the clearing organization's home country. *See* Section 5b(a) of the CEA, 7 U.S.C. 7a–1(a).

[2] *See* Amended Order of Exemption from Registration (Jan. 28, 2016) (ASX Clear (Futures) Pty Limited), available at: *https://www.cftc.gov/sites/default/files/idc/groups/public/@otherif/documents/ifdocs/asxclearamdorderdcoexemption.pdf;* Amended Order of Exemption from DCO Registration (May 15, 2017) (Japan Securities Clearing Corporation), available at: *https://www.cftc.gov/sites/default/files/idc/groups/public/@otherif/documents/ifdocs/jsccdcoexemptamdorder5-15-17.pdf;* Order of Exemption from DCO Registration (Oct. 26, 2015) (Korea Exchange, Inc.), available at: *https://www.cftc.gov/sites/default/files/idc/groups/public/@otherif/documents/ifdocs/krxdcoexemptorder10-26-15.pdf;* and Order of Exemption from DCO Registration (Dec. 21, 2015) (OTC Clearing Hong Kong Limited), available at: *https://www.cftc.gov/sites/default/files/idc/groups/public/@otherif/documents/ifdocs/otccleardcoexemptorder12-21-15.pdf.*

[3] *See* Directive of Chairman Heath P. Tarbert on the Use of Staff Letters and Guidance (Oct. 27, 2020), available at: *https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbetstatement102720.*

[4] *See* Exemption From Derivatives Clearing Organization Registration, 84 FR 35456 (July 23, 2019).

[5] *See* Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 85 FR 67160 (Oct. 21, 2020).

[1] Sec. 5b(h) of the Commodity Exchange Act.

[2] Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to SDs and Major Swap Participants (MSPs), 85 FR 56924 (Sept. 14, 2020).

[3] Comparability Determination for Australia: Margin Requirements for Uncleared Swaps for SDs and MSPs, 84 FR 12908 (Apr. 3, 2019); Amendment to Comparability Determination for Japan: Margin Requirements for Uncleared Swaps for SDs and MSPs, 84 FR 12074 (Apr. 1, 2019).

[4] Amendment to Order of Exemption from SEF registration for Recognized Market Operators authorized in Singapore, Nov. 2, 2020, available at: *https://www.cftc.gov/PressRoom/PressReleases/8301-20;* Amendment to Order of Exemption from SEF registration for E.U. multilateral trading facilities and organized trading facilities, July 23, 2020, available at: *https://www.cftc.gov/PressRoom/PressReleases/8211-20;* Order of Exemption from SEF registration for Japanese derivatives trading facilities, July 11, 2019, available at: *https://www.cftc.gov/PressRoom/PressReleases/7968-19.*

[5] Registration with Alternative Compliance for Non-U.S. DCOs, 85 FR 67160 (Oct. 21, 2020).

[6] Regulation 30.10 orders issued to the Bombay Stock Exchange, National Stock Exchange Int'l Financial Service Centre Ltd. [India], Montreal Exchange, NZX Ltd. [New Zealand], and UBS AG [Switzerland], Nov. 2, 2020, available at: *https://www.cftc.gov/PressRoom/PressReleases/8300-20.*

[7] Reg. 39.6(a)(1)(i).

[8] Reg. 39.6(c).

[9] Exemption from DCO Registration, 84 FR 35456 (July 23, 2019); Opening Statement of Commissioner Brian Quintenz before the Open Commission Meeting on July 11, 2019, available at: *https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement071119.*

[10] Sec. 1a(18) of the Commodity Exchange Act.

need access to foreign markets, products, and a choice of liquidity pools. I hope the Commission will continue to consider the best way to expand the exempt DCO framework to allow for U.S. customer clearing.

Appendix 4—Concurring Statement of Commissioner Rostin Behnam

I respectfully concur with the Commodity Futures Trading Commission's final rule regarding policies and procedures that it will follow with respect to granting exemptions from derivatives clearing organization (DCO) registration pursuant to authority under section 5b(h) of the Commodity Exchange Act (CEA) [1] (the ''Final Rule''). The Final Rule, with limited exceptions, codifies the policies and procedures followed by the Commission in issuing the four exempt DCO orders which currently limit clearing organizations organized outside of the United States to clearing only proprietary swap positions of U.S. persons and futures commission merchants, and not customer positions (''exempt DCOs''). Critical to my vote today, the Final Rule prohibits the clearing of U.S. customer positions at an exempt DCO.[2]

I supported the Commission's 2018 notice of proposed rulemaking [3] as a means to promote transparency and accountability as well as a positive step towards increased cross-border cooperation and deference to our foreign regulatory counterparts. However, I was unable to support the Commission's 2019 supplement to the 2018 Proposal,[4] which proposed permitting exempt DCOs to clear swaps for U.S. customers through foreign intermediaries that would be wholly outside the Commission's direct regulation and oversight. As articulated more fully in my dissent,[5] the 2019 Supplemental Proposal was not the product of internal consensus and its brief history and questionable timeline signaled a lack of appropriate scrutiny and evaluation of the critical financial, market, consumer protection, and systemic risk issues raised by diverging from the customer protection model provided by the CEA and U.S. Bankruptcy Code. It was and remains my view that if the Commission believes it is appropriate to provide U.S. customers with greater access to non-U.S. swap markets, then we can and should engage in a more careful analysis of options, assessment of alternatives, and evaluation of consequences consistent with the Administrative Procedure Act.[6] As the Commission is declining to adopt the 2019 Supplemental Proposal at this time, I am comfortable with supporting the Final Rule.

One area in which I will remain vigilant is with regard to the Commission's reliance on the Principles for Financial Market Infrastructures (PFMI) framework as the benchmark for making the comparability determination with respect to a foreign jurisdiction's supervisory and regulatory scheme required by CEA section 5b(h). I believe that the Commission's reliance on the PFMIs as providing a comprehensive framework for DCO supervision that is comparable to the statutory and regulatory requirements applicable to registered DCOs, with a particular focus on the DCO Core Principles,[7] is within its discretion under CEA section 5b(h). However, I am concerned that the Commission's decision to limit its reference to the PFMIs as they existed in 2012 may lead to untenable divergence in the future should the Commission determine to incorporate subsequent amendments or revisions to the PFMIs or related interpretations and guidance into its own regulatory and supervisory DCO oversight. Alternatively, I am concerned that maintaining a static definition of the PFMIs to provide exempt DCOs with greater regulatory certainty with regard to their ongoing eligibility for the exemption could negatively impact the Commission's consideration regarding whether to adopt or incorporate future changes to the PFMIs or related interpretations and guidance into its regulatory regime. However, I am reassured that the Commission explicitly reserves the ability to incorporate future amendments to the PFMIs into the Final Rule's PFMI definition in § 39.2. As well, because the Commission also maintains broad discretion to condition an exemption on any facts and circumstances it deems relevant under new § 39.6(b)(8), I believe the Commission has clear discretion and authority to make appropriate changes with regard to its consideration of exempt DCO eligibility criteria and ongoing compliance to maintain comprehensive application of and adherence to comparable regulatory and supervisory standards.

My decision to support the Final Rule is largely based on the Commission's determination to move forward with the 2018 Proposal without adopting the 2019 Supplemental Proposal. However, I remain supportive of the Commission's endeavor to explore ways to adapt and—if appropriate—seek to adjust the current intermediary structure established under the CEA and Commission regulations to better accommodate both U.S. customer demand for increased access to clearing in foreign jurisdictions and evolving global swaps market structures. I remain open and look forward to the possibility of further discussing the regulatory and policy issues raised during this rulemaking.

Appendix 5—Statement of Commissioner Dan M. Berkovitz

I am voting for the final rule establishing procedures for granting registration exemptions to foreign derivatives clearing organizations (''Exempt DCOs'') to clear swaps for certain U.S. persons (''Final Rule''). The Final Rule exercises the exemptive authority provided by Congress in the Commodity Exchange Act (''CEA'') [1] in a limited, pragmatic manner that will provide U.S. financial services firms that operate globally with access to foreign clearinghouses and cleared swaps in order to more effectively manage the risks arising from their global operations.

In July of last year, I dissented from the proposed exempt DCO rule, because it also would have permitted Exempt DCOs to clear for U.S. customers, but *only* through foreign intermediaries. In doing so, the proposed rule would have subjected U.S. customer accounts to foreign bankruptcy and other regulations, promoted the use of foreign intermediaries at the expense of U.S. firms, and exceeded this agency's limited exemptive authority.[2] Enabling U.S. customers to clear swaps and amass large positions in non-U.S. markets in this manner would not only pose risks to those customers, but also could have presented systemic risks to the U.S. financial system.

In response to commenters who expressed similar objections, the Final Rule does not contain the concerning provisions. Neither registered FCMs nor their foreign intermediary counterparts can clear for U.S. person *customers.* With respect to clearing for U.S. persons, the Final Rule restricts clearing by an Exempt DCO to only U.S. firms that become clearing members of the Exempt DCO along with certain of their affiliates and persons associated with those firms in the manner identified in the definition of ''proprietary account'' in section 1.3 of our regulations. In addition, registered FCMs, including U.S. firms, can also clear at exempt DCOs, but only for themselves and persons associated with the FCMs in the manner provided in the definition of ''proprietary account.'' These sophisticated market participants are well equipped to assess the risks of clearing swaps under the foreign regime. Furthermore, by requiring that they be members of the Exempt DCO (or clear through an affiliate that is a member), the Commission assures that such entities have taken affirmative actions to assess and accept those risks. The margin funds and related obligations of these persons must also be segregated from customer funds held by registered FCMs thereby minimizing any impact on U.S. customers of the cleared positions at Exempt DCOs. These limitations are a reasonable, practical approach to implementing the authority provided to the Commission to exempt certain foreign DCOs without adding uncertain risk into our system of fully registered DCOs and FCMs.

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[1] 7 U.S.C. 7a–1(a).

[2] *See* Final Rule at II.B.2.a. and § 39.6(b)(1).

[3] Exemption from Derivatives Clearing Organization Registration, 83 FR 39923 (proposed Aug. 13, 2018) (the ''2018 Proposal'').

[4] Exemption from Derivatives Clearing Organization Registration, 84 FR 35456 (proposed July 23, 2019) (the ''2019 Supplemental Proposal'').

[5] *See* Appendix 4—Dissenting Statement of Commissioner Rostin Behnam, Supplemental Proposal, 84 FR at 35476–35478.

[6] *Id.* at 35476.

[7] *See* CEA section 5b(c)(2), 7 U.S.C. 7a–1(c)(2).

[1] Commodity Exchange Act section 5b(h).

[2] *See* Dissenting Statement of Commissioner Berkovitz, 84 FR 35456 at 35479 (July 23, 2019). As discussed in my prior statement, in addition to my substantive concerns, the proposed rule would have relied on CEA Section 4(c) exemptive authority to exempt non-U.S. intermediaries that provide customer clearing at Exempt DCOs from the FCM registration requirement and the regulations applicable to registered FCMs. This reliance would have exceeded the clearly limited authority granted under Section 4(c). With the elimination of customer clearing in the Final Rule, the Commission no longer needs to resort to an overly expansive reading of Section 4(c) authority to adopt the Final Rule.

Furthermore, the Commission has, on an ad hoc basis, previously granted registration exemptions to four foreign clearinghouses limited to proprietary swap positions with effectively the same conditions and limitations as provided in the Final Rule. The Final Rule will therefore maintain consistency with the existing exemptions.

The Final Rule also contains fairly detailed daily, quarterly, and annual reporting requirements, as well as special event notice requirements. These requirements allow the Commission to monitor U.S. person clearing activity at the Exempt DCO on a daily basis and keep the Commission informed of any material changes to the regulatory and financial status of the Exempt DCO in its home jurisdiction. While the Exempt DCOs will be able to operate under the compliance regime and oversight of its home country regulator, the CFTC can maintain limited, but up-to-date oversight of the activities that are relevant for U.S. market participants and that could have an impact on our financial system.

As noted above, the Final Rule does not permit registered FCMs to clear U.S. customer swaps at Exempt DCOs. In the Commission's initial 2018 proposal to establish a framework for Exempt DCOs, the Commission proposed this prohibition. The Commission explained:

Section 4d(f)(1) of the CEA makes it unlawful for any person to accept money, securities, or property (*i.e.,* funds) from a swaps customer to margin a swap cleared through a DCO unless the person is registered as an FCM. Any swaps customer funds held by a DCO are also subject to the segregation requirements of section 4d(f)(2) of the CEA, and in order for a customer to receive protection under this regime, particularly in an insolvency context, its funds must be carried by an FCM, and deposited with a registered DCO. Absent that chain of registration, the swaps customer's funds may not be treated as customer property under the U.S. Bankruptcy Code and the Commission's regulations. Because of this, it has been the Commission's policy to allow exempt DCOs to clear only proprietary positions of U.S. persons and FCMs.[3]

The Final Rule notes that the Commission may revisit the prohibition on U.S. customer clearing in the future. While I agree with the outcome in the Final Rule as to customer clearing given the Commission's interpretation of CEA Section 4d(f), if the above interpretation changes, whether by a change to the statute or by other appropriate means, I could support a further amendment of the Final Rule. Any such change should place U.S. FCMs on an equal footing with their foreign counterparts when competing for U.S. customer clearing at Exempt DCOs. In addition, such a change should not create an advantage for unregistered Exempt DCOs over registered DCOs who comply with all of our regulations.

Finally, I note that CEA Section 5b(h) provides for the registration exemption if the foreign DCO is subject to ''comparable, comprehensive supervision and home country regulation.'' Under the Final Rule, to demonstrate comparability, the DCO must be subject to home country regulations that are consistent with, and the DCO must ''observe in all material respects,'' the ''Principles for Financial Market Infrastructures'' [4] (''PFMIs'') applicable to central counterparties.

Several commenters objected to this approach to comparability determinations on a number of grounds. These commenters stated that the Commission should not substitute a commitment to adhere to the PFMIs for its own examination and assessment as to the comparability and comprehensiveness of the actual foreign regulations. As the PFMIs are only general principles, even when the PFMIs are implemented, material differences may exist between the PFMI-compliant regime and the Commission's DCO core principles and regulations. Commenters further argued that Congress intended for the Commission to analyze comparability only by direct comparison to the CTFC's laws and regulations.

Over the past two years, I have expressed concerns over the erosion of the Commission's standards and role in finding comparability for various CFTC regulations. The Commission's approach has been increasingly deferential to other regulators, which has the potential to permit the importation of increased risks into the U.S. financial system.

In this regard, I too have some concerns about the use of the PFMIs as a standard for comparability. However, for the purpose of granting DCO registration exemptions, I believe the approach taken in the Final Rule is reasonable. I have consistently said that comparability determinations should involve a detailed examination of the other jurisdiction's standards, but also should be outcomes based. Regulators around the world take substantively different approaches to regulating DCOs, but that does not mean any one approach is *necessarily* better or worse than another as to its expected outcome. The PFMIs tend to be more general in nature than the DCO core principles and regulations in the CEA and CFTC regulations. However, regarding the general outcome of DCO regulation, the PFMIs—which the CFTC has contributed to and incorporated in regulation [5]—are consistent with our DCO core principles. Furthermore, given the limited scope of the Final Rule in that it applies only to clearing of proprietary positions, using the PFMIs to find comparability is not unwarranted. Finally, the Final Rule allows for the Commission to assess the extent to which the home country regulations are consistent with the PFMIs and the extent to which the applying DCO is observing the PFMIs. As such, I believe the approach taken in the Final Rule is reasonable.

In conclusion, the Final Rule creates a limited, practical set of policies and procedures for granting exemptions from registration for foreign DCOs. The Exempt DCOs can only clear swaps for U.S. persons who are proprietary traders and who are able to assess the specific risks of clearing at the Exempt DCO. The U.S. customer accounts at registered FCMs will not be commingled with accounts used for Exempt DCO clearing. Finally, U.S. FCMs are not put at a competitive disadvantage to their foreign counterparts. For these reasons, I support the changes made to the proposed rule that result in an appropriate, codified approach to exempting foreign DCOs who meet appropriate standards.

[FR Doc. 2020–26527 Filed 1–6–21; 8:45 am]

BILLING CODE 6351–01–P

[3] Exemption from Derivatives Clearing Organization Registration, 83 FR 39923, 39926 (proposed Aug. 13, 2018).

[4] *See* Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions, Principles for financial market infrastructures (Apr. 2012), available at *http://www.iosco.org/library/pubdocs/pdf/IOSCOPD377-PFMI.pdf.*

[5] *See* 17 CFR 39.30, 39.40.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2020–0358 and EPA–R09–OAR–2019–0423; FRL–10017–89–Region 9]

Air Plan Partial Approval, Partial Disapproval, and Partial Conditional Approval; Arizona; Maricopa County Air Quality Department; Reasonably Available Control Technology State Implementation Plan and Surface Coating Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing a partial approval, partial disapproval, and partial conditional approval of revisions to the Maricopa County Air Quality Department (MCAQD or County) portion of the Arizona State Implementation Plan (SIP). This action concerns the County's demonstration regarding reasonably available control technology (RACT) requirements and negative declarations for the 2008 8-hour ozone National Ambient Air Quality Standards (NAAQS or ''standards'') in the portion of the Phoenix-Mesa ozone nonattainment area under the jurisdiction of the MCAQD. The EPA is also finalizing a conditional approval of a MCAQD rule that regulates emissions from surface coating operations and was submitted with the RACT SIP demonstration.

DATES: This rule is effective on February 8, 2021.

ADDRESSES: The EPA has established dockets for this action under Docket No. EPA–R09–OAR–2020–0358 and EPA–R09–OAR–2019–0423. All documents in

the dockets are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information. If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Nicole Law, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 947–4126 or by email at *Law.Nicole@epa.gov.*

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

Table of Contents

I. Proposed Action

On September 18, 2020 (85 FR 58310), the EPA proposed a partial approval and partial disapproval of the Arizona Department of Environmental Quality's (ADEQ) June 22, 2017 submittal of MCAQD's Analysis of Reasonably Available Control Technology for The 2008 8-Hour Ozone National Ambient Air Quality Standard (NAAQS) State Implementation Plan (RACT SIP) and the associated negative declarations. On January 28, 2020 (85 FR 4928), the EPA proposed to conditionally approve MCAQD Rule 336 Surface Coating Operations and associated portions of the RACT Demonstration.

Local agency	Document	Adopted	Submitted
MCAQD	Analysis of Reasonably Available Control Technology for the 2008 8-Hour Ozone National Ambient Air Quality Standard (NAAQS) State Implementation Plan (RACT SIP).	05/24/2017	06/22/2017
MCAQD	Appendix 1A: Negative Declarations	05/24/2017	06/22/2017
MCAQD	Rule 336: Surface Coating Operations	11/02/2016	06/22/2017

MCAQD's RACT SIP provides the County's demonstration that the applicable SIP for the MCAQD satisfies CAA section 182 RACT requirements for the 2008 8-hour ozone NAAQS. This conclusion is based on the County's analysis of SIP-approved requirements that apply to the following: (1) Source categories for which the EPA has issued a Control Techniques Guidelines (CTG) document, and (2) major non-CTG stationary sources of Volatile Organic Compounds (VOCs) or oxides of nitrogen (NO_X).

With respect to CTG source categories, MCAQD determined that it had sources subject to the CTGs covering solvent metal cleaning, industrial cleaning solvents, miscellaneous metal and plastic parts coating, can coating, fabric coating, film and foil coating, rotogravure and flexography, lithographic printing and letter press printing, wood furniture manufacturing operations, storage of petroleum liquids, tank truck gasoline loading terminals, bulk gasoline plants, gasoline tank trucks and vapor collection systems, and gasoline service stations. MCAQD submitted for SIP approval six rules to implement RACT for these CTG categories: Rules 336, 342, 350, 351, 352, and 353.

On February 26, 2020 (85 FR 10986), the EPA conditionally approved Rules 350, 351, 352, and 353 into the SIP, and also conditionally approved the associated CTG source categories for the MCAQD 2016 RACT SIP: ''Control of Volatile Organic Emissions from Storage of Petroleum Liquids in Fixed-Roof Tanks'' (EPA–450/2–77–036), ''Control of Volatile Organic Emissions from Petroleum Liquid Storage in External Floating Roof Tanks'' (EPA–450/2–78–047), ''Control of Hydrocarbons from Tank Truck Gasoline Loading Terminals'' (EPA–450/2–77–026), ''Control of Volatile Organic Emissions from Bulk Gasoline Plants'' (EPA–450/2–77–035), ''Control of Volatile Organic Compound Leaks from Gasoline Tank Trucks and Vapor Collection Systems'' (EPA–450/2–78–051), and ''Design Criteria for Stage I Vapor Control Systems—Gasoline Service Stations'' (EPA–450/R–75–102). MCAQD has committed to correct the EPA's identified deficiencies, and ADEQ has committed to submit the updated rules within one year of the EPA's final conditional approval. If MCAQD corrects the identified deficiencies and the EPA approves the updated rules, MCAQD will have met its RACT obligation for these rules, and the associated CTGs. We are not acting on rules 350, 351, 352, and 353, or the associated CTG categories in the MCAQD's 2016 RACT SIP in this action.

On August 27, 2019 (84 FR 44701), the EPA approved Rule 342 into the SIP, finding that the rule met current RACT. This rulemaking also approved Rule 337, which had been submitted earlier and was not part of the 2016 RACT SIP submittal. Although we approved Rules 337 and 342, and found that they established RACT level controls, we did not in that action approve the 2016 RACT SIP for the associated CTG source categories. On September 18, 2020 (85 FR 58310), the EPA proposed to find that Rules 331, 337, and 342 establish RACT-level controls for the sources within the following CTG source categories: ''Control of Volatile Organic Emissions from Solvent Metal Cleaning'' (EPA–450/2–77–022), ''Control Techniques Guidelines: Industrial Cleaning Solvents'' (EPA–453/R–06–001), ''Control of Volatile Organic Emissions from Existing Stationary Sources—Volume VIII: Graphic Arts—Rotogravure and Flexography'' (EPA–430/2–78–033) and ''Offset Lithographic Printing and Letterpress Printing'' (EPA–453/R06–002), and ''Control of Volatile Organic Compound Emissions from Wood Furniture Manufacturing Operations'' (EPA–453/R–96–007).

On January 28, 2020 (85 FR 4928), the EPA proposed conditional approval of Rule 336 into the SIP, as well as conditional approval of the associated eight CTG source categories for the County's 2016 RACT SIP: ''Control of Volatile Organic Emissions from Existing Stationary Sources—Volume II: Surface Coating of Cans, Coils, Paper, Fabrics, Automobiles, and Light-Duty Trucks'' (EPA–450/2–77–008), ''Control of Volatile Organic Emissions from Existing Stationary Sources—Volume III: Surface Coating of Metal Furniture'' (EPA–450/2–77–032), ''Control of Volatile Organic Emissions from Existing Stationary Sources—Volume V: Surface Coating of Large Appliances'' (EPA–450/2–77–034), ''Control of Volatile Organic Emissions from Existing Stationary Sources—Volume VI: Surface Coating of Miscellaneous Metal Parts and Products'' (EPA–450/2–78–15), ''Control Techniques Guidelines for Metal Furniture Coatings'' (EPA–

453/R–07–005), ''Control Techniques Guidelines for Large Appliance Coatings'' (EPA–453/R07–004), ''Control Techniques Guidelines for Miscellaneous Metal and Plastic Parts Coatings'' (EPA–453/R–08–003), and ''Control Techniques Guidelines For Paper, Film, and Foil Coatings'' (EPA–453/R–07–003). MCAQD has committed to correct the EPA's identified deficiencies, and ADEQ has committed to submit the updated rule within one year of the EPA's final conditional approval. If MCAQD corrects the identified deficiencies and the EPA approves the updated rule, the County will have met its RACT obligation for this rule, and the associated CTGs.

On September 18, 2020 (85 FR 58310), we proposed to approve negative declarations, including negative declarations for some of the source categories covered by Rule 336. Specifically, of eight CTG source categories addressed by Rule 336 (as listed in the prior paragraph), our September proposal proposed to approve negative declarations for five of them: ''Control of Volatile Organic Emissions from Existing Stationary Sources—Volume III: Surface Coating of Metal Furniture'' (EPA–450/2–77–032), ''Control of Volatile Organic Emissions from Existing Stationary Sources—Volume V: Surface Coating of Large Appliances'' (EPA–450/2–77–034), ''Control Techniques Guidelines for Metal Furniture Coatings'' (EPA–453/R–07–005), ''Control Techniques Guidelines for Large Appliance Coatings'' (EPA–453/R07–004), and ''Control Techniques Guidelines For Paper, Film, and Foil Coatings'' (EPA–453/R–07–003). In addition, it proposed approval of negative declarations for the coils, paper, automobile and light-duty truck portions of the CTG ''Control of Volatile Organic Emissions from Existing Stationary Sources— Volume II: Surface Coating of Cans, Coils, Paper, Fabrics, Automobiles, and Light-Duty Trucks'' (EPA–450/2–77–008). In the same notice, the EPA also proposed to disapprove negative declarations for the Aerospace Coating and Industrial Adhesives source categories, because there are applicable sources in the Maricopa County portion of the Phoenix-Mesa ozone nonattainment area.

With respect to major non-CTG stationary sources of Volatile Organic Compounds (VOCs) or oxides of nitrogen (NO_X), MCAQD determined it had RACT rules covering these sources. On September 18, 2020 (85 FR 58310), the EPA proposed to approve the County's RACT determination that it has RACT rules covering major non-CTG sources of VOC and proposed to disapprove the RACT determination that it has RACT rules covering major sources of NO_X.

The proposed actions and associated technical support documents contain more information on the basis for this rulemaking and on our evaluation of the submittal.

II. EPA Action

The EPA's proposed actions provided 30-day public comment periods. During the comment periods for the two proposed actions, we received no comments. Therefore, as authorized in section 110(k)(4) of the Act, the EPA is conditionally approving into the Arizona SIP, Rule 336 and MCAQD's RACT Demonstration for the 2008 8-hr ozone NAAQS with respect to the following Control Techniques Guidelines (CTGs), as described in our proposal:

1. ''Control of Volatile Organic Emissions from Existing Stationary Sources—Volume II: Surface Coating of Cans, Coils, Paper, Fabrics, Automobiles, and Light-Duty Trucks'' EPA–450/2–77–008, May 1977, cans and fabrics portions only.[1]

2. ''Control of Volatile Organic Emissions from Existing Stationary Sources—Volume VI: Surface Coating of Miscellaneous Metal Parts and Products,'' EPA–450/2–78–15, June 1978.

3. ''Control Techniques Guidelines for Miscellaneous Metal and Plastic Parts Coatings,'' EPA–453/R–08–003, September 2008.[2]

If the MCAQD and the ADEQ submit the required rule revisions to Rule 336 by the specified deadline, and the EPA approves the submission, then the identified deficiencies will be cured. However, if MCAQD, through the ADEQ, fails to submit these revisions to Rule 336 within the required timeframe, the conditional approval will be treated as a disapproval for Rule 336 and the RACT demonstration for the three CTG categories listed above.

Also, as authorized in sections 110(k)(3) and 301(a) of the Act, the EPA is finalizing a partial approval and partial disapproval of the remainder of the RACT SIP and associated negative declarations, as proposed.

We are finalizing a partial disapproval with respect to the portions of the RACT SIP addressing RACT for major sources of NO_X, and CTG source categories for Aerospace Coating and Industrial Adhesives (''National Emission Standards for Hazardous Air Pollutants for Source Categories: Aerospace Manufacturing and Rework'' (59 FR 29216), ''Control of Volatile Organic Compound Emissions from Coating Operations at Aerospace Manufacturing and Rework Operations'' (EPA–453/R–97–004), and ''Control Techniques Guidelines for Miscellaneous Industrial Adhesives'' (EPA–453/R–08–005)). As a result of the final partial disapproval, offset sanctions will be imposed unless the EPA approves a subsequent SIP revision that corrects the identified deficiencies within 18 months of the effective date of this action. Highway sanctions will be imposed unless the EPA approves a subsequent SIP revision that corrects the rule deficiencies within 24 months of the effective date of this action. These sanctions will be imposed under section 179 of the CAA and 40 CFR 52.31. Additionally, section 110(c) requires the EPA to promulgate a federal implementation plan within 24 months unless we approve subsequent SIP revisions that correct the deficiencies.

The EPA is finalizing a partial approval of the RACT SIP with respect to all remaining source categories, as proposed. This includes approval of the County's negative declarations, with the exception of the three disapproved negative declarations, and the County's RACT certifications for the following CTG source categories: ''Control of Volatile Organic Emissions from Solvent Metal Cleaning'' (EPA–450/2–77–022), ''Control Techniques Guidelines: Industrial Cleaning Solvents'' (EPA–453/R–06–001), ''Control of Volatile Organic Emissions from Existing Stationary Sources—Volume VIII: Graphic Arts—Rotogravure and Flexography'' (EPA–430/2–78–033) and ''Offset Lithographic Printing and Letterpress Printing'' (EPA–453/R06–002), and ''Control of Volatile Organic Compound Emissions from Wood Furniture Manufacturing Operations'' (EPA–453/R–96–007).

III. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR

[1] Note that in this action the EPA is finalizing approval of negative declarations for the other categories covered by this CTG: Surface coating of coils, paper, automobiles, and light-duty trucks.

[2] Our January 28, 2020 proposal also noted that the deficiencies in Rule 336 were not consistent with the 2007 CTGs for Metal Furniture and Large Appliance Coatings (85 FR at 4930). However, our September 18, 2020 proposal proposed to approve negative declarations for these two source categories. This final action approves these negative declarations. Therefore, the RACT SIP is fully approved with respect to these CTG source categories, and they are not included within the scope of the conditional approval of the RACT demonstration for CTG source categories associated with Rule 336.

51.5, the EPA is finalizing the incorporation by reference of the MCAQD rule described in the amendments to 40 CFR part 52 set forth below. Therefore, these materials have been approved by the EPA for inclusion in the SIP, have been incorporated by reference by the EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of the EPA's conditional approval, and will be incorporated by reference in the next update to the SIP compilation.[3] The EPA has made, and will continue to make, these documents available through *www.regulations.gov* and at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

IV. Statutory and Executive Order Reviews

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

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

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

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

C. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA, because this SIP partial approval, partial disapproval, and partial conditional approval does not in-and-of itself create any new information collection burdens, but simply partially approves, partially disapproves, and partially conditionally approves certain State requirements for inclusion in the SIP.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This SIP partial approval partial disapproval, and partial conditional approval does not in-and-of itself create any new requirements but simply partially approves, partially disapproves, and partially conditionally approves certain pre-existing State requirements for inclusion in the SIP.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action partially approves, partially disapproves, and partially conditionally approves pre-existing requirements under State or local law and imposes no new requirements. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, result from this action.

F. Executive Order 13132: Federalism

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

G. Executive Order 13175: Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175, because the SIP revision that the EPA is partially approving, partially disapproving, and partially conditionally approving would not apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, and will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because this SIP partial approval, partial disapproval, and partial conditional approval does not in-and-of itself create any new regulations, but simply partially approves, partially disapproves, and partially conditionally approves certain pre-existing State requirements for inclusion in the SIP.

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

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

J. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the NTTAA directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. The EPA believes that this action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with the CAA.

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

The EPA lacks the discretionary authority to address environmental justice in this rulemaking.

L. Congressional Review Act (CRA)

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

M. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 8, 2021. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

[3] 62 FR 27968 (May 22, 1997).

Dated: December 11, 2020.

John Busterud,

Regional Administrator, Region IX.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart D—Arizona

■ 2. Amend § 52.119 by adding paragraph (c)(3) to read as follows:

§ 52.119 Identification of plan—conditional approvals.

* * * * *

(c) * * *

(3) The EPA is conditionally approving portions of the Arizona SIP revisions submitted on June 22, 2017. The conditional approval is based upon the February 25, 2019 commitment from the State to submit a SIP revision consisting of rule revisions that will cure the identified deficiencies within twelve (12) months after the EPA's conditional approval. If the State fails to meet its commitment, the conditional approval will be treated as a disapproval with respect to the rules and CTG categories for which the corrections are not met. The following MCAQD rules and additional materials are conditionally approved:

(i) Rule 336, *Surface Coating Operations*;

(ii) The RACT demonstration titled ''Analysis of Reasonably Available Control Technology for the 2008 8-Hour Ozone National Ambient Air Quality Standards (NAAQS) State Implementation Plan (RACT SIP),'' only those portions of the document claiming RACT was met for the following CTG source categories, ''Control of Volatile Organic Emissions from Existing Stationary Sources—Volume VI: Surface Coating of Miscellaneous Metal Parts and Products,'' EPA–450/2–78–15, June 1978, ''Control Techniques Guidelines for Miscellaneous Metal and Plastic Parts Coatings,'' EPA–453/R–08–003, September 2008, and ''Control of Volatile Organic Emissions from Existing Stationary Sources—Volume II: Surface Coating of Cans, Coils, Paper, Fabrics, Automobiles, and Light-Duty Trucks'' EPA–450/2–77–008, May 1977 (cans and fabrics categories, only).

■ 3. Amend § 52.120 as follows:

■ a. In paragraph (c), Table 4 under the table headings ''Post-July 1988 Rule Codification'' and ''Regulation III—Control of Air Contaminants,'' by revising the entry for ''Rule 336.''

■ b. In paragraph (e), Table 1, under the subheading ''Part D Elements and Plans for the Metropolitan Phoenix and Tucson Areas,'' by adding an entry for ''Analysis of Reasonably Available Control Technology for the 2008 8-Hour Ozone National Ambient Air Quality Standard (NAAQS) State Implementation Plan (RACT SIP)'' after the entry for ''Maricopa Association of Governments (MAG) 1987 Carbon Monoxide (CO) Plan for the Maricopa County Area, MAG CO Plan Commitments for Implementation, and Appendix A through E, Exhibit 4, Exhibit D.''

The revision and addition read as follows:

§ 52.120 Identification of plan.

* * * * *

(c) * * *

TABLE 4—EPA-APPROVED MARICOPA COUNTY AIR POLLUTION CONTROL REGULATIONS

County citation	Title/subject	State effective date	EPA approval date	Additional explanation
*	*	*	*	*
Post-July 1988 Rule Codification				
*	*	*	*	*
Regulation III—Control of Air Contaminants				
*	*	*	*	*
Rule 336	Surface Coating Operations	11/02/2016	01/07/2021, [INSERT **Federal Register** CITATION].	Submitted on June 22, 2017.
*	*	*	*	*

* * * * *

(e) * * *

TABLE 1—EPA-APPROVED NON-REGULATORY AND QUASI-REGULATORY MEASURES

[Excluding certain resolutions and statutes, which are listed in tables 2 and 3, respectively] [1]

Name of SIP provision	Applicable geographic or nonattainment area or title/subject	State submittal date	EPA approval date	Explanation
The State of Arizona Air Pollution Control Implementation Plan				

TABLE 1—EPA-APPROVED NON-REGULATORY AND QUASI-REGULATORY MEASURES—Continued
[Excluding certain resolutions and statutes, which are listed in tables 2 and 3, respectively] [1]

Name of SIP provision	Applicable geographic or nonattainment area or title/subject	State submittal date	EPA approval date	Explanation
*	*	*	*	*
Part D Elements and Plans for the Metropolitan Phoenix and Tucson Areas				
*	*	*	*	*
Analysis of Reasonably Available Control Technology for the 2008 8-Hour Ozone National Ambient Air Quality Standard (NAAQS) State Implementation Plan (RACT SIP).	Maricopa County portion of Phoenix-Mesa nonattainment area for 2008 8-hour ozone NAAQS.	June 22, 2017	January 7, 2021, [INSERT **Federal Register** CITATION].	Except for those portions approved on 2/26/2020 in 85 FR 10986, and those portions of the document claiming RACT was met for the following source categories: ''National Emission Standards for Hazardous Air Pollutants for Source Categories: Aerospace Manufacturing and Rework'' (59 FR 29216), ''Control of Volatile Organic Compound Emissions from Coating Operations at Aerospace Manufacturing and Rework Operations'' (EPA–453/R–97–004), ''Control Techniques Guidelines for Miscellaneous Industrial Adhesives'' (EPA–453/R–08–005), and major sources of NO_X.
*	*	*	*	*

[1] Table 1 is divided into three parts: Clean Air Act Section 110(a)(2) State Implementation Plan Elements (excluding Part D Elements and Plans), Part D Elements and Plans (other than for the Metropolitan Phoenix or Tucson Areas), and Part D Elements and Plans for the Metropolitan Phoenix and Tucson Areas.

* * * * *

■ 4. Amend § 52.122 by adding paragraph (a)(3) as follows:

§ 52.122 Negative declarations.

(a) * * *

(3) Maricopa County Air Quality Department.

(i) The following negative declarations for the 2008 ozone NAAQS were adopted on May 24, 2017 and submitted on June 22, 2017.

EPA document No.	Title
EPA–450/2–77–008	Surface Coating of Coils.
EPA–450/2–77–008	Surface Coating of Paper.
EPA–450/2–77–008	Surface Coating of Automobiles and Light-Duty Trucks.
EPA–450/2–77–025	Refinery Vacuum Producing Systems, Wastewater Separators, and Process Unit Turnarounds.
EPA–450/2–77–032	Surface Coating of Metal Furniture.
EPA–450/2–77–033	Surface Coating of Insulation of Magnet Wire.
EPA–450/2–77–034	Surface Coating of Large Appliances.
EPA–450/2–77–037	Cutback Asphalt.
EPA–450/2–78–029	Manufacture of Synthesized Pharmaceutical Products.
EPA–450/2–78–030	Manufacture of Pneumatic Rubber Tires.
EPA–450/2–78–032	Factory Surface Coating of Flat Wood Paneling.
EPA–450/2–78–036	Leaks from Petroleum Refinery Equipment.
EPA–450/3–82–009	Large Petroleum Dry Cleaners.
EPA–450/3–83–006	Leaks from Synthetic Organic Chemical Polymer and Resin Manufacturing Equipment.
EPA–450/3–83–007	Leaks from Natural Gas/Gasoline Processing Plants.
EPA–450/3–83–008	Manufacture of High-Density Polyethylene, Polypropylene, and Polystyrene Resins.
EPA–450/3–84–015	Air Oxidation Processes in Synthetic Organic Chemical Manufacturing Industry.
EPA–450/4–91–031	Reactor Processes and Distillation Operations in Synthetic Organic Chemical Manufacturing Industry.
EPA–453/R–94–032	ACT Surface Coating at Shipbuilding and Ship Repair Facilities.
61 FR 44050; 8/27/96	Shipbuilding and Ship Repair Operations (Surface Coating).
EPA–453/R–06–003	Flexible Package Printing.
EPA–453/R–06–004	Flat Wood Paneling Coatings.
EPA 453/R–07–003	Paper, Film, and Foil Coatings.
EPA 453/R–07–004	Large Appliance Coatings.
EPA 453/R–07–005	Metal Furniture Coatings.
EPA 453/R–08–004	Fiberglass Boat Manufacturing Materials.
EPA 453/R–08–006	Automobile and Light-Duty Truck Assembly Coatings.
EPA 453/B16–001	Oil and Natural Gas Industry.

(ii) [Reserved]

■ 5. Amend § 52.124 by adding paragraph (b)(2) to read as follows:

§ 52.124 Part D disapproval.

* * * * *

(b) * * *

(2) Maricopa County Air Quality Department.

(i) RACT determinations for major sources of NO_X, and CTG source categories for Aerospace Coating and Industrial Adhesives (''National Emission Standards for Hazardous Air

Pollutants for Source Categories: Aerospace Manufacturing and Rework'' (59 FR 29216), ''Control of Volatile Organic Compound Emissions from Coating Operations at Aerospace Manufacturing and Rework Operations'' (EPA–453/R–97–004), and ''Control Techniques Guidelines for Miscellaneous Industrial Adhesives'' (EPA–453/R–08–005)), in the submittal titled ''Analysis of Reasonably Available Control Technology for the 2008 8-Hour Ozone National Ambient Air Quality Standard (NAAQS) State Implementation Plan (RACT SIP),'' dated December 5, 2016, as adopted on May 24, 2017 and submitted on June 22, 2017.

(ii) [Reserved]

* * * * *

[FR Doc. 2020–27806 Filed 1–6–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 282

[EPA–R06–UST–2018–0701; FRL–10014–65–Region 6]

Arkansas: Final Approval of State Underground Storage Tank Program Revisions and Incorporation by Reference

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: Pursuant to the Resource Conservation and Recovery Act (RCRA or Act), the Environmental Protection Agency (EPA) is taking direct final action to approve revisions to the State of Arkansas's Underground Storage Tank (UST) program submitted by the State. EPA has determined that these revisions satisfy all requirements needed for program approval. This action also codifies EPA's approval of Arkansas's State program and incorporates by reference those provisions of the State regulations that we have determined meet the requirements for approval. The provisions will be subject to EPA's inspection and enforcement authorities under Subtitle I of RCRA sections 9005 and 9006 and other applicable statutory and regulatory provisions.

DATES: This rule is effective March 8, 2021, unless EPA receives adverse comment by February 8, 2021. If EPA receives adverse comment, it will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. The incorporation by reference of a certain publication listed in the regulations is approved by the Director of the Federal Register, as of March 8, 2021, in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

ADDRESSES: Submit your comments by one of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the on-line instructions for submitting comments.

2. *Email: lincoln.audray@epa.gov.*

Instructions: Direct your comments to Docket ID No. EPA–R06–UST–2018–0701. EPA's policy is that all comments received will be included in the public docket without change and may be available online at *https://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *https://www.regulations.gov,* or email. The Federal *https://www.regulations.gov* website is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *https://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties, and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

The index to the docket for this action is available electronically at *https://www.regulations.gov.* You can view and copy the documents that form the basis for this codification and associated publicly available docket materials are available either through *https://www.regulations.gov* or at the Environmental Protection Agency, Region 6, 1201 Elm Street, Suite #500, Dallas, Texas 75270. This facility is open from 8:30 a.m. to 4:00 p.m. Monday through Friday excluding Federal holidays and facility closures. We recommend that you telephone Audray Lincoln, Environmental Protection Specialist at (214) 665–2239 before visiting the Region 6 Office. Interested persons wanting to examine these documents should make an appointment with the office at least two weeks in advance.

FOR FURTHER INFORMATION CONTACT: Audray Lincoln, (214) 665–2239, *lincoln.audray@epa.gov.* Out of an abundance of caution for members of the public and our staff, the EPA Region 6 office will be closed to the public to reduce the risk of transmitting COVID–19. We encourage the public to submit comments via *https://www.regulations.gov,* as there will be a delay in processing mail and no courier or hand deliveries will be accepted. Please call or email the contact listed above if you need alternative access to material indexed but not provided in the docket.

SUPPLEMENTARY INFORMATION:

I. Approval of Revisions to Arkansas's Underground Storage Tank Program

A. Why are revisions to State programs necessary?

States which have received final approval from the EPA under RCRA section 9004(b), 42 U.S.C. 6991c(b), must maintain an underground storage tank program that is equivalent to, consistent with, and no less stringent than the Federal underground storage tank program. When EPA makes revisions to the regulations that govern the UST program, States must revise their programs to comply with the updated regulations and submit these revisions to the EPA for approval. Changes to State UST programs may be necessary when Federal or State statutory or regulatory authority is modified or when certain other changes occur. Most commonly, States must change their programs because of changes to the EPA's regulations in 40 Code of Federal Regulations (CFR) part 280. States can also initiate changes on their own to their underground storage tank program and these changes must then be approved by EPA.

B. What decisions has the EPA made in this rule?

On October 17, 2018, in accordance with 40 CFR 281.51(a), Arkansas submitted a complete program revision application seeking approval for its UST program revisions corresponding to the EPA final rule published on July 15, 2015 (80 FR 41566), which finalized revisions to the 1988 UST regulations and to the 1988 State program approval (SPA) regulations. As required by 40

CFR 281.20, the State submitted the following: A transmittal letter from the Governor requesting approval, a description of the program and operating procedures, a demonstration of the State's procedures to ensure adequate enforcement, a Memorandum of Agreement outlining the roles and responsibilities of the EPA and the implementing agency, a statement of certification from the Attorney General, and copies of all relevant State statutes and regulations.

We have reviewed the application and the revisions to Arkansas's UST program and determined they are no less stringent than the corresponding Federal requirements in subpart C of 40 CFR part 281, and the Arkansas program provides for adequate enforcement of compliance (40 CFR 281.11(b)). Therefore, the EPA grants Arkansas final approval to operate its UST program with the changes described in the program revision application, and as outlined below in Section I.G of this document. The Arkansas Department of Environmental Quality (ADEQ) is the lead implementing agency for the UST program in Arkansas, except in Indian country.

C. What is the effect of this approval decision?

This action does not impose additional requirements on the regulated community because the regulations being approved by this rule are already effective in the State of Arkansas, and they are not changed by this action. This action merely approves the existing State regulations as meeting the Federal requirements and renders them federally enforceable.

D. Why is EPA using a direct final rule?

The EPA is publishing this direct final rule without a prior proposed rule because we view this as a noncontroversial action and anticipate no adverse comment. Arkansas received comments during its comment period when the rules and regulations in this document were being considered and were proposed at the State level. All comments were addressed at public hearing and/or reflected in the adopted regulations.

E. What happens if the EPA receives comments that oppose this action?

Along with this direct final rule, the EPA is publishing a separate document in the ''Proposed Rules'' section of this **Federal Register** that serves as the proposal to approve the State's UST program revision, providing opportunity for public comment. If EPA receives comments that oppose this approval, EPA will withdraw the direct final rule by publishing a document in the **Federal Register** before the rule becomes effective. The EPA will base any further decision on the approval of the State program changes on the proposal to approve after considering all comments received during the comment period. EPA will then address all public comments in a later final rule. You may not have another opportunity to comment. If you want to comment on this approval, you must do so at this time.

F. For what has Arkansas previously been approved?

On February 24, 1995, EPA finalized a rule approving the UST program submitted by Arkansas in lieu of the Federal program. On January 18, 1996, EPA codified the approved Arkansas program that is subject to EPA's inspection and enforcement authorities under RCRA sections 9005 and 9006, 42 U.S.C. 6991d and 6991e, and other applicable statutory and regulatory provisions.

G. What changes are we approving with this action?

In order to be approved, the program must provide for adequate enforcement of compliance as described in 40 CFR 281.11(b) and part 281, subpart D. The ADEQ has broad statutory authority to regulate the installation, operation, maintenance, closure of USTs, and UST releases under the following: Arkansas Code Annotated (ACA), Title 8, Environmental Law; Chapter 1, General Provisions; Subchapter 1 General Provisions section 8–1–107; Subchapter 2 Powers of the Department and the Commission section 8–1–202; Chapter 4 Waste and Air Pollution Control Act; Subchapter 1 sections 8–4–103(d)(1)(A) and (d)(3)(A)–(d)(4)(A); Subchapter 2 Water Pollution section 8–4–224; Chapter 7 Hazardous Substances; Subchapter 8 Regulated Substance Storage Tanks; and Subchapter 9 Petroleum Storage Tank Trust Fund Act.

Specific authorities to regulate the installation, operation, maintenance, closure of USTs, and UST releases are found under Arkansas Pollution Control and Ecology Commission (APC&EC) Regulation Number 12 Storage Tanks, sections Reg. 12.101 through 12.1002 as amended effective August 24, 2018. The aforementioned regulations satisfy the requirements of 40 CFR 281.40 and 281.41.

The Arkansas DEQ's Office of Land Resources (OLR) provides notice and opportunity for public comment on all proposed rules. The OLR investigates and requires petroleum storage tank owners and operators to provide notice about contaminants and submissions of final remediation plans. Requirements for public participation and notification can be found in the ACA at sections 8–4–224 and 8–7–803, as well as in Regulation No. 12 at section 12.104 which incorporates the Federal 40 CFR 280.67 by reference and Regulation No. 8 at section 8.604. Arkansas has met the public participation requirements found in 40 CFR 281.42.

To qualify for final approval, a State's program must be ''no less stringent'' than the Federal program in all elements of the revised EPA final rule published on July 15, 2015 (80 FR 41566). EPA added new operation and maintenance requirements and addressed UST systems deferred in the 1988 UST regulations. The changes also added secondary containment requirements for new and replaced tank and piping, operator training requirements, periodic operation and maintenance requirements for UST systems, and requirements to ensure UST system compatibility before storing certain biofuel blends. It removed past deferrals for emergency generator tanks, field constructed tanks and airport hydrant systems.

The ADEQ made updates to their regulations to ensure that they were no less stringent than the Federal regulations which were revised on July 15, 2015 (80 FR 41566). Title 40 CFR 281.30 through 281.39 contains the ''no less stringent than'' criteria that a State must meet in order to have its UST program approved. In the State's application for approval of its UST program, the Arkansas Assistant Attorney General certified that it meets the requirements listed in 40 CFR 281.30 through 281.39. EPA has relied on this certification in addition to the analysis submitted by the State in making our determination. For further information on EPA's analysis of the State's application, see the Technical Support Document (TSD) contained in the docket for this rulemaking. The corresponding State regulations are as follows:

Title 40 CFR 281.30 lists the Federal requirements for new UST system design, construction, installation, and notification with which a State must comply in order to be found to be no less stringent than Federal requirements. APC&EC Regulation No. 12 Storage Tanks, section 12.104 incorporates the necessary elements of 40 CFR 280 by reference. Additionally, the State includes requirements for notification and notification reporting at APC&EC Regulation No. 12 Storage Tanks, section 12.201(A), requiring UST

system owners and operators to notify the implementing agency of any new UST systems, including instances where one assumes ownership of an existing UST.

Title 40 CFR 281.31 requires that most existing UST systems meet the requirements of 281.30, are upgraded to prevent releases for their operating life due to corrosion, spills, or overfills, or are permanently closed. APC&EC Regulation No. 12 Storage Tanks, section 12.104 which incorporates the necessary Federal 40 CFR 280 requirements by reference, as well as sections 12.109, 12.502, and 12.503 contain the necessary requirements that UST systems be upgraded to prevent releases during their operating life due to corrosion, spills, or overfills.

Title 40 CFR 281.32 contains the general operating requirements that must be met in order for the State's submission to be considered no less stringent than the Federal requirements. APC&EC Regulation No. 12 Storage Tanks, section 12.104 which incorporates the necessary Federal 40 CFR 280 requirements by reference, as well as section 12.105 contain the necessary general operating requirements required by 40 CFR 281.32.

Title 40 CFR 281.33 contains the requirements for release detection that must be met in order for the State's submission to be considered no less stringent than Federal requirements. APC&EC Regulation No. 12 Storage Tanks, section 12.104 which incorporates the necessary Federal 40 CFR 280 requirements by reference, as well as section 12.109 contain the necessary requirements for release detection as required by 40 CFR 281.33.

Title 40 CFR 281.34 contains the requirements for release reporting, investigation, and confirmation that must be met in order for the State's submission to be considered no less stringent than Federal requirements. APC&EC Regulation No. 12 Storage Tanks, section 12.104 which incorporates the necessary Federal 40 CFR 280 requirements by reference, as well as sections 12.108 and 12.305 contain the necessary requirements as required by 40 CFR 281.34 for release reporting, investigation, and confirmation.

Title 40 CFR 281.35 contains the requirements for release response and corrective action that must be met in order for the State's submission to be considered no less stringent than Federal requirements. APC&EC Regulation No. 12 Storage Tanks, section 12.104 which incorporates the necessary Federal 40 CFR 280 requirements by reference contains the required provisions as listed in 40 CFR 281.35 for release response and corrective action.

Title 40 CFR 281.36 contains the requirements for out of service UST systems and closures that must be met in order for the State's submission to be considered no less stringent than Federal requirements. APC&EC Regulation No. 12 Storage Tanks, section 12.104 which incorporates the necessary Federal 40 CFR 280 requirements by reference contains the necessary requirements as listed in 40 CFR 281.36 for out of service UST systems and closures.

Title 40 CFR 281.37 contains the requirements for financial responsibility for UST systems containing petroleum that must be met in order for the State's submission to be considered no less stringent than Federal requirements. APC&EC Regulation No. 12 Storage Tanks, section 12.104 which incorporates the necessary Federal 40 CFR 280 requirements by reference, as well as sections 12.302(A)(1) and 12.314 contain the necessary requirements as listed in 40 CFR 281.37 for financial responsibility for UST systems.

Title 40 CFR 281.38 contains the requirements for lender liability that must be met in order for the State's submission to be considered no less stringent than Federal requirements. APC&EC Regulation No. 12 Storage Tanks, section 12.104 which incorporates the necessary Federal 40 CFR 280 requirements by reference, as well as section 12.321 contain the requirements for lender liability as listed in 40 CFR 281.38.

Title 40 CFR 281.39 contains the requirements for operator training that must be met in order for the State's submission to be considered no less stringent than Federal requirements. APC&EC Regulation No. 12 Storage Tanks, section 12.104 which incorporates the necessary Federal 40 CFR 280 requirements by reference, as well as sections 12.105, and 12.701 through 12.710 contain the requirements for operator training as required by 40 CFR 281.39.

H. Where are the revised rules different from the Federal rules?

Broader in Scope Provisions

The following statutory and regulatory provisions are considered broader in scope than the Federal program:

At ACA 8–7–801(1) introductory paragraph through (1)(B), Arkansas defines ''aboveground storage tank''.

ACA 8–7–802(a)(2), grants the Arkansas Pollution Control and Ecology Commission the power to set reasonable fees for licensure and registration. All such State fees are broader in scope.

At ACA 8–7–808, Arkansas details the requirements of the Regulated Substance Storage Tank Program Fund; all funds of this type are broader in scope because they have no Federal counterparts.

At ACA 8–7–813, references to aboveground storage tanks with respect to the State registration requirement are broader in scope.

ACA Chapter 7, Subchapter 9, sections 8–7–901 through 8–7–908 regarding the detailed requirements of the State Petroleum Storage Tank Trust Fund Act are broader in scope.

At APC&EC Regulation No. 12, section 12.103(20), the reference to aboveground storage tanks are broader in scope.

At APC&EC Regulation No. 12, section 12.107, Arkansas regulates aboveground storage tanks in a manner that is broader in scope than the Federal program.

At APC&EC Regulation No. 12, section 12.201(C) through (F), Arkansas regulates aboveground storage tanks in a manner that is broader in scope than the Federal program.

At APC&EC Regulation No. 12, sections 12.202(B)(2) and 12.203, Arkansas assesses a storage tank registration fee to be paid by tank owners and operators. All such State fees are broader in scope.

APC&EC Regulation No. 12, Chapter 3 Petroleum Storage Tank Trust Fund Corrective Action Reimbursement Procedures and Chapter 4 Petroleum Storage Tank Trust Fund Third-Party Payment Procedures; State trust funds of this type are state-specific and are broader in scope than the Federal program.

Where an approved State program has a greater scope of coverage than required by Federal law, the additional coverage is not part of the federally-approved program. *See* 40 CFR 281.12(a)(3)(ii).

More Stringent Provisions

The following regulatory provisions are considered more stringent in coverage than the Federal program:

At APC&EC Regulation No. 12 Storage Tanks, section 12.105, Arkansas has additional, state-only records requirements, including access by the Department, and additional records for state-specific programs such as the broader in scope Trust Fund Act.

At APC&EC Regulation No. 12 Storage Tanks, section 12.109(A), the State

began requiring secondary containment for new tanks installed after July 1, 2007.

At APC&EC Regulation No. 12 Storage Tanks, section 12.109(C), the State began requiring under dispenser containment for specific tank systems installed after July 1, 2007.

At APC&EC Regulation No. 12 Storage Tanks, section 12.109(B), the State began requiring secondary containment for existing tanks replaced after July 1, 2007.

At APC&EC Regulation No. 12 Storage Tanks, Chapter 6 Licensing of Underground Storage Tank Testers, section 12.602 through 12.613, Arkansas requires UST testers to be licensed in a manner that is not required by the Federal program; however, this is consistent with the licensing of other tank professionals.

I. How does this action affect Indian country (18 U.S.C. 1151) in Arkansas?

Arkansas is not authorized to carry out its Program in Indian country (18 U.S.C. 1151) within the State. This authority remains with EPA. Therefore, this action has no effect in Indian country. *See* 40 CFR 281.12(a)(2).

II. Codification

A. What is codification?

Codification is the process of placing a State's statutes and regulations that comprise the State's approved UST program into the CFR. Section 9004(b) of RCRA, as amended, allows the EPA to approve State UST programs to operate in lieu of the Federal program. The EPA codifies its authorization of State programs in 40 CFR part 282 and incorporates by reference State regulations that the EPA will enforce under RCRA sections 9005 and 9006 and any other applicable statutory provisions. The incorporation by reference of State authorized programs in the CFR should substantially enhance the public's ability to discern the current status of the approved State program and State requirements that can be Federally enforced. This effort provides clear notice to the public of the scope of the approved program in each State.

B. What is the history of codification of Arkansas's UST program?

The EPA incorporated by reference Arkansas's then-approved UST program effective March 18, 1996 (61 FR 1213; January 18, 1996). In this document, the EPA is revising 40 CFR 282.53 to include the approved revisions.

C. What codification decisions have we made in this rule?

In this rule, we are finalizing regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, we are finalizing the incorporation by reference of the Arkansas rules described in the amendments to 40 CFR part 282 set forth below. The EPA has made, and will continue to make, these documents generally available through *https://www.regulations.gov* and/or in hard copy at the EPA Region 6 office (see the **ADDRESSES** section of this preamble for more information).

The purpose of this **Federal Register** document is to codify Arkansas's approved UST program. The codification reflects the State program that would be in effect at the time the EPA's approved revisions to the Arkansas UST program addressed in this direct final rule become final. The document incorporates by reference Arkansas's UST regulations and clarifies which of these provisions are included in the approved and federally enforceable program. By codifying the approved Arkansas program and by amending the Code of Federal Regulations (CFR), the public will more easily be able to discern the status of the federally-approved requirements of the Arkansas program.

The EPA is incorporating by reference the Arkansas approved UST program in 40 CFR 282.53. Section 282.53(d)(1)(i)(A) incorporates by reference for enforcement purposes the State's statutes and regulations. Section 282.53 also references the Attorney General's Statement, the Demonstration of Procedures for Adequate Enforcement, the Program Description, and the Memorandum of Agreement, which are approved as part of the UST program under subtitle I of RCRA.

D. What is the effect of Arkansas's codification on enforcement?

The EPA retains the authority under Subtitle I of RCRA sections 9003(h), 9005 and 9006, 42 U.S.C. 6991b(h), 6991d and 6991e, and other applicable statutory and regulatory provisions to undertake corrective action, inspections and enforcement actions and to issue orders in approved States. With respect to these actions, EPA will rely on Federal sanctions, Federal inspection authorities, and Federal procedures rather than the State authorized analogues to these provisions. Therefore, the EPA is not incorporating by reference such particular, approved Arkansas procedural and enforcement authorities. Section 282.53(d)(1)(ii) of 40 CFR lists those approved Arkansas authorities that would fall into this category.

E. What State provisions are not part of the codification?

The public also needs to be aware that some provisions of the State's UST program are not part of the federally-approved State program. Such provisions are not part of the RCRA Subtitle I program because they are ''broader in coverage'' than Subtitle I of RCRA. Title 40 CFR 281.12(a)(3)(ii) states that where an approved State program has provisions that are broader in scope than the Federal program, those provisions are not a part of the federally-approved program. As a result, State provisions which are ''broader in coverage'' than the Federal program are not incorporated by reference for purposes of enforcement in part 282. Section 282.53(d)(1)(iii) of the codification simply lists for reference and clarity the Arkansas statutory and regulatory provisions which are ''broader in scope'' than the Federal program and which are not, therefore, part of the approved program being codified today. Provisions that are ''broader in scope'' cannot be enforced by EPA; the State, however, will continue to implement and enforce such provisions under State law.

III. Statutory and Executive Order Reviews

This action only applies to Arkansas's UST Program requirements pursuant to RCRA section 9004 and imposes no requirements other than those imposed by State law. It complies with applicable Executive Orders (E.O.s) and statutory provisions as follows:

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

The Office of Management and Budget (OMB) has exempted this action from the requirements of Executive Order 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011). This action approves and codifies State requirements for the purpose of RCRA section 9004 and imposes no additional requirements beyond those imposed by State law. Therefore, this action is not subject to review by OMB.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not a regulatory action under Executive Order 13771 (82 FR 9339, February 3, 2017) because actions

such as this final approval of Arkansas's revised underground storage tank program under RCRA are exempted under Executive Order 12866. Accordingly, I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

C. Unfunded Mandates Reform Act and Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Because this action approves and codifies pre-existing requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538). For the same reason, this action also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

D. Executive Order 13132: Federalism

This action 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, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely approves and codifies State requirements as part of the State RCRA underground storage tank program without altering the relationship or the distribution of power and responsibilities established by RCRA.

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

This action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant and it does not make decisions based on environmental health or safety risks.

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

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a ''significant regulatory action'' as defined under Executive Order 12866.

G. National Technology Transfer and Advancement Act

Under RCRA section 9004(b), EPA grants a State's application for approval as long as the State meets the criteria required by RCRA. It would thus be inconsistent with applicable law for EPA, when it reviews a State approval application, to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

H. Executive Order 12988: Civil Justice Reform

As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct.

I. Executive Order 12630: Governmental Actions and Interference With Constitutionally Protected Property Rights

EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the Executive order.

J. Paperwork Reduction Act

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). ''Burden'' is defined at 5 CFR 1320.3(b).

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

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. Because this rule approves pre-existing State rules which are at least equivalent to, and no less stringent than existing Federal requirements, and imposes no additional requirements beyond those imposed by State law, and there are no anticipated significant adverse human health or environmental effects, the rule is not subject to Executive Order 12898.

L. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801–808, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this document and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). However, this action will be effective March 8, 2021 because it is a direct final rule.

List of Subjects in 40 CFR Part 282

Environmental protection, Administrative practice and procedure, Hazardous substances, Incorporation by reference, Insurance, Intergovernmental relations, Oil pollution, Petroleum, Reporting and recordkeeping requirements, Surety bonds, Water pollution control, Water supply.

Authority: This rule is issued under the authority of Sections 2002(a), 9004, and 7004(b) of the Solid Waste Disposal Act, as amended, 42 U.S.C. 6912, 6991c, 6991d, and 6991e.

Dated: October 27, 2020.

Kenley McQueen,

Regional Administrator, Region 6.

For the reasons set forth in the preamble, EPA is amending 40 CFR part 282 as follows:

PART 282—APPROVED UNDERGROUND STORAGE TANK PROGRAMS

■ 1. The authority citation for part 282 continues to read as follows:

Authority: 42 U.S.C. 6912, 6991c, 6991d, and 6991e.

■ 2. Revise § 282.53 to read as follows:

§ 282.53 Arkansas State-Administered Program.

(a) *History of the approval of Arkansas's program.* The State of Arkansas is approved to administer and enforce an underground storage tank program in lieu of the Federal program

under Subtitle I of the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, 42 U.S.C. 6991, *et seq.* The State's program, as administered by the Arkansas Department of Environmental Quality, was approved by EPA pursuant to 42 U.S.C. 6991c and Part 281 of this Chapter. EPA published the notice of final determination approving the Arkansas underground storage tank base program effective on November 16, 1990. A subsequent program revision application was approved effective on March 8, 2021.

(b) *Enforcement authority.* Arkansas has primary responsibility for administering and enforcing its federally-approved underground storage tank program. However, EPA retains the authority to exercise its corrective action, inspection and enforcement authorities under Subtitle I of RCRA sections 9003(h), 9005 and 9006, 42 U.S.C. 6991b(h), 6991d and 6991e, as well as under any other applicable statutory and regulatory provisions.

(c) *Retaining program approval.* To retain program approval, Arkansas must revise its approved program to adopt new changes to the Federal subtitle I program which make it more stringent, in accordance with RCRA section 9004, 42 U.S.C. 6991c, and 40 CFR part 281, subpart E. If Arkansas obtains approval for the revised requirements pursuant to RCRA section 9004, 42 U.S.C. 6991c, the newly approved statutory and regulatory provisions will be added to this subpart and notice of any change will be published in the **Federal Register**.

(d) *Final program approval.* Arkansas has final approval for the following elements of its program application originally submitted to EPA and approved effective November 16, 1990, and the program revision application approved by EPA effective on March 8, 2021:

(1) *State statutes and regulations*—(i) *Incorporation by reference.* The Arkansas provisions cited in this paragraph are incorporated by reference as part of the underground storage tank program under Subtitle I of RCRA, 42 U.S.C. 6991 *et seq.* The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain copies of the Arkansas regulations that are incorporated by reference from the Arkansas Department of Environmental Quality (ADEQ) website at *http://www.adeq.state.ar.us/regs/default.htm* or the Public Outreach Office, ADEQ, 5301 Northshore Drive, North Little Rock, Arkansas 72118–5317; Phone number: (501) 682–0923. You may inspect all approved material at the EPA Region 6, 1201 Elm Street, Suite 500, Dallas, Texas 75270 (Phone number (214) 665–2239) or the National Archives and Records Administration (NARA). For information on the availability of the material at NARA, email *fedreg.legal@nara.gov* or go to *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

(A) ''EPA-Approved Arkansas Regulatory Requirements Applicable to the Underground Storage Tank Program,'' August 2020. Only those provisions that have been approved by EPA are incorporated by reference. Those provisions are listed in Appendix A to part 282.

(B) [Reserved]

(ii) *Legal basis.* EPA evaluated the following statutes and regulations which provide the legal basis for the State's implementation of the underground storage tank program, but they are not being incorporated by reference and do not replace Federal authorities:

(A) The statutory provisions include: Arkansas Code Annotated (ACA), 2017 Title 8, Environmental Law:

(1) Chapter 1 General Provisions:

(i) Subchapter 1 General Provisions, section 8–1–107; and

(ii) Subchapter 2 Powers of the Department and Commission, section 8–1–202;

(2) Chapter 4 Arkansas Water and Air Pollution Control Act:

(i) Subchapter 1 General Provisions, sections 8–4–103(d)(1)(A) and 8–4–103(d)(3)(A) through (d)(4)(A); and

(ii) Subchapter 2 Water Pollution, section 8–4–224;

(3) Chapter 7 Hazardous Substances:

(i) Subchapter 8 Regulated Substance Storage Tanks, sections 8–7–801(2) through (14)(J); 8–7–802(a)(1); 8–7–802(b); 8–7–803 through 8–7–807; 8–7–809 through 8–7–812, 8–7–813 (except references to aboveground storage tanks [ASTs]); 8–7–814; 8–7–816; 8–7–817; and

(ii) Subchapter 9 Petroleum Storage Tank Trust Fund Act, section 8–7–909.

(B) The regulatory provisions include: Arkansas Pollution Control and Ecology Commission (APC&EC) Regulation No. 12 Storage Tanks, as amended effective August 24, 2018: Chapter 1 General Provisions, Reg. 12.110 Delivery Prohibition; Chapter 2 Registration of Storage Tanks, Reg. 12.201 Registration Requirement; Chapter 5 Licensing of Underground Storage Tank Installers and Service Personnel, Reg. 12.515; Chapter 6 Licensing of Underground Storage Tank Testers, Reg. 12.613 Violations; Chapter 7 Operator Training, Reg. 12.709 Violations and Reg. 12.710 Disclosure Exemption; and Chapter 8 Confidentiality Reg. 12.801 through Reg. 12.805.

(iii) *Provisions not incorporated by reference.* The following specifically identified sections and rules applicable to the Arkansas underground storage tank program that are broader in scope than the Federal program, are not part of the approved program, and are not incorporated by reference herein for enforcement purposes:

(A) Arkansas Code Annotated (ACA), 2017, Title 8 Environmental Law: Chapter 7 Hazardous Substances, Subchapter 8 Regulated Substance Storage Tanks, sections 8–7–801(1) introductory paragraph through (1)(B), 8–7–802(a)(2), 8–7–808, 8–7–813 (as it applies to aboveground storage tanks [ASTs] only); and Subchapter 9 Petroleum Storage Tank Trust Fund Act, sections 8–7–901 through 8–7–908.

(B) Arkansas Pollution Control and Ecology Commission (APC&EC) Regulation No. 12 Storage Tanks, as amended effective August 24, 2018: Chapter 1 General Provisions, Reg. 12.107 Entry and Inspection of Aboveground Storage Tank Facilities; Chapter 2 Registration of Storage Tanks, Reg. 12.201(C) through (F) Registration Requirement, 12.202(B)(2) Certification of Registration (as it applies to fees only), 12.203 Storage Tank Registration Fees; Chapter 3 Petroleum Storage Tank Trust Fund Corrective Action Reimbursement Procedures; and Chapter 4 Petroleum Storage Tank Trust Fund Third-Party Payment Procedures.

(2) *Statement of legal authority.* The Attorney General's Statement, signed by the Assistant Attorney General of Arkansas September 21, 1994, and revisions to that Statement dated October 2, 2018, though not incorporated by reference, are referenced as part of the approved underground storage tank program under Subtitle I of RCRA, 42 U.S.C. 6991 *et seq.*

(3) *Demonstration of procedures for adequate enforcement.* The ''Adequate Enforcement of Compliance'' submitted as part of the original application on September 26, 1994 and as part of the program revision application for approval on October 17, 2018, though not incorporated by reference, is referenced as part of the approved underground storage tank program under Subtitle I of RCRA, 42 U.S.C. 6991 *et seq.*

(4) *Program description.* The program description and any other material submitted as part of the original application September 26, 1994, and as part of the program revision application

October 17, 2018, though not incorporated by reference, are referenced as part of the approved underground storage tank program under Subtitle I of RCRA, 42 U.S.C. 6991 *et seq.*

(5) *Memorandum of Agreement.* The Memorandum of Agreement between EPA Region 6 and the Arkansas Department of Environmental Quality, signed by the EPA Regional Administrator on May 8, 2019, though not incorporated by reference, is referenced as part of the approved underground storage tank program under Subtitle I of RCRA, 42 U.S.C. 6991 *et seq.*

■ 3. Appendix A to part 282 is amended by revising the entry for Arkansas to read as follows:

Appendix A to Part 282—State Requirements Incorporated by Reference in Part 282 of the Code of Federal Regulations

* * * * *

Arkansas

(a) The regulatory provisions include: Arkansas Pollution Control and Ecology Commission (APC&EC) Regulation No. 12 Storage Tanks, as amended effective August 24, 2018:

Chapter 1 General Provisions, Reg. 12.103 Definitions, except (B)(1), Reg. 12.104 Incorporation of Federal Regulations, Reg. 12.105 Records, Reg. 12.106 Entry and Inspection of Underground Storage Tank Facilities, Reg. 12.108 Notice Requirements, Reg. 12.109 Secondary Containment;

Chapter 2 Registration of Storage Tanks, Reg. 12.201(A);

Chapter 5: Licensing of Underground Storage Tank Installers and Service Personnel, Reg. 12.502 Definitions, Reg. 12.503 Applicability, Reg. 12.504 General Requirements, Reg. 12.505 Surety Requirement, Reg. 12.506 Notification Requirement, Reg. 12.507 Contractor Licensing, Reg. 12.508 Individual Licensing, Reg. 12.509 Contractor/Individual Licensing, Reg. 12.510 Experience Requirements, Reg. 12.511 Licensing Examination, Reg. 12.512 Renewal of Licenses, Reg. 12.513 Denial of Licenses, Reg. 12.514 Department Approval of Training and Continuing Education;

Chapter 6: Licensing of Underground Storage Tank Testers, Reg. 12.602 Definitions, Reg. 12.603 Applicability, Reg. 12.604 General Requirements, Reg. 12.605 Surety Requirement, Reg. 12.606 Company Licensing, Reg. 12.607 Individual Licensing, Reg. 12.608 Company/Individual Licensing, Reg. 12.609 Experience Requirements, Reg. 12.610 Renewal of Licenses, Reg. 12.611 Denial of Licenses, Reg. 12.612 Department Approval of Training and Continuing Education; and

Chapter 7: Operator Training, Reg. 12.702 Definitions, Reg. 12.703 Applicability, Reg. 12.704 General Requirements, Reg. 12.705 Class A Operator Certification, Reg. 12.706 Class B Operator Certification, Reg. 12.707 Class C Operator Training, Reg. 12.708 Operator Examination.

(b) Copies of the Arkansas regulations that are incorporated by reference are available from the Arkansas Department of Environmental Quality (ADEQ) website at *http://www.adeq.state.ar.us/regs/default.htm* or the Public Outreach Office, ADEQ, 5301 Northshore Drive, North Little Rock, Arkansas 72118–5317; Phone number: (501) 682–0923.

* * * * *

[FR Doc. 2020–24240 Filed 1–6–21; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 745

[EPA–HQ–OPPT–2020–0063; FRL–10018–61]

RIN 2070–AK50

Review of Dust-Lead Post Abatement Clearance Levels

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Reducing childhood lead exposure is a priority for the Environmental Protection Agency (EPA). As part of EPA's efforts to reduce childhood lead exposure, and in coordination with the President's Task Force on Environmental Health Risks and Safety Risks to Children, EPA reevaluated the 2001 dust-lead clearance levels (DLCL). Clearance levels indicate the amount of lead in dust on a surface following the completion of an abatement activity. Surface dust is collected via dust wipe samples that are sent to a laboratory for analysis to determine whether clearance has been achieved. The post-abatement dust-lead levels are evaluated against, and must be below, the applicable clearance levels. The DLCL have not changed since they were issued in 2001. EPA is finalizing its proposal to lower the DLCL from 40 micrograms of per square foot (μg/ft^2) to 10 μg/ft^2 for floors, and from 250 μg/ft^2 to 100 μg/ft^2 for window sills.

DATES: This final rule is effective March 8, 2021.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPPT–2020–0063, is available at *http://www.regulations.gov* or at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC.

Please note that due to the public health emergency, the EPA Docket Center (EPA/DC) and Reading Room was closed to public visitors on March 31, 2020. Our EPA/DC staff will continue to provide customer service via email, phone, and webform. For further information on EPA/DC services, docket contact information and the current status of the EPA/DC and Reading Room, please visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Claire Brisse, Existing Chemicals Risk Management Division, Office of Pollution Prevention and Toxics (Mailcode 7404T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–9004; email address: *brisse.claire@epa.gov.* These phone numbers may also be reached by individuals who are deaf or hard of hearing, or who have speech disabilities, through the Federal Relay Service's teletype service at (800) 877–8339.

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. Does this action apply to me?

You may be potentially affected by this action if you conduct Lead-Based Paint (LBP) activities in accordance with 40 CFR 745.227; if you operate a training program required to be accredited under 40 CFR 745.225; if you are a firm or individual who must be certified to conduct LBP activities in accordance with 40 CFR 745.226; or if you conduct rehabilitations or maintenance activities in most pre-1978 housing that is covered by a Federal housing assistance program in accordance with 24 CFR part 35. You may also be affected by this action if you operate a laboratory that is recognized by EPA's National Lead Laboratory Accreditation Program (NLLAP) in accordance with 40 CFR 745.90, 745.223, 745.227, 745.327. You may also be affected by this action, in accordance with 40 CFR 745.107 and 24 CFR 35.88, as the seller or lessor of target housing, which is most pre-1978 housing. See 40 CFR 745.103 and 24 CFR 35.86. 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:

- Real estate (NAICS code 531), *e.g.,* lessors of residential buildings and dwellings, residential property managers.
- Other technical and trade schools (NAICS code 611519), *e.g.,* training providers.
- Engineering services (NAICS code 541330) and building inspection services (NAICS code 541350), *e.g.,* dust sampling technicians.
- Lead abatement professionals (NAICS code 562910), *e.g.,* firms and supervisors engaged in LBP activities.
- Testing laboratories (NAICS code 541380) that analyze dust wipe samples for lead.
- Federal agencies that own residential property (NAICS code 92511, 92811).
- Property owners, and property owners that receive assistance through Federal housing programs (NAICS code 531110, 531311).

B. What is the Agency's authority for taking this action?

EPA is finalizing this rule under sections 401 and 402 of the Toxic Substances Control Act (TSCA), 15 U.S.C. 2601 *et seq.,* as created by Title X of the Housing and Community Development Act of 1992 (also known as the ''Residential Lead-Based Paint Hazard Reduction Act of 1992'' or ''Title X'') (Pub. L. 102–550) (Ref. 1).

TSCA section 402 (15 U.S.C. 2682) directs EPA to regulate LBP activities, which include risk assessments, inspections, and abatements. TSCA section 401 (15 U.S.C. 2681) defines abatements as ''measures designed to permanently eliminate lead-based paint hazards'' and the term includes ''all . . . cleanup . . . and post[-]abatement clearance testing activities'' (15 U.S.C. 2681(1)). EPA is further directed, in promulgating the regulations, to ''tak[e] into account reliability, effectiveness, and safety'' (15 U.S.C. 2682(a)(1)).

C. What action is the Agency taking?

Clearance levels are defined as values that indicate the amount of lead in dust on a surface following completion of an abatement activity (40 CFR 745.223). Surface dust is collected via dust wipe samples that are sent to a laboratory for analysis. The post-abatement dust-lead levels must be below the clearance levels, which are the standards used to evaluate the effectiveness of post-abatement cleanings. If the levels are not below the clearance levels, the components (*i.e.* floors, window sills, etc.) represented by the failed sample(s) shall be recleaned and retested. In 2001, EPA originally established DLCL of 40 μg/ft² for floors, 250 μg/ft² for window sills and 400 μg/ft² for window troughs in a final rule entitled, ''Identification of Dangerous Levels of Lead.'' See 66 FR 1206, January 5, 2001 (FRL–6763–5), also known as the 2001 LBP Hazards Rule (Ref. 2).

On June 24, 2020, EPA proposed to revise the DLCL for window sills and floors. EPA is now finalizing its proposal to lower the DLCL set by the 2001 LBP Hazards Rule, from 40 μg/ft² to 10 μg/ft² for floor dust and from 250 μg/ft² to 100 μg/ft² for window sill dust. As explained elsewhere in this preamble, EPA is not revising the DLCL for window troughs at this time. The revised DLCL of 10 μg/ft² on floors and 100 μg/ft² on window sills will not apply retroactively; that is, this final rule will not impose retroactive requirements on regulated entities that have previously performed post-abatement clearance testing using the original DLCL of 40 μg/ft² on floors or 250 μg/ft² on window sills. While EPA's dust-lead hazard standards (DLHS) do not compel property owners to evaluate their property for hazards or take control actions (40 CFR 745.61(c)), if someone opts to perform a lead-based paint activity such as an abatement, then EPA's regulations set requirements for doing so (40 CFR 745.220(d)). This final rule requires individuals and firms who perform an abatement to achieve values below the DLCL of 10 μg/ft² on floors and 100 μg/ft² on window sills at the end of the abatement, which the 2019 rule updating the DLHS (''Review of the Dust-Lead Hazard Standards and the Definition of Lead-Based Paint,'' (84 FR 32632, July 9, 2019) (FRL–9995–49), also known as the 2019 DLHS Rule) did not require under EPA's regulations (Ref. 3).

D. Why is the Agency taking this action?

Reducing childhood lead exposure is an EPA priority. EPA continues to collaborate with its federal partners to reduce lead exposures and, in so doing, to explore ways to strengthen its relationships and partnerships with states, tribes, and localities. In December 2018, the President's Task Force on Environmental Health Risks and Safety Risks to Children released the *Federal Action Plan to Reduce Childhood Lead Exposures and Associated Health Impacts* (Lead Action Plan) (Ref. 4) to enhance the Federal Government's efforts to identify and reduce lead exposure while ensuring children impacted by such exposure are getting the support and care they need to prevent or mitigate any associated health effects. The Lead Action Plan is helping Federal agencies to work strategically and collaboratively to reduce exposure to lead and improve children's health. This final rule, which revises the DLCL, is an action that EPA committed to undertake in the Lead Action Plan (Ref. 5).

In the 2001 LBP Hazards Rule, EPA first established the DLHS that identify dust-lead hazards and the DLCL used to evaluate the effectiveness of cleaning following an abatement. Abatements are designed to permanently eliminate LBP hazards including dust-lead hazards.

In 2019, EPA reevaluated the DLHS (Ref. 3). Based on that revaluation, the final rule revised the DLHS from 40 μg/ft² and 250 μg/ft² to 10 μg/ft² and 100 μg/ft² on floors and window sills, respectively. EPA based that decision on the best available science, the Agency's review of public comments received on the proposal for that rule, and consideration of the potential for risk reduction, including whether such actions were achievable. At that time, EPA focused its rulemaking on the DLHS and the definition of LBP, which were the two actions that EPA had agreed to undertake in response to a 2009 citizen petition (Ref. 6). In that rulemaking, EPA did not propose to change DLCL in 40 CFR part 745, subpart L.

However, EPA recognizes the important relationship between the DLHS and DLCL: The DLHS are used to identify dust-lead hazards and the DLCL are used to demonstrate that specific abatement activities have effectively abated those hazards. The purpose of this final rule is to update the DLCL so that attaining these levels demonstrates elimination of dust-lead hazards under the revised 2019 DLHS. Based on the Agency's careful review of the public comments received on the proposal, EPA is finalizing its proposal to revise the DLCL to 10 μg/ft² for floors and to 100 μg/ft² for window sills. EPA finds that attaining these DLCL abates the dust-lead hazards identified under the 2019 standards, taking into account reliability, effectiveness, and safety. EPA has not been persuaded that elimination of the dust-lead hazards (15 U.S.C. 2681(1)) while accounting for reliability, effectiveness, and safety (15 U.S.C. 2682(a)(1)) justifies selecting different clearance levels. Although EPA is not persuaded to deviate from 10 μg/ft² for floors and 100 μg/ft² for window sills for the DLCL, the Agency did consider whether potential reliability, effectiveness, or safety factors supported different clearance levels. In particular, EPA considered the achievability of 10 μg/ft² for floors and 100 μg/ft² for

window sills in relation to their application in lead risk reduction programs, how the lower dust-lead loadings can be reliably detected by laboratories, the effectiveness of these levels at eliminating dust-lead hazards, and consistency with the revised 2019 standards and across the Federal Government.

EPA did not propose to change the post-abatement clearance level in 40 CFR 745, subpart L for window troughs, and is not modifying the level at this time. Because the revised 2019 standards updated the DLHS for floors and window sills and because EPA wanted to act as expeditiously as possible to update the DLCL in recognition of the updated DLHS for floors and window sills, EPA believes it has reasonably focused this rulemaking to update the DLCL so that attaining these levels demonstrates elimination of dust-lead hazards under the revised 2019 standards. As a result, and after careful review of the public comments, EPA is finalizing its proposal to only revise the DLCL for floors and window sills at this time.

E. What are the estimated incremental impacts of this action?

EPA has prepared an Economic Analysis of the potential incremental impacts associated with this rulemaking (Ref. 7). The analysis is focused on a subset of the target housing (*i.e.,* most pre-1978 housing) and child-occupied facilities where abatement activities are subject to this rule. The analysis, which is available in the docket, estimates incremental costs and benefits for abatements where a dust-lead level is between the original DLCL (40 μg/ft² for floors and 250 μg/ft² for window sills) and alternate levels, including the revised DLCL of 10 μg/ft² for floors and 100 μg/ft² for window sills. Based on data from the U.S. Department of Housing and Urban Development (HUD), EPA estimates that the vast majority of floors and window sills are already clearing at levels below the revised DLCL of 10 μg/ft² and 100 μg/ft² after the completion of an abatement.

EPA identified in the proposal that there was uncertainty about whether some state and local regulations already use the same levels in EPA's DLHS as DLCL, and about whether some abatement contractors voluntarily conduct additional cleaning to ensure that the dust-lead levels fall below the DLHS following an abatement. To the extent that these situations occur, then the costs and benefits of meeting the DLCL estimated in the Economic Analysis would be attributable to the 2019 DLHS Rule and not to this regulation. For the final rule Economic Analysis, EPA contacted states with authorized lead programs and found that several have already revised or are in the process of revising their regulations to adopt clearance levels of 10 μg/ft² on floors and 100 μg/ft² on window sills. In addition, one locality has adopted clearance levels below the original federal levels of 40 μg/ft² on floors and 250 μg/ft² on window sills. Abatements in these jurisdictions will clear below the levels of 10 μg/ft² on floors and 100 μg/ft² on window sills even without revisions to the federal clearance levels. As a result, EPA has narrowed the range of estimated benefits and costs in the Economic Analysis of the final rule by including abatements in these jurisdictions in the baseline. EPA estimates that 57% to 61% of the abatements otherwise affected by the clearance levels in this rule will take place in these jurisdictions. As a result, the Economic Analysis does not account for the benefits and costs of these events. The information on state regulations and its use in the final rule analysis is described in sections 2.3 and 3.1.3(C) of the Economic Analysis. EPA did not obtain any information indicating the extent to which abatement contractors in other states and localities (where the clearance levels are still 40 μg/ft² on floors and 250 μg/ft² on window sills) are voluntarily using 10 μg/ft² on floors and 100 μg/ft² on window sills as clearance levels. Instead, section 8.3 of the Economic Analysis presents sensitivity analyses reflecting different assumptions about abatement contractor actions in the baseline. In order to expand the range of possible estimates, EPA's final estimates of the incremental impacts of this action include a lower bound assumption that half of abatement contractors are voluntarily applying the hazard standards as clearance levels.

As in the Economic Analysis for the 2019 DLHS Rule, there is also uncertainty about the blood lead levels at which investigative actions and lead hazard reduction activities might be taken and the exact nature of these activities. Most states set a blood lead level at which an environmental investigation is recommended or required. Based on guidance posted on environmental and public health department websites for each state, these blood lead action levels range from 5 micrograms per deciliter (μg/dL) to 25 μg/dL. In eight states (AK, IN, MD, ME, MI, NE, OR, and PA) the action level for an environmental investigation is a blood lead level of 5 μg/dL. Fourteen states (CA, GA, IL, KS, LA, NC, NH, NJ, NV, OH, TX, VT, WA, and WV) and the District of Columbia use an action level of 10 μg/dL. Nineteen states (AL, AZ, CO, DE, FL, HI, IA, ID, KY, MN, MO, MS, NM, NY, RI, SC, UT, VA, and WI) use an action level of 15 μg/dL. Four states (CT, MA, OK, and TN) use an action level of 20 μg/dL or above. Five states (AR, MT, ND, SD, and WY) have no policy recommendation or requirement for the blood lead level at which an environmental investigation should be conducted. The differences between states may reflect the prevalence of lead hazards in each state and their relative prioritization of lead hazards and other funding needs.

EPA's analysis includes two scenarios for the number of instances where clearance testing is performed that will be affected by the rule: (1) Where dust-lead loadings are tested because a child's blood lead level equals or exceeds 5 μg/dL (the current Centers for Disease Control and Prevention (CDC) blood lead reference value) (Ref. 8), and a loading is at or above the DLHS; and (2) where dust-lead loadings are tested because a child's blood lead level equals or exceeds the action level set by the state the child lives in, and a loading is at or above the DLHS.

Consequently, the Economic Analysis includes a range for the number of abatement events affected by this rule revising the clearance levels. The upper end of the range is approximately 11,000 events, which assumes that when a child's blood lead level equals or exceeds 5 μg/dL an environmental investigation occurs that includes testing the dust-lead loadings in their home. The low end of the range is approximately 1,200 events, which assumes that dust-lead loading testing occurs when a child's blood lead level equals or exceeds the state blood lead level action level. The benefit and cost estimates are highly sensitive to this range. The following is a brief outline of the estimated incremental impacts of this rulemaking.

1. Benefits

Incremental actions to meet the revised DLCL of 10 μg/ft² for floors and 100 μg/ft² for window sills after abatements where a baseline post-intervention loading is between the original DLCL of 40 μg/ft² for floors and 250 μg/ft² for window sills and the revised DLCL would reduce exposure to lead, resulting in benefits from avoided adverse health effects. In the Economic Analysis of this rule, EPA quantified the benefits of reduced lead exposure to children from avoided Intelligence Quotient (IQ) loss as an indicator of

improved cognitive function and, hence, lifetime earnings. For the subset of adverse health effects where these effects were quantified, the estimated annualized benefits are ≤$13 million to ≥$202 million per year using a 3% discount rate, and ≤$3 million to ≥$44 million per year using a 7% discount rate, with the range representing the uncertainties about the blood lead levels at which an environmental investigation will be triggered and about the relationship between changes in blood lead levels and IQ. The ''≤'' and ''≥'' symbols are intended to convey uncertainty in the results. They do not mean that the results are unbounded (*i.e.,* that the true values could be zero on the lower end or infinity on the higher end). There are additional unquantified benefits due to other avoided adverse health or behavioral effects in children, including attention-related behavioral problems, greater incidence of problem behaviors, decreased cognitive performance, reduced post-natal growth, delayed puberty, decreased hearing, and decreased kidney function (Ref. 9).

2. Costs

This rule is estimated to result in costs of ≤$2 million to ≥$14 million per year using either a 3% or a 7% discount rate. The ''≤'' and ''≥'' symbols are intended to convey uncertainty in the results. They do not mean that the results are unbounded (*i.e.,* that the true values could be zero on the lower end or infinity on the higher end). In the events affected by this rule, incremental costs are incurred for specialized cleaning used to reduce dust-lead loadings to below the clearance levels and for retesting lead levels. In some instances, floors will also be sealed, overlaid or replaced, or window sills will be sealed or repainted.

3. Small Entity Impacts

EPA estimates that this rule may impact ≤1,240 to ≥10,215 small abatement firms; ≤1,025 to ≥8,977 may have cost impacts estimated at less than 1% of revenues, ≤113 to ≥990 may have impacts estimated between 1% and 3%, and ≤28 to ≥240 may have impacts estimated at greater than 3% of revenues. The ''≤'' and ''≥'' symbols are intended to convey uncertainty in the results. They do not mean that the results are unbounded (*i.e.,* that the true values could be zero on the lower end or infinity on the higher end). EPA's analysis assumes that in all cases the costs are borne entirely by the lead paint abatement firm (as opposed to being passed through to the property owner). However, it is more likely that some, or perhaps even most, of these costs will be passed on to the property owners.

4. Environmental Justice

This rule would increase the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population.

5. Effects on State, Local, and Tribal Governments

The rule would not have any significant or unique effects on small governments, or federalism or tribal implications.

F. Children's Environmental Health

Lead exposure has the potential to impact individuals of all ages, but it is especially harmful to young children because the developing brain can be particularly sensitive to environmental contaminants (Refs. 10, 11). Exposure to lead is associated with increased risk of a number of adverse health or behavioral effects in children, including decreased cognitive performance, greater incidence of problem behaviors, and increased diagnoses of attention-related behavioral problems (Ref. 9). Furthermore, floor dust in homes and child-care facilities is a significant route of exposure for young children given their mouthing and crawling behavior and proximity to the floor. Therefore, the environmental health or safety risk addressed by this action may have a disproportionate effect on children (Ref. 12).

Consistent with the Agency's Policy on Evaluating Health Risks to Children (Ref. 13), EPA has evaluated the health effects in children of decreased lead exposure from the lowering of the DLCL. EPA prepared a Technical Support Document for this rulemaking, which models dust-lead exposures and estimates both blood lead levels and associated impacts on IQ at the revised DLCL of 10 μg/ft^2 and 100 μg/ft^2 versus the original DLCL of 40 μg/ft^2 and 250 μg/ft^2 on floors and window sills, respectively (Ref. 12). While no safe level of lead in blood has been identified (Ref. 4), the reductions in children's blood-lead levels resulting from this rule are expected to reduce the risk of adverse cognitive and developmental effects in children. The Technical Support Document shows that health risks to young children decrease with decreasing dust-lead levels.

II. Background

A. Health Effects

Lead exposure has the potential to impact individuals of all ages, but it is especially harmful to young children because the developing brain can be particularly sensitive to environmental contaminants (Ref. 10, 11). Ingestion of lead-contaminated dust is a major contributor to blood lead levels in children, particularly those who reside in homes built prior to 1978 (Ref. 14, 15). Infants and young children can be more highly exposed to lead through floor dust at home and in child-care facilities because they often put their hands and other objects that can have lead from dust on them into their mouths (Ref. 11).

The best available science informs EPA's understanding of the relationships between exposures to dust-lead loadings, blood lead levels, and adverse human health effects. These relationships are summarized in the Integrated Science Assessment for Lead (''Lead ISA'') (Ref. 16), which EPA released in June 2013, and the National Toxicology Program (NTP) Monograph on the Health Effects of Low-Level Lead, which was released by the Department of Health and Human Services in June 2012 (''NTP Monograph'') (Ref. 9).The Lead ISA is a synthesis and evaluation of scientific information on the health and environmental effects of lead, including cognitive function decrements in children (Ref. 16).

The NTP, in 2012, completed an evaluation of existing scientific literature to summarize the scientific evidence regarding potential health effects associated with low-level lead exposure as indicated by blood lead levels less than 10 μg/dL. The evaluation specifically focused on the life stage (prenatal, childhood, adulthood) associated with these potential health effects, and on epidemiological evidence at blood lead levels less than 10 μg/dL, because health effects at higher blood lead levels are well-established. The NTP concluded that there is sufficient evidence for adverse health effects in children and adults at blood lead levels less than 10 μg/dL, and less than 5 μg/dL as well. The NTP concluded that there is sufficient evidence that blood lead levels less than 10 μg/dL are associated with delayed puberty, decreased hearing, and reduced post-natal growth. In children, there is sufficient evidence that blood lead levels less than 5 μg/dL are associated with increased diagnoses of attention-related behavioral problems, greater incidence of problem behaviors, and decreased cognitive

performance. There is limited evidence that blood lead levels less than 5 µg/dL are associated with delayed puberty and decreased kidney function in children 12 years of age and older (Ref. 9).

For further information regarding lead and its health effects, and federal actions taken to eliminate LBP hazards in housing, see the Lead Action Plan, the Technical Support Document for this rulemaking and the background section of the Lead Renovation, Repair and Painting Rule, issued on April 22, 2008 (also referred to as the ''RRP Rule,'' (73 FR 21692, April 22, 2008) (FRL–8355–7), codified at 40 CFR part 745, subpart E) (Ref. 4, 12, 17).

B. Federal Actions To Reduce Lead Exposures

In 1992, Congress enacted Title X of the Housing and Community Development Act (also known as the Residential Lead-Based Paint Hazard Reduction Act of 1992 or ''Title X'') (Ref. 1) in an effort to eliminate LBP hazards. Section 1018 of Title X required EPA and HUD to promulgate regulations for disclosure of any known LBP or any known LBP hazards in target housing offered for sale or lease (known as the ''Disclosure Rule'') (Ref. 18). (''Target housing'' is defined in section 401(17) of TSCA, 15 U.S.C. 2681(17).) On March 6, 1996, the Disclosure Rule was codified at 40 CFR part 745, subpart F, for EPA, and 24 CFR part 35, subpart A, for HUD. It requires information disclosure activities before a purchaser or lessee is obligated under a contract to purchase or lease target housing.

TSCA section 402(a) directs EPA to promulgate regulations covering LBP activities to ensure persons performing these activities are properly trained, that training programs are accredited, and that contractors performing these activities are certified. On August 29, 1996, EPA published final regulations under TSCA section 402(a) that govern LBP inspections, risk assessments, and abatements in target housing and child occupied facilities (COFs) (also referred to as the ''LBP Activities Rule,'' codified at 40 CFR part 745, subpart L) (Ref. 19). The definition of ''child-occupied facility'' is codified at 40 CFR 745.223 for purposes of LBP activities. Regulations promulgated under TSCA section 402(a) contain standards for performing LBP activities, while taking into account reliability, effectiveness, and safety.

TSCA section 402(c)(3) directs EPA to promulgate regulations covering renovation or remodeling activities in target housing, public buildings constructed before 1978, and commercial buildings that create LBP hazards. EPA issued the final RRP Rule under TSCA section 402(c)(3) on April 22, 2008 (Ref. 17).

- TSCA section 403, 15 U.S.C. 2683, gives EPA a related authority to carry out responsibilities for addressing LBP hazards under the Disclosure and LBP Activities Rules. TSCA section 403 requires EPA to promulgate regulations that ''identify . . . lead-based paint hazards, lead-contaminated dust, and lead-contaminated soil'' for purposes of TSCA Title IV and the Residential Lead-Based Paint Hazard Reduction Act of 1992. LBP hazards, under TSCA section 401, are defined as conditions of LBP and lead-contaminated dust and soil that ''would result'' in adverse human health effects (15 U.S.C. 2681(10)). TSCA section 401 defines lead-contaminated dust as ''surface dust in residential dwellings'' that contains lead in excess of levels determined ''to pose a threat of adverse health effects'' (15 U.S.C. 2681(11)). The 2001 LBP Hazards Rule established the DLHS to identify conditions of lead-contaminated dust that would result in adverse human health effects. These DLHS were revised in the 2019 DLHS Rule and are used to identify dust-lead hazards.

The 2001 LBP Hazards Rule also established the DLCL (also referred to as ''clearance levels'' and sometimes referred to elsewhere as ''clearance standards'') under TSCA section 402(a). These clearance levels are used to evaluate the effectiveness of cleaning following an abatement. As defined in TSCA section 401 abatements are designed to permanently eliminate LBP hazards, including dust-lead hazards. For purposes of the DLCL, post-clearance dust-lead loadings below the DLHS indicate permanent elimination of dust-lead hazards.

Pursuant to TSCA section 404, 15 U.S.C. 2684, and EPA's regulations at 40 CFR part 745, subpart Q, interested states, territories, and federally recognized tribes may apply for and receive authorization to administer their own LBP Activities and RRP programs. EPA's regulations are intended to reduce exposures, and the LBP Activities regulations in particular are intended to identify and mitigate hazardous levels of lead. Authorized programs must be ''at least as protective of human health and the environment as the corresponding federal program,'' and must provide for ''adequate enforcement.'' See 40 CFR 745.324(e)(2). The 2019 DLHS Rule revised the regulation to improve the process for states, federally recognized tribes, and territories with authorized LBP Activities programs to demonstrate that their programs meet the requirements of 40 CFR 745.325 (by submitting a report pursuant to 40 CFR 745.324(h) with such demonstration within two years of the effective date of a revision).

HUD's Lead Safe Housing Rule (LSHR) is codified in 24 CFR part 35, subparts B through R. The LSHR implements sections 1012 and 1013 of Title X. Under Title X, HUD has specific authority to control LBP and LBP hazards in federally-assisted target housing (including COFs that are part of an assisted target housing property covered by the LSHR, because they are part of the common area of the property). The LSHR aims in part to ensure that federally-owned or federally-assisted target housing is free of LBP hazards (Ref. 20). Under the LSHR, when a child under age six with an elevated blood lead level residing in certain categories of assisted target housing is identified, the ''designated party'' and/or the housing owner shall undertake certain actions.

C. Applicability and Uses of the DLCL

The DLCL finalized in this regulation support the LBP Activities program, and apply to target housing (*i.e.,* most pre-1978 housing) and COFs (*i.e.,* pre-1978 non-residential properties where children six years of age or under spend a significant amount of time, such as child care centers and kindergartens). Apart from COFs, no other public and commercial buildings are covered by this rule. For further background on the types of buildings to which the LBP Activities program apply, refer to the proposed and final 2001 LBP Hazards Rule (Ref. 2, 21).

The DLCL are incorporated into the post-abatement work practices outlined in the LBP Activities Rule (40 CFR 745.227). LBP Activities regulations apply to inspections, risk assessments, project design, and abatement activities. Pre-abatement dust-lead testing occurs during a risk assessment, often initiated to comply with HUD's LSHR or in response to discovery of a child with a blood lead level that equals or exceeds the current CDC blood lead reference value (Ref. 9), or the action level set by the state the child lives in. The objective of a risk assessment is to determine, and then report, the existence, nature, severity, and location of LBP hazards in residential dwellings and COFs through an on-site investigation. During a risk assessment, a risk assessor collects environmental samples that include dust wipe samples from floors and window sills that are sent to an NLLAP-recognized laboratory for analysis. NLLAP is an EPA program that defines the minimum requirements and abilities that a paint chips, dust, or soil testing

laboratory must meet to attain EPA recognition as an accredited lead testing laboratory. Once the samples are analyzed by an NLLAP-recognized laboratory, the risk assessor compares the results of the dust wipe samples against the DLHS. If the dust-lead loadings from the samples are at or above the applicable DLHS, indicating LBP hazards are present, the risk assessor will identify acceptable options for controlling the hazards in the respective property, which may include abatements and/or interim controls. TSCA section 401 defines abatements as, ''measures designed to permanently eliminate lead-based paint hazards,'' (15 U.S.C. 2681(1)), while interim controls are ''designed to temporarily reduce human exposure or likely exposure to lead-based paint hazards,'' (40 CFR 745.83 and 745.223). These options should allow the property owner to make an informed decision about what actions should be taken to protect the health of current and future residents. Risk assessments can be performed only by certified risk assessors.

The DLCL are used to evaluate the effectiveness of a cleaning following an abatement. After an abatement is complete, a risk assessor or inspector determines whether there are any ''visible amounts of dust, debris or residue,'' which will need to be removed before clearance sampling takes place (40 CFR 745.227(e)(8)). Once the area is free of visible dust, debris and residue, and one hour or more after final post-abatement cleaning ceases, clearance sampling for dust-lead (via dust wipe samples) can take place and will be conducted ''using documented methodologies that incorporate adequate quality control procedures'' (40 CFR 745.227(e)(8)). Only a properly trained and certified risk assessor or inspector can conduct clearance sampling. A NLLAP-recognized laboratory must analyze the dust wipe samples and a risk assessor or inspector must compare the results from window sills and floors (and window troughs) to the appropriate DLCL. Every sample must test below the corresponding DLCL, and if a single sample is equal to or greater than the corresponding DLCL, then the abatement fails clearance and the components represented by the sample must be recleaned and retested (40 CFR 745.227(e)(8)). After the dust wipe samples show dust-lead loadings below the DLCL, an abatement report is prepared, copies of any reports required under the LBP Activities Rule are provided to the building owner (and to potential lessees and purchasers under the LBP Disclosure Rule by those building owners or their agents), and all required records are retained by the abatement firm or by the individuals who developed each report.

Achieving the DLCL after an abatement does not mean that the home is free from all exposure to lead, since exposures are dependent on many factors. For instance, the physical condition of a property may change over time, resulting in an increased exposure. EPA will continue coordinating with other Federal agencies to encourage best practices for occupants of post-abatement properties to conduct ongoing maintenance that will help prevent dust-lead from being reintroduced on previously cleared surfaces.

D. Public Comments Summary

The proposed rule provided a 60-day public comment period, ending on August 24, 2020. EPA received public comments from 28 commenters during the comment period. Comments were received from private citizens, state/local governments (including state health departments), potentially affected lead-based paint businesses, non-governmental organizations, environmental and public health advocacy groups and an individual from an academic institution. Several commenters, including individuals, non-governmental organizations, and state/local governments supported the DLCL as proposed at 10 ug/ft^2 for floors and 100 ug/ft^2 for window sills. A number of commenters requested that EPA promulgate DLCL lower than the proposed levels of 10 µg/ft^2 for floors and 100 µg/ft^2 for window sills. Some commenters specifically suggested that EPA should revise the DLCL for window sills to 40 µg/ft^2 or lower and/or 5 µg/ft^2 for floors. One commenter explained that within the considered options for the proposal, EPA should have analyzed a floor level lower than 10 µg/ft^2 and that the Agency must consider a lower level for floors before finalizing the rule. Other commenters expressed concern over lower DLCL and that contractors may not be able to meet lower clearance requirements without additional work in some cases, which may make it difficult to attract qualified contractors. A few commenters discussed the discrepancy between the revised 2019 DLHS and the original DLCL from 2001 and noted that due to the inconsistency an abatement could be cleared at levels higher than the DLHS, which is confusing and less protective. In this preamble, EPA has responded to the major comments relevant to this final rule. In addition, the more comprehensive version of EPA's response to comments related to this final action can be found in the Response to Comments document (Ref. 22).

To the extent that commenters discussed issues with the DLHS in their public comments, EPA has previously promulgated the DLHS in the recent 2019 rulemaking and notes that within this DLCL rule, EPA is not re-opening or reconsidering the recently revised DLHS.

III. Final Rule

The purpose of this rulemaking is to update the DLCL so that attaining these clearance levels demonstrates elimination of dust-lead hazards under the revised 2019 standards. EPA carefully considered all the public comments related to the proposed rule and is finalizing its proposal to lower the DLCL for floors from 40 µg/ft^2 to 10 µg/ft^2 and to lower the DLCL for window sills from 250 µg/ft^2 to 100 µg/ft^2. As previously mentioned, because there is no DLHS for window troughs, EPA is not revising the DLCL for window troughs at this time.

A. Approach for Reviewing and Selecting the Final Dust-Lead Clearance Levels

As EPA explained in the LBP Activities Rule (Ref. 19) (61 FR 45778, 45779), the work practice standards covered by those regulations are intended to ensure that abatements are conducted reliably, effectively, and safely. While considering those three criteria, the 2001 LBP Hazards Rule modified the work practice standards to include dust-lead clearance levels, which ''are used to evaluate the effectiveness of cleaning following an abatement.'' (Ref. 2) (66 FR 1206, 1211). Abatements are designed to permanently eliminate LBP hazards including dust-lead hazards and the definition of an abatement includes cleanup and post-abatement clearance testing activities (40 CFR 745.223). A dust-lead hazard is identified by the DLHS and the DLCL are used to demonstrate that abatement activities effectively and permanently eliminate those hazards. Therefore, in choosing which DLCL to finalize in this rulemaking, EPA considered how the DLCL will support the reliability, effectiveness, and safety of abatements to permanently eliminate LBP hazards.

The 2001 LBP Hazards Rule adopted the rationale outlined in EPA's 1998 proposed rule (''Identification of Dangerous Levels of Lead,'' 63 FR 30302, 30341, June 3, 1998) (Ref. 21). See also 66 FR 1206, 1222–1223 (Ref. 2). EPA chose DLCL that were ''achievable

using products and methods known to be reliable and effective'' (Ref. 21). In the 2018 proposal for the 2019 DLHS Rule (''Review of the Dust-Lead Hazard Standards and the Definition of Lead-Based Paint,'' 83 CFR 30889, July 2, 2018), EPA acknowledged that if the DLHS were set too low, the effectiveness of the LBP Activities program may be harmed if the abatement projects became overly expensive and time consuming due to issues of achievability (Ref. 23). That same concern for achievability applies to EPA's decision on which DLCL to set in this rulemaking.

EPA received several comments during the public comment period suggesting that EPA promulgate DLCL lower than the proposed levels at 10 μg/ft² for floors and 100 μg/ft² for window sills, while a subset of commenters specifically requested lowering the DLCL to 5 μg/ft² for floors and/or to 40 μg/ft² for window sills. A few commenters also noted that lower levels for DLCL have been shown to be feasible by the survey of lead hazard control grantees conducted by HUD's Office of Lead Hazard Control and Healthy Homes (OLHCHH) (also known as the HUD Clearance Survey) (Ref. 24).

As noted in the final 2019 DLHS Rule and the DLCL proposal, according to the HUD Clearance Survey ''reduction in the federal clearance standard for floors from 40 μg/ft² to 10 μg/ft², a reduction in the federal clearance standard for windowsills from 250 μg/ft² to 100 μg/ft² . . . are all technically feasible using the methods currently employed by OLHCHH LHC grantees to prepare for clearance'' even though, at the time the survey took place, the levels that projects had to be cleared to were the original DLCL of 40 μg/ft² and 250 μg/ft², respectively (Ref. 24). Additionally, according to public comments, a state department of health and a non-governmental organization believe that most NLLAP-recognized laboratories or those within their state are capable of testing the clearance levels as proposed. Therefore, the final DLCL of 10 μg/ft² on floors and 100 μg/ft² on window sills are shown to be achievable using available products and methods that are effective and reliable in permanently eliminating LBP hazards. To the extent commenters argue that lower options, particularly for sills, are *also* achievable, such an argument does not necessitate selecting the lower options because the primary design of the DLCL is to demonstrate permanent elimination of the dust-lead hazards, which EPA finds is achieved by clearance levels of 10 μg/ft² on floors and 100 μg/ft² for window sills. For further information on the HUD Clearance Survey, see the preamble to the 2019 DLHS Rule (Ref. 3).

In addition to the specific criteria of reliability, effectiveness, and safety, the 2001 LBP Hazards rulemaking considered the DLCL in the broader context of Title X, and selected DLCL that are compatible with a ''workable framework for lead-based paint hazard evaluation and reduction'' (Ref. 21). To this end, EPA chose DLCL that were consistent with the DLHS in part to ensure they were ''as easy as possible to understand and implement'' (Ref. 21).

EPA maintains the concern for consistency between the DLCL and DLHS for this rulemaking. During the public comment period several commenters expressed concern over the discrepancy between the 2019 DLHS and the 2001 DLCL (Ref. 22). The commenters explained that this inconsistency in the levels created confusion and leads to ethical concerns of clearing a home with post-abatement levels higher than the 2019 revised DLHS. A few commenters urged EPA to quickly finalize as proposed to, in part, fix the mismatch between the DLHS and the DLCL. Compounding the potential for such confusion is the fact that, as indicated in the 2019 DLHS Rule and described in greater detail elsewhere in this preamble, HUD cross-references EPA's DLHS for clearance work practices under HUD's LSHR. This means that if EPA chose a different DLCL than the DLHS, a segment of the regulated community would have had two sets of clearance levels to consider. The selected DLCL of 10 μg/ft² on floors and 100 μg/ft² on window sills will mitigate this confusion within the regulated community.

As stated previously in this preamble, EPA wanted to act as expeditiously as possible to update the DLCL in recognition of the updated DLHS for floors and window sills. EPA believes it has reasonably focused this rulemaking to revise the DLCL so that attaining these levels demonstrates elimination of dust-lead hazards under the revised 2019 standards. When finalizing DLCL of 10 μg/ft² for floors and 100 μg/ft² for window sills, as discussed above, the EPA considered the achievability of these levels, how the lower dust-lead loadings can be reliably detected by laboratories, the effectiveness of these levels, and consistency with the revised 2019 standards and across the Federal Government. For further information on the public comments received and a more comprehensive version of EPA's response to comments related to this final action can be found in the Response to Comments document (Ref. 22).

B. Technical Analysis

The Technical Support Document that accompanies this final rule evaluated the 2001 DLCL, the background dust-lead level, and the five DLCL options (15 μg/ft² for floors and 100 μg/ft² for window sills; and 10 μg/ft² for floors, and 40 μg/ft², 60 μg/ft², 80 μg/ft² and 100 μg/ft² for window sills) with values between background (lowest) and the 2001 DLCL (highest). The methods for estimating exposure and health impacts utilized for the 2019 DLHS rulemaking are reflected in the Technical Support Document for this rule to analyze the DLCL options. The various components of the model and input parameters used in the Technical Support Document for the DLHS and this rulemaking have been the subject of multiple Science Advisory Board Reviews, workshops and publications in the peer review literature (Ref. 12, 26). The analysis outlined in the 2019 DLHS Rule was used in that rulemaking to identify conditions that would result in adverse health effects. Where the DLHS are used to identify conditions that would result in adverse health effects, the DLCL must demonstrate that those conditions identified by the DLHS have been eliminated. Therefore, the health impact analysis for the DLCL is less central to the decision-making for this rule than it was to the 2019 DLHS Rule. Regardless, EPA must understand the impact on public health when selecting the DLCL in order to inform the Economic Analysis.

The analyses that EPA developed and presented in both the Technical Support Document for the 2019 DLHS Rule and the Technical Support Document accompanying this final rule, were specifically designed to model potential health effects that might accrue to the subpopulation, *i.e.,* children living in pre-1940 and pre-1978 housing. EPA notes that its different program offices estimate exposures for different populations, different media, and under different statutory requirements and thus different models or parameters may be a better fit for their purpose. As such, the approach and modeling parameters chosen for this rulemaking should not necessarily be construed as appropriate for or consistent with the goals of other EPA programs (Ref. 12).

In its evaluation, EPA estimated blood lead levels and IQ changes as a proxy for changes in cognitive function in children, six and under, exposed long-term to these analyzed dust-lead loading levels. As also reflected in the 2019 DLHS Rule, EPA generated two different

modeling approaches to estimate the quantitative relationships between dust-lead and blood lead level data. The first approach used mechanistic modeling data that include consideration of age-specific ingestion rates, activity patterns, and background exposures. The second approach used empirical data that includes co-reported dust-lead and blood lead level measurements in the homes of children. The dust-lead and blood lead level data are used to develop an empirical relationship to estimate blood lead level for each candidate DLCL. Both approaches (mechanistic and empirical) are compared to provide independent confirmation of the relationship between dust-lead loadings and blood lead level. For additional information summarizing the methodologies employed in the Technical Support Document, see the 2018 preamble to the proposed DLHS rule (Ref. 23).

C. Effect of the Revised DLCL on EPA and HUD Programs

1. LBP Activities Rule—EPA Abatements

Abatements are any measures or set of measures designed to permanently eliminate lead-based paint hazards and include activities such as the removal of paint and dust, the permanent enclosure or encapsulation of lead-based paint, the replacement of painted surfaces or fixtures, and all preparation, cleanup, disposal, and post-abatement clearance testing activities associated with such measures. Abatements must be conducted by certified abatement workers and supervisors. After LBP abatements are conducted, EPA's regulations require a certified inspector or risk assessor to conduct post-abatement clearance testing (via dust wipe samples) of the abated area. If the dust wipe sample results show dust-lead loadings equal to or exceeding the applicable clearance level, ''the components represented by the failed sample shall be recleaned and retested.'' See 40 CFR 745.227(e)(8)(vii). In other words, the abatement is not cleared until the dust wipe samples in the work area are below the clearance levels. Under this final rule, inspectors and risk assessors would compare dust wipe sampling results for floors and window sills to the revised DLCL of 10 μg/ft² and 100 μg/ft², respectively, and the results for window troughs to the DLCL of 400 μg/ft². Dust wipe sampling results at or above the DLCL would indicate that the components represented by the sample must be recleaned and retested. This final rule does not change any other risk assessment requirements.

2. Renovation, Repair and Painting Rule

The revised DLCL will not trigger new requirements under the existing RRP Rule (40 CFR part 745, subpart E). The RRP Rule requires post-renovation cleaning verification under 40 CFR 745.85(b), but the rule does not require dust wipe sampling and analysis using the DLCL. However, although optional under the RRP Rule, dust wipe sampling for clearance using the DLCL in accordance with the LBP Activities Rule (40 CFR 745.227(e)(8)) may be required by contract or by another Federal, state, territorial, tribal, or local law or regulation. At this time, other than HUD's Lead Safe Housing Rule, EPA is not familiar with other laws and regulations that require clearance testing using EPA's DLCL.

3. EPA–HUD Disclosure Rule

Under the Disclosure Rule, prospective sellers and lessors of target housing must provide purchasers and renters with a federally approved lead hazard information pamphlet and disclose known LBP and/or LBP hazards, and any available records, reports, and additional information pertaining to LBP and/or LBP hazards. The information disclosure activities are required before a purchaser or renter is obligated under a contract to purchase or lease target housing. Records or reports pertaining to LBP and/or LBP hazards must be disclosed, including results from post-abatement clearance testing, regardless of whether the level of dust-lead is below the clearance levels.

The revised DLCL of 10 μg/ft² on floors and 100 μg/ft² on window sills will not result in additional disclosures because there are no new information collection requirements to consider under this rule. Property owners would already be disclosing results, records, reports, and any additional information that show dust-lead below the original DLCL of 40 μg/ft² on floors or below 250 μg/ft² on window sills, and any results, records, and reports of additional cleaning due to the lower DLCL would be reflected in this same record.

4. LSHR Clearance Requirements

The DLCL in this final rule will not change the clearance levels that apply to hazard reduction activities under HUD's LSHR because the LSHR currently requires clearance at the DLHS level, which is reflected by the lower DLCL. The LSHR requires certain hazard reduction activities to be performed in certain federally-owned and assisted target housing including abatements, interim controls, paint stabilization, and ongoing LBP maintenance. Hazard reduction activities are required in this housing when LBP hazards are identified or when maintenance or rehabilitation activities disturb paint known or presumed to be LBP. The LSHR's clearance regulations, 24 CFR 35.1340, specify requirements for clearance of these projects (when they disturb more than de minimis amounts of known or presumed lead-based painted surfaces, as defined in 24 CFR 35.1350(d)), including a visual assessment, dust sampling, submission of samples for analysis for lead in dust, interpretation of sampling results, and preparation of a report. As explained in the preamble to the 2019 DLHS Rule (Ref. 3), the LSHR clearance regulations cross-reference EPA's DLHS. As a result, the LSHR clearance levels were lowered to 10 μg/ft² and 100 μg/ft² for floors and window sills, respectively, when the 2019 DLHS Rule became effective on January 6, 2020. Accordingly, activities under the LSHR are currently required to be cleared using EPA's DLHS.

5. 2017 Policy Guidance—HUD Requirements for Lead Hazard Control Grants

On February 16, 2017, HUD's OLHCHH issued policy guidance to establish new and more protective requirements for dust-lead action levels for its Lead-Based Paint Hazard Control (LBPHC) and Lead Hazard Reduction Demonstration (LHRD) grantees (the requirements also apply to related HUD grants authorized by Title X, section 1011 (42 U.S.C. 4852), under similar names, including Lead Hazard Reduction (LHR) grants and their High Impact Neighborhoods and Highest Lead-Based Paint Abatement Needs grant categories) (Ref. 27). In particular, the guidance adopted clearance levels of 10 μg/ft² and 100 μg/ft² for floors and window sills, respectively, for lead hazard control activities performed under these grant programs. The change in requirements was supported by scientific evidence on the adverse effects of lead exposure at low blood-lead levels in children, (<10 μg/dL) as well as the achievability of lower clearance levels based on the HUD Clearance Survey (Ref. 24). The guidance clearance levels for floors and window sills are equal to the final DLCL. Consequently, the changes to the DLCL that EPA is promulgating with this final rule, will not affect the clearance levels used by the LBPHC and LHRD grantees.

6. HUD Guidelines

The HUD Guidelines for the Evaluation and Control of Lead-Based

Paint Hazards in Housing were developed in 1995 under section 1017 of Title X. They provide detailed, comprehensive, technical information on how to identify LBP hazards in residential housing and COFs, and how to control such hazards safely and efficiently. The Guidelines were revised in 2012 to incorporate new information, technological advances, and new Federal regulations, including EPA's LBP hazard standards. Based on EPA's changes to the DLHS in 2019 and the changes to DLCL from this final rule, HUD plans to revise Chapter 5 of the Guidelines on risk assessment and reevaluation and Chapter 15 on clearance, and make conforming changes elsewhere as needed.

7. Previous LBP-Related Activities

The DLCL are used to evaluate the effectiveness of a cleaning following an abatement. After the dust wipe samples show dust-lead loadings below the DLCL, an abatement report is prepared, copies of any reports required under the LBP Activities Rule are provided to the building owner (and to potential lessees and purchasers under the LBP Disclosure Rule by those building owners or their agents), and all required records are also retained by the abatement firm or by the individuals who developed each report. The revised DLCL of 10 μg/ft² on floors and 100 μg/ft² on window sills will not impose retroactive requirements on regulated entities that have previously performed post-abatement clearance testing using the original DLCL of 40 μg/ft² on floors or 250 μg/ft² on window sills. These new requirements would only apply to post-abatement clearance sampling and analysis conducted after the effective date of this final rule.

D. Conforming the Definition of Clearance Levels

EPA is finalizing as proposed, clarifying language that defines the achievement of post-abatement clearance, which explains what dust-lead levels are permitted on a surface following an abatement that would achieve clearance. The post-abatement clearance procedures set forth in 40 CFR 745.227 state that clearance is not achieved when post-abatement dust-lead levels (which are a measure of the mass of lead per area, commonly expressed in micrograms per square foot (μg/ft²)) equal or exceed the clearance levels (40 CFR 745.227(e)(8)(vii)). However, prior to this rule's amended language, 40 CFR 745.223 defined clearance levels as ''the *maximum* amount of lead permitted in dust on a surface following completion of an abatement activity'' (40 CFR 745.223) (emphasis added). EPA also notes that HUD's clearance standards rule for interim controls of lead-based paint hazards in HUD-assisted target housing is consistent with the procedures set forth in 40 CFR 745.227 rather than 40 CFR 745.223. To resolve this post-abatement discrepancy, EPA is conforming the definition of clearance levels found in 40 CFR 745.223 to the post-abatement clearance procedures in 40 CFR 745.227, in order to clarify in the definition that the post-abatement dust-lead levels must be below the clearance levels.

Three commenters (including state health departments and an environmental non-governmental organization) submitted public comments that supported EPA's decision to clarify in the DLCL definition that the post-abatement dust-lead levels need to be below the DLCL in order to achieve clearance. EPA agrees with the support from the public commenters and is conforming the definition in 40 CFR 745.223 as proposed.

E. State Authorization

Pursuant to TSCA section 404 and EPA's regulations at 40 CFR part 745, subpart Q, interested states, territories and federally recognized tribes may apply for and receive authorization to administer their own LBP Activities programs, as long as their programs are at least as protective of human health and the environment as the EPA's program and provide adequate enforcement. As part of the authorization process, states, territories and federally recognized tribes must demonstrate to EPA that they meet the requirements of the LBP Activities Rule. A state, territory or federally recognized tribe must demonstrate that it meets the revised DLCL in its application for authorization or, if already authorized, in a report submitted under 40 CFR 745.324(h) no later than two years after the effective date of the new requirements. If an application for authorization has been submitted but not yet approved, the state, territory or federally recognized tribe must demonstrate that it meets the new requirements either by amending its application, or in a report it submits under 40 CFR 745.324(h) no later than two years after the effective date of the new requirements.

IV. References

The following is a list 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. Public Law 102–550, Title X—Housing and Community Development Act, enacted October 28, 1992 (also known as the Residential Lead-Based Paint Hazard Reduction Act of 1992 or ''Title X'') (42 U.S.C. 4851 *et seq.*). *https://www.govinfo.gov/content/pkg/USCODE-2017-title42/html/USCODE-2017-title42-chap63A-sec4851.htm.*
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12. U.S. EPA, Office of Pollution Prevention and Toxics. *Technical Support Document for Residential Dust-lead Clearance Levels Rulemaking Estimation of Blood Lead Levels and Effects from Exposures to Dust-lead.* December 2020.
13. U.S. EPA. *Policy on Evaluating Health Risks to Children.* Policy. October 1995. *https://www.epa.gov/sites/production/files/2014-05/documents/1995_childrens_health_policy_statement.pdf.*
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26. U.S. EPA, Office of Pollution Prevention and Toxics. *Technical Support Document for Residential Dust-lead Hazard Standards Rulemaking Approach taken to Estimate Blood Lead Levels and Effects from Exposures to Dust-lead.* June 2019.
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V. Statutory and Executive Order Reviews

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

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

This action is an economically significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011). Any changes made in response to OMB recommendations have been documented in the docket. The Agency prepared an analysis of the potential costs and benefits associated with this action, which is available in the docket (Ref. 7).

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is considered an Executive Order 13771 regulatory action (82 FR 9339, February 3, 2017). Details on the estimated costs of this final rule can be found in EPA's analysis of the potential costs and benefits associated with this action (Ref. 7).

C. Paperwork Reduction Act (PRA)

This action does not directly impose an information collection burden under the PRA, 44 U.S.C. 3501 *et seq.* Under 24 CFR part 35, subpart A, and 40 CFR 745, subpart F, and approved under OMB Control Number 2070–0151, sellers and lessors must already provide purchasers or lessees any available records or reports ''pertaining to'' LBP, LBP hazards and/or any lead hazard evaluative reports available to the seller or lessor. Accordingly, a seller or lessor must disclose any reports showing dust-lead levels, regardless of the value. Thus, this action would not result in additional disclosures. Because there are no new information collection requirements to consider under this rule, or any changes to the existing requirements to consider under this rule, an ICR is not necessary.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA, 5 U.S.C. 601 *et seq.* The small businesses subject to the requirements of this action are abatement firms that may incur costs associated with additional cleaning and sealing in houses where a post-abatement loading is between the original DLCL of 40 μg/ft^2 for floors and 250 μg/ft^2 for window sills, and the revised DLCL of 10 μg/ft^2 for floors and 100 μg/ft^2 for window sills.

EPA's Economic Analysis (Ref. 7) presents low and high scenarios for the number of housing units where a child with a blood lead level that equals or exceeds a Federal or state trigger value lives. For the low scenario, environmental investigations are assumed to be conducted when a child's blood lead level equals or exceeds the trigger value set by that child's state. These values vary from 5 μg/dL to 25 μg/dL, depending on the state. For the

high scenario, environmental investigations are assumed to be conducted when a child's blood lead level equals or exceeds the CDC's reference level of 5 µg/dL. The two scenarios function as bounding estimates, and a more realistic assessment of the number of environmental investigations is that they are between the high and low scenarios. The low and high scenarios for the number of environmental investigations affect the estimated number of small business that might incur costs for cleaning and additional dust wipe testing if EPA promulgates the clearance levels in this final rule.

The Agency has determined that this rule may impact ≤1,240 to ≥10,215 small abatement firms. Of these, about ≤1,025 to ≥8,977 may have cost impacts less than 1% of revenues, ≤113 to ≥990 may have impacts between 1% and 3%, and ≤28 to ≥240 may have impacts greater than 3% of revenues. The ''≤'' and ''≥'' symbols are intended to convey uncertainty in the results. They do not mean that the results are unbounded (*i.e.,* that the true values could be zero on the lower end or infinity on the higher end). Details of the analysis are presented in the EA, which is available in the docket (Ref. 7).

In addition to the use of the high scenario (which is likely to overestimate the number of small entities with significant impacts), the analysis makes a series of other assumptions that are likely to lead to an overestimate of small entity impacts. In order to estimate the potential impacts of the rule, EPA assumed that an environmental investigation occurs whenever a child's blood lead level is found to equal or exceed a Federal or state trigger value; that the environmental investigation always includes dust wipe testing of the child's home; and that a clean-up occurs whenever the environmental investigation indicates that dust-lead loadings exceed a hazard standard. Neither the DLCL nor the other provisions of EPA's LBP activities regulations require property owners to evaluate their properties for the presence of dust-lead hazards, nor to take action to address the hazards if dust-lead hazards are identified. These assumptions may overestimate the number of abatements affected, and thus the number of small abatement firms with significant impacts.

The analysis also assumes that in all cases where a dust-lead hazard is identified, the property owner performs at least one baseline abatement activity. This likely overestimates costs because some events may only involve interim controls, and EPA does not require clearance testing for such events. Again, this assumption may overestimate the number of abatements affected, and thus the number of small abatement firms with significant impacts.

Finally, the analysis assumes that in all cases the costs are borne entirely by the lead paint abatement firm (as opposed to being passed through to the property owner). However, it is more likely that some, or perhaps even most, of these costs will be passed on to the property owners. In some circumstances the demand for abatements is likely to be relatively inelastic. Furthermore, the costs of this rule for an affected job are a fraction of the costs of a typical abatement, and only a fraction of jobs are estimated to require re-clearance (meaning that the additional costs for a few jobs can be spread over the up-front prices of a much larger pool of abatements). EPA believes it is likely that abatement contractors will be able to raise up-front prices to some degree to account for the potential costs of additional cleaning and associated activities. Such pass-through of costs would decrease the magnitude of the cost impacts on individual abatement firms.

In light of these conservative assumptions, the small entity impacts analysis likely overstates the number of small businesses with large impacts, both in terms of the magnitude of the impacts and the number of businesses affected.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The total estimated annual cost of the rule is $3 million to $14 million per year (Ref. 7), which does not exceed the inflation-adjusted unfunded mandate threshold of $156 million.

F. Executive Order 13132: Federalism

This action does not have federalism implications, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. States that have authorized LBP Activities programs must demonstrate that they have DLCL at least as protective as the levels at 40 CFR 745.227. However, authorized states are under no obligation to continue to administer the LBP Activities program, and if they do not wish to adopt the new DLCL they can relinquish their authorization. In the absence of a state authorization, EPA will administer these requirements. Thus, Executive Order 13132 does not apply to this action.

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

This action does not have tribal implications as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). Federally recognized tribes that have authorized LBP Activities programs must demonstrate that they have DLCL at least as protective as the clearance level at 40 CFR 745.227. However, these authorized tribes are under no obligation to continue to administer the LBP Activities program, and if they do not wish to adopt the new DLCL they can relinquish their authorization. In the absence of a tribal authorization, EPA will administer these requirements. Thus, Executive Order 13175 does not apply to this action.

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

This action is subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is economically significant as defined in Executive Order 12866, and EPA believes that the environmental health or safety risk addressed by this action may have a disproportionate effect on children. Accordingly, we have evaluated the environmental health or safety effects of dust-lead exposure in children. The results of this evaluation are contained in Unit I.F. of the preamble titled ''Children's Environmental Health,'' Unit II.A. of the preamble titled ''Health Effects,'' the Economic Analysis and the Technical Support Document, where the health impacts of lead exposure and children is discussed more fully (Ref. 7, 12). The documents referenced above are available in the public docket for this action.

The primary purpose of this rule is to clear abatements to a level that can reliably, effectively and safely eliminate LBP hazards in target housing, including target housing where children reside, and COFs. EPA's analysis indicates that there will be approximately 2,300 to 22,000 children per year affected by the rule (Ref. 7).

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution or use of energy and the Administrator of the Office of Information and Regulatory Affairs has not otherwise determined that the action is a significant energy action.

J. National Technology Transfer and Advancement Act (NTTAA)

Since this action does not involve any technical standards, NTTAA section 12(d), 15 U.S.C. 272 note, does not apply to this action.

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

EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). The documentation for this decision is contained in the Economic Analysis, which is available in the docket (Ref. 7).

L. Congressional Review Act (CRA)

This action is subject to the CRA, 5 U.S.C. 801 *et seq.,* and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 745

Environmental protection, Abatement, Child-occupied facility, Clearance levels, Hazardous substances, Lead, Lead poisoning, Lead-based paint, Target housing.

Andrew Wheeler,

Administrator.

Therefore, for the reasons set forth in the preamble, 40 CFR chapter I, subchapter R, is amended as follows:

PART 745—[AMENDED]

■ 1. The authority citation for part 745 continues to read as follows:

Authority: 15 U.S.C. 2605, 2607, 2681–2692 and 42 U.S.C. 4852d.

■ 2. Amend § 745.223 by revising the definition for ''Clearance levels'' to read as follows:

§ 745.223 Definitions.

* * * * *

Clearance levels are values that indicate the amount of lead in dust on a surface following completion of an abatement activity. To achieve clearance when dust sampling is required, values below these levels must be achieved.

* * * * *

■ 3. Amend § 745.227 by revising paragraph (e)(8)(viii) to read as follows:

§ 745.227 Work practice standards for conducting lead-based paint activities: Target housing and child-occupied facilities.

* * * * *

(e) * * *

(8) * * *

(viii) The clearance levels for lead in dust are 10 μg/ft^2 for floors, 100 μg/ft^2 for interior window sills, and 400 μg/ft^2 for window troughs.

* * * * *

[FR Doc. 2020–28565 Filed 1–6–21; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket Nos. 11–42, 17–108, 17–287; FCC 20–151; FRS 17241]

Restoring Internet Freedom; Bridging the Digital Divide for Low-Income Consumers; Lifeline and Link Up Reform and Modernization

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) responds to a remand from the U.S. Court of Appeals for the D.C. Circuit directing the Commission to assess the effects of the Commission's *Restoring Internet Freedom Order* on public safety, pole attachments, and the statutory basis for broadband internet access service's inclusion in the universal service Lifeline program. This document also amends the Commission's rules to remove broadband internet service from the list of services supported by the universal service Lifeline program, while preserving the Commission's authority to fund broadband internet access service through the Lifeline program.

DATES: This *Order on Remand* shall become effective February 8, 2021.

ADDRESSES: Federal Communications Commission, 45 L Street NE, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Annick Banoun, Competition Policy Division, Wireline Competition Bureau, at (202) 418–1521, *annick.banoun@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Order on Remand* in WC Docket Nos. 11–42, 17–108, and 17–287, adopted October 27, 2020, and released on October 29, 2020. The document is available for download at *https://www.fcc.gov/document/fcc-responds-narrow-remand-restoring-internet-freedom-order-0*. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *FCC504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

Synopsis

1. In the *Restoring Internet Freedom Order* (83 FR 7852, Feb. 22, 2018), we reversed the Commission's misguided and short-lived utility-style regulation of the internet and returned to the light-touch regulatory framework for broadband internet access service that facilitated rapid and unprecedented growth for almost two decades. In this *Order on Remand,* we maintain this well-established approach after further considering three discrete issues raised by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit).

2. In *Mozilla Corp.* v. *FCC,* the D.C. Circuit upheld the vast majority of our decision in the *Restoring Internet Freedom Order,* remanding three discrete issues for further consideration—namely, the effect of that *Order* on: (1) Public safety; (2) the regulation of pole attachments; and (3) universal service support for low-income consumers through the Lifeline program. Because the court concluded that ''the Commission may well be able to address on remand'' these three issues, it declined to vacate the *Restoring Internet Freedom Order,* pending our further analysis. After considering the three issues identified by the court in light of the record developed thereafter, we see no grounds to depart from our determinations in the *Restoring Internet Freedom Order*.

I. Background

3. Building on decades of precedent, the Commission adopted the *Restoring Internet Freedom Order* to return to the successful light-touch bipartisan framework that promoted a free and open internet and, for almost twenty years, saw it flourish. The *Restoring*

Internet Freedom Order took effect on June 11, 2018. The *Restoring Internet Freedom Order* reversed the *Title II Order* (80 FR 19738, April 13, 2015), adopted in March 2015, which reclassified broadband internet access service from an information service to a telecommunications service and reclassified mobile broadband internet access services as a commercial mobile service and adopted three bright-line rules—blocking, throttling, and paid prioritization—as well as a general internet conduct standard and ''enhancements'' to the transparency rule. The *Restoring Internet Freedom Order,* adopted in December 2017, ended the agency's brief foray into utility-style regulation of the internet and restored the light-touch framework under which a free and open internet underwent rapid and unprecedented growth for almost two decades. The *Restoring Internet Freedom Order* ended Title II regulation of the internet and returned broadband internet access service to its long-standing classification as an information service under Title I, consistent with Supreme Court's holding in *Brand X*. Having determined that broadband internet access service—regardless of whether offered using fixed or mobile technologies—is an information service under the Communications Act of 1934, as amended (the Act), we also concluded that as an information service, mobile broadband internet access service should not be classified as a commercial mobile service or its functional equivalent.

4. *Mozilla Corp.* v. *FCC*. In *Mozilla Corp.* v. *FCC,* the D.C. Circuit largely affirmed the Commission's classification decision in the *Restoring Internet Freedom Order*. On February 6, 2020, the D.C. Circuit denied all pending petitions for rehearing, and the Court issued its mandate on February 18, 2020. Although largely affirming the Commission's decision, the *Mozilla* court ''remand[ed] for further proceedings on three discrete points.'' The first is the effect of the ''changed regulatory posture'' in the *Restoring Internet Freedom Order* on public safety. The D.C. Circuit observed that ''Congress created the Commission for the purpose of, among other things, 'promoting safety of life and property through the use of wire and radio communications' '' in section 1 of the Act, and concluded that public safety is ''an important aspect of the problem'' that the agency must consider and address. The *Mozilla* court also noted that ''[a] number of commenters voiced concerns about the threat to public safety that would arise under the proposed (and ultimately adopted)'' *Restoring Internet Freedom Order,* including ''how allowing broadband providers to prioritize internet traffic as they see fit, or to demand payment for top-rate speed, could imperil the ability of first responders, providers of critical infrastructure, and members of the public to communicate during a crisis.'' The court declined to consider petitioners' arguments based on ''an incident involving the (apparently accidental) decision by Verizon to throttle the broadband internet of Santa Clara firefighters while they were battling a devastating California wildfire,'' which occurred after the *Restoring Internet Freedom Order*. Likewise, the court declined to consider the responses to those arguments in the Commission's brief because they had not been set forth in the *Restoring Internet Freedom Order*.

5. The second discrete issue that the D.C. Circuit remanded is how the reclassification of broadband internet access service affects the regulation of pole attachments. The D.C. Circuit noted petitioners' ''substantial concern that, in reclassifying broadband internet as an information service, the Commission, without reasoned consideration, took broadband outside the current statutory scheme governing pole attachments.'' Our authority over pole attachments pursuant to section 224 of the Act extends to attachments made by a cable television system or provider of telecommunications service. States may ''reverse preempt'' our pole attachment rules and adopt their own rules governing pole attachments in place of ours. The *Mozilla* court acknowledged our observation that facilities remain subject to pole attachment regulation when deployed by entities commingling broadband internet access service with a service covered by section 224 of the Act. The D.C. Circuit found that our conclusion was sound with respect to ''providers who 'commingl[e]' telecommunication and broadband services'' but incomplete given the court's view that post-reclassification, ''the statute textually forecloses any pole-attachment protection for standalone broadband providers.'' The *Mozilla* court concluded that ''[t]he Commission was required to grapple with'' the matter of pole-attachment regulation for broadband-only providers and remanded the issue for further consideration.

6. The third discrete issue that the court remanded is the statutory basis for broadband internet access service's inclusion in the Lifeline program. The Lifeline program helps low-income Americans gain access to affordable communications services, and is part of the Commission's universal service efforts to close the digital divide. First created by the Commission in 1985, Congress codified this commitment to low-income consumers in the 1996 Telecommunications Act. Currently, the Lifeline program offers qualifying low-income consumers a discount of up to $9.25 per month on voice, broadband internet access service, or bundled services that meet the program's minimum service standards. Consumers who reside on Tribal lands can receive a discount of up to $34.25 on Lifeline service that satisfies the minimum service standards. The D.C. Circuit described petitioners' concern ''that reclassification would eliminate the statutory basis for broadband's inclusion in the [Lifeline] Program'' and pointed out that ''Congress [ ] tethered Lifeline eligibility to common-carrier status,'' citing statutory language limiting the designation of eligible telecommunications carriers (ETCs) and receipt of universal service support to common carriers. Similarly, citing the U.S. Court of Appeals for the Tenth Circuit's ''observ[ation], before broadband was classified as a telecommunications service, that 'broadband-only providers . . . cannot be designated as 'eligible telecommunications carriers' ' because 'under the existing statutory framework, only 'common carriers' . . . are eligible to be designated as 'eligible telecommunications carriers,' '' the D.C. Circuit concluded that the *Restoring Internet Freedom Order*'s reclassification of broadband internet access service would appear to preclude broadband's inclusion in the Lifeline Program. Consequently, the *Mozilla* court ''remand[ed] this portion of the [*Restoring Internet Freedom Order*] for the Commission to address.''

II. Discussion

7. We address in turn each of the three issues the *Mozilla* court remanded and conclude that, in each case, there is no basis to alter our conclusions in the *Restoring Internet Freedom Order*. Specifically, we examine the effects that the *Restoring Internet Freedom Order* might have on public safety communications, pole attachment rights for broadband-only providers, and the universal service Lifeline program, as well as how such possible effects bear on the Commission's underlying decisions to classify broadband internet access service as an information service and eliminate the internet rules. Our analysis below shows that the *Restoring*

Internet Freedom Order promotes public safety, facilitates broadband infrastructure deployment for ISPs, and allows us to continue to provide Lifeline support for broadband internet access service. Further, we conclude that any potential negative effects that the reclassification may have on public safety, pole attachment rights for broadband-only providers, and the Lifeline program are limited and would not change our classification decision in the *Restoring Internet Freedom Order* even if such negative effects were substantiated. Rather, we find that that overwhelming benefits of Title I classification and restoration of light-touch regulation outweigh any adverse effects.

A. Public Safety

8. The *Mozilla* court directed us to address the effect on public safety of the ''changed regulatory posture'' in the *Restoring Internet Freedom Order*. The *Mozilla* court focused in particular on claims in the record concerning dangers that might arise from ''allowing broadband providers to prioritize internet traffic as they see fit, or to demand payment for top-rate speed,'' and how such actions ''could imperil the ability of first responders, providers of critical infrastructure, and members of the public to communicate during a crisis.'' Among other things, the D.C. Circuit rejected our argument that ''the public safety issues . . . were redundant of the arguments made by edge providers,'' finding instead that ''unlike most harms to edge providers incurred because of discriminatory practices by broadband providers, the harms from blocking and throttling during a public safety emergency are irreparable.''

9. We find that neither our decision to return broadband internet access service to its long-standing classification as an information service, nor our subsequent decision to eliminate the internet conduct rules, is likely to adversely impact public safety. To the contrary, our analysis reinforces our determinations made in the *Restoring Internet Freedom Order,* and we find that on balance, the light-touch approach we adopted and the regulatory certainty provided by the *Restoring Internet Freedom Order* benefit public safety and further our charge of promoting ''safety of life and property'' and the national defense though the use of wire and radio communications. We also find that even if there were some adverse impacts on public safety applications in particular cases—which we do not anticipate—the overwhelming benefits of Title I classification would still outweigh any potential harms.

1. The Commission's Public Safety Responsibilities

10. Advancing public safety is one of our fundamental obligations. The Title I approach spurs investment in a robust network and innovative services, which enhances the effectiveness of our work to promote public safety consistent with our statutory responsibilities. Indeed, this has been the case over the almost 20 years during which broadband internet access service (and, as appropriate, mobile broadband internet access service) was classified as a Title I service.

11. As the D.C. Circuit explained, when '' 'Congress has given an agency the responsibility to regulate a market such as the telecommunications industry that it has repeatedly deemed important to protecting public safety,' then the agency's decisions 'must take into account its duty to protect the public.' '' We take seriously our public safety responsibilities, as demonstrated by a number of our recent actions. In 2019, for example, pursuant to Kari's Law Act of 2017 the Commission required newly manufactured, imported, sold, or leased multi-line telephone systems—such as those used by hotels and campuses—to allow users to dial 911 directly, without having to dial a prefix such as a ''9'' to reach an outside line. We also adopted rules pursuant to section 506 of the RAY BAUM'S ACT to ensure that ''dispatchable location'' information, such as the street address, floor level, and room number of a 911 caller, is conveyed with 911 calls so that first responders can more quickly locate the caller. More recently, we proposed taking action to modernize the Commission's rules to facilitate the priority treatment of voice, data, and video services for public safety personnel and first responders, including removing outdated requirements that may impede the use of IP-based technologies. The Commission has taken important measures to increase the effectiveness of Wireless Emergency Alerts (WEAs) by requiring Participating Commercial Mobile Service Providers to support longer WEA messages; support Spanish-language messages; create a new message category (''State/Local WEA Tests''); and further implement enhanced geotargeting capabilities. We have also urged wireless service providers and electric power providers to coordinate their response and restoration efforts more closely following disasters, resulting in the establishment of the Cross Sector Resiliency Forum in February 2020. Further, to safeguard America's critical communications infrastructure from potential security threats, we prohibited the use of public funds from the Commission's Universal Service Fund (USF) to purchase or obtain any equipment or services produced or provided by companies posing a national security threat to the integrity of communications networks or the communications supply chain, and proposed to require certain USF recipients to remove and replace such equipment and services from their networks and reimburse them for doing so. We also initially designated Huawei Technologies Company (Huawei) and ZTE Corporation (ZTE) as covered companies for purposes of this rule, and we established a process for designating additional covered companies in the future. Additionally, the Commission's Public Safety and Homeland Security Bureau issued final designations of Huawei and ZTE as covered companies, thereby prohibiting the use of USF funds on equipment or services produced or provided by these two suppliers. We also recently proposed, pursuant to the Secure and Trusted Communications Networks Act, to (1) create a list of covered communications equipment and services that pose an unacceptable risk to the national security of the United States or the security and safety of United States persons; (2) ban the use of federal subsidies for any equipment or services on the list of covered communications equipment and services; (3) require that all providers of advanced communications service report whether they use any covered communications equipment and services; and (4) establish regulations to prevent waste, fraud, and abuse in the proposed reimbursement program to remove, replace, and dispose of insecure equipment. In furtherance of our duties to protect life, we also recently designated 988 as the 3-digit number to reach the National Suicide Prevention Lifeline and required all service providers to complete the transition by July 16, 2022.

2. Overview of Public Safety Communications Marketplace

12. Public safety communications fall into two broad categories: (1) Communications within and between public safety entities, and (2) communications between public safety entities and the public. We review each in turn.

13. *Communications Among Public Safety Entities.* The record reflects that

many public safety entities have access to and make use of dedicated public safety-specific and/or prioritized, specialized enterprise-level broadband services for data communications between public safety officials. Perhaps the most important example of a dedicated network is the Congressionally-created First Responder Network Authority (FirstNet). In 2012, Congress passed the Middle Class Tax Relief and Job Creation Act, which in part directed ''the establishment of a nationwide, interoperable public safety network'' to ''ensure the deployment and operation of a nationwide, broadband network for public safety communications''—a resilient network capable of supporting both data and voice communications. The law granted 20 megahertz of spectrum to be used for the network and allocated $7 billion of funding. FirstNet is ''explicitly designed for fast, prioritized public safety communications.'' FirstNet offers service priority and preemption, which allow first responders to communicate over an ''always-on'' network. Public safety entities using FirstNet can boost their priority levels during emergency situations ''to ensure first responder teams stay connected'' even when networks are congested. AT&T describes preemption as an ''enhanced'' form of priority service because it ''shifts non-emergency traffic to another line,'' which ensures national security and emergency preparedness users' communications are successfully completed. According to AT&T, priority and preemption support voice calls, ''text messages, images, videos, location information, [and] data from apps . . . in real time.'' In the first half of 2019, the monthly numbers of device connections to FirstNet ''outperformed expectations at approximately 196% of projected targets.'' In May 2019, ''a majority of agencies and nearly 50% of FirstNet's total connections were new subscribers (not AT&T migrations).'' As of August 2019, FirstNet was deployed in all 50 states, and nearly 9,000 public safety agencies and organizations were subscribers of the network. The number of public safety agencies subscribing to FirstNet services continues to increase. Recent data suggests that more than 12,000 public safety agencies and organizations—accounting for over 1.3 million connections nationwide—subscribe to FirstNet services. These trends suggest that first responders recognize the benefits of prioritization, preemption, and other innovative features that enhance public safety communications. The record reflects that ''[m]ore and more, public safety is relying on the FirstNet core and public safety's own dedicated network for critical public safety communications—one that offers faster performance than commercial networks.'' The Spectrum Act requires FirstNet to apply for renewal of its license after 10 years (*i.e.,* in 2022). The Act states that to obtain renewal, FirstNet must demonstrate that ''during the preceding license term, the First Responder Network Authority has met the duties and obligations set forth under [the Spectrum] Act.''

14. As we observed previously, other service providers have recently begun offering or enhanced their public safety services to compete with FirstNet. For example, Verizon offers services designed for first responders and public safety entities through its public safety private core that include the ability to prioritize public safety communications to ensure that they stay connected during emergencies. Such services also provide an extra layer of assurance that public safety communications will continue to operate during peak times. In addition, public safety users ''have access to several . . . enhanced services'' from Verizon, including Mobile Broadband Priority Service and data preemption. These services ''provide public safety users priority service for data transmissions'' by giving users priority over commercial users during periods of heavy network congestion and ''reallocat[ing] network resources from commercial data/internet users to first responders'' if networks reach full capacity.

15. Similarly, U.S. Cellular offers ''enhanced data priority services for first responders and other emergency response teams.'' The company uses a ''dedicated broadband LTE network that separates mission-critical data from commercial and consumer traffic,'' ensuring that national security and emergency preparedness personnel ''have access to vital services'' during emergency situations. In addition to prioritizing network access, U.S. Cellular uses preemption ''to automatically and temporarily reallocate lower priority network resources to emergency responders so they can stay connected during emergencies or other high-traffic events.'' T-Mobile also launched a specialized set of rate plans for first responder organizations in early 2019, aimed at addressing these organizations' needs that their high-speed data allowance not run out or be slowed during emergencies. These dedicated or specialized types of service plans allow first responder organizations to receive unlimited smartphone or hotspot data that receives high priority on the network at all times. T-Mobile is also expanding these efforts by offering Connecting Heroes, a program launching later this year to provide a version of this service for free to U.S. state and local public and non-profit law enforcement, fire, and emergency medical services (EMS) agencies.

16. Though many communications between public safety entities increasingly take advantage of these enterprise-level dedicated public safety broadband services, the record reflects that public safety entities employ broadband internet access services for their communications between public safety officials as well. As the Association of Public-Safety Communications Officials-International, Inc. (APCO) explains, public safety agencies rely on retail broadband services for a variety of public safety applications, including for example, accessing various databases, sharing data with emergency responders, translating communications with 911 callers and patients in the field, streaming video into 911 and emergency operations centers, and accessing critical information about a 911 caller that is not delivered through the traditional 911 network.

17. While this proceeding focuses on a specific data service—broadband internet access service—we note that the universe of public safety to public safety communications extends beyond this particular service. The enterprise services described above often provide a viable alternative for states and localities to purchase dedicated broadband connections to use for public safety communications. In addition, voice services continue to play an important role. The Commission has historically supported these efforts through the establishment of three priority services programs that support prioritized voice services for public safety users. The Telecommunications Services Priority System (TSP) authorizes the ''assignment and approval of priorities for provisioning and restoration of common-carrier provided telecommunication services'' and ''services which are provided by government and/or non-common carriers and are interconnected to common carrier services.'' The Government Emergency Telecommunications Service (GETS) ''provides government officials, first responders, and NSEP personnel with 'priority access and prioritized processing in the local and long distance segments of the landline networks, greatly increasing the probability of call completion.' '' And, the Wireless Priority Service program

(WPS) provides ''prioritized voice calling for subscribers using Commercial Mobile Radio Service . . . networks.'' As noted above, we recently proposed modernizing these rules to broaden the scope of information covered to address data and video and to remove outdated requirements that may impede the use of IP-based technologies.

18. *Communications Between Public Safety Entities and the Public.* Communications between public safety entities and the public occur using a wide array of communications technologies. With respect to broadband services, the record reflects broad consensus that not only do public safety entities and first responders need to be able to communicate rapidly and reliably with each other during crisis situations, but members of the public using mass-market services must also be able to easily and efficiently communicate with first responders and access public safety resources and information. As the County of Santa Clara states, ''[T]he fundamental work of government, including public safety personnel, is outward facing: To protect our residents, we must be able to communicate with them, and they with us.'' The record suggests that most data communications between public safety entities and individuals likely take place over broadband internet access services, and not enterprise or dedicated services. As CTIA explains, consumers regularly use their mobile devices and broadband connections ''to access broadly available information regarding threatening weather, shelter-in-place mandates, ongoing active-shooter scenarios, and other matters essential to public safety.'' Members of the public often rely on broadband services during emergencies to enable them to find and receive potentially life-saving information, and to allow public safety officials to build on-the-ground situational awareness with information they gather from residential broadband service users. First responders can also gain valuable information from members of the public through mass-market broadband access, such as when ''citizens used hashtags to flag rescuers and to compile helpful databases'' in the wake of Hurricane Harvey in 2017.

19. Further, ''public safety'' communications may encompass more than just communications during emergencies, as the COVID–19 pandemic has demonstrated, with many Americans relying on telemedicine over mass-market broadband services for ''routine health care, triage, and basic health advice'' as well as for updates on public health information and stay-at-home and quarantine orders. 5G networks' ability to transmit massive amounts of data in real time will also help enable new applications that will allow more advanced communications between the public and health care officials, such as allowing health care professionals, through ubiquitous wireless sensors, to remotely monitor patients' health and transmit data to their doctors before problems become emergencies, and to develop connected ambulance services for faster patient transport.

20. Non-data and one-way broadcast communications services, notably including members of the public making use of voice services to call 911, continue to play a central role in public safety communications between Americans and public safety entities. Consistent with Congressional direction, the Commission has ''designate[d] 9–1–1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance,'' and has adopted regulations designed to improve its performance and effectiveness. Audio and video communications also are important for public safety communications to the public, including for communicating emergency alerts. The Emergency Alert System is a national public warning system through which broadcasters, cable systems, and other service providers deliver audio alerts that include modulated data that can be converted into a visual message to the public to warn them of impending emergencies and dangers to life and property in accordance with Commission regulations. In addition, communications via text message also have taken on an important public safety role, including through Commission-mandated text-to-911 capabilities and Wireless Emergency Alerts. Consistent with its statutory duties, the Commission has played a major role in establishing and facilitating these means of communication between public safety entities and the public.

3. The Benefits of Increased Innovation, Investment, and Regulatory Certainty Provided by the *Restoring Internet Freedom Order* Will Enhance Public Safety

21. In the *Restoring Internet Freedom Order,* the Commission ''eliminat[ed] burdensome regulation that stifles innovation and deters investment'' and predicted that ''this light-touch information service framework will promote investment and innovation.'' The *Mozilla* court affirmed this finding, concluding that our position as to the economic benefits of reclassification away from public-utility style regulations was ''supported by substantial evidence.'' The record reflects that our finding applies just as much, if not more so, to public safety communications. Consistent with our findings in the *Restoring Internet Freedom Order,* a number of commenters assert that the Commission's reclassification of broadband internet access services has ''restored a regulatory environment that encourages robust investment in broadband networks and facilities that can be used for many purposes, including public safety purposes,'' and that this light-touch regulatory environment has improved and expanded the resources available to public safety entities and consumers alike. Though many factors affect ISPs' investment decisions, these comments lend support to our findings in the *Restoring Internet Freedom Order* that ''reclassification of broadband internet access service from Title II to Title I is likely to increase ISP investment and output'' and that the ''ever-present threat of regulatory creep is substantially likely to affect the risk calculus taken by ISPs when deciding how to invest their shareholders' capital, potentially deterring them from investment in broadband.'' Given the variety of factors and the limited nature of the scope of the remand and subsequent record, described below, we do not reopen or expand on these predictions at this time. We reject the argument that AT&T's plan to grandfather legacy DSL services (with speeds ranging from 788 kbps to 6 Mbps) undermines our reliance on the likelihood of increased investment as a result of the *Restoring Internet Freedom Order*. The *Mozilla* court has already affirmed the Commission's finding that the *Restoring Internet Freedom Order* is likely to promote investment and deployment. In any event, AT&T's filing demonstrates that its customers in the service areas referenced by Public Knowledge et al. have plenty of options for broadband internet access service (at speeds of 10 Mbps and higher). Finally, we observe that the reclassification of broadband internet access service as an information service had no effect on the Commission's authority over ISPs' discontinuance of broadband services, as the Commission explicitly forbore from section 214 with respect to broadband internet access services in the *Title II Order*.

22. As described above, an increasing number of public safety entities

subscribe to enterprise-level quality-of-service dedicated public safety data services. While the Greenlining Institute raises concerns that the record does not specify the number of public safety entities that purchase enterprise-grade services, or the affordability and competitiveness of the fees for such services, we observe several commenters explained the widespread nature of such services. For example, NCTA explains that one of its members provides data connectivity solutions ''for thousands of public safety entities, including police and fire departments, hospitals, ambulance services, public safety dispatchers, medical dispatch centers, and 911 providers throughout the country.'' Further, as noted above, as of August 2019, FirstNet was deployed in all 50 states, and nearly 9,000 public safety agencies and organizations were subscribers of the network. As Verizon explains, public safety entities generally purchase enterprise service contracts that are ''similar to other large agreements that government entities use to buy most goods and services on favorable terms for a fair price,'' explaining that some states use master agreements negotiated by nationwide purchases organizations such as the National Association of State Procurement Offices, for example. We also note that because such services were excluded from regulation under the *Title II Order,* that Order did not reduce the costs of such services in any case. These types of plans were not subject to the requirements of the *Title II Order* or the *Open Internet Order* (76 FR 59192, Sept. 23, 2011). However, even these non-mass-market offerings benefit from the *Restoring Internet Freedom Order*'s light-touch approach, regulatory certainty, and likely investment incentives because they often make use of infrastructure that also is used to facilitate broadband internet access services (*e.g.,* middle mile connections). As CTIA states, ''[r]obust and expansive broadband infrastructure benefits both consumers and public safety personnel, whether they rely on mass-market connectivity or enterprise offerings, because even infrastructure built principally to serve mass-market broadband consumers (such as middle-mile networking) increases overall network capacity, improving the experience of enterprise and government users *and* those utilizing non-[broadband internet access service] data services.'' Further, as broadband speeds and other performance characteristics continue to improve, the range of public safety services and applications that could potentially be offered over these networks expands.

23. The record reflects that the regulatory certainty and light-touch approach the *Restoring Internet Freedom Order* affords also likely gives ISPs stronger incentives to upgrade networks to 5G, paving the way for new and innovative applications and services that can benefit public safety. 5G networks' ability to transmit massive amounts of data in real time will help enable new applications that provide immediate situational awareness to enable public safety professionals and first responders to ''provide more informed support and make better decisions during an emergency.'' For example, 5G capabilities will enable search and rescue drones and other unmanned vehicles to reach areas that would otherwise be inaccessible, and will also help enable products ''like augmented reality headsets that can help firefighters see through smoke, and create augmented disaster mapping that helps rescue teams get a clearer picture of the situation on the ground.'' The deployment and growth of 5G and the innovative applications it will enable will have clear public safety benefits, and we believe that our light-touch, market driven approach likely has, and likely will continue, to encourage ISPs' investments in these networks.

24. The record reflects that improved, more robust broadband networks and services also have obvious and significant benefits for communications between public safety entities and the public. According to one commenter, ''[t]hree in ten Americans describe themselves as 'constantly' online,'' and that ''the best way to reach them will be for public safety communication to also take place online.'' As the Edward Davis Company explains, ''better, faster, and more widespread broadband connections make it easier for the public to contact public safety in times of need and help public safety respond more quickly.'' Indeed, the Public Safety Broadband Technology Association asserts that light-touch regulation ''promotes extensive deployment and quick adoption of fast broadband, which enables citizens to reach public safety more easily in times of need.'' Similarly, USTelecom observes that increased investment has ''given rise to robust, reliable, and resilient networks that improve consumers' access to public safety information, providing first responders and other government agencies with new and innovative ways to communicate and share, analyze, and act on information during emergencies.''

25. The COVID–19 pandemic has brought that point into stark relief. The robustness and reliability of ISPs' networks have helped make possible the large-scale changes to daily life, including reliance on telework, digital learning, telehealth, and online communications with local and state officials. The record demonstrates that, even with unprecedented increases in traffic during the COVID–19 pandemic, broadband networks have been able to handle the increase in traffic and shift in usage patterns. The ability of these networks to absorb major increases in traffic has allowed Americans to maintain social distancing, which experts have found to yield tremendous public health and safety benefits by ''flattening the curve'' of viral transmissions. USTelecom observes that one study showed that out of the ten countries with the highest populations in the world, the United States was the only country to not experience any download speed degradation in April 2020. Further, unlike the European Union, which takes a utility-style approach to broadband regulation and has had to request that bandwidth intensive services such as Netflix reduce video quality in order to ease stress on its network infrastructure, the United States has not had to take similar steps, despite similar surges in internet traffic. This country's robust and resilient broadband networks are, in significant part, the result of over two decades of almost continuous light-touch regulation, which has promoted substantial infrastructure investment and deployment. For the foregoing reasons, we conclude that our decision to return broadband internet access service to its historical information service classification benefits public safety communications by encouraging the deployment of more robust, resilient broadband services networks and infrastructure over which public safety communications to, from, and among the public ride.

4. The *Restoring Internet Freedom Order* Is Unlikely To Harm Public Safety Communications, and Any Harm That It Could Cause Would Be Minimal

26. We find that our reclassification and rule determinations in the *Restoring Internet Freedom Order* are not likely to adversely affect public safety communications over broadband internet access service. First, we explain why the same protections we identify in the *Restoring Internet Freedom Order* as sufficient to protect openness generally—transparency, antitrust, and consumer protection law—equally protect the openness of public safety communications. Next, we find an absence of evidence of harms to public

safety communications arising from the *Restoring Internet Freedom Order* or from the two-decade history of light-touch regulation of the internet. We then review assertions regarding specific forms of possible harm to public safety communications—blocking, throttling, loss or delay due to paid prioritization, barriers to communications by individuals with disabilities, and damage to the safety and reliability of critical infrastructure—and conclude that the record reflects insufficient evidence of such harms as a result of the *Restoring Internet Freedom Order* or that such harms are likely to arise. Finally, we conclude that even if a harm to public safety communication were to somehow arise from the *Restoring Internet Freedom Order,* its impact would be limited because broadband internet access service, while important, is only a part of the broader public safety communications ecosystem. As such, we reject assertions by Public Knowledge et al. that ''[i]n making its finding that reclassification and elimination of the rules will not harm public safety, the Commission focuses strictly on the question of prioritization of service.''

27. *Transparency, Antitrust, and Consumer Protection Laws Prevent Harms.* The protections highlighted in the *Restoring Internet Freedom Order* are important factors in preserving the openness of public safety communications over broadband internet access service. Among these protections are the transparency rules we adopted, which ''require ISPs to disclose any blocking, throttling, affiliated prioritization, or paid prioritization in which they engage.'' As we explained in the *Restoring Internet Freedom Order*—in analysis that the *Mozilla* court upheld as reasonable—''[h]istory demonstrates that public attention, not heavy-handed Commission regulation, has been most effective in deterring ISP threats to openness and bringing about resolution of the rare incidents that arise. The Commission has had transparency requirements in place since 2010, and there have been very few incidents in the United States that plausibly raise openness concerns.'' ''Transparency thereby 'increases the likelihood that harmful practices will not occur in the first place and that, if they do, they will be quickly remedied.' ''

28. Indeed, many ISPs, including all major ISPs, have gone further than disclosing their policies by making ''enforceable commitments to maintain internet openness.'' As NCTA explains, ''[a]ll major broadband providers have now publicly made enforceable commitments not to engage in conduct that violates consensus open internet principles.'' ISPs have made these commitments despite the lack of Title II regulation, and the record reflects that ISPs recognize the importance of these commitments with respect to public safety communications—for example, Comcast explains that its incentives to adhere to public commitments to open internet protections ''are rightly even stronger . . . when it comes to serving the public safety community, particularly first responders during an emergency.'' We disagree with Free Press's assertions that the ''notion that transparency and shaming will discipline carriers is a vain hope.'' We observe that the *Mozilla* court has already upheld the Commission's findings regarding reliance on the transparency rule. These commitments are not merely empty promises with no binding effect; instead, as a direct result of the *Restoring Internet Freedom Order,* the terms of such commitments are now enforceable by the Federal Trade Commission (FTC), the nation's premier consumer protection agency. Indeed, a Memorandum of Understanding between the Commission and the FTC states that the FTC will ''investigate and take enforcement action as appropriate against internet service providers for unfair, deceptive, or otherwise unlawful acts or practices, including . . . actions pertaining to the accuracy of the disclosures such providers make pursuant to the *Internet Freedom Order*'s requirements, as well as their marketing, advertising, and promotional activities.''

29. Commitments to transparency carry particular force in the context of public safety communications because of the strong incentive for ISPs to maintain or improve their reputations by protecting such communications. As NCTA explains, ''broadband providers recognize the vital importance of ensuring robust and reliable networks for public safety communications, and know that they would need to answer to customers and policymakers if their practices were to threaten to hamper public safety in any way.'' In addition, there are strong business incentives for broadband providers to ensure that public safety communications remain unharmed. ISPs have more than business incentives to ensure that broadband communications remain unhampered by harmful network management practices. As ACA Connects explains, the community-based providers that it represents also ''have a personal stake in ensuring the safety of their neighbors, family and friends.'' As we previously found in the *Restoring Internet Freedom Order,* even when public safety is not at stake, it is likely that ''any attempt by ISPs to undermine the openness of the internet would be resisted by consumers and edge providers.''

30. Likewise, consistent with our findings in the *Restoring Internet Freedom Order,* we find that antitrust law can also protect consumers from practices that may hinder their ability to access public safety resources and similarly helps protect public safety communications over broadband internet access service from blocking, throttling, alleged degradation due to paid prioritization, and other harms to openness. The antitrust laws, particularly sections 1 and 2 of the Sherman Act, as well as section 5 of the FTC Act, protect competition in all sectors of the economy, including broadband internet access. Consequently, if an ISP attempts to block or degrade traffic in a manner that is anticompetitive, relief may be available under the antitrust laws. Moreover, to the extent an ISP has market power, antitrust laws could be used to address any anticompetitive paid prioritization practices by an ISP. As we explained in the *Restoring internet Freedom Order,* ''[o]ne of the benefits of antitrust law is its strong focus on protecting competition and consumers.'' If the types of conduct and practices that had been prohibited under the *Title II Order* were challenged as anticompetitive under the antitrust laws, such conduct would likely be evaluated under the ''rule of reason,'' which amounts to a consumer welfare test. A welfare approach was established in *Reiter* v. *Sonotone Corp.,* 442 U.S. 330, 343 (1979). The transparency rule the Commission adopted amplifies the power of antitrust law and the FTC Act to deter and, where needed, remedy behavior that harms consumers, including for public safety purposes.

31. Further, consistent with our conclusion in the *Restoring Internet Freedom Order,* we believe that consumer protection laws also help protect public safety communications from practices that could harm openness. The FTC has broad authority to protect consumers from ''unfair and deceptive acts or practices.'' The FTC's unfair-and-deceptive-practices authority ''prohibits companies from selling consumers one product or service but then providing them something different,'' which makes voluntary commitments not to engage in blocking, throttling, or paid prioritization enforceable. The FTC also requires the

''disclos[ur]e [of] material information if not disclosing it would mislead the consumer,'' so if an ISP ''failed to disclose blocking, throttling, or other practices that would matter to a reasonable consumer, the FTC's deception authority would apply.'' Reclassification restored the FTC's authority to enforce those consumer protection requirements in the case of broadband internet access service. Indeed, the FTC has already successfully used its authority to pursue a complaint against AT&T for allegedly deceptively marketing one of its own mobile broadband subscription plans. And all states have laws proscribing deceptive trade practices.

32. The D.C. Circuit found that the Commission's reliance on antitrust and consumer protection laws to limit anticompetitive behavior was reasonable, especially as part of the broader regulatory and economic framework, and we do not revisit those prior Commission findings here. Nor do we find that reasoning substantially diminished when public safety concerns are at issue. For one, that reasoning retains its full force with respect to protections that flow from the ISPs' own public statements. ISPs know that their public statements regarding network management—whether made to comply with our transparency rule or otherwise—are subject to enforcement by the FTC. Thus, ISPs' public statements, in effect, create *ex ante* requirements to which they are bound. The record does not reveal that enforcement of those statements, such as through the FTC's consumer protection authority, would be any less effective at preventing contrary ISP conduct than would enforcement of Commission rules prohibiting the same network management practices.

33. Consumer protection and antitrust laws help guard against risks from conduct not foreclosed by providers' public statements, as well. The record here does not reveal credible claims that ISPs would somehow target their conduct to harm public safety in a manner that would require *ex ante* public safety-focused legal protections. Instead, commenters' concerns here reflect the view that the ISP conduct that could lead to public safety harms is the same conduct about which concerns have been expressed more generally, even if the consequences of such conduct could be particularly dire in the public safety context. Because consumer protection and antitrust laws help safeguard users of broadband internet access service from conduct that could undermine internet openness—and because that same conduct underlies the public safety concerns expressed by commenters here—those laws help address any public safety concerns notwithstanding their lack of an express public safety focus. Although some commenters observe that antitrust and consumer protection laws are not framed with a focus on public safety concerns, neither the Title II regulatory framework nor the restrictions on ISP conduct in the bright line and general conduct rules adopted in the *Title II Order* specified particular restrictions on ISPs in connection with public safety, either. Although ''traffic prioritization . . . practices that serve a public safety purpose, may be acceptable under our rules as reasonable network management'' under the *Title II Order,* the restrictions on ISP conduct under the bright line rules were not framed in terms of public safety, nor did the factors identified by the Commission to guide the application of its general conduct rule focus on public safety concerns. This conclusion is not diminished by the fact that the Commission did adopt a public safety-focused *carve-out* from those conduct rules because that carve-out rule did not restrict ISP conduct in any way. In sum, even the *Title II Order* itself thus adopted rules restricting ISP conduct that it anticipated ultimately could benefit public safety, notwithstanding the lack of a public safety focus. Consequently, although we do not presume that consumer protection and antitrust laws themselves provide perfect protections against all possible public safety concerns, we conclude that they do still provide significant protections notwithstanding their lack of an express public safety focus, and rely on them in conjunction with the broader range of considerations that collectively persuade us that public safety harms are unlikely under our regulatory framework in the *Restoring Internet Freedom Order*. Even *ex post* FTC enforcement of such conduct as ''unfair'' or anticompetitive practices would have a significant effect by causing providers to avoid conduct in the first instance if it has the potential to result in liability under those legal regimes. We anticipate a similar deterrent effect from consumer protection laws. Although the *Mozilla* court noted that the record reflected concern about adequacy of *ex post* enforcement in the public safety context to the extent that such potential for enforcement did not fully deter harmful ISP conduct from occurring, we find that to be a far more limited concern than some commenters claim. As a threshold matter, while the court focused on commenters' concerns about ''dire, irreversible'' public safety consequences from ISP conduct such as loss of life, commenters here raise a wide array of situations with a claimed nexus to safety of life and property where it is doubtful that ISP conduct—even assuming *arguendo* that it occurred and had momentary effects on the relevant applications—would result in meaningful harm, let alone loss of life. More fundamentally, we rely on transparency, consumer protection laws, and antitrust laws only as one part of a broader set of considerations that collectively persuade us that public safety harms are unlikely to result from the regulatory approach in the *Restoring Internet Freedom Order*. For example, ISPs' conduct in the first instance is likely to be informed by the highly probable reputational effects. In addition, as we explain below, even if ISP conduct like paid prioritization were to occur, the record does not reveal likely practical harm to applications used for public safety communications over mass market broadband internet access service. We note that such public safety communications often occur over specialized networks which generally include quality-of-service guarantees—unlike best efforts broadband internet access service—which further limits the scope of communications potentially affected.

34. *Absence of Proven Harms.* The internet has been subject to light-touch regulation for the entirety of the time since enactment of the 1996 Act, apart from the short period in which the *Title II Order* controlled. Further, during most of the past two decades, the Commission did not have in place potentially enforceable attempts at conduct regulation. The Commission adopted the *Comcast-BitTorrent Order,* which attempted to directly enforce Federal internet policy that it drew from various statutory provisions, in August 2008. On April 6, 2010, the U.S. Court of Appeals for the D.C. Circuit rejected the Commission's action, holding that the Commission had not justified its action as a valid exercise of ancillary authority. The Commission adopted the *Open Internet Order* in December 2010, but it was not effective until some months later. The *Verizon* court decision was decided on January 14, 2014, and the *Title II Order* was not adopted until over a year later, on February 26, 2015, and became effective several months later. Yet for all this time from which to draw, commenters claiming that the *Restoring Internet Freedom Order* harms public safety communications are only able to point

to a few heavily-contested public-safety-related incidents. Notably, none of the claims arises from the time period prior to the existence of rules governing ISPs. Even if these claims were valid—and we find below that they are not—they do not establish a compelling basis to reconsider the *Restoring Internet Freedom Order*'s determinations and impose preemptive, industry-wide, utility-style regulations. The dearth of evidence of practices harmful to public safety is unsurprising, as ISPs lack an economic incentive to engage in practices such as blocking or throttling, especially when these practices may harm public safety.

35. Commenters opposing the *Restoring Internet Freedom Order* repeatedly cite as support a 2018 incident involving the decrease in the Santa Clara, California fire department's broadband service speed during an emergency. However, as explained below, the changed regulatory posture in the *Restoring Internet Freedom Order* had no bearing on how this incident played out, both because the broadband service at issue was not subject to either regulatory regime and because the provider's conduct would not have been prohibited under the *Title II Order* even if it did apply. Notably, no commenter contested in their reply comments other commenters' claims that the incident would not have been prevented under the *Title II Order*. The County of Santa Clara asserts that while the County's firefighters were ''in the midst of fighting the Mendocino Complex Fire in the summer of 2018, Verizon severely throttled the broadband internet'' of the fire department, which prevented the department's equipment ''from tracking, organizing, and prioritizing resources from around the state and country to where they are most urgently needed.'' The County of Santa Clara concedes that Verizon reduced the speed of the fire department's broadband service because the fire department's account had exceeded its monthly data cap. Although Verizon's established practice was to not enforce data speed restrictions on public safety users' plans during emergency situations, a customer service error led to the speed of the fire department's service being reduced despite this policy. Verizon contends that once its management learned of the customer's complaint, Verizon ''immediately and publicly addressed the situation, including by updating training for call center representatives to ensure that they are aware that they must promptly remove any data throughput limitations for first responders in an emergency. That same week, Verizon introduced a new plan for public safety customers that eliminated any data speed restrictions for first responders, at no additional cost, and that gave other public safety customers two month' leeway before any throughput limitation would be enforced.

36. As an initial matter, the Santa Clara incident is not relevant to an analysis of the effect of the *Restoring Internet Freedom Order* on public safety. Because the fire department's service plan from Verizon was an enterprise plan rather than a mass-market service, it is not a broadband internet access service under either the *Title II Order* or the *Restoring Internet Freedom Order*. Even if the service plan had been a mass-market service, however, the record does not demonstrate that it would have run afoul of the *Title II Order*. Neither the classification of broadband internet access service as a telecommunications service nor the *Title II Order*'s bright line rules prohibited data use caps such as the one in the fire department's service plan. In fact, the *Title II Order* specifically explained that ''[a] broadband provider may offer a data plan in which a subscriber receives a set amount of data at one speed tier and any remaining data at a lower tier.'' Neither does the record demonstrate that the possibility of case-by-case review of data caps under the general conduct rule—with its uncertain outcomes—would have prohibited such plans. Following the incident, to avoid another such error, Verizon took a number of steps, such as ''updating training for call center representatives to ensure that they are aware that they must promptly remove any data throughput limitations for first responders in an emergency'' and ''introducing a new plan for public safety customers that eliminated any data speed restrictions for first responders, at no additional cost.'' Thus, the issue was quickly addressed due to public awareness and market-based pressure on Verizon to take swift corrective action—precisely the mechanisms that we anticipated would be most effective under the *Restoring Internet Freedom Order*'s light-touch approach. Further, the record does not provide demonstrable evidence that the *Title II Order* regime would have resulted in any incremental benefit. We disagree with Free Press' assertion that ''Title II allowed the Commission to do more than just enforce those Net Neutrality rules. It also empowered the Commission to assess and prevent other forms of unjust or unreasonable behavior—which may well have included Verizon's decision to cap and throttle firefighters during an emergency. . . .'' It is undisputed that Verizon's plan with respect to Santa Clara County was not a broadband internet access service offering; therefore, as discussed above, it would not have been subject to the internet conduct rules under the *Title II Order,* including the no unreasonable interference/disadvantage standard.

37. We also disagree with ADT that two incidents from 2015 and 2016 warrant Commission rules prohibiting blocking and throttling of public safety-related services. ADT alleges an incident occurred in 2015, in which a number of its customers in Puerto Rico using a specific broadband provider suddenly lost the ability to use features of its home automation service that enables customers to control their alarm systems remotely or to access their video surveillance cameras, and another, similar incident occurred on the mainland in 2016. We considered and rejected such concerns as a basis for conduct rules in the *Restoring Internet Freedom Order,* however, explaining that ''it is unclear if the blocking was intentional and the blocking was resolved informally.'' ADT does not provide any new information here that justifies revisiting those observations. Further, we observe that ADT has not pointed to any such issues since the adoption of the *Restoring Internet Freedom Order,* consistent with our expectation that ISPs are unlikely to risk the reputational damage of engaging in such practices. In addition, our transparency rule requires ISPs to disclose such practices, which would enable alarm services companies like ADT to address such issues in a timely manner. Indeed, ADT itself recognizes that the currently mandated disclosures ''provide a framework for ensuring that public safety and alarm company communications using broadband services are afforded protections against unintentional blocking or throttling, that they are informed of mechanisms to promptly restore services, including any repair or restoration performance metrics, and that they are provided contact information necessary to trigger ISP corrective actions.'' ADT urges us to ''remind ISPs that they must prominently display contact information and sufficiently disclose the[ ] mechanisms to have service promptly restored in the event of inadvertent blocking or throttling of broadband services.'' We restrict this *Order on Remand* to addressing the issues specifically remanded by the D.C. Circuit and decline to comment upon or

interpret other aspects of the *Restoring Internet Freedom Order* such as the transparency requirements. We do note, however, that ISPs remain obligated to fulfill all transparency obligations set forth in the *Restoring Internet Freedom Order,* including disclosure of redress options. Relevant to its concerns about discrimination by ISPs with competing alarm monitoring services, ADT notes that ISPs have ''stated commitments to refrain from engaging in unreasonable discrimination'' and recognizes that ''[f]ailure to comply with disclosed practices exposes ISPs to liability.'' Thus, we conclude that the incidents cited by ADT do not justify revisiting the regulatory approach we adopted in the *Restoring Internet Freedom Order*.

38. *Speculation Regarding Specific Forms of Harm*. We next review speculative claims in the record regarding various specific types of harm to public safety communications that allegedly could arise from the *Restoring Freedom Order*. In each case, we find no evidence that the form of harm at issue has occurred and conclude that such harm is unlikely to arise as a result of the *Restoring Internet Freedom Order*.

39. *Speculative Harm—Blocking and Throttling*. We disagree with commenters who assert that the *Restoring Internet Freedom Order* will lead to ISPs engaging in blocking and throttling practices that harm public safety. As an initial matter, all major ISPs have made written commitments not to engage in practices considered to violate open internet principles, including blocking and throttling. Even in the absence of such commitments, as we previously found in the *Restoring Internet Freedom Order,* it is likely that ''any attempt by ISPs to undermine the openness of the internet would be resisted by consumers and edge providers.'' Consequently, ISPs lack an economic incentive to engage in practices such as blocking or throttling, especially when these practices may harm public safety. As the D.C. Circuit explained, ''the harms from blocking and throttling during a public safety emergency are irreparable.'' We agree, and as such note ISPs' enforceable commitments against blocking and throttling, and again note that such emergency communication often occur over specialized, non-mass market data services to maintain quality-of-service. Even if, as the County of Santa Clara et al. claims, ''[i]t is difficult, if not impossible for governments to identify harm caused by violations of net neutrality principles,'' we observe that it would be as difficult to detect violations of binding net neutrality rules as it is voluntary commitments. We observe that the record lacks evidence of blocked or throttled public safety as a result of the reclassification of broadband internet access service as an information service and the elimination of the internet conduct rules. Thus, we find no basis on this record to conclude that ISPs have engaged or are likely to engage in blocking or throttling that cause harm to public safety in a manner that would have been prohibited under Title II.

40. Importantly, although proponents of Title II regulation express concern that a light-touch framework will lead to practices such as throttling and blocking, the record does not contain even one recent example of such conduct harmful to public safety that would have been prohibited under Title II. If unleashing ISPs from Title II regulation truly endangered public safety, then one would expect that this threat would have materialized in the more than two years that have passed since the *Restoring Internet Freedom Order* took effect. Instead, there has been no evidence that the anticipated harms have occurred, or that ISPs plan to engage in blocking or throttling of public safety traffic.

41. Likewise, we find unpersuasive commenters' concerns regarding the effect of service plans that limit data or speeds on members of the public who rely on mass market broadband internet access services to access public safety information. We observe that broadband service plans that limit data or speeds were not prohibited even under the *Title II Order*; as such, we find the return of broadband internet access service to its information services classification and elimination of the conduct rules irrelevant to the impact on the permissibility of throttling under a data plan when the data cap is exceeded. We also observe that the record provides no evidence of any actual incidences of throttling or usage-based plan allowances that have harmed consumers' mass market broadband internet access service communications in the public safety context.

42. We are similarly unpersuaded by commenters' concerns that public safety communications may be harmed if ISPs theoretically engaged in blocking or throttling practices because ''transmissions from public safety officials'' cannot ''reliably be isolated and identified as governmental communications.'' Because ISPs understand that broadband internet access service is used for public safety communications, they have strong incentives to act in accordance with their commitments to abide by open internet principles for all communications, lest they risk reputational damage they might suffer if they were found to be hampering communications that have public safety implications. ISPs' successful response to the exponential network demands during the COVID–19 pandemic demonstrate their willingness and ability to act under a light-touch regulatory framework to protect and facilitate public safety communications during crises.

43. Taken together, these considerations persuade us that commenters' concerns that the regulatory approach of the *Restoring Internet Freedom Order* would lead to ISP blocking or throttling that causes harm to public safety are speculative and unlikely to occur. The dearth of real-world examples of public safety harms from blocking or throttling mass market broadband internet access service bolsters our views discussed above that the transparency rule, coupled with consumer protection and antitrust laws—especially when further coupled with the particular reputational harms likely to arise were ISPs to block or throttle traffic in a way that harmed public safety—substantially reduce the likelihood of such conduct occurring in the first instance. And scenarios of concern to commenters involving service plans with data caps or speed limits would not have been addressed differently under the Title II regime in any event. As a result, these speculative concerns do not justify altering our regulatory approach in the *Restoring Internet Freedom Order*.

44. *Speculative Harm—Paid Prioritization*. We are unpersuaded by commenters who assert that the *Restoring Internet Freedom Order* will result in ISPs engaging in harmful paid prioritization practices that will have an adverse effect on public safety. The Commission has long recognized and permitted prioritization of public safety communications. For decades, National Security and Emergency Preparedness (NSEP) personnel have had access to priority services programs that leverage access to commercial voice communications infrastructure to support national command, control, and communications by providing prioritized connectivity during national emergencies. (''NSEP personnel'' generally refers to individuals who are responsible for maintaining a state of readiness or responding to and managing any event or crisis (local, national, or international), which causes or could cause injury or harm to the population, damage to or loss of property, or degrades or threatens the NSEP posture of the United States.) This

prioritized connectivity may consist of prioritized provisioning and restoration of wired communications circuits or prioritized communications for wireline or wireless calls. The current priority services programs were established pursuant to Executive Order 12472, issued in 1984, which called for development of priority services programs to facilitate communications among top national leaders, policy makers, military forces, disaster response/public health officials, public utility services, and first responders. The Commission's rules for the current priority services programs date back to the establishment of the Telecommunications Service Priority (TSP) System in 1988 and the creation of the Priority Access Service (PAS), more commonly referred to as Wireless Priority Service (WPS), in 2000. As the Commission explained when it classified wireline broadband internet access service as an information service, for example, the ''classification of wireline broadband internet access service as an information service, . . . will not affect the Commission's existing rules implementing the National Security Emergency Preparedness (NSEP) Telecommunications Service Priority (TSP) System.'' In any case, even assuming *arguendo* that classification of broadband internet access service as a telecommunications service otherwise might have affected the application of these rules—such that obligations under those rules newly would have applied as a result of that classification—that outcome did not actually result from the *Title II Order* given the forbearance granted there. We recently sought comment on updating and revising our rules governing the priority services programs. The Commission recently proposed to update its rules to expand the scope of the priority services programs to include data, video, and IP-based voice services. As the variety and volume of dedicated services for prioritization of public safety traffic demonstrate, prioritization of public safety communications is critically important to protecting life and property, and nothing in our rules currently prevents service providers from prioritizing public safety communications. Even the *Title II Order* acknowledged that public safety could benefit from traffic prioritization without running afoul of the bright-line rules in effect at the time, noting that ''traffic prioritization, including practices that serve a public safety purpose, may be acceptable under our rules as reasonable network management.'' Moreover, the Commission's proposals, should they be adopted, could provide an additional avenue to ensure that public safety communications are appropriately prioritized. As Free State Foundation explains, ''[s]haring commercial cores and network traffic on an undifferentiated basis with non-public safety users can pose serious risk to the integrity of public safety communications in times of emergency and other peak congestion situations. When networks are congested or at risk of becoming so, providing network preferences for public safety-related data traffic can prevent disruptions of calls and other timely information being sent to and from first responders and other responsible agencies.''

45. The Commission explained in the *Restoring Internet Freedom Order* that ''we expect that eliminating the ban on paid prioritization will help spur innovation and experimentation, encourage network investment, and better allocate the costs of infrastructure, likely benefiting consumers and competition.'' We see no basis for departing from this reasoning in the public safety context. Concerns expressed by commenters regarding potential adverse effects to public safety as a result of paid prioritization of non-public safety communications appear to be purely hypothetical at this point. Indeed, even as the country faces an unprecedented crisis, the harms predicted by such commenters have not materialized. We note that paid prioritization arrangements are ubiquitous throughout our economy. As Free State Foundation explains, ''[b]oth market participants and economists have recognized that such arrangements can benefit customers who choose to pay more for enhanced services while making other customers no worse off. In the broadband communications context, paid priority arrangements between broadband ISPs and edge providers can benefit consumers by offering them novel services supported by Quality-of-Service guarantees. Edge service providers, including new entrants, potentially can improve their competitiveness by obtaining fast and extra-reliable broadband connections. Prioritized access may be necessary for some future internet-based innovative services to function and attract customers. And public safety agencies already stand to benefit from these pro-innovation and pro-investment effects of paid prioritization arrangements and to thereby better fulfill their duties to the public.'' Moreover, ISPs have made clear, enforceable written commitments to their customers not to engage in paid prioritization. We also observe that our theories in the *Restoring Internet Freedom Order* for when paid prioritization might be used contemplated fairly narrow scenarios that are unlikely to be the kind of pervasive practices feared in the *Title II Order,* and the record here does not undercut that assessment. In particular, we rejected assertions that allowing paid prioritization would lead ISPs to create artificial scarcity on their networks by neglecting or downgrading non-paid traffic or public safety communications, creating a widespread need for, and purchase of, paid prioritization arrangements. Instead, we anticipated paid prioritization being used to address innovative, but ultimately targeted, scenarios. In addition, a number of ISPs question the likelihood and prevalence of paid prioritization arrangements actually occurring in practice. Given those considerations, neither scarcity of network resources nor instances of paid prioritization are likely to be anywhere as pervasive as feared by proponents of the *Title II Order,* particularly to the point of adversely impacting public safety communications. Further, as AT&T points out, the *Title II Order* did not ban all prioritization. That Order expressly permitted direct interconnection between ISPs and content delivery networks, which act as agents for paying content providers. The *Title II Order* also made clear that certain categories of service, such as ''enterprise'' services and those services considered ''non-BIAS services,'' were not subject to the Order's restrictions. Finally, under the *Title II Order,* the Commission was authorized to grant waivers of the paid priority ban where the petitioner could demonstrate that ''the practice would provide some significant public interest benefit and would not harm the open nature of the internet.'' We thus conclude that the scenarios of potential concern for public safety communications are much narrower than commenters fear. As a result, such concerns do not alter our decision to retain the regulatory framework of the *Restoring Internet Freedom Order.*

46. We are unpersuaded by assertions that permitting paid prioritization practices that were impermissible under the *Title II Order* will necessarily lead to degradation of public safety communications. Such commenters ''mistakenly believe that QoS is a zero-sum game, one in which it is impossible to tailor the management of network resources to the needs of specific

organizations and applications without impairing those not so managed.'' As we already concluded in the *Restoring Internet Freedom Order,* '' 'prioritizing the packets for latency-sensitive applications will not typically degrade other applications sharing the same infrastructure,' such as email, software updates, or cached video.'' The record here supports a similar conclusion for a wider array of applications, as well. As Rysavy Research explains, for example, ''prioritizing one application over another does not necessarily mean a poorer experience for the lower-priority applications. A video streaming application can tolerate considerable delay because the player buffers information, so a user watching a video will never notice some slightly-delayed data. . . . Because different applications have different needs, traffic management is not a zero-sum game.'' As such, we find that commenters' concerns that the *Restoring Internet Freedom Order* will lead to reduced speed for customers that do not pay extra for paid prioritization, resulting in harms to public safety, are not well-founded.

47. *Speculative Harm—Communications by Individuals with Disabilities.* We are not persuaded by the claims of some commenters that the regulatory approach adopted in the *Restoring Internet Freedom Order* would detrimentally effect the safety of life and property for persons with disabilities. We consider these arguments insofar as they relate to the public safety remand in *Mozilla.* To the extent that these comments raise other issues related to the effect of the *Restoring Internet Freedom Order*'s regulatory approach on persons with disabilities, we do not reopen those issues from the *Restoring Internet Freedom Order* here and thus reject the arguments as outside the scope of this proceeding. Consistent with the Commission's commitment to communications services for individuals with disabilities, we conclude that the regulatory approach established in the *Restoring Internet Freedom Order* ultimately benefits public safety communications by individuals with disabilities in the same manner as public safety communications more generally—by encouraging competition and deployment. Further, as held in the *Restoring Internet Freedom Order,* the regulatory approach adopted there does not significantly alter the regulatory landscape of statutory protections for communications by persons with disabilities.

48. In substantial part, the concerns raised about potential public safety harm to persons with disabilities are the same harms commenters raise with respect to the public more generally from potential blocking, throttling, or paid prioritization—that users' broadband internet access service-based communications services needed for public safety reasons might be hindered by such ISP conduct and/or that users might pay more for broadband internet access services with capabilities that avoid such harms. To the extent that commenters simply raise the same concerns that we have considered and found unpersuasive in the case of the public more generally, we likewise reject them in the specific context of persons with disabilities for the same reasons.

49. Nor does the record persuade us that there are likely public safety harms in connection with services used specifically by persons with disabilities as a result of the regulatory approach adopted in the *Restoring Internet Freedom Order.* The California Public Utilities Commission (California PUC) contends that persons with disabilities ''increasingly rely upon internet-based video communications, both to communicate directly (point-to-point) with other persons who are deaf or hard of hearing who use sign language, and through video relay service,'' and that ''[t]hese applications often require significant bandwidth, making their use particularly sensitive to data caps and network management practices.'' As to data caps, however, neither the classification of broadband internet access service as a telecommunications service nor the *Title II Order*'s bright line rules prevented such caps. Nor does the record demonstrate that the possibility of case-by-case review of data caps—with its uncertain outcomes—would meaningfully address commenters' hypothetical public safety concerns that data caps would hinder the functionality of services relied upon by persons with disabilities for public safety-related communications. Commenters do not explain why they think the application of that case-by-case review would have addressed any theoretical concerns about public safety communications involving persons with disabilities. We do recognize that the use of broadband internet access service to facilitate video communications by persons with disabilities is distinct from the specific types of applications ''such as email, software updates, or cached video'' that the *Restoring Internet Freedom Order* identified as typically unlikely to be degraded by prioritization of latency-sensitive applications on the same facilities. In addition to the video communications services cited by the California PUC, BBIC cites educational tools for persons with disabilities: ''Remote Real-time Captioning for classes, E-Text through *Bookshare.org* (Accessing and Downloading Accessible Text Books) and the ability to access and download software including dictation software, screen readers, and Text To Speech Softwares.'' As a threshold matter, the nexus to public safety is unclear, particularly as it relates to the use of broadband internet access service by persons with disabilities to download books and software. We also find that downloading books and software are likely akin to the non-latency-sensitive uses of broadband internet access service that the Commission already held unlikely typically to be affected by prioritization of other traffic, and the record here does not demonstrate otherwise. With respect to ''Remote Real-time Captioning for classes,'' we are not persuaded that any public safety implications are materially different for that use of broadband internet access service than for others, like video communications, discussed in the text. To the extent that BBIC's concern is about blocking or throttling of traffic, the Commission already rejected the likelihood of that in the *Restoring Internet Freedom Order,* and we do not revisit that conclusion here. Nor are we persuaded that there are public safety implications for these specific uses of broadband internet access service cited by BBIC that cannot adequately be addressed, if needed, through the marketplace or other laws given that their nature and context does not appear to involve the need for immediate communications to address imminent threats to life or property. But we do not find the likely effects on these services meaningfully different than our public safety analysis of the other video communications applications potentially used by the public more generally as raised by commenters in the record here. Indeed, there is no evidence of such harm occurring since the *Restoring Internet Freedom Order* took effect. Consequently, we reject public safety concerns about video applications used by persons with disabilities for the same reasons we reject public safety concerns raised in connection with other latency-sensitive over-the-top services used by the public more generally for public safety purposes. Although the record does not persuade us of likely public safety harms to communications involving persons with disabilities using video communications over broadband internet access service, should such

evidence emerge we have authority to act consistent with the regulatory approach to broadband internet access service adopted in the *Restoring Internet Freedom Order*. As we held in the *Restoring Internet Freedom Order,* the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA) ''directed the Commission to enact regulations to prescribe, among other things, that networks used to provide'' advanced communications services (ACS), which includes electronic messaging and interoperable video conferencing services, '' 'may not impair or impede the accessibility of information content when accessibility has been incorporated into that content for transmission through . . . networks used to provide [ACS].' ''

50. We also are not persuaded by commenters' claims that ISP conduct will lead to violations of laws establishing protections for persons with disabilities. As a threshold matter, the nexus between those concerns and public safety issues (or any other remanded issue) is far from clear—and to the extent commenters raise issues lacking a nexus to the remanded issues, we reject them as beyond the scope of this proceeding. Independently, the record does not demonstrate that the regulatory approach adopted in the *Restoring Internet Freedom Order* will lead to the violation of the laws cited by commenters. Commenters express vague concerns about the potential violation of section 225 of the Act, which calls for the Commission to establish Telecommunications Relay Services (TRS) to provide certain persons with disabilities communications services that are functionally equivalent to voice telephone service. The Commission's rules define the standards that providers subject to section 225 must meet. Although some TRS services are carried via broadband internet access service, commenters do not explain how the regulatory approach in the *Restoring Internet Freedom Order* will preclude providers subject to section 225 from complying with the Commission's rules implementing section 225. We also see no basis in this record to conclude that our policy discretion under section 225 of the Act to revise our TRS rules to reflect evolving standards over time would be materially affected under the regulatory approach adopted in the *Restoring Internet Freedom Order*.

51. Commenters' arguments are also flawed insofar as they focus not on violations of laws by the ISPs themselves but on the theory that ISPs' conduct might make it harder for third parties to comply with their obligations under laws protecting individuals with disabilities. For one, the record does not demonstrate that such effects on third party compliance are likely. Independently, we are not persuaded that such speculative concerns would provide a sound basis upon which to revisit the regulatory approach of the *Restoring Internet Freedom Order*. Even assuming *arguendo* that certain regulation of ISPs could make it easier for third parties to comply with those third parties' statutory obligations, the net result would be to shift compliance burdens away from the parties actually subject to the statutory duties and onto the ISPs. In effect, such regulation would require ISPs to implicitly subsidize the compliance costs of the entities actually subject to the statutory duties. We are not persuaded that would be an appropriate basis for regulation.

52. Finally, we are unpersuaded by BBIC's assertion that provider conduct no longer prohibited by the regulatory approach in the *Restoring Internet Freedom Order* might violate the Americans with Disabilities Act's (ADA) ''prohibit[on on] interference with rights granted under the ADA statute'' or ''raise state law tort issues such as claims for prospective interference with business advantage.'' BBIC does not explain why the theoretical potential for a provider's conduct to violate any such requirements is, in itself, a reason to return to the regulatory approach of the *Title II Order*. Not only is the potential for violations theoretical, but BBIC has not sufficiently articulated a potential legal violation. We thus reject BBIC's assertion that ''[t]he FCC must explain its analysis of whether the ADA interference statute is violated by ISP demands for payment for fast internet access for additional payments or at risk of slowdown of the data or vital services including telemedicine for persons with disabilities.'' In other words, even assuming *arguendo* that certain provider conduct already is prohibited by a law like the ADA's prohibition on interference, the record does not reveal any public safety benefit from the Commission separately and independently regulating broadband internet access service providers simply to ensure they comply with obligations they already otherwise are subject to by law. Finally, the record does not reveal any additional public safety concerns that would arise from the speculative claimed violation of these laws, independent of the concerns about the public safety effects of ISPs' pricing and network management practices that we already considered and rejected above. Indeed, one concern raised by the California PUC appears even further removed, insofar as it expresses concern about the loss of ''copper wires which carry 911, closed captioning and TTY services.'' Neither the definition nor classification of broadband internet access service is tied to the physical medium—copper vs. fiber—over which it is provided, however, nor does the California PUC give any indication of how the *Title II Order* would have addressed its concerns about the loss of copper network facilities better (or at all).

53. *Speculative Harm—Critical Infrastructure*. We disagree that the elimination of the internet conduct rules will impact the safety and reliability of ''critical infrastructure sectors,'' including electric, gas, water, and communications utilities, ''which in turn negatively impacts public safety,'' as claimed by some commenters. Commenters cite various federal laws or statements of policy regarding critical infrastructure in general or the use of the internet and other communications technologies as part of those sectors. In some cases, the cited materials appear to adopt principles or requirements specific only to the implementation of those statutes or involve communications services generally in a way that extends far beyond the scope of this proceeding. Nor is our analysis altered by references to ''state laws making the interference with administration of government an offense ranging from a civil to a criminal misdemeanor—or felony.'' The record is not sufficiently developed on these legal standards and their potential application to any provider conduct that theoretically could raise public safety concerns for us to formally opine on them here, and in any case BBIC does not explain why the theoretical potential for a provider's conduct to violate any such requirements is, in itself, a reason to return to the regulatory approach of the *Title II Order*. The California PUC also cites its efforts to ''adopt[ ] a number of emergency customer protection measures to support residential and small business customers of utilities affected by disasters,'' stating that these come in the aftermath of a disaster and involve what it asserts without elaboration are ''vital communications services.'' The actual nexus between the California PUC's customer protection measures and protection of critical infrastructure or public safety more generally is unclear on this record. And the California PUC's concern in this regard appears to center on arguments certain providers made objecting to its regulations, among many other grounds, on the basis of the

preemption portion of the *Restoring Internet Freedom Order*. These arguments appear to have been made prior to the *Mozilla* court vacating that portion of the *Restoring Internet Freedom Order*—a fact the California PUC does not address—and otherwise remain unresolved. We thus are not persuaded that these arguments demonstrate a public safety harm arising from the *Restoring Internet Freedom Order*'s regulatory approach. Commenters' concerns about critical infrastructure-related risks are premised on the same ISP conduct that underlie commenters' public safety concerns more generally—blocking, throttling, and paid prioritization—which we find unlikely to occur for the reasons already discussed above. As we found, the effects of ISP conduct involving paid prioritization, should they occur, are unlikely to detrimentally affect applications used for public safety purposes generally, and the record does not justify a different conclusion in the case of the applications cited by commenters in connection with critical infrastructure. Late in the proceeding BBIC filed an *ex parte* attaching in full a number of law journal articles and a brief from the *Mozilla* litigation from 2018 and 2019 without directing the Commission's attention to particular elements or aspects of those attachments beyond the specific quotes or arguments from those materials that it referenced in earlier filings, instead stating simply that ''the attached material [is] responsive to issues raised in these proceedings.'' Reviewing that filing in a manner consistent with the circumstances, each of the attachments appear, at least in part, to discuss public safety concerns in general, including critical infrastructure issues in particular. To the extent that the attachments appear to bear on the remanded public safety issue, these attachments do not appear to raise facts, arguments, or concerns that differ in material ways from those we otherwise address and find unpersuasive in this section. For example, we do not readily identify in these attachments—and BBIC's accompanying *ex parte* letter does not highlight—circumstances where ISPs are likely to behave differently than otherwise reflected in our public safety analysis; nor applications or services with technical characteristics materially different than those otherwise considered in our analysis; nor legal responsibilities imposed on the Commission that we have not met here; nor other reasons for the Commission to reject its regulatory approach from the *Restoring Internet Freedom Order* that are materially different from the arguments the Commission otherwise finds unpersuasive in its analysis here. Nor is there evidence of such harm occurring since the *Restoring Internet Freedom Order* took effect.

54. Although commenters discuss various applications that arguably have at least some nexus to critical infrastructure protection, the record does not reveal technical details regarding the operation of any of those applications that demonstrates that they would be significantly affected by ISP network management, let alone in a way that would have been prohibited by the rules adopted in the *Title II Order*. Nor is it even clear that all of the cited applications rely on mass market broadband internet access service, rather than enterprise services, specialized services, or other services that fell outside the scope of the *Open Internet Order* and *Title II Order*. For example, it is not clear from the record that '' 'Smart Grid communication to the internet-enabled backbone,' '' necessarily relies on mass market broadband internet access service. Nor is it clear whether the operation of certain devices that facilitate the applications cited by commenters, such as ''internet-connected thermostats, solar panels, and energy storage units,'' would rely on mass market broadband internet access service or instead on some other ''non-BIAS data services'' and as such, by default would not have been regulated by the *Title II Order* in any event. Commenters' various high-level claims about the general importance of communications to critical infrastructure also appear to extend beyond mass market broadband internet access services. Indeed, it is the increasingly robust broadband made available since the *Restoring Internet Freedom Order* that has made possible the ''fast, instantaneous communications'' needed for many of the beneficial critical infrastructure-related programs to be effective.

55. *Limited Scope of Any Hypothetical Harm.* We emphatically agree with the *Mozilla* court that ''whenever public safety is involved, lives are at stake.'' Our analysis above demonstrates that harms to public safety, and thus American lives, have not arisen and are unlikely to arise as a result of the *Restoring Internet Freedom Order*. To be thorough, we must further observe that if some harm were nonetheless to arise, its impact would necessarily be limited by the important but bounded role that broadband internet access service plays in the broader public safety communications marketplace. Public safety entities often rely on enterprise-level broadband data services for communications between public safety officials, which were never subject to the *Title II Order*. And while mass market broadband services are a critical element of public safety communications for members of the public, such services are not the only means of disseminating, accessing, and conveying important public health and safety communications, as consumers rely on voice services (most notably 911 capabilities), the emergency alert system, and wireless emergency alerts for accessing important public safety information as well.

5. The Public Safety Benefits and Overall Benefits of the *Restoring Internet Freedom Order* Outweigh Any Unlikely Harms to Public Safety

56. Our analysis leads us to conclude that the likely benefits of the *Restoring Internet Freedom Order* for public safety clearly outweigh any harms. Getting broadband to more Americans sooner and at lower prices can and will likely save lives. This public safety benefit extends beyond broadband internet access service to all commingled services that rely on the same facilities, and even to other services that ISPs may invest in with money that they would otherwise have spent on regulatory compliance. Weighed against our conclusion that harms to public safety have not arisen and are unlikely to arise as a result of the *Restoring Internet Freedom Order,* it is clear that the benefits of the underlying order outweigh the costs as to public safety. Moreover, we must take into account that the likely benefits of the *Restoring Internet Freedom Order* extend far beyond public safety, and into every realm of American life touched by the internet. As we explained in the *Restoring Internet Freedom Order,* reinstating the information service classification for broadband internet access service ''is more likely to encourage broadband investment and innovation, further our goal of making broadband available to all Americans and benefitting the entire internet ecosystem. ISP investment does not simply take the form of greater deployment, but can also be directed toward new and more advanced services for consumers. Enabling ISPs to freely experiment with services and business arrangements that can best serve their customers, without excessive regulatory and compliance burdens, ''is an important factor in connecting underserved and hard-to-reach populations,'' and we agree with the Chamber of Commerce that the positive

effects of the *Restoring Internet Freedom Order* likely will help ''enable the deployment of rural broadband and 5G technologies that benefit the entire economy and will help close the digital divide.'' We thus conclude that the overall benefits of the *Restoring Internet Freedom Order* (including to public safety) clearly outweigh any harms to public safety.

B. Pole Attachments

57. The *Mozilla* court directed us to ''grapple with the lapse in legal safeguards'' that results from reclassification eliminating section 224 pole attachment rights of ISPs that lack a commingled telecommunications service or cable television system (*i.e.,* broadband-only providers). For the reasons below, we find that the benefits of returning to the light-touch information service classification adopted in the *Restoring Internet Freedom Order* far outweigh any limited potential negative effects resulting from the loss of section 224 rights for broadband-only ISPs.

1. Section 224 Authority

58. The Commission has broad authority under section 224 of the Act to regulate attachments to utility-owned-and-controlled poles, ducts, conduits, and rights-of-way. Section 224 defines pole attachments as ''any attachment by a cable television system or provider of telecommunications service to a pole, duct conduit, or right-of-way owned or controlled by a utility.'' It authorizes us to prescribe rules to ensure that the rates, terms, and conditions of pole attachments are just and reasonable; require utilities to provide nondiscriminatory access to their poles, ducts, conduits, and rights-of-way to telecommunications carriers and cable television systems (collectively, attachers); provides procedures for resolving pole attachment complaints; governs pole attachment rates for attachers; and allocates make-ready costs among attachers and utilities. The Act defines a utility as a ''local exchange carrier or an electric, gas, water, steam, or other public utility, . . . who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications.'' However, for purposes of pole attachments, a utility does not include any railroad, any cooperatively-organized entity, or any entity owned by a federal or state government. Section 224 excludes incumbent local exchange carriers from the meaning of the term ''telecommunications carrier,'' therefore these entities do not have a mandatory access right under section 224(f)(1). The Commission has held that when incumbent local exchange carriers obtain access to poles, section 224 governs the rates, terms, and conditions of those attachments. The Act allows utilities that provide electric service to deny access to their poles, ducts, conduits, or rights-of-way because of ''insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.''

59. The Act nonetheless only gives the Commission limited authority. It exempts from our jurisdiction those pole attachments in states that have elected to regulate pole attachments themselves, referred to as reverse preemption states. Twenty-four states and the District of Columbia have elected this reverse preemption, leaving our rules to govern pole attachments in 26 states and the U.S. Territories. Section 224 also does not cover poles owned by municipalities, electric cooperatives, railroads, or the Federal or state governments.

2. The Benefits of Reclassification Outweigh Any Potential Drawbacks for Broadband-Only ISPs

60. Based on the record, we find that the benefits of returning broadband internet access service to its historical information service classification outweigh any potential adverse effects resulting from the loss of pole attachment rights under section 224 for broadband-only ISPs. First, we find that any drawbacks of reclassification are limited because in the areas where federal pole attachment regulation applies, almost all ISPs' pole attachments remain subject to section 224, as they commingle cable or telecommunications services with their broadband services. Second, we conclude that the benefits of reclassification for broadband-only providers outweigh any limited pole attachment-related drawbacks they face—and the *overall* benefits of reclassification outweigh the drawbacks of broadband-only ISPs' attachments no longer being subject to section 224.

61. *Drawbacks of Reclassification Are Limited.* Section 224 applies to attachments of cable television systems and providers of telecommunications services, but not to providers of only information services. As the Commission has previously clarified, however, ''where the same infrastructure would provide 'both telecommunications and wireless broadband internet access service,' the provisions of section 224 governing pole attachments would continue to apply to such infrastructure used to provide both types of service.'' This determination is consistent with the U.S. Supreme Court's decision in *NCTA* v. *Gulf Power Co.,* in which the Court held that the protections afforded by section 224 to cable attachments remain in place when a service provider uses the same facilities to offer broadband internet access service to its subscribers. Thus, in non-reverse preemption states, ''the protections afforded by section 224 to cable television systems and providers of telecommunications service remain in place when a service provider uses the same facilities to offer broadband internet access service to its subscribers.'' Only the few ISPs that do not offer cable or telecommunications services over the same network would not be able to avail themselves of the protections Congress established in section 224 and the Commission's implementing rules.

62. We find that the vast majority of subscribers are served by ISPs that provide either cable or telecommunications services over their networks and therefore remain able to take advantage of the rights guaranteed by section 224 after the reclassification of broadband internet access service as an information service. Public Knowledge et al. claim that AT&T may soon cease to provide a telecommunications service or a cable television service, and as a result, ''the entire AT&T network will no longer be eligible for pole attachment rates'' and AT&T may no longer ''qualify as a LEC.'' Speculation regarding a single provider is insufficient to justify changing our course. Further, in the attachment on which Public Knowledge et al. rely, AT&T merely sets forth a plan to grandfather DSL (a legacy information service). The document specifically states that customers that wish to retain plain old telephone service (a telecommunications service) may do so, and Public Knowledge et al. do not provide any evidence that AT&T plans to discontinue any telecommunications services offered over any of its facilities. Carriers must obtain Commission approval prior to discontinuing telecommunications services, and interested parties would have an opportunity to object to any proposed continuance. The record overwhelmingly confirms our conclusion. According to ACA Connects, all of its members '''commingle' broadband with either or both a cable or telecommunications service over the same network.'' Likewise, the Edison Electric Institute's members ''report that at this time very few ISPs seek to attach to electric

company poles to provide broadband-only service.'' USTelecom cites a November 2019 report stating that at least 96% of the broadband market was served by companies that either provided telecommunications services or operated a cable system.'' Further, we agree with ACA Connects that ISPs will continue to offer commingled services for the foreseeable future because ''ISPs have an incentive to offer as many services as possible over their networks to achieve efficiencies and maximize revenues, and thus very few providers only offer over their networks standalone broadband service.'' In fact, NCTA argues that a reason broadband-only providers are particularly rare is ''precisely because triple-play services are both popular with subscribers and beneficial to providers.'' Notably, multiple commenters agree that the majority of existing ISPs offer commingled services. Further, ISPs may gain the status of telecommunications providers, and thus become eligible for section 224 pole attachment rights. Our experience with the substantial participation in the Connect America Fund (CAF) Phase II universal service support auction and, more recently, our Rural Digital Opportunity Fund Phase I auction demonstrates that providers are willing or able to become telecommunications carriers when they find it beneficial. 220 applicants qualified to bid in the CAF Phase II auction, and as of September 2020, 192 of 194 winning bidders had been designated as ETCs in 45 states and been authorized to begin receiving support. The Rural Digital Opportunity Fund auction imposed similar ETC designation requirements on applicants. Bidding in the Rural Digital Opportunity Fund Phase I auction is scheduled to begin on October 29, 2020, and the Commission received 505 applications to participate. As another option, a broadband-only provider may also partner with an existing cable or telecommunications provider to invoke section 224 protections.

63. Although we agree that timely ''access to utility poles is a competitive bottleneck,'' based on the record, we are convinced that reclassification does not significantly limit new entrants to the marketplace or the effectiveness of the Commission's recent one-touch-make-ready rules. Broadband-only providers now have the regulatory flexibility to enter into innovative and solution-oriented pole attachment agreements with pole owners. Indeed, Southern Company notes that its operating companies—Georgia Power, Alabama Power, and Mississippi Power—''routinely enter into pole license agreements with entities that are neither cable television systems nor telecommunications carriers'' and ''[t]he negotiation of these pole license agreements is often more efficient than negotiation of pole license agreements with cable television systems or telecommunications carriers because the prospective licensee appears to be more interested in a deal that works than they are interested in ensuring that any perceived regulatory rights are reflected in the agreement.'' Further, since the adoption of the *Restoring Internet Freedom Order,* there is only limited evidence in the record that a small number of broadband-only providers have experienced increased costs to obtain access to poles, and there is also evidence that such costs or other barriers have not increased. For instance, Southern Company explains that ''its operating companies have not increased pole attachment rates or prohibited a broadband provider from attaching equipment following the Order'' and that it must ''answer to a state public service commission when it comes to the lease of property capitalized within the rate base.'' Only WISPA provides some isolated and anecdotal examples of higher pole attachment rates, but fails to demonstrate the existence of a widespread problem. Indeed, WISPA emphasizes that these few incidents do not outweigh the overall positive impact of Title I reclassification for its members. Although some commenters contend that the reclassification has adversely impacted broadband-only providers, they largely fail to provide data or specific examples that connect the *Restoring Internet Freedom Order* to a rise in pole attachment rates or denials of pole access. For instance, while Google Fiber states that, prior to the *Title II Order,* negotiations over pole attachment agreements with pole owners ''were difficult and time consuming,'' and it ''had to be willing to pay higher rent than cable operators and telecommunications providers,'' as commenters note, Google does not provide examples of similar negotiation and rate difficulties since the adoption of the *Restoring Internet Freedom Order*. Notably, Google merely speculates that it ''may find itself with no right to use [''one-touch make-ready''] OTMR procedures in a given market.'' Google Fiber advocacy at the time suggests that it anticipated accruing benefits from our adoption of OTMR. Google Fiber strongly supported OTMR adoption in the *2018 Wireline Infrastructure* (83 FR 46812, Sept. 14, 2018) proceeding, despite the fact this proceeding occurred after we reclassified broadband as an information service in the *Restoring Internet Freedom Order*. Google Fiber also had a representative on the Broadband Deployment Advisory Committee who voted in favor of its report recommending that the Commission adopt OTMR. We find this speculation unconvincing and, to the contrary, agree with ACA Connects members that over time, new and existing attachers, as well as pole owners, will ''find it to their advantage to use [the OTMR] process, making it an industry standard—regardless of whether an attacher has section 224 rights.''

64. Further, despite its concerns that pole owners will use the reclassification of broadband internet access service as an information service to delay and even block new deployments by broadband-only providers, Google acknowledges that before broadband internet access service was classified as a telecommunications service, it was able to enter into such agreements with utilities. Southern Company confirms that in February 2014, ''Google Fiber first approached Georgia Power about a pole license agreement'' and ''[b]y December 15, 2014, the parties had fully executed their agreement.'' Notably, although Google Fiber repeatedly emphasizes the unfairness of its inability to take advantage of pole access rights for cable operators under section 224, NCTA contends that Google Fiber could, in fact, be classified as a Title VI cable service due to its video offering, but has taken the position that its video offering is not a cable service in order to avoid regulatory burdens under Title VI.

65. The limited impact of the loss of section 224 rights for broadband-only providers is further diminished by the fact that states have the ability to reverse-preempt the Commission's rules under section 224(c)—and a substantial minority have in fact done so. As multiple commenters note, our Title I classification does not impact the 24 states and the District of Columbia that have chosen to reverse-preempt our rules. Therefore, if a state prefers to adopt a different regulatory approach, that state has the opportunity to exercise its authority to expand the reach of government oversight of pole attachments, and several states that have reverse preempted currently regulate pole attachments by information service providers. The *Restoring Internet Freedom Order* does not disturb the authority of states that have reverse preempted to assert such jurisdiction or prevent states that have not reverse

preempted from doing so in order to assert such jurisdiction. The California Public Utilities Commission expresses concern that ''ISPs may attempt to invoke the information services classification as a shield against a State's jurisdiction to regulate pole attachment safety.'' It claims that ''overloaded poles and/or insufficiently maintained attachments'' have presented public safety issues. However, California currently regulates pole attachments at the state level so it is free to assert its authority over pole attachments by broadband-only providers under California law as it wishes without federal restriction under the Act.

66. We note further that section 224 has several gaps, such that the exclusion of broadband-only providers is not aberrant. Section 224 applies to specific categories of poles and, as noted above, only in applicable states. As noted above, poles owned by municipalities, electric cooperatives, railroads, and Federal and state governments are not covered under section 224, and so the adoption of the *Restoring Internet Freedom Order* does not affect the access of any ISP to such poles.

67. *The Benefits of Reclassification Outweigh Any Pole Attachment-Related Drawbacks.* Ultimately, the record supports our determination that the reclassification of broadband internet access service as an information service has facilitated rather than inhibited new technologies and business models, despite the rare potential for pole attachment access challenges. To this end, given the overall benefits of Title I reclassification, we find that it would be counterproductive to upend our light-touch regulatory framework for broadband internet access service because of speculative concerns that at most would impact a small minority of ISPs and consumers.

68. First, there is no question that the overall benefits of reclassification outweigh the limited drawbacks that stem from broadband-only ISPs losing their section 224 pole attachment rights. As we have discussed, numerous commenters—including broadband-only ISPs—assert that Title I reclassification has promoted robust infrastructure investment and deployment in broadband networks and facilities. Indeed, the *Mozilla* Court upheld our cost-benefit analysis in the *Restoring Internet Freedom Order,* stating that we made a ''reasonable case that [our] 'light-touch' approach is more conducive to innovation and openness than the *Title II Order*.''

69. Second, the regulatory certainty provided by the Commission's actions in the *Restoring Internet Freedom Order* create incentives that likely help foster substantial investment in new broadband infrastructure, including poles, and increased broadband deployment. For instance, ''[a] WISPA member in Minnesota has invested $1.5 million dollars to expand its network by adding 12 new towers since January 2018'' and ''[t]his expansion has allowed the company to fully cover two additional counties in Minnesota.'' We agree with the majority of commenters that these benefits outweigh the loss of section 224 protections for the very limited number of broadband-only providers that do not offer a cable or telecommunications service over the same network as they provide broadband internet access service. Indeed, despite a membership including broadband-only providers, WISPA emphatically confirms our position that ''[t]here is no doubt that the *Restoring Internet Freedom Order*'s abandonment of burdensome Title II regulations for broadband internet access service providers is of paramount importance in promoting deployment of new service and enhancing competitive offerings. If it were actually a choice between the world of Title II regulation and the lighter touch of Title I regulation, with no pole attachment protections for broadband-only providers, WISPA would choose the latter paradigm.''

70. We decline at this time to address requests in the record to reinterpret section 224 or rely on other sources of authority to extend the availability of access rights under section 224 to broadband-only providers. A number of commenters propose sources of Commission authority to extend section 224 to cover broadband-only ISPs. For instance, WISPA proposes to directly apply section 224 or rely on ancillary authority. Specifically, WISPA contends that the plain text and objective of section 224, as well as provisions such as sections 157 and 257 of the Act, and section 706 of the 1996 Act, is ''to level the playing field, promote competition, expand the public's access to advanced services or ensure that customers have access to service at 'just and reasonable rates.' '' According to WISPA, we could also exercise our ancillary jurisdiction under section 154 or rely on section 706 as our statutory authority to extend pole access and rate rights to broadband-only providers. Other commenters offer general support for us to extend section 224 to cover broadband-only providers. Alternatively, Southern Company proposes ''to unwind many of the incumbent-friendly pole attachment regulations adopted by the Commission during the past decade, in order to allow broadband-only providers to compete on a more level regulatory playing field.'' For the purposes of this *Order on Remand,* we find that even assuming we lack authority to extend section 224 to cover broadband-only providers, the overall benefits of reclassification outweigh the limited drawbacks. Parties arguing in favor of extending pole attachment rights to broadband-only ISPs are free to file a petition for rulemaking or petition for declaratory ruling, which we then may consider with the benefit of a full and focused record on the topic.

C. Lifeline Broadband Services

71. The D.C. Circuit in *Mozilla* directed us to consider on remand the statutory basis for broadband internet access service's inclusion in the Lifeline program. After such consideration, we further explain our finding that we have legal authority under section 254(e) of the Act to distribute Lifeline support for broadband service provided by ETCs. That authority is undergirded by the clear intent of Congress that universal service efforts should increase access to advanced services, and the record in this proceeding offers broad support for our conclusion.

1. The History of Funding Broadband Services Through the Universal Service Fund

72. In the 2011 *USF/ICC Transformation Order* (76 FR 73830, Nov. 29, 2011), the Commission adopted comprehensive reforms to modernize the Universal Service Fund (USF or Fund) to ''implement Congress's goal of promoting ubiquitous deployment of, and consumer access to, both traditional voice calling capabilities and modern broadband services over fixed and mobile networks.'' As part of this modernization effort, the Commission leveraged the funding disbursed through the Fund's high-cost mechanism to encourage the deployment of broadband-capable networks, even though broadband internet access service was at the time classified as an information service. The Commission stated that by ''referring to 'facilities' and 'services' as distinct items [in section 254(e)] for which federal universal service funds may be used . . . Congress granted the Commission the flexibility not only to designate the types of telecommunications service for which support would be provided but also to encourage the deployment of the types of facilities that will best achieve the principles set forth in section 254(b) and any other universal service principle that the Commission may

adopt under section 254(b)(7).'' The Commission further concluded that section 254 allowed it to condition the receipt of universal service support on ETCs offering broadband capabilities to their customers. The Tenth Circuit affirmed this approach as a reasonable interpretation of the statute and upheld the Commission's authority to structure universal service support to ensure that the universal service policies set out in section 254(b) of the Act are achieved.

73. The Commission first funded broadband internet access service offerings in the Lifeline program when it launched the Lifeline Broadband Pilot Program as part of the reforms adopted in the *2012 Lifeline Order* (77 FR 12952, March 2, 2012). In doing so, the Commission relied upon the same theory of legal authority it applied to the high-cost mechanism in the *USF/ICC Transformation Order*. At the time that the Commission initiated the Lifeline Broadband Pilot Program, broadband internet access service was classified as an information service under Title I. After a successful pilot program, in the *2016 Lifeline Order* (81 FR 33026, May 24, 2016), the Commission expanded the Lifeline program to include support for broadband internet access service funding. However, since broadband internet access service had been reclassified as a telecommunications service subject to Title II regulatory requirements before the *2016 Lifeline Order,* the Commission relied on that reclassification when expanding the Lifeline program to include support for broadband but did not disavow the legal authority theory used in the *USF/ICC Transformation Order* or the *2012 Lifeline Order*.

74. In the *2017 Lifeline Notice of Proposed Rulemaking (NPRM)* (83 FR 2104, Jan. 16, 2018), to ensure that the Commission was administering the Lifeline program on sound legal footing, the Commission proposed to apply the same theory of legal authority it used in the *USF/ICC Transformation Order* and the *2012 Lifeline Order* to continue funding broadband internet access service in the Lifeline program. In that *NPRM,* the Commission asserted that it had the proper authority ''under Section 254(e) of the Act to provide Lifeline support to ETCs that provide broadband service over facilities-based broadband-capable networks that support voice service.'' The Commission concluded that this ''legal authority does not depend on the regulatory classification of broadband internet access service, and thus, ensures the Lifeline program has a role in closing the digital divide regardless of the regulatory classification of broadband service.'' Indeed, the Commission further concluded that it had a '' 'mandatory duty' to adopt universal service policies that advance the principles outlined in section 254(b) and we have the authority to 'create some inducement' to ensure that those principles are achieved.'' In the same *NPRM,* the Commission sought comment on eliminating the Lifeline Broadband Provider category of ETC, a broadband-only ETC designation that had been newly created in the *2016 Lifeline Order* when broadband internet access service had been classified as a Title II service.

75. Finally, in the *2019 Lifeline Order* (84 FR 71308, Dec. 27, 2019), the Commission re-evaluated the legal structure of the Lifeline Broadband Provider ETC category. With no obligation to offer the supported voice service under section 254(c), the Commission found that the Lifeline Broadband Provider category was in conflict with section 214. As such, the Commission eliminated this ETC category. Free Press argues that the Commission's decision to reclassify broadband internet access service as an information service ''locks [ ] out'' broadband-only providers from the Lifeline program. Thus, all ETCs currently are required to be common carriers and to offer voice service. The Commission has held that the section 214 requirement that an ETC offer the supported services through ''its own facilities or a combination of its own facilities and resale of another carrier's service'' would be satisfied when service is provided by any affiliate within the holding company structure.

2. The Commission Has Authority To Support Broadband Service in the Lifeline Program

76. Upon further review and having considered the record in both the *Restoring Internet Freedom* proceeding and in response to the *2017 Lifeline NPRM,* we determine that we have authority under section 254 of the Act to provide support for broadband internet access service from the Lifeline program in addition to a qualifying voice service. First, we elaborate on our application of the theory of legal authority adopted in the *USF/ICC Transformation Order* to the Lifeline program. Second, we address how this authority is not dependent on the regulatory classification of broadband internet access service and is consistent with the section 214(e) requirement that ETCs be common carriers. Third, we make necessary adjustments to the Commission's rules to implement this approach. Finally, we address how this legal authority will still allow the Lifeline program to reimburse broadband-only service offerings.

77. We conclude, as the Commission found in the context of the high-cost mechanism, that we have authority under section 254 to continue funding broadband internet access service offerings in the Lifeline program and that this position is strongly supported by the text of the Communications Act and the record. Under section 254(e), carriers receiving support ''shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.'' Under this statutory provision, the Commission has flexibility to design its support mechanisms to fund both the service itself—here, voice telephony—and the underlying facilities used to offer the supported service—here, broadband-capable networks. Modern communications networks are multi-use networks used to provide an array of services. Providing Lifeline support when ETCs provide broadband internet access service thus has the effect of supporting the underlying broadband-capable network also used to offer voice telephony. As in the high-cost program, the Commission's support mechanisms can and should incentivize ETCs to offer access to the services that advance the principles of section 254(b). The Leadership Conference *Ex Parte* also raises a number of suggestions for further Commission action to respond to the COVID–19 pandemic, which we do not address here as they are beyond the scope of this remand proceeding. Other commenters argue that the Commission lacks authority to fund broadband internet access services through the Lifeline program under section 254. We believe this is incorrect, and we address those arguments below. All ETCs participating in the Lifeline program are and will remain common carriers and must offer voice services by themselves or through an affiliate, but the Commission can also continue to support broadband internet access service in the Lifeline program, and the universal service support will flow to the facilities of ETCs that are by definition common carrier providers of voice services.

78. Section 254(e) states that ETCs ''shall be eligible to receive specific Federal universal service support'' and that an ETC receiving universal service support ''shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.'' Section 254(c) does not impose an impediment to this conclusion. While section 254(c)(1) refers to universal service as

''an evolving level of telecommunications services,'' this does not prohibit the Commission from using the program to more broadly advance the principles set forth in section 254(b) and indicates that Congress disfavored a static approach focused on legacy technologies. Additionally, section 254(b) establishes the principles on which the Commission shall base its policies for the preservation and advancement of universal service. Such principles include ensuring that quality services are available at ''affordable rates'' and that ''access to advanced telecommunications and information services should be provided in all regions of the Nation.''

79. As the Commission concluded in the *USF/ICC Transformation Order,* by requiring in section 254(e) that ETCs use high-cost support for both facilities *and* services, Congress granted the Commission flexibility to not only designate the types of services for which support would be provided, but also to encourage the deployment of the types of facilities that will best achieve the principles set forth in section 254(b). In addition, the Commission has a ''mandatory duty'' to implement universal service policies that advance the principles outlined in section 254(b), and to accomplish that duty we have the authority to ''create some inducement'' to ensure that those principles are achieved. Our authority under section 254 therefore permits us to direct universal service support through the Lifeline program to both voice services and broadband internet access service in accordance with our long-standing principle ''that universal service support should be directed where possible to networks that provide advanced services, as well as voice services.'' In upholding the Commission's reliance on this approach when it instituted the modernized high-cost programs, the Tenth Circuit approvingly noted that by ''interpreting the second sentence of § 254(e) as an implicit grant of authority that allows it to decide how USF funds shall be used by recipients, the FCC also acts in a manner consistent with the directive in § 254(b) and allows itself to make funding directives that are consistent with the principles outlined in § 254(b)(1) through (7).'' The National Lifeline Association (NaLA) and AT&T propose that the Commission may be able to rely on its ancillary authority under section 4(i) of the Act to continue to support broadband internet access service in the Lifeline program. The National Consumer Law Center (NCLC) and the United Church of Christ (UCC), as well as AT&T, pointed to section 254(j) as another potential source of authority for supporting broadband internet access service in the Lifeline program. Additionally, the Lifeline Connects Coalition urged us to explore using Title I's general jurisdictional grant as an option to support broadband internet access service in the Lifeline program or ancillary authority options for the principles outlined in section 254(b). Because we find that section 254(e) provides a clear source of authority for the Commission to support ETCs providing broadband internet access service in the Lifeline program, we do not find it necessary to rely on the other sources of legal authority proposed in the record.

80. The D.C. Circuit in *Mozilla,* in remanding this issue back to the Commission, stated that we ''fail[ ] to explain'' how our authority under section 254(e) could extend to broadband internet access service ''now that broadband is no longer considered to be a common carrier[service].'' We clarify that while broadband internet access service itself is not a common carrier service, many broadband providers are ETCs—and thus, by definition, are common carriers. Section 254(e) permits us to direct universal service support to both the voice service and broadband internet access service provided by such ETCs. This support flows regardless of the type of service provided, as long as it goes to support the facilities of a designated ETC. Thus, it is the ''common-carrier status'' of the provider, not the service, that governs whether the provider is eligible to receive Lifeline support for services provided over its network. If a service provider is not a common carrier and thus cannot become an ETC, the Lifeline program cannot support its provision of broadband internet access service. For this reason we also reject NARUC's contention that the Commission's continued use of ''voice telephony service'' to define the supported service creates a risk that a provider that is not a common carrier will obtain designation as an ETC. There is no basis for NARUC's claim that the 10th Circuit's decision in *In re FCC 11–161* rejected the Commission's use of voice telephony service as the supported service, and nothing in our Order today changes that result. As the court noted in that decision, only common carriers are eligible to obtain designation as an ETC and the court ''agree[d] with the FCC that the petitioners' argument 'will not be ripe for judicial review unless and until a state commission (or the FCC) designates . . . an entity' that is not a telecommunications carrier as 'an 'eligible telecommunications carrier' '; under § 214(e).'' Since NARUC provides no evidence that a non-common carrier has been designated by the FCC or a state commission, much less as the result of the *Restoring Internet Freedom* proceeding, and the legal authority we identify today continues to require ETCs to be common carriers, we see no risk that a non-common carrier will receive an ETC designation.

81. We thus reject arguments that we cannot support broadband internet access service in the Lifeline program if it is not classified as a telecommunications service. Our approach outlined today does not impact the ETC designation process or the requirement that support recipients be ETCs and, consistent with the statute ETCs will still offer voice telephony service and be required to be common carriers. While the Commission has not classified VoIP service as a telecommunications service, it has consistently recognized that a provider may offer VoIP on a Title II basis if it voluntarily ''holds itself out as a telecommunications carrier and complies with appropriate federal and state requirements.'' Thus, the Commission is continuing to support telecommunications services pursuant to its authority under section 254 of the Act. This approach simply enables low-income consumers to receive discounts for broadband internet access service provided by ETCs, allowing us to work towards fulfilling our principles of ensuring affordable rates and access to advanced telecommunications and information services across all regions of the Nation.

82. We disagree with commenters that argue that the *Restoring Internet Freedom Order* renders the Commission unable to ensure the availability of Lifeline-supported options for low-income consumers. The Commission retains the authority, if warranted, to condition Lifeline support on the provision of broadband internet access service, as it has in the context of the high-cost mechanism. The limited example put forward in the context of AT&T's grandfathering of legacy DSL does not persuade us otherwise—as the commenters who raise the point admit, ''the loss of these DSL connections does not necessarily mean a loss to existing Lifeline subscribers.'' We also note that the *Restoring Internet Freedom Order* does nothing to change the procedures by which carriers may seek to relinquish their status as ETCs, which will continue to be governed by section 214(e)(4) of the Act to ensure that

geographic areas are not left without a Lifeline provider.

83. We further reject arguments that the Commission cannot apply the legal authority articulated in the *USF/ICC Transformation Order* because of the differences between the high-cost program and the Lifeline program. However, as articulated in this section, we do not believe that the program differences are material with respect to the Commission's authority under section 254(e) to provide funding for broadband service in the Lifeline program, as funding will ultimately flow to supported facilities. Every ETC, whether they participate in the high-cost program, Lifeline program, or both programs, necessarily incurs network costs associated with the provision of the supported voice service and advanced services, such as broadband internet access service. In the case of facilities-based Lifeline providers, these costs arise in deploying and maintaining their own broadband-capable networks used to offer the voice telephony supported service. Resellers participating in the Lifeline program likewise incur costs associated with the network used to offer the supported voice service by directly compensating the underlying facilities-based providers for the wholesale voice services. Some commenters also raised concerns that our actions to reclassify broadband internet access service as an information service would bar resellers from the Lifeline program. In the *2017 Lifeline NPRM* the Commission sought comment on the continued role of resellers in the Lifeline program more generally, as well as on other possible rule changes that might be warranted should resellers remain in the Lifeline program. Although we do not adopt changes in that regard in this *Order,* those issues remain pending. Both programs ultimately offset those network costs. The main difference is that the high-cost program provides supplemental support for areas that are especially expensive to serve, while the Lifeline program compensates providers for some of their costs so they can offer discounted service to low-income Americans, thus incentivizing ETCs to provision, maintain, and upgrade facilities and services where low-income consumers live. Contrary to some commenters' suggestion, this statutory authority is entirely consistent with the Lifeline program's goals of promoting affordability and availability of voice and broadband services. Indeed, the Commission first established the Lifeline program goal of ensuring the availability of broadband service in the *2012 Lifeline Order*—well before the Commission decided to impose Title II regulation on broadband internet access service. The Commission's authority to disburse Lifeline funds for broadband service is in part due to the fact that such funding ultimately flows to support the provision, maintenance, and upgrading of the voice-capable networks, but the Commission can and does still direct Lifeline funds in a way to best promote affordable voice and broadband services for low-income consumers.

84. We also reject arguments by some commenters that we cannot justify supporting broadband internet access service through the Lifeline program if the supported voice service is scheduled to eventually receive no Lifeline reimbursement in certain parts of the country. In the *2016 Lifeline Order,* the Commission adopted a phasing out of support for voice-only service in the Lifeline program in most areas after December 1, 2021. In doing so, the Commission concluded that ''Lifeline should transition to focus more on [broadband internet access service] given the increasingly important role that broadband service plays in the marketplace. . . .'' The Commission also created a carve-out of the support phasedown, allowing continued support to voice services at a rate of $5.25 per month after December 1, 2021 to eligible subscribers served by a provider that is the only Lifeline provider in a Census block. First, support for voice-only services is not ending entirely, as the Lifeline program will continue to offer support to eligible subscribers in a Census block with only one ETC. Nothing in the text of section 254 requires an ETC to receive universal service funds everywhere it offers the section 254(c)(1) supported service. Section 254(c)(1) refers to the services included in the definition of universal service as being ''supported by Federal universal service support mechanisms,'' but does not specify the details of those mechanism or under what range of circumstances universal service funds must actually flow. Likewise, although section 254(e) requires ETCs to use support ''only for the provision, maintenance, and upgrading of facilities and services for which the support is intended,'' it does not specify how the Commission must direct those funds to be allocated as between support for ''the provision . . . of services'' vs. ''the provision, maintenance, and upgrading of facilities'' used to offer the section 254(c)(1) supported service. Second, voice services will continue to be a component of many Lifeline offerings, as nearly 90% of Lifeline subscribers currently choose to apply their discount to a bundled offering that includes voice service along with broadband internet access service that meets the program's minimum service standards. As such, even as the voice phasedown continues, the Commission will continue to support the provision of voice services and voice-capable networks by ETCs. We therefore disagree with commenters asserting that it is unreasonable to claim that Lifeline support would benefit voice facilities while continuing to phase out support for voice-only service. As to comments urging the Commission to pause the voice phasedown at this time, we decline to decide here and the issue remains open from the *2017 Lifeline NPRM.* This Order is limited to addressing the three discrete issues remanded to the Commission by the D.C. Circuit. Nevertheless, we believe that a continued voice phasedown does not impede the Commission from relying on the legal authority we have explained herein.

85. We also disagree with commenters who argue that the best approach to supporting broadband internet access service through Lifeline is to simply reclassify broadband internet access service as a Title II service. We find our approach today instead allows for the Lifeline program to fund broadband internet access service offerings, while also allowing the Commission to continue to apply a light-touch regulatory approach to broadband internet access service, and will promote investment and innovation without grafting costly and restrictive requirements onto a program that is focused on making vital services affordable. Free Press also raises the possibility that as providers transition away from offering switched telephone service they may not be eligible to participate in the Lifeline program with broadband internet access service classified as a Title I service. While Free Press casually raises this concern, it does not offer any evidence of it impacting the Lifeline marketplace today, or anytime in the near future. As such, we decline to address this concern at this time and believe that voice telephony as a supported service will not present any near-term challenges for providers.

86. We next make necessary adjustments to the Commission's rules. In the *2016 Lifeline Order,* the Commission amended § 54.101 of its rules to include broadband internet access service as a supported service. As we discuss above, the classification of broadband internet access service as an

information service does not bar us from providing support for the provision of broadband by ETCs who are providing voice telephony, but broadband internet access service cannot be an independent supported telecommunications service under section 254(c). Although section 254(e) directs that ''[a] carrier that receives [universal service] support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended,'' section 254 is silent about the mechanics by which the Commission may determine the magnitude of high-cost or Lifeline support an ETC will receive, including the conditions that trigger the flow of support. By contrast, where Congress wished to specify in greater detail the mechanics of how support amounts would be calculated and triggered, it did so. Consequently, so long as the Lifeline funds ultimately are used consistent with the requirements of section 254(e), there is no statutory bar to conditioning the receipt of support on the provision of an information service offered over the network that provides the section 254(c)(1) supported service, and calculating support amounts in a way that accounts for the fulfillment of that condition. The California PUC previously argued that if broadband internet access service were reclassified as an information service, the Commission may not have the ability to impose its Lifeline minimum service standards on broadband services offered in the Lifeline program because of the limitations of section 254(c). As stated here, however, section 254(c) does not impose a bar on how the Commission might trigger universal support to a properly designated ETC. In the high-cost program, the Commission long has provided support without relying on a trigger based solely on the provision of the section 254(c)(1) supported service. For example, the Commission calculated the amount of high-cost support for rate-of-return carriers based on the number of voice or broadband internet access services lines they provided, even though only voice telephony was the section 254(c)(1) supported service. Thus, because broadband internet access service is not a section 254(c) telecommunications service, we remove broadband internet access service from the list of supported services in § 54.101, while preserving our authority to fund broadband internet access service through the Lifeline program.

87. We note that, while we did not propose this specific rule change in the *2017 Lifeline NPRM,* the Commission did specifically seek comment on relying on section 254(e) as the legal authority to support broadband internet access service in the Lifeline program without relying on the regulatory classification of broadband internet access service as a telecommunications service. Since this rule change is a direct result of our reliance on this legal theory, we find that removing broadband internet access service as a supported service in these rule sections is supported by the text of the *NPRM* itself and, in addition, is in any event a ''logical outgrowth'' of the proposal in the *NPRM*. We also note that this rule change will have little practical effect on ETCs as the authority outlined today allows the Lifeline program to continue funding broadband internet access service offerings.

88. *Continued Support for Plans that Only Satisfy the Broadband Minimum Service Standards*. We next clarify that the Lifeline program can continue to provide support for broadband-only offerings by ETCs to qualifying low-income households. In order to receive reimbursement for providing a Lifeline service, ETCs must identify if the service meets the mandatory minimum standards for voice or broadband to determine the amount of support they can claim from the Lifeline program. With the phasedown of voice support proceeding in accordance with the Commission's current rules, we expect to see some subscribers who receive a Lifeline service that only qualifies for Lifeline support because the service meets the program's minimum service standards for broadband internet access service. Even though these offerings do not rely on a qualifying voice service—although they could very well include some level of bundled non-qualifying voice service, as many Lifeline subscribers receive today—we can continue to provide reimbursement under the statutory authority we outline today. As the *Mozilla* court notes, section 214(e) requires that entities designated as ETCs must be common carriers. The common carrier requirement of section 214(e) creates a limitation on the type of entities that may be designated as an ETC, but it does not prohibit an ETC from providing a broadband only-service to a qualifying low-income household and also receiving Lifeline support for that service to that household. The statute does not mandate that ETCs only offer service on a common carrier basis, nor does it prevent the Commission from reimbursing broadband internet access service offerings as a way to accomplish the principles on which the Commission is required to base its universal service policies pursuant to section 254(b).

89. Using universal support to promote advanced services by ETCs that are, by definition, common carriers is consistent with past Commission efforts in the high-cost mechanism. In 2016, for example, the Commission allowed high-cost support for broadband-only loops for rate-of-return carriers. In doing so, the Commission stated that it was applying the principle first outlined in the *USF/ICC Transformation Order* ''that universal service support should be directed where possible to networks that provide advanced services, as well as voice services.'' NaLA echoed this approach when it stated that, even if the Commission continues its phase-down in Lifeline voice support, ''as long as voice telephony service remains a supported service and ETCs are offering voice service, the Commission can continue to provide universal service funding only for the provision of broadband service. . . .'' Under the approach we adopt today, ETCs, operating as common carriers, would still be required to offer voice service, including through bundled service offerings, but the Lifeline program would target its resources to induce ETCs to provide broadband internet access service offerings, both bundled and standalone, to Lifeline subscribers.

90. A number of commenters expressed concern that the Commission would be unable to support broadband-only providers as a result of broadband internet access service's status as an information service. The Commission has already decided this issue and it is no longer before us now. As we explained in the *2019 Lifeline Order,* broadband-only providers that do not offer any voice service cannot participate in the program because they are not common carriers offering the supported voice service and thus do not satisfy the requirement in section 214(e)(1) that ETCs ''offer the services that are supported by the Federal universal support mechanisms'' under section 254(c). AARP encourages us to use section 706 of the 1996 Act as a source of authority to support stand-alone broadband. However, we have determined that section 706 is not a grant of regulatory authority and merely a hortatory congressional statement.

91. The California PUC raises a concern that classifying broadband internet access service as a Title I service will impact states' ability to support broadband-only services in state universal service programs. We disagree. Congress specifically delineated the states' authority to

''advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunication service, and safeguard the rights of consumers.'' This authority is broad enough for the states to accomplish their universal service goals without forcing a burdensome federal regulatory regime (*i.e.,* Title II) on broadband internet access service offerings. It is true that the text specifically references telecommunications services, but that reference is part of a larger list of areas where states can act as long as the state action is not inconsistent with section 254. Section 254 not only permits a state to work with telecommunications carriers in the state to support its own universal service programs, but it also allows states to ''adopt regulations to provide for additional definitions and standards to preserve and advance universal service within the state. . . .'' As long as those state actions do not rely on or burden Federal universal support mechanisms, then a state is permitted to structure its programs in a way that it deems best to promote universal service.

92. Finally, while we are confident that our analysis of the statutory authority allows for the continued support of broadband internet access service through the Lifeline program, we would still reach the same conclusion on the classification of broadband internet access service that we did in the *Restoring Internet Freedom Order* even if a court were to conclude that the Lifeline program could not support broadband internet access service. As the Commission previously stated, a return to Title I classification better facilitates critical broadband investment through the removal of regulatory uncertainty and lower compliance burdens. Further, Title I classification allows for greater freedom to operate and serve customers in rural or underserved areas of the country. Additionally, by reclassifying broadband internet access service as a Title I service the Commission sought to bring greater regulatory certainty to the market, removing a fog that stifled innovation. As such, we believe that the benefits of reclassification would outweigh the removal of broadband internet access service from the Lifeline program, were the sound statutory authority relied on today be found insufficient.

D. The Order on Remand Is Consistent With the Administrative Procedure Act

1. The Commission's Notice and Comment Procedures Comported With the Administrative Procedure Act

93. We conclude that we have satisfied the notice and comment requirements of the Administrative Procedure Act (APA) in this proceeding. We therefore reject arguments to the contrary. The *Restoring Internet Freedom NPRM* (82 FR 25568, June 2, 2017) sought comment on returning to the long-standing information service classification of broadband internet access service, and we did just that in the *Restoring Internet Freedom Order*. The D.C. Circuit's decision in *Mozilla* left the regulatory approach adopted in the *Restoring Internet Freedom Order* in place while remanding to us for further analysis the effect on certain public safety, pole attachment, and Lifeline universal service support issues. The Commission sought comment in the *2017 Lifeline NPRM* on, among other things, the treatment of broadband internet access service under the Lifeline program irrespective of the regulatory classification of that service.

94. Agencies generally have broad discretion to choose the appropriate procedural response to a court remand, including whether and to what extent to conduct a new rulemaking proceeding. In this *Order on Remand,* we do not reconsider or alter any aspect of the regulatory approach adopted in the *Restoring Internet Freedom Order*. To the extent that commenters contend that additional notice would be required to adopt an approach different than the one we take in this *Order on Remand,* those arguments are not applicable here. Instead, we simply act in response to the *Mozilla* remand to explain our decision not to revisit that approach in light of the three discrete issues remanded by the D.C. Circuit. Thus, as a threshold matter, we conclude that the APA does not compel additional notice beyond that already provided. Indeed, except to the extent that we remove broadband internet access service from the list of supported services in our universal service rules, our *Order on Remand* procedurally could be analogized to a decision declining to initiate a rulemaking to revise the regulatory approach adopted in the *Restoring Internet Freedom Order* in light of the three remanded issues—which need not be preceded by its own notice and comment procedures under the APA. Alternatively—and again, except to the extent that we modify our universal service rules to remove broadband internet access service from the list of supported services—our response to the three remanded issues could be seen as, at most, an interpretive rule or policy statement.

95. Independently, we conclude that even if some form of additional notice and comment procedures were required here in light of *Mozilla,* our procedures on remand have been sufficient. The Bureau elected to refresh the record on issues implicated by the *Mozilla* remand to supplement the original *Restoring Internet Freedom* rulemaking record and the record of the *2017 Lifeline NPRM,* consistent with similar actions taken by the Commission's Bureaus in many instances in the past. Nothing in the D.C. Circuit's remand displaced the Commission's authority to ''conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice,'' nor to rely on Bureaus' actions on delegated authority for ''the prompt and orderly conduct of its business.'' The Bureau's request for comment on the *Mozilla* remand was published in the **Federal Register** (85 FR 12555, March 3, 2020), hereinafter referred to as ''Restoring Internet Freedom Remand Public Notice (PN)''). We also agree with numerous commenters that the issues to be addressed on remand were apparent, including from the *Mozilla* decision itself. Before turning to specific questions upon which the Bureau sought to develop the record further, the *Restoring Internet Freedom Remand PN* began with requests for comment framed in terms that mirrored the scope of the D.C. Circuit's remand in *Mozilla*. Commenters criticizing the scope of the *Restoring Internet Freedom Remand PN*'s request for comments on the remanded issues neglect that fact. Nothing about the *Restoring Internet Freedom Remand PN* hindered commenters from understanding the supplemental information that the Commission would be considering or from raising the arguments they wished to raise in response to the remand. To the extent that some court precedent contemplates notice and comment in certain circumstances where an agency engages in new fact-gathering on remand, the objective is to ensure that parties have an opportunity to comment on any new factual information critical to the agency's decision whether to modify a rule on remand. While we consider the additionally-gathered information instead to supplement information in the original rulemaking record, even if it were critical information, we find that the objectives of that precedent have been satisfied here.

96. We also find that there was adequate time for participation by commenters. Commenters expressing concern about the timing of the comment period focus specifically on the development of the record related to public safety issues. Commenters do not identify any inadequacy in the comment period provided in the *Restoring Internet Freedom Remand PN,* which provided a full opportunity for commenters to raise public safety concerns and which the Commission is considering in responding to the *Mozilla* remand. With respect to the *Restoring Internet Freedom Remand PN* requesting comment to supplement the record in response to the remand, the process was appropriate, as well. As USTelecom observes, ''the Commission published the Notice on March 3, 2020, more than a month and a half before comments were due.'' This comment cycle included an extension of time ''to enable state, county, and municipal governments to be able to respond adequately to the issues raised in the Public Notice relating to how the Commission's action affects public safety.'' This provided ample opportunity to submit information in response to the *Restoring Internet Freedom Remand PN*. To the extent that certain parties belatedly sought a further extension, we agree with the Bureau that the request was neither timely nor provided evidence that further extension of time was warranted.

97. The record also does not persuade us that there are additional arguments or information that interested parties in fact would have raised under a different comment process that they were unable to raise in the record for consideration in this proceeding. We reject arguments in response to the *Restoring Internet Freedom Remand PN* that reiterate concerns that certain commenters' efforts to address the COVID–19 pandemic limit their ability to fully participate even under the extended comment cycle. Those arguments are not materially different from the arguments the Bureau considered and appropriately rejected in the *Further Extension Denial Order*. Further, in addition to the formal comment process, parties were able to make *ex parte* filings, as well. Insofar as certain parties sought a further 60-day extension of the already once-extended comment period, we note that substantially more than 60 days have passed since that comment deadline, during which time they have been free to raise their arguments in *ex parte* filings, which are considered by the Commission as part of the record in this proceeding.

98. We reject the claims of some commenters that the U.S. Supreme Court's recent decision in *DHS* v. *Regents of the Univ. of Cal.* support their prior contentions that ''the Commission must have a formal Notice of Proposed Rulemaking (NPRM) as a prelude to issuing any response to the remand by the *Mozilla* Court.'' Contrary to those claims, *DHS* v. *Regents of the Univ. of Cal.* does not specify that a new, Commission-level Notice of Proposed Rulemaking would be required here. To the extent that *DHS* v. *Regents of the Univ. of Cal.* speaks to the procedures to be followed when an agency takes new action to provide additional explanation on remand, it does not adopt any one-size-fits-all approach, but merely observes that the procedures followed must be whatever otherwise is required for the relevant action. In contrast to the posture in that case—where DHS's prior decision was vacated—the D.C. Circuit in *Mozilla* remanded without vacatur, leaving the *Restoring Internet Freedom Order* in place, and in this *Order on Remand* we do not modify or alter the regulatory approach adopted there. Consequently, whatever procedures theoretically might be required for DHS in response to *DHS* v. *Regents of the Univ. of Cal.,* it does not follow that a new, Commission-level rulemaking would be required here. Independently, as discussed above, we also find that even assuming *arguendo* that some manner of additional notice and comment were required, our procedures here have been adequate.

2. The Commission Thoroughly Considered the Relevant Issues on Remand

99. In the substantive sections of this *Order* we thoroughly analyze the effects of the *Restoring Internet Freedom Order* on public safety, pole attachments, and Lifeline consistent with the D.C. Circuit's remand, and explain why those considerations do not persuade us to depart from the regulatory approach we adopted in that *Order*. This included addressing the thousands of public comments by identifying which ones were responsive to the three specific issues subject to the remand and analyzing those responsive arguments here. Our action satisfies both the *Mozilla* remand and the APA's reasoned decision-making requirements. We therefore reject arguments that the Commission's analysis of the remanded issues has failed, or will fail, the reasoned decision-making requirements of the APA.

100. Our analysis in the *Order on Remand* also demonstrates that we remained open-minded regarding the issues remanded in *Mozilla*. In *Little Sisters of the Poor,* the Supreme Court recently ''decline[d] to evaluate the final rules [at issue there] under the open-mindedness test'' that had been used by the Third Circuit given that ''the text of the APA provides the ''maximum procedural requirements'' that an agency must follow in order to promulgate a rule.'' The Court concluded that ''the open-mindedness test violates the 'general proposition that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA.' '' To the extent that commenters seek to advance the same basic ''open-mindedness'' test here, the Supreme Court's decision provides an additional reason why it is unavailing. But in any case, we independently conclude that we did, in fact, remain open-minded for the reasons discussed in the text. For one, the cases cited by commenters expressing concern in this regard involved scenarios where the court was evaluating the adequacy of the original notice or opportunity for comment rather than where, as here, the agency is responding to a court's remand to consider certain specific issues in evaluating whether they warrant a change in its prior decision. Indeed, rather than evidence that the Commission had a closed mind on the remanded issues as some commenters contend, the solicitation of comments in the *Restoring Internet Freedom Remand PN* reveals our willingness to give full consideration to those issues. In contrast to the Bureau's requests for comment in the *Restoring Internet Freedom Remand PN,* the district court in *Int'l Snowmobile Mfrs. Ass'n* v. *Norton,* confronted a situation where agency decisionmakers made ''definitive statements'' about the outcome ''before the [environmental review] process was complete.'' A Bureau-level Public Notice requesting comment does not similarly represent ''definitive statements'' about the outcome the full Commission will reach in this proceeding. Our analysis likewise demonstrates that we remained open-minded in that regard, but were not persuaded to depart from our regulatory approach in the *Restoring Internet Freedom Order* on the basis of those considerations.

101. We also have no obligation in this proceeding to re-open issues from the *Restoring Internet Freedom Order* that were not remanded by *Mozilla*. Some commenters quote language from *DHS* v. *Regents of the Univ. of Cal.,* that an agency supplementing its original reasoning must '' 'deal with the problem

afresh.' '' To the extent that these commenters suggest that we therefore must reopen the issues in the *Restoring Internet Freedom Order* more broadly, we reject that claim. The DHS action at issue in *DHS* v. *Regents of the Univ. of Cal.* had been both vacated and remanded in full. The relevant ''problem'' that DHS was dealing with there thus was the entirety of its action. Here, by contrast, the D.C. Circuit declined to vacate the *Restoring Internet Freedom Order,* leaving it in place while directing the Commission to address ''three discrete points.'' In this context, it is most reasonable to define the ''problem'' that we consider afresh here to be the effect of the regulatory approach in the *Restoring Internet Freedom Order* on the public safety, pole attachment, and Lifeline universal service support issues identified by the *Mozilla* court. Insofar as commenters raise issues beyond the scope of the remanded issues, we reject them as outside the scope of this proceeding. While in some cases commenters raise issues with no clear nexus to the remanded issues at all, in other cases commenters raise arguments that potentially encompass, but extend beyond, the remanded issues. We reject arguments only insofar as they fall outside or extend beyond the remanded issues, and otherwise consider them in our analyses of public safety, pole attachments, and Lifeline support, respectively, insofar as they do in fact bear on any of those issues. Taking up those broader issues here would unsettle reasoning and decisions not rejected by the court, giving us—and parties supportive of the *Restoring Internet Freedom Order*'s regulatory approach—a task on remand that not only was not required but that could not reasonably have been anticipated by *Mozilla*'s remand of ''three discrete points.'' For example, commenters relitigate the question whether the Commission was correct in predicting that Title I classification would promote competition, investment, and innovation—a finding that was affirmed by the D.C. Circuit and is outside the scope of the remand. While many commenters argue that experience following the *Restoring Internet Freedom Order* has borne out the Commission's prediction, some argue that Title I classification has had no effect in investment, and others still claim that it has decreased investment. We need not and cannot settle this dispute here: Because such issues lie outside the scope of the remand, commenters did not have a full and fair opportunity to address these issues in the same comprehensive way that they did prior to the *Restoring Internet Freedom Order*. Perhaps for that reason, the evidence offered in this proceeding fails to grapple with the effect of Title I classification on competition, investment, and innovation with nearly the same depth of analysis as the studies submitted in the *Restoring Internet Freedom* record, and therefore nothing in the comments in this remand proceeding provides firm ground to revisit the predictive judgment that we have already made. Should parties wish to raise issues beyond those subject to the D.C. Circuit's remand in support of a request for new rules, they may do so in a petition for rulemaking supporting their request for such broader action.

E. The Order on Remand Is Consistent With the First Amendment

102. Our *Order on Remand* also is consistent with the First Amendment of the U.S. Constitution. Contrary to the suggestion of some commenters, neither the classification of broadband internet access service as an information service nor the *Restoring Internet Freedom Remand PN* seeking comment on the *Mozilla* remand represents a government restriction on speech that requires scrutiny under the First Amendment. In particular, we are not persuaded that actions taken by broadband internet access service providers to manage traffic on their networks constitutes governmental action. Nor does the record support the view that the request for comments in the *Restoring Internet Freedom Remand PN* somehow compelled, restricted, or otherwise chilled private parties' speech.

III. Procedural Matters

103. *Paperwork Reduction Act.* This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4).

104. *Congressional Review Act.* The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs that this rule is non-major under the Congressional Review Act, 5 U.S.C. 804(2). The Commission will send a copy of this *Order on Remand* to Congress and the Government Accountability Office pursuant to 5 U.S.C. 801(a)(1)(A).

105. People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

106. For further information about this rulemaking proceeding, please contact Annick Banoun, Competition Policy Division, Wireline Competition Bureau, at (202) 418–1521 or *annick.banoun@fcc.gov*.

IV. Supplemental Final Regulatory Flexibility Analysis

107. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), this Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) supplements the Final Regulatory Flexibility Analysis (FRFA) included in the *2019 Lifeline Order* in WC Docket Nos. 17–287, 11–42, and 09–197, to the extent required by the adoption of this *Order on Remand*. The Commission sought written public comment on the proposals in the *2017 Lifeline NPRM,* including comment on the initial Regulatory Flexibility Analysis. This Supplemental FRFA conforms to the RFA.

A. Need for, and Objectives of, the Order on Remand

108. The Commission is required by section 254 of the Communications Act of 1934, as amended, to promulgate rules to implement the universal service provisions of section 254. The Lifeline program was implemented in 1985 in the wake of the 1984 divestiture of AT&T. On May 8, 1997, the Commission adopted rules to reform its system of universal service support mechanisms so that universal service is preserved and advanced as markets move toward competition. Since the *2012 Lifeline Order,* the Commission has acted to address waste, fraud, and abuse in the Lifeline program and improved program administration and accountability.

109. In this *Order on Remand,* the Commission addresses several items remanded to it by the D.C. Circuit Court of Appeals in *Mozilla* v. *FCC.* As part of addressing those issues, the Commission clarifies its legal authority for reimbursing broadband internet access service through the Lifeline program. This clarification requires minor revisions to the Commission's Lifeline rules. With this action, we fulfill the Commission's role as the steward of the Universal Service Fund

(USF or Fund) and ensure that the Lifeline program can continue to allocate its limited resources to reimbursing increasingly important broadband internet access service for low-income Americans.

B. Summary of Significant Issues Raised by Public Comments to the IRFA or FRFA

110. The Commission received no comments in direct response to the IRFA contained in the *2017 Lifeline NPRM* or the FRFA in the *2019 Lifeline Order.*

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

111. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rule(s) as a result of those comments.

112. The Chief Counsel did not file any comments in response to the proposed rule(s) in this proceeding.

D. Description and Estimate of the Number of Small Entities to Which Rules May Apply

113. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one that: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

114. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA's Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States, which translates to 30.7 million businesses.

115. Next, the type of small entity described as a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' The Internal Revenue Service (IRS) uses a revenue benchmark of $50,000 or less to delineate its annual electronic filing requirements for small exempt organizations. Nationwide, for tax year 2018, there were approximately 571,709 small exempt organizations in the U.S. reporting revenues of $50,000 or less according to the registration and tax data for exempt organizations available from the IRS.

116. Finally, the small entity described as a ''small governmental jurisdiction'' is defined generally as ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' U.S. Census Bureau data from the 2017 Census of Governments indicate that there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number there were 36,931 general purpose governments (county, municipal and town or township) with populations of less than 50,000 and 12,040 special purpose governments—independent school districts with enrollment populations of less than 50,000. Accordingly, based on the 2017 U.S. Census of Governments data, we estimate that at least 48,971 entities fall into the category of ''small governmental jurisdictions.''

1. Wireline Providers

117. *Incumbent Local Exchange Carriers (Incumbent LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 indicate that 3,117 firms operated the entire year. Of this total, 3,083 operated with fewer than 1,000 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our actions. According to Commission data, one thousand three hundred and seven (1,307) Incumbent Local Exchange Carriers reported that they were incumbent local exchange service providers. Of this total, an estimated 1,006 have 1,500 or fewer employees. Thus, using the SBA's size standard the majority of incumbent LECs can be considered small entities.

118. *Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate NAICS Code category is Wired Telecommunications Carriers and under that size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 indicate that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees. Based on these data, the Commission concludes that the majority of Competitive LECS, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers, are small entities. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services. Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees. In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees. Also, 72 carriers have reported that they are Other Local Service Providers. Of this total, 70 have 1,500 or fewer employees. Consequently, based on internally researched FCC data, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities.

119. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a small business size standard specifically for Interexchange Carriers. The closest applicable NAICS Code category is Wired Telecommunications Carriers. The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 indicate that 3,117 firms operated for the entire year. Of that number, 3,083 operated with fewer than 1,000 employees. According to internally-developed Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services. Of this total, an estimated 317 have

1,500 or fewer employees. Consequently, the Commission estimates that the majority of interexchange service providers are small entities.

120. *Operator Service Providers (OSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The closest applicable NAICS Code category is Wired Telecommunications Carriers. The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 indicate that 3,117 firms operated for the entire year. Of that number, 3,083 operated with fewer than 1,000 employees. According to internally developed Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services. Of this total, an estimated 317 have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of OSPs are small entities.

121. *Local Resellers.* The SBA has not developed a small business size standard specifically for Local Resellers. The SBA category of Telecommunications Resellers is the closest NAICS code category for local resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry. Under the SBA's size standard, such a business is small if it has 1,500 or fewer employees. 2012 Census Bureau data shows that 1,341 firms provided resale services during that year. Of that number, all operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of these resellers can be considered small entities. According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services. Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by the rules adopted.

122. *Toll Resellers.* The Commission has not developed a definition for Toll Resellers. The closest NAICS Code Category is Telecommunications Resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. MVNOs are included in this industry. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. 2012 U.S. Census Bureau data show that 1,341 firms provided resale services during that year. Of that number, 1,341 operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of these resellers can be considered small entities. According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services. Of this total, an estimated 857 have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of toll resellers are small entities.

2. Wireless Carriers and Service Providers

123. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census Bureau data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms employed fewer than 1,000 employees and 12 firms employed of 1000 employees or more. Thus under this category and the associated size standard, the Commission estimates that the majority of Wireless Telecommunications Carriers (except Satellite) are small entities. The Commission's own data—available in its Universal Licensing System—indicate that, as of August 31, 2018 there are 265 Cellular licensees that will be affected by our actions. The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to internally developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services. Of this total, an estimated 261 have 1,500 or fewer employees, and 152 have more than 1,500 employees. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

124. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined ''small business'' for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these small business size standards. In the Commission's auction for geographic area licenses in the WCS there were seven winning bidders that qualified as ''very small business'' entities, and one winning bidder that qualified as a ''small business'' entity.

125. *Satellite Telecommunications Providers.* This category comprises firms ''primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.'' Satellite telecommunications service providers include satellite and earth station operators. The category has a small business size standard of $35 million or less in average annual receipts, under SBA rules. For this category, U.S. Census Bureau data for 2012 show that there were a total of 333 firms that operated for the entire year. Of this total, 299 firms had annual receipts of less than $25 million. Consequently, we estimate that the majority of satellite telecommunications providers are small entities.

126. *Common Carrier Paging.* As noted, since 2007 the Census Bureau has placed paging providers within the broad economic census category of

Wireless Telecommunications Carriers (except Satellite).

127. In addition, in the *Paging Second Report and Order* (83 FR 19440, May 3, 2018), the Commission adopted a size standard for ''small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. The SBA has approved this definition. An initial auction of Metropolitan Economic Area (''MEA'') licenses was conducted in the year 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses. A subsequent auction of MEA and Economic Area (''EA'') licenses was held in the year 2001. Of the 15,514 licenses auctioned, 5,323 were sold. One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs, was held in 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.

128. Currently, there are approximately 74,000 Common Carrier Paging licenses. According to the most recent Trends in Telephone Service, 291 carriers reported that they were engaged in the provision of ''paging and messaging'' services. Of these, an estimated 289 have 1,500 or fewer employees and two have more than 1,500 employees. We estimate that the majority of common carrier paging providers would qualify as small entities under the SBA definition.

129. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite). Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census Bureau data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had fewer than 1,000 employees and 12 firms had 1000 employees or more. Thus under this category and the associated size standard, the Commission estimates that a majority of these entities can be considered small. According to Commission data, 413 carriers reported that they were engaged in wireless telephony. Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees. Therefore, more than half of these entities can be considered small.

130. *All Other Telecommunications.* The ''All Other Telecommunications'' category is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing internet services or voice over internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry. The SBA has developed a small business size standard for ''All Other Telecommunications'', which consists of all such firms with annual receipts of $35 million or less. For this category, U.S. Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year. Of those firms, a total of 1,400 had annual receipts less than $25 million and 15 firms had annual receipts of $25 million to $49,999,999. Thus, the Commission estimates that the majority of ''All Other Telecommunications'' firms potentially affected by our action can be considered small.

3. Internet Service Providers

131. *Internet Service Providers (Broadband).* Broadband internet service providers include wired (*e.g.,* cable, DSL) and VoIP service providers using their own operated wired telecommunications infrastructure fall in the category of Wired Telecommunication Carriers. Wired Telecommunications Carriers are comprised of establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. The SBA size standard for this category classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Consequently, under this size standard the majority of firms in this industry can be considered small.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

132. As the changes enacted today are primarily clarifications of existing Commission rules or statutory authorities, we do not anticipate that the changes will result in significant additional compliance requirements for small entities. However, some small entities may have an additional burden. For those changes, we have determined that the clarity the rule changes will bring to the Lifeline program outweighs the burden of any increased compliance concerns. We have noted the applicable rule changes below impacting small entities.

133. *Compliance burdens.* The rules we implement impose some compliance burdens on small entities by requiring them to become familiar with the new rules to comply with them. In most instances, the burden of becoming familiar with the new rule in order to comply with it is the only additional burden the rule imposes.

134. *Adjusting systems to account for potential changes in* Lifeline *reimbursement rates.* The rules we implement may require small entities to change their billing systems, customer service plans, and other business operations to account for modifications in the Lifeline supported services. We believe these changes will not be significant.

F. Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

135. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): ''(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.''

136. This rulemaking could impose minimal additional burdens on small entities. These impacted small entities should already be familiar with the Commission's supported services rules, but the removal of broadband internet

access service as a defined supported service may cause some small entities to adjust their business practices.

137. The Commission will send a copy of this *Order on Remand* including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of this *Order on Remand,* including the Supplemental FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of this *Order on Remand* and the Supplemental FRFA (or summaries thereof) will also be published in the **Federal Register**.

V. Ordering Clauses

138. Accordingly, *It is ordered* that, pursuant to sections 1–4, 201, 230, 231, 254, 257, 303, 332, 403, 501, and 503 of the Communications Act of 1934, as amended, 47 U.S.C.151–154, 201, 230, 231, 254, 257, 303, 332, 403, 501, and 503, and § 1.2 of the Commission's rules, 47 CFR 1.2, this *Order* is *Adopted*.

139. *It is further ordered* that, pursuant to §§ 1.4(b)(1) and 1.103(a) of the Commission's rules, 47 CFR 1.4(b)(1), 1.103(a), this *Order on Remand shall be effective* 30 days after publication in the **Federal Register**.

140. *It is further ordered* that part 54 of the Commission's rules *Is Amended* as set forth in Appendix A of the *Order on Remand*.

141. *It is further ordered* that the Commission *shall send* a copy of this *Order on Remand* to Congress and to the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

142. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *Order on Remand,* including the Final Regulatory Flexibility Analysis (FRFA), to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 54

Communications common carriers, Health facilities, Infants and children, Internet, Libraries, Puerto Rico, Reporting and recordkeeping requirements, Schools, Telecommunications, Telephone, Virgin Islands.

Federal Communications Commission.

Marlene Dortch,

Secretary.

Final Rules

The Federal Communications Commission amends part 54 of title 47 of the Code of Federal Regulations as follows:

PART 54—UNIVERSAL SERVICE

■ 1. The authority citation for part 54 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i), 155, 201, 205, 214, 219, 220, 229, 254, 303(r), 403, 1004, and 1302 unless otherwise noted.

■ 2. Revise § 54.101 to read as follows:

§ 54.101 Supported services for rural, insular, and high cost areas.

(a) Voice telephony services shall be supported by Federal universal service support mechanisms. Eligible voice telephony services must provide voice grade access to the public switched network or its functional equivalent; minutes of use for local service provided at no additional charge to end users; access to the emergency services provided by local government or other public safety organizations, such as 911 and enhanced 911, to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems; and toll limitation services to qualifying low-income consumers as provided in subpart E of this part.

(b) An eligible telecommunications carrier eligible to receive high-cost support must offer voice telephony service as set forth in paragraph (a) of this section in order to receive Federal universal service support.

(c) An eligible telecommunications carrier (ETC) subject to a high-cost public interest obligation to offer broadband internet access services and not receiving Phase I frozen high-cost support must offer broadband services within the areas where it receives high-cost support consistent with the obligations set forth in this subpart and subparts D, K, L, and M of this part.

(d) Any ETC must comply with subpart E of this part.

■ 3. Amend § 54.400 by revising paragraph (n) to read as follows:

§ 54.400 Terms and definitions.

* * * * *

(n) *Supported service.* Voice telephony service is the supported service for the Lifeline program.

* * * * *

■ 4. Amend § 54.403 by revising paragraph (b)(1) to read as follows:

§ 54.403 Lifeline support amount.

* * * * *

(b) * * *

(1) Eligible telecommunications carriers that charge Federal End User Common Line charges or equivalent Federal charges must apply Federal Lifeline support to waive the Federal End User Common Line charges for Lifeline subscribers if the carrier is seeking Lifeline reimbursement for eligible voice telephony service provided to those subscribers. Such carriers must apply any additional Federal support amount to a qualifying low-income consumer's intrastate rate, if the carrier has received the non-Federal regulatory approvals necessary to implement the required rate reduction. Other eligible telecommunications carriers must apply the Federal Lifeline support amount, plus any additional support amount, to reduce the cost of any generally available residential service plan or package offered by such carriers that provides at least one service commensurate with the requirements outlined in § 54.408, and charge Lifeline subscribers the resulting amount.

* * * * *

[FR Doc. 2020–25880 Filed 1–6–21; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 86, No. 4
Thursday, January 7, 2021

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

[Docket Nos. PRM–50–93 and PRM–50–95; NRC–2009–0554]

Calculated Maximum Fuel Element Cladding Temperature

AGENCY: Nuclear Regulatory Commission.

ACTION: Petitions for rulemaking; denial.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is denying two related petitions for rulemaking (PRMs), PRM–50–93 and PRM–50–95, submitted by Mark Edward Leyse. The petitioner requested that the NRC amend its regulations for the domestic licensing of production and utilization facilities. The petitioner asserted that data from multirod (assembly) severe fuel damage experiments indicate that specific aspects of the NRC's regulations on emergency core cooling systems acceptance criteria and evaluation models are not conservative and that additional regulations are necessary. The NRC is denying these petitions because existing NRC regulations provide reasonable assurance of adequate protection of public health and safety. The petitioner did not present sufficient new information or arguments to support the requested changes.

DATES: The dockets for the petitions for rulemaking, PRM–50–93 and PRM–50–95, are closed on January 7, 2021.

ADDRESSES: Please refer to Docket ID NRC–2009–0554 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2009–0554. Address questions about NRC dockets to Dawn Forder; telephone: 301–415–3407; email: *Dawn.Forder@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 ''ADAMS Public Documents'' and then 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.* For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in Section IV, ''Availability of Documents.''
- *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: Daniel Doyle, Office of Nuclear Material Safety and Safeguards, telephone: 301–415–3748, email: *Daniel.Doyle@nrc.gov,* U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Background and Summary of the Petitions

Section 2.802 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Petition for Rulemaking—Requirements for Filing,'' provides an opportunity for any interested person to petition the Commission to issue, amend, or rescind any regulation. On November 17, 2009, Mark Edward Leyse submitted a PRM under § 2.802. The NRC assigned docket number PRM–50–93 to this petition and published a notice of receipt and request for public comment in the **Federal Register** on January 25, 2010 (75 FR 3876).

The petitioner asserted that data from multirod (assembly) severe fuel damage experiments indicate that specific aspects of the NRC's regulations and associated regulatory guidance on Emergency Core Cooling Systems (ECCS) acceptance criteria and evaluation models are not conservative and that additional regulations are necessary. Therefore, the petitioner requested that the NRC: (1) Amend its regulations to require that the calculated maximum fuel element cladding temperature not exceed a limit based on data from cited experiments; (2) amend its regulations and associated regulatory guidance to require that the rates of energy release, hydrogen generation, and Zircaloy cladding oxidation from the metal-water reaction of zirconium with steam considered in the evaluation models used to calculate ECCS cooling performance be based on data from cited experiments; and (3) issue a new regulation that requires minimum allowable core reflood rates in the event of a loss-of-coolant accident (LOCA).

On June 7, 2010, Mark Edward Leyse, on behalf of the New England Coalition, submitted a petition for enforcement action under § 2.206, ''Requests for action under this subpart.'' The petitioner requested that the NRC order the Vermont Yankee Nuclear Power Station to lower its licensing basis peak cladding temperature to provide an adequate margin of safety in the event of a LOCA. The NRC staff concluded that this petition did not meet the criteria for review under § 2.206 because it identified generic issues that could require revisions to existing NRC regulations. Therefore, the NRC decided to review it as a PRM under § 2.802 and assigned it docket number PRM–50–95. Because PRM–50–93 and PRM–50–95 address similar issues, the NRC staff consolidated its review into a single activity. On October 27, 2010, the NRC published a notice of consolidation of PRM–50–93 and PRM–50–95 in the **Federal Register** (75 FR 66007) and requested public comment.

The NRC identified three main issues in the two petitions. The remaining paragraphs of Section I summarize the following information for each main issue: (1) Relevant background information; (2) arguments in the petitions; and (3) specific requests the petitioner made to address each issue.

Issue 1: Calculated Maximum Fuel Element Cladding Temperature Limit

Background for Issue 1

Under § 50.46, ''Acceptance criteria for emergency core cooling systems for light-water nuclear power reactors,'' of 10 CFR, light-water nuclear power reactors fueled with uranium oxide pellets within cylindrical Zircaloy cladding must be provided with an ECCS that must be designed so that its calculated cooling performance following postulated loss of coolant accidents (LOCAs) [1] conforms to the criteria specified in § 50.46(b).[2] Under § 50.46(b)(1), the calculated maximum fuel element cladding temperature shall not exceed 2,200 °F. In addition, § 50.46(b)(2) through (5), respectively, contain requirements for calculations involving: Maximum cladding oxidation, maximum hydrogen generation, changes in core geometry, and long-term cooling.

Petitioner's Arguments and Requests Related to Issue 1

The petitioner asserted that data from multirod (assembly) severe fuel damage experiments indicate that the calculated maximum fuel element cladding temperature limit of 2,200 °F specified in § 50.46(b)(1) is not conservative. Although not its intended purpose, the NRC previously determined that this limit provides a conservative safety margin from an area of Zircaloy cladding oxidation behavior known as the autocatalytic regime. An autocatalytic condition occurs when the heat released by the metal-water reaction of zirconium with steam is greater than the heat that can be transferred away from the Zircaloy cladding. This causes the Zircaloy cladding temperature to rise, thereby increasing the diffusion of oxygen into the metal, which in turn raises the rate at which the zirconium-steam oxidation reaction occurs. As the metal-water reaction rate continues to increase, the temperature of the Zircaloy cladding continues to rise, eventually resulting in an uncontrolled reaction and temperature excursion. The petitioner asserted that data from cited experiments indicate that such autocatalytic metal-water oxidation reactions and uncontrolled temperature excursions involving Zircaloy cladding have occurred at temperatures below 2,200 °F. The petitioner provided this assertion as evidence that the 2,200 °F limit is not conservative, and requested that the NRC amend § 50.46 to require that the calculated maximum fuel element cladding temperature not exceed a limit based on data from cited experiments, instead of the 2,200 °F limit specified in § 50.46(b)(1).

Issue 2: Metal-Water Reaction Rate Equations for ECCS Evaluation Models

Background for Issue 2

To evaluate conformance with the criteria specified in § 50.46(b), ECCS cooling performance must be calculated using an acceptable evaluation model [3] for a range of postulated LOCAs of different sizes, locations, and other properties sufficient to provide assurance that the most severe postulated LOCAs are evaluated. On September 16, 1988, the NRC amended the requirements of § 50.46 and appendix K, ''ECCS Evaluation Models,'' to 10 CFR part 50 to reflect an improved understanding of ECCS performance during reactor transients that was obtained through extensive research performed after promulgation of the original requirements (53 FR 35996). Under § 50.46(a)(1), licensees or applicants may use one of two acceptable ECCS evaluation model options: (1) A best-estimate or realistic evaluation model [4] or (2) a conservative evaluation model. Each ECCS evaluation model option is summarized below.

Option 1: Best-Estimate or Realistic ECCS Evaluation Model

Section 50.46(a)(1)(i) of 10 CFR specifies that a best-estimate evaluation model must include sufficient supporting justification to show that the analytical technique realistically describes the behavior of the reactor system during a LOCA. Comparisons to applicable experimental data must be made and uncertainties must be identified and assessed so that the uncertainty in the calculated results can be estimated to (1) account for the uncertainty in comparing the calculated ECCS cooling performance to the criteria specified in § 50.46(b); and (2) assure that there is a high probability of not exceeding these criteria.

RG 1.157 describes models,[5] correlations,[6] data, model evaluation procedures, and methods that are acceptable to the NRC staff for meeting the requirements for: (1) A realistic or best-estimate calculation of ECCS cooling performance during a LOCA; (2) estimating the uncertainty in that calculation; and (3) including uncertainty in the comparisons of the calculated results to the criteria of § 50.46(b) to assure a high probability that the criteria would not be exceeded. Other models, data, model evaluation procedures, and methods can be considered if they are supported by appropriate experimental data and technical justification.

To be considered acceptable under RG 1.157, evaluation models should account for identified sources of heat—including the metal-water reaction rate—in performing best-estimate calculations. In particular, the rates of energy release, hydrogen generation, and Zircaloy cladding oxidation from the metal-water reaction of zirconium with steam should be calculated in a best-estimate manner using one of two procedures, depending on the cladding temperature:

(1) If the cladding temperature is less than or equal to 1,900 °F, correlations to be used to calculate metal-water reaction rates should: (a) Be checked against a set of relevant data and (b) recognize the effects of steam pressure, pre-oxidation of the cladding, deformation during oxidation, and internal oxidation from both steam and uranium oxide fuel.

(2) If the cladding temperature is greater than 1,900 °F, the Cathcart-Pawel equation and the underlying empirical data used to derive it are considered acceptable for calculating the rates of energy release, hydrogen generation, and cladding oxidation.

[1] Under § 50.46(c), LOCAs are hypothetical accidents that would result from the loss of reactor coolant, at a rate that exceeds the capability of the reactor coolant makeup system, from breaks in pipes in the reactor coolant pressure boundary.

[2] Criterion 35 of appendix A to 10 CFR part 50, ''General Design Criteria for Nuclear Power Plants,'' further requires that a system to provide abundant emergency core cooling shall be provided and that the system safety function shall be to transfer heat from the reactor core following any loss of reactor coolant at a rate such that: (1) Fuel and cladding damage that could interfere with continued effective core cooling is prevented and (2) the cladding metal-water reaction is limited to negligible amounts.

[3] Regulatory Guide (RG) 1.157, ''Best-Estimate Calculations of Emergency Core Cooling System Performance,'' issued May 1989, states that ''the term 'evaluation model' refers to a nuclear plant system computer code or any other analysis tool designed to predict the aggregate behavior of a reactor during a loss of coolant accident. It can be either best-estimate or conservative and may contain many correlations or models.''

[4] RG 1.157 states that ''the terms 'best-estimate' and 'realistic' have the same meaning. Both terms are used to indicate that the techniques attempt to predict realistic reactor system thermal-hydraulic response.''

[5] RG 1.157 states that ''the term 'model' refers to a set of equations derived from fundamental physical laws that is designed to predict the details of a specific phenomenon.''

[6] RG 1.157 states that ''the term 'correlation' refers to an equation having empirically determined constants such that it can predict some details of a specific phenomenon for a limited range of conditions.''

Option 2: Conservative ECCS Evaluation Model

Alternatively, a conservative evaluation model may be developed in conformance with the required and acceptable features of appendix K, ''ECCS Evaluation Models,'' to 10 CFR part 50. Under appendix K, section I.A., evaluation models must account for various sources of heat during LOCA conditions including the metal-water reaction rate. In particular, section I.A.5, ''Metal-Water Reaction Rate,'' of appendix K requires use of the Baker-Just equation to calculate the rates of energy release, hydrogen generation, and Zircaloy cladding oxidation from the metal-water reaction of zirconium with steam, assuming that the reaction is not steam limited.

Petitioner's Arguments and Requests Related to Issue 2

The petitioner argued that data from multirod (assembly) severe fuel damage experiments indicate that the equations used to calculate the metal-water reaction rate in ECCS evaluation models that the NRC has determined to be acceptable for use in evaluating ECCS cooling performance are not conservative. In particular, the petitioner asserted that data from cited experiments indicate that use of the Cathcart-Pawel equation in realistic evaluation models or use of the Baker-Just equation in conservative evaluation models would: (1) Overestimate the temperature at which autocatalytic metal-water oxidation reactions would occur during a LOCA; and (2) underestimate the rate of Zircaloy cladding oxidation from the metal-water reaction of zirconium with steam and, therefore, underestimate the heatup, heatup rate, and maximum temperature of the Zircaloy cladding during a LOCA. Therefore, the petitioner requested that the NRC amend RG 1.157 and appendix K to 10 CFR part 50 to require that the rates of energy release, hydrogen generation, and Zircaloy cladding oxidation from the metal-water reaction of zirconium with steam considered in evaluation models used to calculate ECCS cooling performance be calculated based on data from cited experiments, instead of using the Cathcart-Pawel or Baker-Just equations.

Issue 3: Minimum Allowable Core Reflood Rate

Background for Issue 3

Section 50.46(b) of 10 CFR does not include criteria for calculated ECCS cooling performance pertaining to the core reflood rate following postulated LOCAs.

Petitioner's Arguments and Requests Related to Issue 3

The petitioner asserted that a constant core reflood rate of approximately 1 inch per second or lower would not, with high probability, prevent Zircaloy cladding from exceeding the 2,200 °F limit in § 50.46(b)(1) if, at the onset of reflood, the cladding temperature was greater than or equal to 1,200 °F. In particular, the petitioner asserted that: (1) Although reflood rates would vary throughout the reactor core during a LOCA, local reflood rates could be approximately 1 inch per second or lower; and (2) extrapolation of data from the cited experiments indicates that a constant core reflood rate of approximately 1 inch per second or lower would not, with high probability, prevent Zircaloy cladding from exceeding the 2,200 °F limit, if the cladding temperature was greater than or equal to 1,200 °F at the onset of reflood.[7] Therefore, the petitioner requested that the NRC issue a new regulation that would require minimum allowable core reflood rates in the event of a LOCA.

II. Public Comments on the Petitions

II.A. Overview of Public Comments

The NRC received a total of 33 comment submissions that collectively included 125 individual comments. The NRC reviewed and considered all 125 comments in its evaluation of the petitions. Table I identifies the number of comment submissions and individual comments submitted, grouped by three main categories of comments. These categories are used only to facilitate presenting a high-level summary and totals for the comments that different stakeholder groups submitted; the NRC staff used the same approach for addressing all submitted comments, regardless of category or who submitted them. The paragraphs that follow provide a high-level overview of each category of comments.

TABLE I—NUMBER OF COMMENT SUBMISSIONS AND INDIVIDUAL COMMENTS BY CATEGORY

Category	Number of comment submissions	Number of individual comments
Comments from the Petitioner	[a] 13	[a] 97
Comments from Nuclear Industry Representatives	3	9
Comments from Public Interest Groups or Other Interested Individuals	17	19
Total	33	125

[a] The petitioner provided nine comment submissions after the public comment period that closed on November 26, 2010. Although not required to do so, the NRC also considered all the comment submissions that were submitted after the public comment period closed.

Category 1: Comments From the Petitioner

Petitioner Mark Edward Leyse provided 13 comment submissions in support of PRM–50–93 and PRM–50–95. He provided nine of these comment submissions after the comment period closed. The NRC considered all 13 comment submissions in its evaluation. In general, the petitioner's comments further supported the petitions by either: (1) Repeating information that had already been provided; (2) providing additional details to clarify specific issues; or (3) citing other references that the petitioner believed further substantiated the arguments in the petitions. In some comments, the petitioner identified additional technical issues that were relevant to the subject matter, but were not directly related to the requested changes to the NRC's regulations. As discussed in Section III, the NRC staff addressed these additional technical issues in its final technical safety analysis report.

[7] Extrapolation of the experimental data was necessary because the referenced tests were started with relatively low initial cladding temperatures. The petitioner hypothesized that, if these tests had started with higher initial cladding temperatures, autocatalytic oxidation and failure of the Zircaloy cladding would have occurred with high probability.

Category 2: Comments From Nuclear Industry Representatives

The Nuclear Energy Institute (NEI) provided two comment submissions that oppose PRM–50–93 and PRM–50–95. Overall, NEI recommended that the NRC deny PRM–50–93 and PRM–50–95 because the experiments identified in the petitions—whether considered individually or in conjunction with other experiments—do not substantiate the assertions or requests made in the petitions. NEI further provided additional experimental evidence that indicates the NRC's regulations and associated regulatory guidance on ECCS acceptance criteria and evaluation models are adequate.

Exelon Corporation provided one comment submission that opposes PRM–50–93 and PRM–50–95, stating that: (1) It did not consider the proposed amendments to the NRC's regulations or associated regulatory guidance to be necessary and (2) it agreed with the comments that NEI submitted.

Category 3: Comments From Public Interest Groups or Other Interested Individuals

Three public interest groups (Don't Waste Michigan, Beyond Nuclear, and Union of Concerned Scientists (UCS)) each provided one comment submission in support of PRM–50–93 and PRM–50–95. In general, these comments provided high-level statements of support for the petitions but did not cite relevant evidence to substantiate the petitions.

Other interested individuals provided a total of 10 comment submissions on PRM–50–93 and PRM–50–95. In general, these individual comments also provided high-level statements of support for the petitions but did not cite relevant evidence to substantiate the petitions. In addition, several comments identified unrelated concerns about the NRC's regulations or practices that the NRC staff determined to be outside the scope of PRM–50–93 and PRM–50–95.

Robert Leyse, a relative of petitioner Mark Edward Leyse, provided four comment submissions in support of PRM–50–93 and PRM–50–95. Robert Leyse had previously submitted a related petition for rulemaking (PRM–50–76) that the NRC denied on September 6, 2005.[8] In general, his comments either repeated information provided in the petitions or expressed his view that the NRC did not appropriately consider all relevant information in its denial of PRM–50–76.

II.B. NRC Response to Public Comments

Two main factors influenced the NRC's approach to developing and documenting its response to public comments submitted on PRM–50–93 and PRM–50–95: (1) The substantial number, length, and complexity of the comments that were submitted; and (2) the limited availability of NRC resources due to competing, higher-priority work. In this approach, individual comments that addressed similar subject categories were grouped into one of 16 high-level comment bins. The following paragraphs provide for each bin of comments: (1) A high-level summary of the main subject category addressed in the grouped comments, including a listing in parentheses of the unique identifiers for individual comments that were assigned to the bin; and (2) the NRC's response to the grouped comments, including—if appropriate—a high-level summary of the basis for the response and reference to the relevant section(s) of the NRC's final technical safety analysis report that provide(s) additional details to support the NRC's position. A separate document consolidates all 33 comment submissions and 125 individual comments, and provides the following information: (1) A table that lists the unique identifier and ADAMS accession number assigned to each comment submission document and (2) markings that clearly assign unique identifiers to portions of each comment submission that were identified as distinct individual comments. Information about how to access this consolidated document is provided in Section IV.

1. General Support for Petitions Without Providing Rationale

Comment: The NRC should initiate rulemaking to address the issues raised in the petitions. (5–1, 6–1, 7–1, 8–1, 9–1, 10–1, 11–1, 12–1, 15–1, 19–1, 23–1)

NRC response: Because these comments generally supported the petitions without providing a rationale to substantiate this support, the NRC's overall response to the petitions applies to this bin of comments. The final technical safety analysis report provides additional details to support the NRC staff's position.

2. General Opposition to Petitions Without Providing Rationale

Comment: The requested amendments to NRC's regulations are not necessary. (18–1)

NRC response: Because this comment generally opposed the petitions without providing a rationale to substantiate this opposition, the NRC's overall response to the petitions applies to this bin of comments. The final technical safety analysis report provides additional details to support the NRC staff's position.

3. Comments Related to PRM–50–76

Comment: As stated in PRM–50–76, the Cathcart-Pawel and Baker-Just equations are not conservative because they were not developed to consider how complex thermal-hydraulic phenomena would affect the metal-water reaction rate in the event of a LOCA. (2–1, 17–2)

NRC response: The NRC disagrees with these comments. Consistent with the technical safety analysis that was performed for PRM–50–76, the NRC staff determined that—for the development of metal-water reaction rate equations—well-characterized isothermal tests are more important than considering the effects of complex thermal-hydraulic phenomena. The suggested use of complex thermal-hydraulic conditions would be counterproductive in tests that experimentally derive reaction rate correlations because temperature control is required to develop a consistent set of data for correlation derivation. Isothermal tests provide this needed temperature control. Section 1.1, ''Similar Petition Previously Considered by NRC (ML041210109),'' of the final technical safety analysis report provides additional details to support the NRC staff's position.

4. Peak Cladding Temperature Limit Is Not Conservative

Comment: Data from cited experiments indicate that autocatalytic metal-water oxidation reactions and uncontrolled temperature excursions involving Zircaloy cladding have occurred at temperatures below 2,200 °F, indicating the regulatory limit of 2,200 °F is not conservative. (2–6, 2–10, 3–1, 4–1, 14–5, 14–7, 14–11, 16–2, 16–4, 20–1, 20–5, 20–6, 20–10, 20–14, 20–15, 21–4, 21–14, 23–2, 24–1, 25–1, 26–11, 32–1, 32–7)

NRC response: The NRC disagrees with these comments. The NRC staff reviewed experimental data and information from the cited experiments and found no evidence of temperature

[8] Robert Leyse petitioned the NRC on May 1, 2002, requesting the NRC to amend Appendix K of 10 CFR part 50 and RG 1.157 to correct asserted technical deficiencies in the Baker-Just and Cathcart-Pawel equations used to calculate the metal-water reaction rate in ECCS evaluation models. The NRC denied PRM–50–76, determining that: (1) None of the specific technical issues raised by the petitioner showed safety-significant deficiencies in the research, calculation methods, or data used to support ECCS cooling performance evaluations; and (2) the NRC's regulations and regulatory guidance on ECCS cooling performance evaluations were based on sound science and did not need to be amended (70 FR 52893).

escalation rates that demonstrated the occurrence of autocatalytic or runaway oxidation reactions below 2,200 °F under LOCA conditions. Section 2.1, ''Peak Cladding Temperature Limit is Nonconservative,'' of the final technical safety analysis report provides additional details to support the NRC staff's position.

5. Baker-Just and Cathcart-Pawel Equations Are Not Conservative

Comment: Data from cited experiments indicate that the Baker-Just and Cathcart-Pawel equations used to calculate the metal-water reaction rate in ECCS evaluation models that the NRC has determined to be acceptable for use in evaluating ECCS cooling performance are not conservative. (1–1, 2–5, 14–1, 14–8, 14–9, 14–10, 14–12, 14–13, 14–14, 16–1, 20–4, 20–7, 20–8, 20–9, 20–11, 20–12, 20–16, 20–17, 21–3, 21–10, 21–13, 24–2, 26–1, 27–1, 27–3, 28–2, 29–3, 29–5, 29–6, 30–1, 30–2, 32–2, 32–9)

NRC response: The NRC agrees in part and disagrees in part with these comments. The NRC agrees that the Cathcart-Pawel equation is generally not conservative. However, consistent with its intended use, the NRC staff has determined that use of the Cathcart-Pawel equation generally results in sufficiently accurate calculations of the metal-water reaction rate that are appropriate for realistic ECCS evaluation models. The NRC disagrees that the Baker-Just equation is not conservative. Consistent with its intended use, the NRC staff has determined that use of the Baker-Just equation results in sufficiently conservative calculations of the metal-water reaction rate that are appropriate for conservative ECCS evaluation models. Section 2.2, ''Baker-Just and Cathcart-Pawel Equations are Nonconservative,'' of the final technical safety analysis report provides additional details to support the NRC staff's position.

6. Need for a Minimum Allowable Reflood Rate

Comment: Extrapolation of data from cited experiments indicates that a new regulation that requires minimum allowable core reflood rates in the event of a LOCA is necessary to prevent Zircaloy cladding from exceeding the regulatory limit of 2,200 °F under certain conditions. (2–2, 2–3, 2–4, 16–3, 20–2, 20–3, 20–13, 20–18, 21–2, 24–3, 26–2, 26–7, 26–9, 32–6)

NRC response: The NRC disagrees with these comments. The NRC staff has determined—using simulations of a Zircaloy cladding bundle with the geometry and design that was used for the cited experiments—that steam cooling would be sufficient to maintain Zircaloy cladding temperatures below the 2,200 °F limit. Section 2.3, ''Need for a Minimum Allowable Reflood Rate,'' of the final technical safety analysis report provides additional details to support the NRC staff's position.

7. Issues Related to National Research Universal Full-Length High-Temperature (FLHT) In-Reactor Tests

Comment: In the FLHT–1 test, the test conductors were unable to prevent a temperature excursion and runaway oxidation by increasing the coolant flow rate when peak cladding temperatures reached approximately 2,200 °F. This provides additional evidence indicating that the regulatory limit of 2,200 °F is not conservative. (21–5, 26–4, 26–8, 28–3, 29–1, 29–4)

NRC response: The NRC disagrees with these comments. The NRC staff determined that excessive heatup rates were not experienced during the FLHT–1 experiment until temperatures exceeded 2,420 °F. Section 3.1, ''Issues Related to National Research Universal (NRU) full-length high-temperature (FLHT) In-reactor Tests,'' of the final technical safety analysis report provides additional details to support the NRC staff's position.

8. Eutectic Behavior at Temperatures Below 2,200 °F

Comment: In a design-basis LOCA, eutectic reactions [9] between various fuel assembly components (the Zircaloy cladding, control rods, and spacer grids) at temperatures below 2,200 °F could significantly reduce the safety margins for the following types of materials interactions: (1) Degradation of boiling-water reactor (BWR) control blades due to the eutectic reaction of boron carbide (B4C), stainless steel, and Zircaloy; (2) degradation of pressurized-water reactor (PWR) cladding due to the eutectic reaction between Inconel grids and Zircaloy cladding; and (3) degradation of PWR control rods that contain silver, indium, and cadmium. (21–1, 21–6, 21–7, 21–8, 21–9, 24–4, 26–10)

NRC response: The NRC disagrees with these comments. These assertions are not supported by available experimental evidence. In its review of available information, the NRC staff was unable to find any evidence that loss of a coolable geometry had occurred at temperatures below 2,200 °F. Test results and analyses have shown that insignificant eutectic reactions occur for times and maximum temperatures assumed in a design-basis LOCA. Section 3.2, ''Eutectic Behavior at Temperatures below 2,200 °F (1,204 °C),'' of the final technical safety analysis report provides additional details to support the NRC staff's position.

9. TRAC/RELAP [10] Advanced Computational Engine (TRACE) Code Simulation of (Full Length Emergency Cooling Heat Transfer) FLECHT Run 9573

Comment: NRC's TRACE simulations of FLECHT Run 9573 are invalid because they did not simulate the section of the test bundle that incurred runaway oxidation. Therefore, since NRC's conclusions regarding the reflood rate are based on its TRACE simulations of FLECHT Run 9573, these conclusions are also invalid. (31–4, 32–3, 32–5, 33–1)

NRC response: The NRC disagrees with these comments. The NRC staff determined that the experimental data from FLECHT run 9573 do not show evidence of runaway oxidation below 2,200 °F, despite its low reflood rate. In addition, FLECHT run 9573 was a low-reflood-rate experiment in which thermocouple measurements were taken at five elevations. All five elevations were included in the NRC's TRACE simulation of FLECHT run 9573. Section 3.3, ''TRACE simulation of FLECHT run 9573,'' of the final technical safety analysis report provides additional details to support the NRC staff's position.

10. Stainless Steel and Zircaloy Heat Transfer Coefficients

Comment: The heat transfer coefficients used in appendix K ECCS evaluation models are based on data from thermal-hydraulic experiments conducted with stainless steel rod bundles and therefore should not be used to infer what would happen in a reactor core with Zircaloy bundles in the event of a LOCA. (2–9, 22–1, 26–3, 26–5, 26–6, 32–4)

NRC response: The NRC disagrees with these comments. The NRC staff determined that models for convective heat transfer are dependent upon the properties of the fluid—not the material properties of the heat transfer surface. Therefore, the heater rod material used in the experiments is irrelevant to developing correlations based on the experimental data. Section 3.5,

[9] In this context, a eutectic reaction is a reaction in which two materials in contact with one another at relatively high temperatures can liquefy at a temperature that is lower than the melting temperatures of the two individual materials.

[10] *TRAC:* Transient Reactor Analysis Code. *RELAP:* Reactor Excursion and Leak Analysis Program.

''Stainless Steel and Zircaloy Heat Transfer Coefficients,'' of the final technical safety analysis report provides additional details to support the NRC staff's position.

11. Issues Related to the PHEBUS B9R Test

Comment: Oxidation models are unable to predict autocatalytic oxidation reactions that occurred below 2,200 °F in the PHEBUS B9R–2 test. (32–8, 32–10)

NRC response: The NRC disagrees with these comments. The NRC staff determined that data from the cited PHEBUS B9R test does not demonstrate that an autocatalytic oxidation reaction occurred at temperatures below 2,200 °F. Section 3.6, ''Issues Related to the PHEBUS B9R Test,'' of the final technical safety analysis report provides additional details to support the NRC staff's position.

12. Whether Runaway Oxidation Begins at 2,012 °F

Comment: Information in a report about degraded core quench experiments [11] indicates that temperatures at which temperature excursions associated with runaway oxidation occur range from 1,922 °F to 2,012 °F. (2–7)

NRC response: The NRC disagrees with this comment. The NRC staff examined the cited report and found no data to support a determination that runaway oxidation occurs at cladding temperatures less than 2,200 °F for experiments simulating conditions for design-basis accidents. Section 3.7, ''Issue Related to Whether Runaway Oxidation Temperatures Start at 1100 °C (2012 °F),'' of the final technical safety analysis report provides additional details to support the NRC staff's position.

13. Experimental Methods Used To Derive the Baker-Just Metal-Water Oxidation Reaction Correlation

Comment: The Baker-Just equation is not conservative because it is partly derived using experimental data from inductive heating experiments that included radiative heat losses. These radiative heat losses would affect the oxidation behavior such that the experiment is not representative of reactor behavior in the event of a LOCA and would cause the Baker-Just equation to be not conservative. (13–1, 14–2, 14–3, 14–4, 14–6, 17–1, 27–2)

NRC response: The NRC disagrees with these comments. The NRC staff determined that the subject experimental data are consistent with data obtained using other methods and concluded that radiative heat losses are not relevant in correlating the data to develop the metal-water reaction rate equation. The NRC staff further concluded that use of the Baker-Just equation results in sufficiently conservative calculations of the metal-water reaction rate that are appropriate for conservative ECCS evaluation models. Section 3.9, ''Experimental Methods Used to Derive the Baker-Just Metal-Water Oxidation Reaction Correlation,'' of the final technical safety analysis report provides additional details to support the NRC staff's position.

14. Issues Related To Cladding Oxidation and Hydrogen Production

Comment: The Cathcart-Pawel and Baker-Just equations are unable to determine the increased hydrogen production that occurred in the CORA and LOFT LP–FP–2 experiments. (29–2, 31–3)

NRC response: The NRC neither agrees nor disagrees with these comments. The cited experiments were performed to better understand reactor behavior under severe accident conditions. Increased hydrogen production under such beyond-design-basis conditions is not relevant in determining the suitability of the Cathcart-Pawel or Baker-Just equations when used in evaluations of ECCS cooling performance for design-basis LOCAs. Section 3.10, ''Issues Related to Cladding Oxidation and Hydrogen Production,'' of the final technical safety analysis report provides additional details to support the NRC staff's position.

15. Issues Related to the Fuel Rod Failure (FRF) Tests Conducted in the Transient REActor Test (TREAT) Facility Reactor

Comment: Data from the FRF–1 experiment for the TREAT facility indicate that ECCS evaluation models underpredicted the amount of hydrogen produced in that experiment. This means that ECCS evaluation models would underpredict the amount of hydrogen produced in the event of a LOCA and therefore are not conservative. In addition, neither Westinghouse nor the NRC applied the Baker-Just equation to metallurgical data from the locations of FLECHT run 9573 that incurred autocatalytic oxidation in their application of the Baker-Just equation under LOCA conditions to evaluate its suitability. For this reason, it was incorrect for Westinghouse and the NRC to conclude that there is sufficient conservatism in applying the Baker-Just equation to LOCA conditions. (2–8, 21–11, 21–12, 28–1)

NRC response: The NRC disagrees with these comments. The NRC considered the information about the FRF–1 experiment in the TREAT facility in the 1971 Indian Point Unit 2 licensing hearing and determined that the ECCS evaluation models were adequate. In addition, while it is true that the Baker-Just equation has not been applied to metallurgical data from the locations of FLECHT run 9573 that incurred autocatalytic oxidation, these data were not collected at the time of the experiment, and therefore do not exist. However, the NRC staff has determined that the inability to apply the Baker-Just equation to such data is an inadequate basis for asserting that it was incorrect for Westinghouse and the NRC to conclude that there is sufficient conservatism in applying the Baker-Just equation to LOCA conditions. Several independent studies have shown that use of the Baker-Just equation results in sufficiently conservative calculations of the metal-water reaction rate under design-basis LOCA conditions. Section 3.11, ''Issues Related to the FRF Tests Conducted in the TREAT Reactor,'' of the final technical safety analysis report provides additional details to support the NRC staff's position.

16. Issues Raised at the Public Commission Meeting in January 2013

Comment: An NRC document [12] states that runaway zirconium oxidation would commence at 1,832 °F in a postulated station blackout scenario at Grand Gulf Nuclear Station, which indicates the regulatory limit of 2,200 °F is not conservative. In addition, a report about best-estimate predictions for the LOFT LP–FP–2 experiments [13] states that runaway oxidation would commence if fuel-cladding temperatures were to start increasing at a rate of 3.0 kelvins/second (K/s). Since an analysis in support of the NRC staff's interim evaluation of the petitions showed heatup rates of 10.3 K/s and 11.9 K/s at

[11] Committee on the Safety of Nuclear Installations, Nuclear Energy Agency, Organisation for Economic Co-operation and Development. *Degraded Core Quench: Summary of Progress 1996–1999. NEA/CSNI/R(99)23.* Paris, France: Organisation for Economic Co-operation and Development; 2000. Available at: *http://www.oecd-nea.org/nsd/docs/1999/csni-r99-23.pdf.*

[12] Haskin FE, Camp AL. *Perspectives on Reactor Safety. NUREG/CR–6042 (SAND93–0971).* Washington, DC: U.S. Nuclear Regulatory Commission; 1994. Available at: *https://www.nrc.gov/docs/ML0727/ML072740014.pdf.*

[13] Guntay S, Carboneau M, Anoda Y. *Best Estimate Prediction for OECD LOFT Project Fission Product Experiment LP–FP–2. OECD LOFT–T–3803.* Idaho Falls, ID: EG&G IDAHO, INC.; 1985. Available at ADAMS accession no. ML071940361.

2,199 °F, this indicates that runaway oxidation has occurred at temperatures below the 2,200 °F limit. (31–1, 31–2)

NRC response: The NRC disagrees with the comments. First, the postulated station blackout scenario discussed in the document is a severe accident that involves conditions that are beyond the design basis, and it is inappropriate to evaluate the regulatory limit of 2,200 °F for design-basis LOCAs using information obtained from models of severe accidents, which model conditions that are more severe than those of design-basis accidents and therefore do not provide information about how fuel cladding would respond to high temperatures under design-basis LOCA conditions. Second, the NRC staff has determined that the runaway oxidation described in the cited LOFT LP–FP–2 report was initiated because of the high temperature (2,870 °F), not because of the heatup rate of 3.0 K/s. Therefore, the NRC staff concluded that there is no basis for the assertion that runaway oxidation has occurred at temperatures below the 2,200 °F limit because heatup rates of more than 3.0 K/s have been observed at lower temperatures. Section 3.12, ''Issues Raised at the Public Commission Meeting in January 2013,'' of the final technical safety analysis report provides additional details to support the NRC staff's position.

III. NRC Technical Evaluation and Reasons for Denial

The NRC staff used a special review process to evaluate these petitions. It did this for three main reasons: (1) Additional time and resources were needed to reevaluate more than 40 years of severe accident and thermal-hydraulic experimental data from more than 200 technical references to address all arguments in the petitions; (2) to promptly respond to any significant safety issues, if any were to be identified; and (3) to keep the public informed and to publicly address any stakeholder concerns about the adequacy of the NRC's regulations following the accident that occurred in 2011 at the Fukushima Dai-ichi Nuclear Power Station in Japan.

As part of this special review process, the NRC made a series of draft interim reports available to the public. These reports informed the public of NRC's progress in evaluating the petitions and included the NRC staff's initial evaluation of specific issues and relevant data that were prioritized to determine the order in which they would be evaluated. Information about how to access these draft interim reports is provided in Section IV.

The NRC staff completed its technical evaluation of the petitions and prepared a final technical safety analysis report that documents the official technical basis for the staff's evaluation. This final technical safety analysis report includes the NRC staff's evaluation of (1) each of the three main issues raised in the petitions and (2) additional technical issues that are not directly related to the requested changes to the NRC's regulations that were raised in either the petitions or in subsequent communications (*e.g.,* submitted public comments, email messages, letters, and oral statements in a public meeting with the Commission).

Overall, the NRC is denying the petitions because the petitioner did not present sufficient new information or arguments to support the requested changes. In addition, the NRC disagrees with the arguments in the petitions and concludes that the requested amendments to its regulations and associated regulatory guidance on ECCS acceptance criteria or evaluation models are not necessary. The remaining paragraphs of Section III summarize the staff's evaluation of each of the three main issues identified in the petitions and identify the relevant section of the staff's final technical safety analysis report that provides additional details to support the NRC's position. Information about how to access the final technical safety analysis report is provided in Section IV.

Issue 1: Calculated Maximum Fuel Element Cladding Temperature Limit

The NRC staff reviewed experimental data and information from the multirod (assembly) severe fuel damage experiments cited in the petitions and found no evidence of temperature escalation rates that demonstrated the occurrence of autocatalytic or runaway oxidation reactions at Zircaloy cladding temperatures less than 2,200 °F. Although some rapid temperature increases were observed in the data from the cited experiments, the NRC staff disagrees with the assertion that these data indicate that (1) autocatalytic metal-water oxidation reactions and uncontrolled temperature excursions involving Zircaloy cladding have occurred at temperatures less than the 2,200 °F limit under LOCA conditions and (2) the 2,200 °F limit is therefore not conservative. The NRC staff has further determined that the 2,200 °F limit in § 50.46(b)(1) provides an adequate margin of safety to preclude autocatalytic metal-water oxidation reactions.

Therefore, the NRC concludes that the petitioner did not provide sufficient information to support amending 10 CFR 50.46 to require that the calculated maximum fuel element cladding temperature not exceed a limit based on data from cited experiments, instead of the 2,200 °F limit in § 50.46(b)(1). Section 2.1, ''Peak Cladding Temperature Limit is Nonconservative,'' of the final technical safety analysis report provides additional details to support the staff's position.

Issue 2: Metal-Water Reaction Rate Equations for ECCS Evaluation Models

The NRC staff has determined that: (1) Use of the Cathcart-Pawel equation generally results in sufficiently accurate calculations of the metal-water reaction rate that are appropriate for realistic ECCS evaluation models and (2) use of the Baker-Just equation results in sufficiently conservative calculations of the metal-water reaction rate that are appropriate for conservative ECCS evaluation models. The final technical safety analysis report also cites several independent studies that provide further support for these findings.

The petitioner relied on two main arguments to support the assertion that the Cathcart-Pawel and Baker-Just equations are not conservative. The first argument was that data from cited multirod (assembly) severe fuel damage experiments indicate both equations are not conservative for use in analyses that calculate the temperature at which an autocatalytic or runaway oxidation reaction involving the Zircaloy cladding would occur in the event of a LOCA. The NRC staff disagrees with this argument for two reasons: (1) Autocatalytic or runaway oxidation does not begin at a specific temperature and (2) the petitioner made invalid comparisons between the results of specific experiments and generic calculations that were not intended to be applied to a specific test facility.

The second argument was that the Cathcart-Pawel and Baker-Just equations were not developed to consider how complex thermal-hydraulic phenomena would affect the metal-water reaction rate in the event of a LOCA. However, consistent with the technical safety analysis that was performed for PRM–50–76, the NRC staff determined that—for the development of metal-water reaction rate equations—well-characterized isothermal tests are more important than the complex thermal hydraulics suggested in the petitions. The suggested use of complex thermal-hydraulic conditions would be counterproductive in tests to experimentally derive reaction rate correlations because temperature control is required to develop a

consistent set of data for correlation derivation. Isothermal tests provide this necessary temperature control. However, previous studies have applied the derived correlations to transients that include complex thermal-hydraulic conditions to verify that the proposed phenomena embodied in the correlations are limiting. These studies showed that (1) use of the Cathcart-Pawel equation results in conservative or best-estimate calculations of the metal-water reaction rate and (2) use of the Baker-Just equation results in conservative calculations of the metal-water reaction rate.

Therefore, the NRC concludes that the petitioner did not provide sufficient information to support revising RG 1.157 and appendix K to 10 CFR part 50 to require that the rates of energy release, hydrogen generation, and Zircaloy cladding oxidation from the metal-water reaction of zirconium with steam considered in evaluation models used to calculate ECCS cooling performance be calculated based on data from cited experiments, instead of using the Cathcart-Pawel or Baker-Just equations. Section 2.2, ''Baker-Just and Cathcart-Pawel Equations are Nonconservative'' of the final technical safety analysis report provides additional details to support the NRC staff's position.

Issue 3: Minimum Allowable Core Reflood Rate

NRC calculations using simulations of a Zircaloy cladding bundle with the geometry and design that was used for the cited multirod (assembly) severe fuel damage experiments disproved the petitioner's assertions about the reflood rate. In particular, calculations using simulations showed that steam cooling would be sufficient to maintain the Zircaloy cladding temperatures below the 2,200 °F limit specified in § 50.46(b)(1). Moreover, the NRC staff determined that (1) cooling of a fuel rod bundle depends on several parameters and heat transfer mechanisms rather than on the reflood rate alone; (2) linear extrapolation of initial Zircaloy cladding temperatures to predict final cladding temperature is inappropriate because of increased radiative cooling at higher temperatures; and (3) extrapolation of experimental data does not show ''with high probability'' that peak cladding temperatures will exceed 2,200 °F.

Therefore, the NRC staff concludes that the petitioner did not provide sufficient information to support issuance of a new regulation that requires minimum allowable core reflood rates in the event of a LOCA. Section 2.3, ''Need for a Minimum Allowable Reflood Rate,'' of the final technical safety analysis report provides additional details to support the NRC staff's position.

IV. Availability of Documents

Table II provides information about how to access the documents referenced in this document. The **ADDRESSES** section of this document provides additional information about how to access ADAMS.

TABLE II—INFORMATION ABOUT HOW TO ACCESS REFERENCED DOCUMENTS

Date	Document	ADAMS accession No. or **Federal Register** citation
	Submitted Petitions	
May 1, 2002	Petition for Rulemaking (PRM–50–76)	ML022240009
November 17, 2009	Petition for Rulemaking (PRM–50–93)	ML093290250
June 7, 2010	Petition for Rulemaking (PRM–50–95)	ML102770018
	Federal Register Notices	
September 6, 2005	Denial of Petition for Rulemaking (PRM–50–76)	70 FR 52893
January 25, 2010	Notice of Receipt of Petition for Rulemaking (PRM–50–93)	75 FR 3876
October 27, 2010	Notice of Consolidation of Petitions for Rulemaking and Re-Opening of Comment Period (PRM–50–93 and PRM–50–95).	75 FR 66007
	Consolidated Public Comments Document	
November 21, 2017	Public Comments on Petitions for Rulemaking: Calculated Maximum Fuel Element Cladding Temperature.	ML17325A007
	Draft Interim Reports	
August 23, 2011	Draft Interim Review of PRM–50–93/95 Issues Related to the CORA Tests	ML112290888
September 27, 2011	Draft Interim Review of PRM–50–93/95 Issues Related to the LOFT LP–FP–2 Test	ML112650009
October 16, 2012	Draft Interim Review of PRM–50–93/95 Issues Related to Conservatism of 2200 °F, Metal-Water Reaction Rate Correlations, and ''The Impression Left from [FLECHT] Run 9573.''.	ML12265A277
March 8, 2013	Draft Interim Review of PRM–50–93/95 Issues Related to Minimum Allowable Core Reflood Rate.	ML13067A261
	Final Technical Safety Analysis Report	
August 19, 2016	Technical Safety Analysis of PRM–50–93/95, Petition for Rulemaking on § 50.46	ML16078A318

V. Conclusion

For the reasons cited in this document, the NRC is denying PRM–50–93 and PRM–50–95. The petitioner did not present sufficient new information or arguments to support the requested changes. In addition, the NRC disagrees with the arguments in the petitions and concludes that the requested amendments to its regulations and associated regulatory guidance are not necessary. The NRC's existing regulations provide reasonable assurance of adequate protection of public health and safety.

Dated: December 29, 2020.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2020–29151 Filed 1–6–21; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Parts 1301, 1309, and 1321

[Docket No. DEA–587]

RIN 1117–AB58

Amending Regulations To Require Online Submission of Applications for and Renewals of DEA Registration

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: This rule proposes to amend the Drug Enforcement Administration (DEA) regulations to require all initial and renewal applications for DEA registration to be submitted online.

DATES: Electronic comments must be submitted, and written comments must be postmarked, on or before March 8, 2021. Commenters should be aware that the electronic Federal Docket Management System will not accept any comments after 11:59 p.m. Eastern Time on the last day of the comment period.

All comments concerning collections of information under the Paperwork Reduction Act must be submitted to the Office of Management and Budget on or before March 8, 2021.

ADDRESSES: To ensure proper handling of comments, please reference ''Docket No. DEA–587'' on all correspondence, including any attachments.

• *Electronic comments:* The Drug Enforcement Administration (DEA) encourages that all comments be submitted electronically through the Federal eRulemaking Portal which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *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. 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: Scott A. Brinks, Regulatory Drafting and Policy Support Section, Diversion Control Division, Drug Enforcement Administration; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152; Telephone: (571) 362–3261.

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 the Drug Enforcement Administration (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 of the personal identifying information you do not want made 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 the confidential business information to be redacted within the comment.

Comments containing personal identifying information or confidential business information identified as directed above will be made publicly available in redacted form. If a comment has so much confidential business 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 confidential as directed above.

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

Legal Authority

The Controlled Substances Act (CSA) grants the Attorney General authority to promulgate rules and regulations relating to: The registration and control of the manufacture, distribution, and dispensing of controlled substances and listed chemicals; reporting changes to professional or business addresses; and the efficient execution of his statutory functions. 21 U.S.C. 821, 822(a), 827(h), 871(b), 957(a). The Attorney General is further authorized by the CSA to promulgate rules and regulations relating to the registration and control of importers and exporters of controlled substances and listed chemicals. 21 U.S.C. 958(f). The Attorney General has delegated this authority to the Administrator of DEA. 28 CFR 0.100(b).

DEA Form 224 applies to new registration applications for retail pharmacy, hospital/clinic, practitioner, teaching institution, or mid-level practitioner registrations.[1] DEA Form 225 applies to new registration applications for manufacturer, distributor, researcher, canine handler, analytical laboratory, importer, or exporter registrations.[2] DEA Form 363 applies to new registration applications for narcotic treatment program registrations.[3] DEA Form 510 applies to new registration applications for domestic chemical registrations.[4] DEA Forms 224a, 225a, 363a, and 510a apply to registration renewal applications.[5]

Purpose of the Proposed Rule

The purpose of this notice of proposed rulemaking is to simplify the form submission process by requiring that all registration and renewal applications be submitted online. Currently, DEA regulations permit DEA Registration Forms (224/224a, 225/225a, 363/363a, and 510/510a) to be submitted either through the secure online database, or by paper forms delivered to DEA Headquarters.[6] This proposed rule will amend DEA regulations to require that all registration and renewal applications be

[1] 21 CFR 1301.13(e)(1)(iv).

[2] 21 CFR 1301.13(e)(1)(i)–(iii), (v)–(vi), and (viii)–(x).

[3] 21 CFR 1301.13(e)(1)(vii).

[4] 21 CFR 1309.21.

[5] 21 CFR 1301.13(e)(1) and 1309.21

[6] *https://www.deadiversion.usdoj.gov/drugreg/index.html#regapps.*

submitted through the secure online database, and that paper forms will no longer be accepted. Submission through the secure online database will be a streamlined process which will benefit both DEA and registrants.

Discussion of Regulatory Changes

Need for Regulatory Changes

Regulatory changes are needed to conform existing DEA regulations regarding the submission of registration and renewal applications to the Administration's current requirements that other DEA forms be submitted online. This rule proposes to amend existing DEA regulations in seven sections.[7] Title 21 CFR 1301.13 and 1301.14 are proposed to be amended to remove the option to submit paper forms and provide instructions for online application and payment instructions. The rule also proposes removing 21 CFR 1301.14 (b), which will become obsolete with the adoption of the secure application portal. 21 CFR 1309.12 is proposed to be amended to clarify payment options. Title 21 CFR 1309.32 is proposed to be amended to remove the option to submit paper forms and provide instruction for online applications and payments for listed chemical handlers. Title 21 CFR 1309.33 is proposed to be amended to clarify the online application and payment process while removing § 1309.33 (b), which will become obsolete with the adoption of the secure application portal. Title 21 CFR 1309.34 is proposed to be amended to clarify the handling of defective applications. Title 21 CFR 1321.01 is proposed to be amended to remove reference to submitting paper forms by mail to any DEA Registration Unit address.

Regulatory Analyses

Executive Orders 12866, 13563, and 13771, Regulatory Planning and Review, Improving Regulation and Regulatory Review, and Reducing Regulation and Controlling Regulatory Costs

This proposed rule was developed in accordance with the principles of Executive Orders (E.O.) 12866, 13563, and 13771. E.O. 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects; distributive impacts; and equity). E.O. 13563 is supplemental to and reaffirms the principles, structures, and definitions governing regulatory review established in E.O. 12866.

E.O. 12866 classifies a ''significant regulatory action,'' requiring review by the Office of Management and Budget (OMB), as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. DEA has determined that this proposed rule is not a ''significant regulatory action'' under E.O. 12866, section 3(f).

Analysis of Benefits and Costs

DEA has examined the benefits and costs of this proposed rule. There has been a continued decrease in the use of paper forms from 2016 to 2020. Paper forms as a percentage of total applications decreased annually from 7.5 percent in 2016 to 2.8 percent, 1.5 percent, and 1.1 percent, in years 2017, 2018, and 2019, respectively. In the first three months of 2020, 99.3 percent of all DEA registration forms were submitted electronically via DEA's secure website and 0.7 percent were submitted by paper. While it is possible the percentage of paper submissions will continue to drop, DEA believes 0.7 percent is a reasonable estimate. Therefore, this proposed rule will impact the remaining 0.7 percent of registration forms that are submitted by paper, approximately 4,453 registrations per year.[8] Benefits include cost savings, as discussed in the following paragraphs, and increased simplicity in the registration process. This proposed rule will simplify the form submission process and require that all new applications and renewals be submitted online. Additionally, electronic submissions will increase efficiency and accuracy.

There are no new costs associated with this proposed rule. The labor burden to submit an application is estimated to be the same for electronic and paper submissions. No special software is needed to complete an online application via DEA's public website. Furthermore, all applicants, including the estimated 0.7 percent of applicants using paper forms, are assumed to be able to access the internet without incurring additional costs. DEA believes providing a contact email address on the application is indicative of internet access. Although the applicant's contact email address is an optional field, virtually all paper submissions include contact email addresses.[9] Although online applications are available at no additional cost, DEA acknowledges some applicants have a preference for paper forms. DEA does not have a basis to quantify this preference; however, DEA believes any cost of eliminating this preference is offset by the qualitative cost savings discussion below.

DEA anticipates there will be cost savings associated with electronic submissions. Some cost savings are described qualitatively and some are quantified. Many paper submissions contain illegible or erroneous information or omit required information. Many such errors or omissions, such as not including a signature or paying the wrong amount require DEA to contact applicants for corrections or clarifications, a time-consuming process for both DEA and the applicant. Electronic submissions are expected to virtually eliminate the requirement for DEA to contact applicants for clarification of form data or for correction of submission errors, as validation features in the system will flag common errors before transmission. DEA has not tracked the number or the duration of such delays and does not have a strong basis to quantify these cost savings.

This proposed rule would eliminate the need to print paper forms and transmit them by mail or courier service. DEA estimates there will be a cost savings of $0.63 ($0.55 for postage plus $0.08 for an envelope), or a total of $2,805 per year for an estimated 4,453 responses per year. DEA assumes the cost savings associated with eliminating printing costs is negligible.

[7] 21 CFR 1301.13, 1301.14, 1309.12, 1309.32, 1309.33, 1309.34, and 1321.01.

[8] The average annual number of applications from 2017 to 2019 is 636,097. 636,097 × 0.7 percent = 4,453.

[9] Based on review of applications from January 2020 to March 2020, there were 307 applications for initial registration using the paper form. Six of 307 applications did not contain a contact email address. DEA believes it is likely the six applicants have email addresses (and have access to the internet), but opted to not provide the email address. Including the online applications, six of 30,509 applications for new registrations over the three-month period, January-March 2020, did not contain email addresses.

Furthermore, DEA anticipates cost savings from the elimination of production costs (*i.e.,* paper forms, envelopes, postage, equipment, and labor). Based on the information collection requests for the registration forms, recently approved by OMB, DEA's production costs of $49,910 will be eliminated.[10] In summary, DEA estimates this proposed rule will result in an annual cost savings of $52,715 ($2,805 to applicants and $49,910 to DEA).

Section 2(a) of E.O. 13771 [11] requires an agency, unless prohibited by law, to identify at least two existing regulations to be repealed when the agency publicly proposes for notice and comment or otherwise promulgates a new regulation. In furtherance of this requirement, Section 2(c) of E.O. 13771 requires that the new incremental costs associated with new regulations, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations. Because this proposed rule is estimated to have a total cost of less than zero (cost savings of $52,715 per year), DEA expects the rule will be considered an E.O. 13771 deregulatory action.

Executive Order 12988, Civil Justice Reform

This proposed rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of E.O. 12988, Civil Justice Reform to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burdens. DEA expects the instant validation of online registration applications to reduce ambiguity and reduce the number of errors in submissions and reduce burdens on both DEA and registrants.

Executive Order 13132, Federalism

This proposed rule does not have federalism implications warranting the application of E.O. 13132. The proposed rule does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

The proposed rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (RFA), the DEA has reviewed the economic impact of this proposed rule on small entities. DEA's economic impact evaluation indicates that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.

The RFA requires an agency to analyze options for regulatory relief of small entities unless it can certify that the rule will not have a significant impact on substantial number of small entities. DEA has analyzed the economic impact of each provision of this proposed rule and estimates that it will have minimal economic impact on affected entities, including small businesses, nonprofit organizations, and small governmental jurisdictions.

This proposed rule will simplify the form submission process by requiring all initial registration and renewal applications be submitted online. The rule would affect all applicants for DEA registration or re-registration who would use paper forms. There has been a continued decrease in the use of paper applications from 2016 to 2020. Paper applications, as a percentage of total applications, decreased annually from 7.5 percent in 2016 to 2.8 percent, 1.5 percent, and 1.1 percent, in years 2017, 2018, and 2019, respectively. In the first three months of 2020, 99.3 percent of all DEA Registration Forms were submitted electronically via DEA's secure website and 0.7 percent were submitted by paper. While it is possible the percentage of paper submissions will continue to drop, DEA believes 0.7 percent is a reasonable estimate. Therefore, this proposed rule will impact the remaining 0.7 percent of registration forms that are submitted by paper, approximately 4,453 registrations per year.[12]

All registration business activities (registrant-type) have used paper registration forms in the past three years. DEA estimated the number of applications by business activity based on the three-year average, 2017–2019, of actual paper application submissions. DEA applied the percentages for each business activity to the estimated 4,453 paper registration per year. For example, on average, 5.73 percent of total paper registration forms were for pharmacy registrations. Applying 5.73 percent to the 4,453 estimated total paper registrations, the estimated number of paper registrations for pharmacy registrations was 255 (4,453 × 5.73 percent). This calculation was conducted for each business activity and the results are in Table 1 below.

TABLE 1—PERCENTAGE AND NUMBER OF PAPER REGISTRATIONS BY BUSINESS ACTIVITY

Business activity	2017 (percent)	2018 (percent)	2019 (percent)	Average (percent)	Number of registrations
Pharmacy	3.12	6.25	7.81	5.73	255
Hospital/Clinic	2.11	2.67	3.57	2.78	124
Practitioner	79.73	77.99	74.13	77.29	3,442
Teaching Institution	0.03	0.04	0.01	0.03	1
Manufacturer	0.23	0.33	0.39	0.32	14
Distributor	0.15	0.18	0.28	0.20	9
Researcher/Canine Handler	3.00	3.61	2.96	3.19	142
Analytical Lab	0.41	0.53	0.51	0.48	22
Importer	0.07	0.10	0.10	0.09	4
Exporter	0.03	0.04	0.07	0.05	2
Reverse Distributor	0.01	0.02	0.04	0.03	1
Mid-level Practitioner (MLP)	10.38	7.62	9.40	9.14	407
Narcotic Treatment Program	0.38	0.33	0.38	0.36	16
Chemical Manufacturer	0.11	0.11	0.10	0.11	5

[10] The estimated production cost is the sum of the estimated production cost for each of the forms. Office of Information and Regulatory Affairs, Inventory of Currently Approved Information Collections, April 13, 2020, *https://www.reginfo.gov/public/do/PRAMain* (accessed April 13, 2020). *See* Paperwork Reduction Act section below for specific OMB control numbers.

[11] 82 FR 9339.

[12] The average annual number of applications from 2017 to 2019 is 636,097. 636,097 × 0.7 percent = 4,453.

TABLE 1—PERCENTAGE AND NUMBER OF PAPER REGISTRATIONS BY BUSINESS ACTIVITY—Continued

Business activity	2017 (percent)	2018 (percent)	2019 (percent)	Average (percent)	Number of registrations
Chemical Importer	0.06	0.02	0.03	0.04	2
Chemical Distributor	0.13	0.10	0.13	0.12	5
Chemical Exporter	0.03	0.04	0.09	0.05	2
Total	100.00	100.00	100.00	100.00	4,453

(Source: DEA)

As this proposed rule affects all business activities that are required to obtain a registration with DEA pursuant to the CSA, this proposed rule would affect small entities in a wide variety of industries. Table 2 indicates the sectors, as defined by the North American Industry Classification System (NAICS), affected by the proposed rule. Most DEA registrants are, or are employed by, small entities under Small Business Administration (SBA) standards.

TABLE 2—INDUSTRIAL SECTORS OF DEA REGISTRANTS

Business Activity	NAICS Code	NAICS Code Description
Manufacturer	325411	Medicinal and Botanical Manufacturing.
	325412	Pharmaceutical Preparation Manufacturing.
Distributor, Importer, Exporter	424210	Drugs and Druggists' Sundries Merchant Wholesalers.
Reverse Distributor	5621	Waste Collection.
	5622	Waste Treatment and Disposal.
Pharmacy	445110	Supermarkets and Other Grocery (except Convenience) Stores.
	446110	Pharmacies and Drug Stores.
	452210	Department Stores.
	452311	Warehouse Clubs and Supercenters.
Analytical Labs	541380	Testing Laboratories.
Teaching institute	611310	Colleges, Universities and Professional Schools.
Researcher	541715	Research and Development in the Physical, Engineering, and Life Sciences (except Nanotechnology and Biotechnology).
Canine Handler	561612	Security Guards and Patrol Services.
Practitioner, Mid-level Practitioner,* Narcotic Treatment Program, Hospital/Clinic.	541940	Veterinary Services.
	621111	Offices of Physicians (except Mental Health Specialists).
	621112	Offices of Physicians, Mental Health Specialists.
	621210	Offices of Dentists.
	621330	Offices of Mental Health Practitioners (except Physicians).
	621391	Offices of Podiatrists.
	621420	Outpatient Mental Health and Substance Abuse Centers.
	621491	HMO Medical Centers.
	621493	Freestanding Ambulatory Surgical and Emergency Centers.
	622110	General Medical and Surgical Hospitals.
	622210	Psychiatric and Substance Abuse Hospitals.
	622310	Specialty (except Psychiatric and Substance Abuse) Hospitals.
Chemical Manufacturer	325	Chemical Manufacturing.
Chemical Distributor, Chemical Importer, Chemical Exporter.	424690	Other Chemical and Allied Products Merchant Wholesalers.

* Practitioners and mid-level practitioners are generally employed in one of these industries.

As shown in Table 2, the proposed rule would affect a wide variety of entities across many industry sectors. As some industry sectors are expected to consist primarily of DEA registrants (*i.e.,* 446110-Pharmacies and Drug Stores, 622110-General Medical and Surgical Hospitals, etc.), this proposed rule is expected to affect some small entities. For reference, Table 3 lists the average annual revenue for the smallest of small businesses in each industry sector. The table below lists the results.

TABLE 3—AVERAGE ANNUAL REVENUE OF SMALLEST OF SMALL ENTITIES

NAICS code	NAICS code description	Enterprise size (number of employees)	Number of establishments	Average revenue per establishment ($)
325	Chemical Manufacturing	0–4	3,148	1,938,546
325411	Medicinal and Botanical Manufacturing	0–4	108	727,444
325412	Pharmaceutical Preparation Manufacturing	*5–9	129	2,639,287
424210	Drugs and Druggists' Sundries Merchant Wholesalers	0–4	3,630	1,367,131

TABLE 3—AVERAGE ANNUAL REVENUE OF SMALLEST OF SMALL ENTITIES—Continued

NAICS code	NAICS code description	Enterprise size (number of employees)	Number of establishments	Average revenue per establishment ($)
424690	Other Chemical and Allied Products Merchant Wholesalers	0–4	3,352	2,007,996
445110	Supermarkets and Other Grocery (except Convenience) Stores	0–4	23,710	453,787
446110	Pharmacies and Drug Stores	0–4	6,360	1,069,655
452112	Discount Department Stores	0–4	6	266,167
452910	Warehouse Clubs and Supercenters	0–4	12	326,333
541380	Testing Laboratories	0–4	2,415	297,737
541712	Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology).	0–4	5,013	427,790
541940	Veterinary Services	0–4	8,881	292,166
561612	Security Guards and Patrol Services	0–4	2,162	114,198
5621	Waste Collection	0–4	3,853	365,902
5622	Waste Treatment and Disposal	0–4	616	461,159
611310	Colleges, Universities, and Professional Schools	0–4	372	913,078
621111	Offices of Physicians (except Mental Health Specialists)	0–4	95,648	447,715
621112	Offices of Physicians, Mental Health Specialists	0–4	8,980	253,837
621210	Offices of Dentists	0–4	50,781	330,868
621320	Offices of Optometrists	0–4	10,939	269,348
621330	Offices of Mental Health Practitioners (except Physicians)	0–4	16,149	145,005
621391	Offices of Podiatrists	0–4	5,300	288,546
621420	Outpatient Mental Health and Substance Abuse Centers	0–4	1,810	211,249
621491	HMO Medical Centers	*5–9	16	620,188
621493	Freestanding Ambulatory Surgical and Emergency Centers	0–4	1,011	549,974
622110	General Medical and Surgical Hospitals	0–4	39	10,621,308
622210	Psychiatric and Substance Abuse Hospitals	*20–99	27	5,142,444
622310	Specialty (except Psychiatric and Substance Abuse) Hospitals	0–4	21	8,561,238

*The revenue figure for the smallest size category is unavailable. The revenue figure for the smallest size category with available revenue figure is used.

There are no new costs associated with this proposed rule. The labor burden to submit an application is estimated to be the same for electronic and paper submissions. No special software is needed to complete an online application via DEA's public website. Furthermore, all applicants, including the estimated 0.7 percent of applicants using paper forms, are assumed to be able to access the internet without incurring additional costs. DEA believes using email for contact is indicative of having internet access. Although the applicant's contact email address is an optional field on a paper registration application, virtually all applications submitted include contact email addresses.[13] Although online applications are available at no additional cost, DEA acknowledges some applicants have a preference for paper forms. DEA does not have a basis to quantify this preference; however, DEA believes any costs associated with eliminating this preference is offset by the qualitative cost savings discussion below.

DEA anticipates there will be cost savings associated with electronic submissions. Some cost savings are described qualitatively and some are quantified. Many paper applications submitted contain illegible or erroneous information or omit required information. Many such errors or omissions, such as not including a signature or paying the wrong amount, require DEA to contact applicants to correct or clarify the information in the paper form, consuming DEA's and the applicant's time and resources. Electronic submissions are expected to virtually eliminate the requirement for DEA to contact applicants for clarifications of form data or correction of submission errors, as validation features in the system will flag common errors prior to transmission. As DEA has not tracked the number of delays or the duration of such delays, DEA does not have a basis to quantify the cost savings.

Furthermore, this proposed rule would eliminate the need to print paper forms and transmit by mail or courier service. DEA estimates there will be a cost savings of $0.63 ($0.55 for postage plus $0.08 for an envelope) per each paper form not submitted. DEA assumes the cost savings associated with eliminating printing costs is negligible.

Therefore, this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

In accordance with the Unfunded Mandates Reform Act of 1995 (UMRA),[14] DEA has determined that this action would not result in any Federal mandate that may result ''in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year.'' Therefore, neither a Small Government Agency Plan nor any other action is required under the UMRA.

Paperwork Reduction Act

This proposed rule would modify existing collection(s) of information requirement under the Paperwork Reduction Act (PRA).[15] Pursuant to the PRA,[16] DEA has identified the collections of information below related to this proposed rule. A person is not required to respond to a collection of information unless it displays a valid OMB control number.[17]

[13] Based on a review of applications submitted from January 2020 to March 2020, there were 307 applications for initial registrations submitted using the paper form. Six of those 307 applications did not contain a contact email address. Including the online applications, six of 30,509 applications for new registrations over the three month period, January-March 2020, did not contain email addresses.

[14] 2 U.S.C. 1501, *et seq.*

[15] 44 U.S.C. 3501–3521.

[16] 44 U.S.C. 3507(d).

[17] Copies of existing information collections approved by OMB may be obtained at *http://www.reginfo.gov/public/do/PRAMain.*

A. Collections of Information Associated With the Proposed Rule

1. Title: Application for Registration-DEA 224, Application of Registration Renewal-DEA 224A.

OMB Control Number: 1117–0014.

Form Number: DEA–224/224a.

DEA is proposing to amend its regulations for all new and renewal registration applications to implement the requirement of online submission through the DEA Diversion Control Division website. This amendment would improve the submission process by aligning it with the Administration's current requirements for other online form submissions. The online submission of DEA Forms 224/224a by a Retail Pharmacy, Hospital/Clinic, Practitioner, Teaching Institution, or Mid-Level Practitioner would be filed with DEA through the DEA Diversion Control Division secure network (available on the DEA Diversion Control Division website). The online submission of new and renewal applications through the secure database will ensure the Administration's receipt of applications in a more timely and organized manner.

DEA estimates the following number of respondents and burden associated with this collection of information:

- *Number of respondents:* 617,086.
- *Frequency of response:* 1.
- *Number of responses:* 617,086.
- *Burden per response:* 0.202186 [18]
- *Total annual hour burden:* 124,766.

2. *Title:* Application for Registration (DEA Form 225); Application for Registration Renewal (DEA Form 225a); Affidavit for Chain Renewal (DEA Form 225B).

OMB Control Number: 1117–0012.

Form Number: DEA–225/225(A).

DEA is proposing to amend its regulations for all new and renewal registration applications to implement the requirement of electronic only submission. This amendment would clarify the submission process by aligning it with the Administration's current requirements for other online form submissions. The online submission of DEA Forms 225/225a by Manufacturer, Distributor, Researcher, Canine Handler, Analytical Laboratory, Importer, or Exporter would be filed with DEA through the DEA Diversion Control Diversion secure network (available on the DEA Diversion Control Division website). The online submission of new and renewal applications through the secure database will ensure the Administration's receipt of applications in a more timely and organized manner.

DEA estimates the following number of respondents and burden associated with this collection of information:

- Number of respondents: 16,338
- Frequency of response: 1
- Number of responses: 16,338
- Burden per response (hour): 0.199106 [19]
- Total annual hour burden: 3,253

3. *Title:* Application for Registration (DEA Form 363) and Application for Registration Renewal (DEA Form 363a).

OMB Control Number: 1117–0015.

Form Number: DEA–363/363a.

DEA is proposing to amend its regulations for all new and renewal registration applications to implement the requirement of online submission. This amendment would clarify the submission process by aligning it with the Administration's current requirements for other online form submissions. The electronic submission of DEA Forms 363/363a by a Narcotic Treatment Program would be filed with DEA through the DEA Diversion Control Diversion secure network (available on the DEA Diversion Control Division website). The online submission of new and renewal applications through the secure database will ensure the Administration's receipt of applications in a more timely and organized manner.

DEA estimates the following number of respondents and burden associated with this collection of information:

- *Number of respondents:* 1,900
- *Frequency of response:* 1
- *Number of responses:* 1,900
- Burden per response: 0.187895 [20]
- Total annual hour burden: 357

4. *Title:* Application for Registration Under Domestic Chemical Diversion Control Act of 1993 and Renewal Application for Registration under Domestic Chemical Diversion Control Act of 1993.

OMB Control Number: 1117–0031.

Form Number: DEA 510/510a.

DEA is proposing to amend its regulations for all new and renewal registration applications to implement the requirement of online submission. This amendment would clarify the submission process by aligning it with the Administration's current requirements for other form submissions. The electronic submission of DEA Forms 510/510a by a Domestic Chemical Handler would be filed with DEA through the DEA Diversion Control Diversion secure network (available on the DEA Diversion Control Division website). The online submission of new and renewal applications through the secure database will ensure the Administration's receipt of applications in a more timely and organized manner.

DEA estimates the following number of respondents and burden associated with this collection of information:

- *Number of respondents:* 1,001
- *Frequency of response:* 1
- *Number of responses:* 1,001
- *Burden per response (hour):* 0.182817 [21]
- *Total annual hour burden:* 183

B. Request for Comments Regarding the Proposed Collections of Information

Written comments and suggestions from the public and affected entities concerning the proposed collections of information are encouraged. Under the PRA, DEA is required to provide a notice regarding the proposed collections of information in the FR with the notice of proposed rulemaking and solicit public comment. Pursuant to the PRA,[22] DEA solicits comments on the following issues:

- Whether the proposed collection of information is necessary for the proper performance of the functions of DEA, including whether the information will have practical utility.
- The accuracy of DEA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Recommendations to enhance the quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

All comments concerning collections of information under the PRA must be submitted to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for the Department of Justice, Washington, DC 20503. Please state that your comments refer to RIN 1117–0014, 1117–0012, 1117–0015, or 1117–0031/Docket No. DEA–587. All comments must be submitted to OMB on or before March 8, 2021. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposed rule.

[18] Calculated based on total annual hour burden and the number of respondents (124,766/617,086 = 0.202186).

[19] Calculated based on total annual hour burden and the number of respondents (3,253/16,338 = 0.199106).

[20] Calculated based on total annual hour burden and the number of respondents (357/1,900 = 0.187895).

[21] Calculated based on total annual hour burden and the number of respondents (183/1,001 = 0.182817).

[22] 44 U.S.C. 3506(c)(2).

If you need a copy of the proposed information collection instrument(s) with instructions or additional information, please contact the Regulatory Drafting and Policy Support Section (DPW), Diversion Control Division, Drug Enforcement Administration; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152; Telephone: (571) 362–3261.

List of Subjects

21 CFR Part 1301

Administrative practice and procedure, Drug traffic control, Security measures.

21 CFR Part 1309

Administrative practice and procedure, Drug traffic control, Exports, Imports, Security measures.

21 CFR Part 1321

Administrative practice and procedure.

For the reasons stated in the preamble, DEA proposes to amend 21 CFR parts 1301 and 1309 as follows:

PART 1301—REGISTRATION OF MANUFACTURERS, DISTRIBUTORS, AND DISPENSERS OF CONTROLLED SUBSTANCES

■ 1. The authority citation for part 1301 continues to read as follows:

Authority: 21 U.S.C. 821, 822, 823, 824, 831, 871(b), 875, 877, 886a, 951, 952, 956, 957, 958, 965 unless otherwise noted.

■ 2. In § 1301.13, revise paragraphs (e)(2) and (3) to read as follows:

§ 1301.13 Application for registration; time for application; expiration date; registration for independent activities; application forms, fees, contents and signature; coincident activities.

* * * * *

(e) * * *

(2) DEA Forms 224, 225, and 363 may be obtained online at *www.DEAdiversion.usdoj.gov.* Only applications submitted online through the secure application portal on DEA's website will be accepted for processing.

(3) DEA will send renewal notifications via email to registrants approximately 60 days prior to their registration expiration date. Registrants are responsible for keeping their email address current in the secure application portal on DEA's website throughout the duration of their registration. DEA Forms 224a, 225a, and 363a may be obtained online at *www.DEAdiversion.usdoj.gov.* Only applications submitted online through the secure application portal on DEA's website will be accepted for processing.

* * * * *

■ 3. Amend § 1301.14 by:

■ a. Revising paragraph (a);

■ b. Removing paragraph (b);

■ c. Redesignating paragraphs (c) and (d) as paragraphs (b) and (c); and

■ d. Revising newly redesignated paragraph (b).

The revisions read as follows:

§ 1301.14 Filing of application; acceptance for filing; defective applications.

(a) All applications for registration shall be submitted for filing online using the secure application portal at *www.DEAdiversion.usdoj.gov.*

(b) Application submitted for filing are dated by the system upon receipt. If found to be complete, the application will be accepted for filing. Applications failing to comply with the requirements of this part will be rejected by the system, with the applicate receiving error messages at the time of application.

* * * * *

PART 1309—REGISTRATION OF MANUFACTURERS, DISTRIBUTORS, IMPORTERS AND EXPORTERS OF LIST I CHEMICALS

■ 4. The authority citation for part 1309 continues to read as follows:

Authority: 21 U.S.C. 802, 821, 822, 823, 824, 830, 871(b), 875, 877, 886a, 952, 953, 957, 958.

■ 5. Revise § 1309.12 to read as follows:

§ 1309.12 Time and method of payment; refund.

(a) For each application for registration or reregistration to manufacture, distribute, import, or export the applicant shall pay the fee when the application for registration or reregistration is submitted for filing online using the secure application portal at *www.DEAdiversion.usdoj.gov.*

(b) Payment shall be made online by credit card at the time of submission using the secure application portal at *www.DEAdiversion.usdoj.gov.*

■ 6. In § 1309.32, revise paragraphs (a) through (c) to read as follows:

§ 1309.32 Application forms; contents; signature.

(a) Any person who is required to be registered pursuant to § 1309.21 and is not so registered, shall apply on DEA Form 510 using the secure application portal at *www.DEAdiversion.usdoj.gov.*

(b) Any person who is registered pursuant to Section 1309.21, shall apply for reregistration on DEA Form 510a using the secure application portal at *www.DEAdiversion.usdoj.gov.*

(c) DEA Forms 510 and 510a may be obtained online at *www.DEAdiversion.usdoj.gov.* DEA will send renewal notifications via email to registrants approximately 60 days prior to their registration expiration date. Registrants are responsible for keeping their email address current in the secure application portal on DEA's website throughout the duration of their registration. Only applications submitted online through the secure application portal on DEA's website will be accepted for processing.

* * * * *

■ 7. Revise § 1309.33 to read as follows:

§ 1309.33 Filing of application; joint filings.

All applications for registration shall be submitted online at *www.DEAdiversion.usdoj.gov* for filing. The appropriate registration fee and any required attachments must accompany the application.

■ 8. Amend § 1309.34 by revising paragraph (a) to read as follows:

§ 1309.34 Acceptance for filing; defective applications.

(a) Applications submitted for filing are dated upon receipt. If the application is found to be complete, the application will be accepted for filing. Applications failing to comply with the requirements of this part will not be accepted for filing.

* * * * *

PART 1321—DEA MAILING ADDRESSES

■ 9. The authority citation for part 1321 continues to read as follows:

Authority: 21 U.S.C. 871(b).

■ 10. Amend § 1321.01 by revising the table heading and the entry under ''DEA Registration Section'' to read as follows:

§ 1321.01 DEA mailing addresses.

* * * * *

TABLE 1 TO § 1321.01—DEA MAILING ADDRESSES

Code of Federal Regulations Section—Topic	DEA mailing address
* * * * * * *	
DEA Registration Section	
1301.03—Procedures information request (controlled substances registration). 1301.18(c)—Research project controlled substance increase request ... 1301.51—Controlled substances registration modification request ..... 1301.52(b)—Controlled substances registration transfer request. 1301.52(c)—Controlled substances registration discontinuance of business activities notification. 1309.03—List I chemicals registration procedures information request. 1309.61—List I chemicals registration modification request.	Drug Enforcement Administration, Attn: Registration Section/DRR, P.O. Box 2639, Springfield, VA 22152.
* * * * * * *	

* * * * *

Timothy J. Shea,

Acting Administrator.

[FR Doc. 2020–28532 Filed 1–6–21; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 15

Office of the Secretary

43 CFR Part 30

[212A2100DD/AAKC001030/A0A501010.999900 253G]

RIN 1094–AA55

American Indian Probate Regulations

AGENCY: Bureau of Indian Affairs, Office of the Secretary, Interior.

ACTION: Proposed rule.

SUMMARY: The Department of the Interior (Department) is updating regulations governing probate of property that the United States holds in trust or restricted status for American Indians. Since the regulations were last revised in 2008, the Department identified opportunities for improving the probate process. These proposed revisions would allow the Office of Hearings and Appeals (OHA) to adjudicate probate cases more efficiently by, among other things, establishing an expedited process for small, funds-only estates, reorganizing the purchase-at-probate process so that estates may be closed more quickly, streamlining notice to co-owners who are potential heirs while adding electronic notice to all by website posting, and specifying which reasons justify reopening of closed probate estates. The proposed revisions would also enhance OHA's processing by adding certainty as to how estates should be distributed when certain circumstances arise that are not addressed in the statute.

DATES: Submit written comments by March 8, 2021. A Tribal consultation session will be held on February 9, 2021, at 2 p.m. Eastern Time and a public hearing will be held on February 11, 2021, at 2 p.m. Eastern Time (see Section V in the **SUPPLEMENTARY INFORMATION** for details).

ADDRESSES: You may submit comments by any one of the following methods:

- *Federal Rulemaking Portal: www.regulations.gov.* The rule is listed under Agency Docket Number DOI–2019–0001.
- *Email:* Tribes may email comments to: *consultation@bia.gov.* All others should email their comments to: *comments@bia.gov.*
- *Mail or Courier:* Ms. Elizabeth Appel, Office of Regulatory Affairs & Collaborative Action, U.S. Department of the Interior, 1849 C Street NW, Mail Stop 4660 MIB, Washington, DC 20240.

We cannot ensure that comments received after the close of the comment period (see **DATES**) will be included in the docket for this rulemaking and considered. Comments sent to an address other than those listed above will not be included in the docket for this rulemaking. Locations of the Tribal consultation session and public hearing are listed in Section V of this rule.

FOR FURTHER INFORMATION CONTACT: Elizabeth K. Appel, Director, Office of Regulatory Affairs & Collaborative Action—Indian Affairs, *Elizabeth.appel@bia.gov,* (202) 273–4680.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

This proposed rule would update regulations that address how OHA probates property that the United States holds in trust or restricted status for American Indians. In October 2019, the Department sought input on a number of issues in the existing probate regulations through an advance notice of proposed rulemaking (ANPRM). 84 FR 58353 (October 31, 2019). The Department reviewed and considered the input and developed this proposed rule to improve the probate process. These proposed revisions would allow OHA to adjudicate probate cases more efficiently by, among other things, establishing an expedited process for small, funds-only estates, reorganizing the purchase-at-probate process so that estates may be closed more quickly, streamlining notice to co-owners who are potential heirs, and specifying which reasons justify reopening of closed probate estates. The proposed revisions would also enhance OHA's processing by adding certainty as to how estates should be distributed when certain circumstances arise that are not addressed in the statute.

II. Background

The Department probates thousands of estates each year for American Indian individuals who own trust or restricted property. The Bureau of Indian Affairs (BIA), OHA, and the Office of the Special Trustee for American Indians (OST) each play a role in the probate process. BIA compiles the information necessary to build a case record (*i.e.,* the probate file) and then transfers the record to OHA for a judge to adjudicate and issue a final probate decision. In accordance with the final probate decision, OST distributes trust funds from the estate and BIA distributes the trust or restricted real property.

After the American Indian Probate Reform Act (AIPRA) was enacted in 2004, the Department codified implementing regulations at 25 CFR part 15 for the BIA and OST portions of the probate process and at 43 CFR part 30 for the OHA adjudication process. 73 FR 67255 (November 13, 2008); 76 FR 45198 (July 28, 2011). In 2016 and 2017, BIA reached out to Tribes for input on how the probate process was working, hosting a Tribal listening session in Spokane, Washington, on June 27, 2016, hosting two Tribal consultation teleconference sessions on July 12 and 13, 2016, and accepting written comment through January 4, 2017. More recently, in an effort to streamline the process and benefit Indian heirs and devisees, the Department identified current issues in the existing regulations and sought input, through an advance notice of proposed rulemaking (ANPRM), on where improvements may be made through regulatory change. 84 FR 58353 (October 31, 2019). The Department received six comment submissions in response to the ANPRM and addresses them, issue by issue, in Section III. Section III also discusses how the proposed rule addresses issues identified in the ANPRM. Through the process of evaluating the responses and further examining the current regulations, the Department identified additional changes that could improve current processes, which the proposed rule also incorporates. Section IV provides an overview of all the changes this proposed rule would make to the current regulations.

III. Proposed Resolution to Issues Identified in ANPRM and Response to Comments on the ANPRM

A. Issue 1: Gaps in AIPRA Intestacy Distribution

AIPRA sets out how a decedent's estate should be distributed when a decedent dies without a will (*i.e.,* intestate) at 25 U.S.C. 2206(a), but fails to account for how trust personalty (including trust funds) should be distributed under two circumstances when there are no eligible family heirs under AIPRA: (1) The estate contains trust personalty but no trust real property; and (2) more than one Tribe has jurisdiction over trust real property in the estate. No comments were received on this issue in response to the ANPRM. The proposed rule addresses this issue by adding a new § 30.507 to clarify how trust personalty is distributed in these circumstances.

B. Issue 2: Overly Burdensome ''Purchase at Probate'' Process

AIPRA authorizes certain ''eligible purchasers'' to purchase trust and restricted interests in a parcel of land in the decedent's estate under certain circumstances. *See* 25 U.S.C 2206(o). The current regulations set out this ''purchase at probate'' process at 43 CFR part 30, subpart G, but the process has proven to be unwieldy because it requires the estate to be kept open indefinitely during the purchase at probate process and requires completion of the purchase at probate before issuing the final probate decision. This in turn requires OHA to make provisional determinations of heirs or devisees (creating the possibility of having to re-do the already-lengthy process). The proposed rule addresses this issue by overhauling the purchase at probate process in a manner that eliminates the need to keep probate cases open while providing certainty as to who the heirs and devisees are and what interests they have consented to selling before proceeding with the purchase at probate.

The Department received comments on two aspects of the purchase at probate issue, as follows:

1. Notice to Co-Owners of a Purchase at Probate

Current regulations provide that OHA will provide notice that it has received a written request to purchase at probate to certain parties by mail, and other parties by posting. *See* § 30.165. Co-owners of property in the estate are eligible purchasers, and under the current regulations, receive notice of a request to purchase at probate through a posted notice. The ANPRM suggested instead requiring notice of a request to purchase at probate by mail to any co-owners who have submitted prior notice to the BIA that they want to receive notice of probates involving specified allotments.

The proposed rule's approach to purchase at probate requires OHA to provide notice of a pending purchase request in the probate decision. *See* proposed § 30.408. The current regulations include a provision requiring OHA to mail or deliver notice of the probate decision to interested parties. *See* § 30.237. That provision is unchanged by the proposed rule, so interested parties will receive notice of the purchase at probate request in the probate decision; however, the proposed rule revises the definition of ''interested party'' to exclude anyone who may or will inherit solely as a co-owner of an allotment. *See* proposed § 30.101. Another proposed revision allows anyone who may or will inherit solely as a co-owner of an allotment to obtain notice by filing a request for such notice with regard to any allotment they identify. *See* proposed § 30.114

The proposed rule would also eliminate posting of notices of purchase requests because posting adds significant time to the purchase process, while resulting in few, if any, co-owner requests to purchase. (Note, however, that notices of the hearing are still posted, so any interested co-owner may choose to participate in the hearing). The revisions would work to reserve notice to co-owners only for situations in which a co-owner has requested to receive notice, while continuing to meet due process requirements and reducing complexities in the probate process.

Comment: The revision would eliminate the right of eligible purchasers

(co-owners) to notice when OHA receives a request to purchase at probate and would place the onus on the co-owners to provide notice that they wish to be told of purchase offers.

Response: Co-owners may purchase interests in the allotment at any time: Before probate (with the consent of the interest owner), during probate (through purchase at probate, only if consent is given by the heir or devisee who would otherwise inherit the interest and all requirements are met to permit a judge to approve the purchase at probate), or after probate (with the consent of the new interest owner). Given that the co-owner may purchase interests in the allotment at any time, and must always obtain the consent of another party to do so, removing notice by posting of another purchase offer during probate does not harm the co-owner in any way. If the co-owner would like to receive notice of a purchase at probate offer on the allotment, the co-owner may request such notice and receive it directly, by mail.

Comment: OHA must be required to notify co-owners by mail of an open period for registering their desire to be notified of a purchase at probate offer.

Response: Establishing an open period for registering a desire to be notified would unnecessarily limit the time for co-owners to state their desire to be notified. At any time, co-owners may request to be notified in writing in the event any request to purchase is submitted for the property. Additionally, requiring notification to co-owners by mail of an open period for registering their desire to be notified of a purchase at probate offer would make the process less, rather than more, efficient.

2. Elimination of Purchase at Probate of Minerals-Only Interests

Allotments contain both surface interests and minerals interests. In some circumstances, the surface interests and minerals interests have been severed from each other. As a result, a decedent's estate may contain real property interests that are referred to as ''minerals-only'' interests. Purchasers sometimes seek to purchase those minerals-only interests from the estate. The current probate regulations state that fair market value will be determined by an appraisal or valuation method developed by the Secretary. *See* § 30.264. The Department is able to provide the fair market value of a real property interest only via an appraisal. The Department is unable to perform appraisals for minerals-only interests at this time.

Comment: Elimination of purchase at probate of mineral interests-only interests is adverse to and limits the rights of Tribes. Consult with Tribes and explain why valuation does not provide fair market value of minerals-only interest and why the ''OVS valuation'' cannot be the basis for an appraisal. Instead of eliminating purchase at probate, regulations could address whatever issues may have been identified with the OVS–DME valuations.

Response: There is no statutory requirement for approval of a purchase at probate or providing anyone with a right to purchase at probate; rather, a judge decides in any given case whether to allow a purchase at probate. In cases where a judge decides to allow a purchase at probate, the statute requires that the judge ensure the purchase is for at least fair market value. In cases in which the mineral and surface estates are not separated, appraisals of the combined surface and mineral estate are relied upon for fair market value. In cases where there is no surface estate, the ''OVS valuations'' do not reflect the fair market value of the real property. Those valuations nearly always estimate the minerals-only interests at zero dollars; therefore, the proposed rule would provide that no interest of a minerals-only property may be purchased at probate on the basis of the value of the minerals themselves. The proposed rule does not entirely foreclose the opportunity to purchase a minerals-only interest at probate, however. The proposed rule would provide that purchase of a minerals-only real property interest may be considered for purchase at probate if sufficient evidence of the fair market value of the real property interest (rather than the value of the minerals themselves) is submitted.

C. Issue 3: Notice to Co-Owners Who Are Potential Heirs

The current regulations require OHA to provide all interested parties—including co-owners, when they are potential heirs—with mailed notice of probate proceedings. *See* § 30.114. Co-owners may be potential heirs in one circumstance: If a decedent dies without any eligible person heirs as listed in AIPRA's order of succession, and there is no Tribe with jurisdiction over the allotment, then a surviving co-owner of a trust or restricted interest in the allotment may potentially be an ''heir'' of last resort. The ANPRM suggested revising the regulations to state that potential heirs who may inherit solely based on their status as co-owners will not receive mailed notice of a probate proceeding, unless they have previously filed a request for notice with BIA or OHA. This proposed rule includes that provision at § 30.114 and provides that public notice will continue to be posted.

Comment: Owners are entitled to due process in the form of notice sent by first class mail, but the ANPRM would instead require potential heirs to notify BIA of their wish to be notified when they become a potential heir.

Response: This comment suggests a concern that a co-owner may be deprived of an opportunity to testify at hearing about his/her right to receive a share of the decedent's estate if the co-owner does not receive notice of the hearing by mail. Co-owners are only potential heirs in the circumstance in which there are no eligible family heirs and no Tribe with jurisdiction. Co-owners rarely know the decedent or decedent's family and therefore rarely have information to assist the judge with the determination of heirs. The only relevant testimony of most co-owners would involve the legal question as to whether a Tribe has jurisdiction over property. If a co-owner has the resources to develop and present a legal argument as to whether a Tribe has jurisdiction over a property, it should not be a burden on that co-owner to take the step of notifying the BIA of a desire to be notified by mail of probates involving the property. Additionally, the proposed rule provides that notice will be posted on OHA's website, and still provides for physical posting of notice of a probate hearing, unless physical posting was not possible due to one of the listed circumstances.

Comment: The proposed change could result in unconstitutional takings and extinguishes the fiduciary responsibility of the Department to co-owners.

Response: Providing notice of a probate hearing through posting in lieu of mailing does not result in any takings because the co-owner is not at risk of losing any property interest. While the co-owner has an ownership interest in the allotment, the co-owner does not own the specific fractional property interest being probated. If the co-owner will be inheriting a share of that property interest (as the only eligible heir because there are no other heirs and there is not a Tribe with jurisdiction over the allotment), then the co-owner will receive the interest through the inheritance. A co-owner may have the option to purchase the interest—something co-owners are free to pursue at any time outside of the probate context—or the fractional interest the co-owner already owns may slightly increase. There are limited situations in

which co-owners may be considered potential heirs at the start of a case, but the property interest being probated ends up being distributed to another person or entity. For example, a will may be submitted at the hearing, a person may credibly claim to be the decedent's child and heir, or the judge may rule that a Tribe does in fact have jurisdiction over an off-reservation allotment. In those situations, the judge retains the discretion, on a case-by-case basis, to mail notices and decisions to all affected co-owners. For these reasons, the proposed rule continues to take the approach of notifying most co-owners by posting, rather than mail. (For other changes to posting in general, please see Section IV.A. ''Summary of Proposed Changes'' below). If concerns remain about notice to co-owners, the Department requests additional information to identify the concern underlying this comment, given that the co-owner will not be losing any rights.

D. Issue 4: Insufficient Trust Funds for Funeral Services

The current regulations allow whoever is responsible for making the funeral arrangements on behalf of the decedent's family to obtain up to $1,000 from the decedent's Individual Indian Money (IIM) account to pay for funeral services. *See* 25 CFR 15.301. Due to the passage of time, this amount has proven to be insufficient. In addition, the current regulations require a balance of at least $2,500 in the decedent's IIM account at the date of death in order for individuals to request the $1,000 distribution. The Department sought, but did not receive, comments on this ANPRM issue. The proposed rule would allow individuals to request up to $5,000 from the decedent's IIM account to pay for funeral services and would eliminate the requirement for the IIM account to have a specific balance as of the date of death. This change would recognize the increase in the cost of funeral services since the $1,000 limit was put in place, and would help to ensure that family members are able to pay such costs immediately.

E. Issue 5: No Regulatory Process for Exercise of ''Tribal Purchase'' Option

The ANPRM highlighted that there are currently no regulatory provisions implementing the AIPRA authority for a Tribe with jurisdiction to purchase an interest in trust or restricted land if the owner of the interest devises it to a non-Indian. *See* 25 U.S.C. 2205(c)(1)(A). The Department did not receive any comments on this section, and is not addressing it in this proposed rule, but plans to a consider addressing it in a future rulemaking.

F. Issue 6: Minor Estate Inventory Corrections

At times, BIA determines after a probate decision has been issued that trust or restricted property belonging to a decedent was either omitted from, or incorrectly included in, the inventory of an estate. Under the current regulations, such circumstances require multiple orders, including a modification order, from a judge. The current regulations also require that the modification order be appealable to the Interior Board of Indian Appeals (IBIA). As a result, it can take significant time to make minor estate inventory corrections to include omitted property.

The ANPRM suggested certain revisions to improve probate process efficiency and reduce the amount of time for corrections of estate inventories, by authorizing BIA to make minor estate inventory corrections or to streamline the process that OHA follows before issuing an inventory modification order. One such streamlining measure could involve an heir or devisee being allowed to—prior to the exercise of an IBIA appeal option—request that an OHA judge reconsider a modification order, thus reducing the number of cases that might result in such an IBIA appeal.

Comment: Do not allow BIA to make inventory corrections because the current regulations protect rights that were adjudicated through the original probate and the finality of a probate decision provides clarity and certainty. This change could result in a significant increase of OHA caseload as eligible parties appeal erroneous or conflicted decisions. It would be impossible to ensure equal standing for co-owners seeking redress from unilateral modifications. Also, ''minor'' and ''corrections'' are undefined, and any corrections must be treated as a rehearing or reopening subject to advance notice to existing co-owners, and no administrative action (*e.g.,* distributing revenue to prospective new co-owner) should be imposed by the agency pending final appeal decision..

Response: The proposed rule addresses the concerns expressed in the comments about BIA making inventory corrections by allowing BIA to petition OHA for a distribution order, but leaving the decision as to whether and how changes to an estate inventory affect distribution to the judge. The proposed rule would add a new section that specifically addresses typographical and other non-substantive errors for correction by OHA. *See* proposed § 30.250. Proposed revisions also address how OHA may direct distribution of property that BIA identifies as belonging to an estate after a probate decision is issued, and how OHA may address property that BIA identifies as having been incorrectly included in an estate. Anyone who is adversely affected may challenge the OHA distribution order by filing an appeal through a reconsideration process, which is designed to be more expeditious than an appeal to IBIA. *See* proposed §§ 30.251–30.253.

G. Issue 7: Judicial Authority

The ANPRM suggested adding provisions to the regulations to explicitly allow the OHA judge to order both medical records and vital records from State and local entities as needed, and to issue interrogatories in cases involving will contests.

Comment: Judges should be provided additional discovery powers to obtain basic facts about the cases.

Response: The Department has determined that a more comprehensive overhaul of judicial authority is required, and will consider addressing these issues in a future rulemaking.

H. Issue 8: Indian Status Determinations

Under current probate regulations, a probate decision must determine the Indian status of every heir or devisee. But a determination of Indian status is often not necessary for a probate decision to be made. The ANPRM would require the probate decisions to determine the Indian status of an heir or devisee only when such a determination is necessary; for example, the determination of Indian status may be necessary in AIPRA cases involving a will and where the devisee is not a lineal descendant of the decedent.

Comment: Require an Indian status determination only for those individuals who stand to inherit as an heir or devisee.

Response: The proposed rule would limit determinations of Indian status to those situations where such determinations are necessary for a probate decision to be made.

I. Issue 9: Increase Opportunities To Use ''Renunciation'' To Maintain Trust Status of Property

The current regulations allow an heir or devisee to renounce an inherited or devised interest in trust or restricted property, but provide that the renunciation must take place before the probate decision is made. (See 43 CFR part 30, subpart H). Once a probate decision is made, renunciation is not allowed. The current regulations allow

petitions for rehearing to be filed within 30 days of a probate decision being made but fail to list renunciation among the bases for which an OHA judge may grant a rehearing. The ANPRM noted that, where renunciations are available at later stages, such as during a rehearing, then individuals could renounce to prevent property from going out of trust. The Department did not receive any comments on this issue. The proposed rule revises the renunciation provisions to allow for renunciations at three additional times after the issuance of a probate decision: Within 30 days from the mailing date of the decision; before the entry of an order on rehearing, if a petition for rehearing is pending; or within 30 days of the mailing date of the distribution order that provides the heir or devisee with additional property.

J. Issue 10: Presumption of Death

The probate process authorizes OHA—in some circumstances—to determine whether a person is deceased. Proof of death is not always available. To facilitate the decision-making process, the current regulations allow OHA to apply a presumption of death. The current rule is that such a presumption may be made if there has been no contact with the absent person for the last six years, dating back from the time of the *hearing.* The hearing does not always occur until well after a probate file is sent by BIA to OHA, so the ANPRM suggested revising the provisions in 43 CFR 30.124(b)(2), keeping the six-year rule but having it date back from the last date of known contact with the absent person. As needed for practicality, these revisions could include exceptions and/or rules about what ''known contact'' entails and/or how ''known contact'' is shown.

Comment: Exclude word-of-mouth and social media postings from acceptable forms of contact, and limit to tamper-proof forms of written or timestamped recorded media that conform to requirement for ''clear and convincing evidence'' found at 43 CFR 30.124.

Response: The proposed rule does not exclude word-of-mouth and social media postings or otherwise limit what evidence of contact can be presented because it is the judge's role to weigh the evidence and determine its credibility, as the judge would with any other evidence. The proposed rule lists specific evidence that will allow a judge to presume that a missing person has died and presume the date of death, including specific evidence showing that the person has been absent for at least 6 years. The proposed rule also specifies that the presumption may be rebutted by evidence that establishes that the person is still alive or explains the individual's absence in a manner consistent with continued life rather than death.

K. Issue 11: Reopening Closed Probate Cases

In separate areas of the current regulations, a party may file a petition for rehearing or a petition for reopening (*see* 43 CFR 30.240 and 30.125). A petition for rehearing must be filed within 30 days of the probate decision and the requirements for presenting new evidence are specifically laid out. Petitions for reopening may be filed much later with few limitations on the reasons for a reopening. The ANPRM suggested revising the current regulations to: (1) Limit the ability of a party who did not use the opportunity to participate in an initial probate proceeding to later file a petition for reopening; and (2) in both rehearing and reopening proceedings, make clear the circumstances under which new evidence may be presented.

Comment: Limit the number of times an interested party or BIA may petition for reopening.

Response: The proposed rule includes limits on re-petitioning to ensure finality of probate proceedings.

Comment: Reject limitations on petitions to reopen because individuals fail to participate in probates for legitimate reasons. Probate judges already have discretion to deny petitions to reopen where they see fit.

Response: It is true that probate judges already have discretion to deny petitions to reopen where they see fit, but probate judges will usually deny petitions to reopen where an individual had the opportunity to participate in an initial probate proceeding and failed to avail himself or herself of that opportunity. If the individual received notice of the opportunity to participate in the probate proceeding, it is incumbent upon that individual to participate in the proceeding, notify OHA, or seek a rehearing within 30 days. If, as the commenter notes, the individual had a ''legitimate reason'' for not participating, the individual should contact the court at that time or seek a rehearing within 30 days, rather than wait until after the probate decision has become final. At some point, there needs to be finality in each probate proceeding, and subjecting probate proceedings to being reopened undermines that finality. As such, reopening should be reserved for only the most necessary of circumstances.

Comment: The rules are clear enough, but the agency manipulates or ignores the rules; clarify that the Department may not act on its own volition.

Response: The rules are intended to establish consistency and predictability, but judges have the flexibility to make judgments within the framework of the rules.

L. Issue 12: Streamlining Process for Small Estates

Current regulations require estates with trust property or trust funds in excess of $5,000 to be adjudicated by an OHA decision maker through the formal probate process involving a hearing: a process that can be perceived as disproportionately time consuming for small estates. Current regulations also establish a summary probate process—which allows for disposition of the estate without a formal hearing, by a judge or ADM, based on the probate file alone—if the estate involves only cash of $5,000 or less on the date of death. The ANPRM suggested increasing the scope of estates that are subject to OHA's summary process, which does not require a formal hearing (*see* 43 CFR part 30, subpart I), and/or determine what would be considered a small estate and, for estates within that definition, create a streamlined distribution scheme for such estates.

Comment: Reject the change because eliminating hearings for simple estates would undermine due process.

Response: Eliminating hearings for small estates that include only minimal funds and no land or trust personalty promotes due process by allowing faster resolution of pending probate cases. However, in recognition of this commenter's concern regarding limiting hearings, the proposed rule takes a different approach from that suggested in the ANPRM. Rather than increasing the scope of estates subject to summary probate proceedings as suggested in the ANPRM, the proposed rule limits the estates that are subject to summary probate proceedings by lowering the dollar threshold (from $5,000 to $300), while further streamlining the summary probate process to allow estates to be handled more efficiently in the summary probate process. Like the current regulations, the proposed summary probate process allows for disposition of an estate by a judge or ADM based on the probate file, without a hearing. The proposal further streamlines the process by obviating the need for notice prior to issuance of the probate decision through elimination of the option to convert the proceedings to formal probate proceedings, elimination of consideration of claims against the

estate, and extending the deadline for renouncing to 30 days after the mailing of the probate decision. The probate decision under the proposed rule would then not only set out and explain the distribution, but provide instructions on how to renounce or seek review of the decision. This proposal also promotes due process by providing the opportunity for anyone adversely affected by the decision in a summary to file a request for review, but streamlines the process by allowing for reconsideration rather than de novo review.

Comment: Develop, in consultation with Tribes, a separate process for ''micro estates'' where value to be distributed is $100 or less, so value can be distributed in less than 60 days. Where multiple heirs, allow heirs to relinquish their interests with a one-page notarized attestation.

Response: The proposed rule revises summary probate proceeding provisions to establish an expedited process for small estates consisting only of funds of $300 or less. This threshold amount was identified as a natural dividing point based on data reflecting the amounts of probate estates.

Comment: Object to change based on sense of equal treatment. If changes are made, at a minimum, co-owners and potential heirs should be granted sufficient notice that this provision may be invoked only with an opportunity to object.

Response: As proposed, all interested parties will receive notice of the decision and anyone adversely affected will have the opportunity to seek review.

M. Issue 13: Descent of Off-Reservation Lands

The ANPRM noted that the current regulations do not address the provision of AIPRA regarding descent of interests in trust or restricted lands that are located outside the boundaries of an Indian reservation and are not subject to the jurisdiction of a Tribe. *See* 25 U.S.C. 2206(d)(2). The Department received no comments on this provision and will consider addressing this issue in a future rulemaking.

IV. Overview of Proposed Rule

The Department is proposing revisions to existing regulations that are unclear and/or create uncertainty and may lengthen the time it takes to process probates. The proposed rule aims to streamline probate processes, while providing due process, so that probate cases may be closed and distribution to heirs and devisees may occur more quickly. Closing the probate case sooner allows for distribution of property more quickly and creates certainty in the determination of the heirs and devisees. Each open probate case has the potential to create ripple effects of uncertainty as heirs and devisees become decedents themselves. The Department recognizes both the financial and emotional toll open probate cases take on families and, with this proposed rule, aims to provide certainty for families and future generations more expeditiously.

A. Summary of Proposed Changes

One way in which the proposed rule would accomplish the goal of streamlining the probate process is by overhauling the process and criteria for summary probate proceedings, to establish a process for very small estates: Estates that contain no interests in trust or restricted land and that include only funds (no other trust personalty) of $300 or less. The expedited process for these small estates will allow OHA to adjudicate the cases based on the probate file alone, while allowing anyone adversely affected by the decision a limited time to seek review. Other revisions that will help to expedite resolution of probate cases include:

- A revision so that the judge does not need to determine the status of eligible heirs or devisees as Indian in every probate case, but only those in which that information is necessary;
- A revision to eliminate the need to provide mailed notice to co-owners who would inherit only because of their status as co-owners if there were no eligible family heirs and no Tribe with jurisdiction;
- A new provision allowing OHA to issue a correction order to correct non-substantive and typographical errors without reopening the probate case;
- Revised processes for when it is discovered after issuance of a decision in a probate case that additional property must be added to an estate inventory or that property was incorrectly included in the estate inventory, including a process for challenging these types of decisions through reconsideration rather than appeal to the IBIA;
- Revisions to allow heirs and devisees to renounce their interests at hearings (having their written declarations acknowledged before a judge) and allowing them to renounce not just prior to issuance of the probate decision, but also within 30 days of the decision, upon rehearing, or when additional property is added to the decedent's estate.

The proposed rule also includes revisions to provide that, in addition to mailing notice to heirs and devisees and others listed in § 30.114, OHA will post notice of formal probate proceedings on its website and physically post notice (unless physical posting is not possible due to one of the listed circumstances). It also proposes to eliminate physical posting for a hearing that will not be held in person and proposes to provide better targeted locations for physical posting.

The current rule requires posting at the agency with jurisdiction over the trust or restricted parcels in the estate and at five or more conspicuous places in the vicinity of the designated place of hearing (which is generally located in the area of the identified heirs or devisees). The proposed rule would require OHA to post on its website, allowing notice to be available to all. These changes would accommodate the increased use of telephonic and other alternatives to in-person hearings, which are occurring and are anticipated to continue to occur as a result of technological advances. Posting notice on OHA's website also establishes one location that is available for anyone to access regardless of residency. The proposed rule retains provisions for some physical postings in addition to mailed notice and the website posting. Specifically, the proposed rule allows for physical posting at the home agency and at the agency with jurisdiction over the trust or restricted parcels in the estate, if different from the home agency, but reduces from five to one the number of conspicuous places in the vicinity of the hearing that notice must be physically posted. The proposed rule further clarifies that if there is not an in-person hearing, then the posting in the conspicuous place in the vicinity of the hearing is not required. The proposed rule would also establish that OHA may proceed with a hearing even if physical posting was not possible due to one of the listed circumstances. The Department specifically invites comment on these changes, including:

- Whether physical posting is effective in actually providing notice to potential parties who do not receive mailed notice;
- Whether locations for posting other than the ones presented in the proposed rule would be more effective;
- Whether posting would be more effective using any method(s) other than, or in addition to, those presented in the proposed rule;
- Whether there should be physical postings in more than one conspicuous place in the vicinity of in-person hearings (and if so, how many); and

• Whether OHA should proceed with scheduling a hearing when it is only able to mail notices and post notices on its website, but the physical posting of additional notices is ''not possible'' (*i.e.,* the agency office is closed or inaccessible or extenuating circumstances exist preventing personnel from physically posting) and whether the definition of ''extenuating circumstances'' is appropriate.

The proposed rule would also clarify terminology and state what happens when various eventualities arise, which will help judges decisively address the issues and provide clarity for heirs and devisees throughout the process. For example, the proposed rule would delineate:

• That there is one probate ''decision,'' which results from the summary probate proceeding or formal probate proceeding, and all other written rulings issued by judges are ''orders,'' such as an order on rehearing, an order on reopening, or a distribution order;

• The evidence a judge may rely on to presume that an individual has died and their date of death;

• How a judge will partition an allotment when a will attempts to divide an allotment into two or more distinct portions and devises at least one of those portions;

• Who receives personal, mailed notice of a formal probate proceeding and how public notice is posted;

• Rehearing and reopening processes and how they relate to each other;

• The meanings of joint tenancy and tenants-in-common and how the presumption of joint tenancy and the anti-lapse provision each operate in the determination of heirs and devisees;

• How trust personalty will be distributed when there are no eligible family heirs, and when there are either no land interests in the decedent's estate or there are land interests within the jurisdiction of more than one Tribe.

As mentioned in the prior section, the proposed rule would also overhaul the purchase at probate process. The current purchase at probate provisions are unwieldy in their fit with the formal probate proceedings and result in probate cases being kept open indefinitely while the purchase at probate process, including appraisals/valuations, continues. Additionally, because the current provisions require the purchase at probate to be completed before the probate decision is issued, purchases at probate are completed based on provisional heirs and devisees, which causes uncertainty and increases the chance of having to redo the already-lengthy process. The proposed rule would instead sequence the purchase at probate process to allow the probate to be closed, while the purchase at probate continues, as follows:

• The eligible purchaser may request to purchase at any time before the completion of the first probate hearing (including at the hearing) or within 30 days of the distribution order mailing date, when requesting to purchase property newly added to the inventory.

• If the request is still pending at the time the probate decision is issued and is not denied in the decision, OHA then includes in the probate decision (or reconsideration order if property was added) a list of all the purchase at probate requests that have been submitted, direction to BIA to obtain an appraisal/valuation of the interest, and direction to heirs or devisees on how to consent if they wish to do so. The property is distributed and any property subject to the purchase at probate request is conveyed with an encumbrance.

• If consent is needed for the purchase, BIA holds off on ordering the appraisal/valuation until at least one heir or devisee has filed the written notification that the heir or devisee would consider selling the interest.

• BIA obtains the appraisal/valuation.

• BIA files a Petition to Complete Purchase at Probate, and OHA issues an Order to Submit Bids to all potential bidders that includes the fair market value.

• Anyone who may be affected by the determination of the fair market value may object to the fair market value stated in the Order to Submit Bids by filing a written objection with OHA within 45 days.

• OHA determines whether the bid is successful based on whether the bid was timely, equal to or greater than the fair market value, and, when consent is required for the purchase, the applicable heir, devisee, or surviving spouse accepts the bid.

• OHA notifies parties of the successful bid.

• The successful bidder pays for the interest purchased and the interest transfers.

• Any interested party who is adversely affected by the judge's order to approve or disapprove the purchase at probate may appeal to the IBIA within 30 days of the order.

B. Crosswalk of Current Regulation to Proposed Regulation

The following chart provides a high-level crosswalk of the current regulatory provisions as compared to the proposed provisions. Sections not listed in the ''current'' column are unaffected by this proposed rule.

In 25 CFR part 15:

Current §	Proposed §	Summary of proposed changes
15.202 What items must the agency include in the probate file?.	15.202 What items must the agency include in the probate file?.	Redesignates paragraphs and adds a new paragraph (b) to establish a more limited universe of documents required to be included in estates that will be subject to a summary probate proceeding (*i.e.*, estates with no land and $300 or less in funds). Also adds a new paragraph (a)(16) to address the need for the probate file to include valuation reports in the limited circumstances in which a special statute applies that requires the valuation report.
15.301 May I receive funds from the decedent's IIM account for funeral services?.	15.301 May I receive funds from the decedent's IIM account for funeral services?.	Increases the amount that may be requested and approved for distribution from a decedent's IIM account to pay for funeral expenses from $1,000 to $5,000. Also deletes requirement for the IIM account to contain at least $2,500 and clarifies that funds, if approved, are taken from the balance of the account as of the date of death.
N/A	15.404 What happens if BIA identifies additional property of a decedent after the probate decision is issued?.	New section.

Current §	Proposed §	Summary of proposed changes
N/A	15.405 What happens if BIA identifies that property was incorrectly included in a decedent's inventory?	New section.

In 43 CFR part 30:

Current §	Proposed §	Summary of proposed changes
30.100 How do I use this part?	30.100 How do I use this part?	Updates citations (no substantive change).
30.101 What definitions do I need to know?	30.101 What definitions do I need to know?	Deletes definitions of ''BLM'' and ''de novo review'' because they are no longer used. Revises the definitions of ''ADM'' to delete reference to de novo review, ''decision'' to clarify that there is a single probate decision, ''Indian probate Judge'' to reflect that the judges exercise delegated authority, ''Interested party'' to exclude those who may inherit solely as a co-owner, and ''summary probate proceeding'' to reflect the new approach to these proceedings. Adds definitions for ''distribution order,'' ''extenuating circumstances,'' ''home agency,'' ''joint tenancy,'' ''lineal descendant,'' ''order,'' ''Petition to Complete Purchase at Probate,'' and ''tenants in common.''
30.114 Will I receive notice of the probate proceeding?	30.114 Will I receive notice of the probate proceeding?	Deletes provisions in current paragraph (b) regarding requesting a formal probate proceeding in lieu of a summary probate proceeding because, with the proposed revisions to the summary probate proceeding elsewhere in the proposed rule, this provision is no longer applicable. Revises paragraph (b) to provide that potential heirs who may inherit solely as co-owners of an allotment will not receive actual notice unless they have previously filed a request for notice with BIA or OHA.
30.123 Will the judge determine matters of status and nationality?	30.123 Will the judge determine matters of status and nationality?	Adds ''if relevant'' so that a judge is not required to determine the status of eligible heirs or devisees as Indian if their status is not relevant in the probate case.
30.124 When may a judge make a finding of death?	30.124 When may a judge make a finding of death?	Revises to list specific evidence that will support a presumption that an heir, devisee, or person for whom a probate case has been opened has died and the date of death. Also establishes what evidence will rebut the presumption.
30.125 May a judge reopen a probate case to correct errors and omissions?	30.129 May a judge reopen a probate case to correct errors and omissions?	Redesignated to follow other section on correcting errors in ''Judicial Authority'' subpart. No substantive change.
N/A	30.125 May a judge order that a property interest be partitioned as a result of a devise?	New section.
N/A	30.250 May a correction order be issued to correct typographical and other non-substantive errors?	New section.
30.126 What happens if property was omitted from the inventory of the estate?	30.251 What happens if BIA identifies additional property of a decedent after a decision is issued?	Clarifies what information BIA must provide to OHA in support of the petition to add the property, and provides that the judge will issue a distribution order of the additional property.
30.127 What happens if property was improperly included in the inventory?	30.252 What happens if BIA identifies that property was incorrectly included in a decedent's inventory?	Clarifies what information BIA must provide to OHA in support of the petition to remove the property, and provides that the judge will issue a distribution order that addresses any modifications to the distribution of the decedent's property resulting from the correction of the inventory.
N/A	30.253 What happens if a request for reconsideration of a distribution order is timely made?	New section. Adds a process to allow interested parties to seek reconsideration of the distribution order.
Subpart G—Purchase at Probate	Subpart M—Purchase at Probate	Revises this subpart overall to streamline the process for purchasing decedent's interests at probate using the statutory authority in the American Indian Probate Reform Act.
30.160 What may be purchased at probate?	30.400 What may be purchased at probate?	Adds a provision regarding purchase of minerals-only interests at probate. Deletes provision regarding timing of requesting a purchase at probate (addressed in proposed § 30.404).
30.161 Who may purchase at probate?	30.401 Who may purchase at probate?	No substantive change.
30.162 Does property purchased at probate remain in trust or restricted status?	30.402 Does property purchased at probate remain in trust or restricted status?	No change.

Current §	Proposed §	Summary of proposed changes
30.163 Is consent required for a purchase at probate?	30.403 Is consent required for a purchase at probate?	Adds that, to purchase any interest included in an approved consolidation agreement, the consent of the recipient of the consolidated interest is required. Adds a new paragraph (b) establishing procedures for heirs and devisees to refuse consent to a purchase at probate. Adds to the conditions in which a Tribe does not need consent to purchase that the interest is not part of an approved consolidation agreement.
30.164 What must I do to purchase at probate?	30.404 How do I initiate a purchase at probate? 30.405 When may I initiate a purchase at probate?	Changes the deadline for filing a purchase request from before issuance of the final probate decision or order to instead before the end of the first probate hearing.
N/A	30.406 May I withdraw my request to purchase at probate?	New section.
N/A	30.407 How will OHA address requests to purchase at probate?	New section.
30.165 Who will OHA notify of a request to purchase at probate? 30.166 What will the notice of the request to purchase at probate include?	30.408 What will OHA include in the probate decision or reconsideration order when a purchase at probate is pending?	Revisions to incorporate the purchase at probate process into the final probate decision or reconsideration order, since that final decision and order are provided to the heirs or devisees, BIA, and anyone who has submitted a request to purchase.
N/A	30.409 How will a pending purchase at probate request affect how the decedent's property is distributed?	New section.
N/A	30.410 How will the purchase at probate process continue after the decision or reconsideration order is issued?	New section.
30.167 How does OHA decide whether to approve a purchase at probate?	30.411 How will the interests to be purchased at probate be valued?	Adds that BIA will obtain the appraisal or other fair market valuation and that any appraisal/valuation must be made on the basis of the fair market value as of the decedent's date of death.
	30.416 How does OHA decide whether a bid is successful?.	Adds that the appraisal/valuation must state or include a certification that it is assessing the fair market value of the real property interest. Clarifies that OHA may hold a hearing and that the applicable heir, devisee, or surviving spouse may choose which bid to accept if multiple bids are submitted.
30.168 How will the judge allocate the proceeds from a sale?	(see 30.419, listed below)	Combines information on allocating proceeds with information on OHA issuing the order approving the sale.
30.169 What may I do if I do not agree with the appraised market value?	30.415 What may I do if I do not agree with the determination of fair market value in the Order to Submit Bids?	Expands who may object to a fair market value determination to include any party who may be affected by the determination. Combines time for filing an objection (30 days) and filing supporting documentation (15 days) into a deadline of 45 days for both. Requires objecting party to provide copies of the objection and supporting documents to parties who have an interest in the purchase of the property. Provides that the judge may issue a Modified Order to Submit Bids.
30.170 What may I do if I disagree with the judge's determination to approve a purchase at probate?	30.423 What may I do if I disagree with the judge's determination to approve or deny a purchase at probate.	Replaces process for objecting to the judge with a process for appealing to IBIA.
30.171 What happens when the judge grants a request to purchase at probate?	30.412 What will OHA do when it receives BIA's notification that an appraisal/valuation has been completed? 30.417 How does the judge notify the parties whether there was a successful bid?	Clarifies that OHA issues an Order to Submit Bids to all potential bidders, and that this occurs after the fair market value has been determined.
N/A	30.413 Who are potential bidders?	New section.
N/A	30.414 What will be contained in the Order to Submit Bids?	New section.
30.172 When must the successful bidder pay for the interest purchased?	30.418 When must the successful bidder pay for the interest purchased?	No substantive change.
30.173 What happens after the successful bidder submits payment?	30.419 What happens after the successful bidder submits payment?	Adds information on allocation of the proceeds of the sale.
30.174 What happens if the successful bidder does not pay within 30 days?	30.420 What happens if the successful bidder does not pay within 30 days?	No substantive change.

Current §	Proposed §	Summary of proposed changes
30.175 When does a purchased interest vest in the purchaser?	30.421 When does a purchased interest vest in the purchaser?	No substantive change.
N/A	30.422 What will happen to any lease income received or accrued from purchased land interests before the purchased interest vests in the purchaser?	New section.
N/A	30.424 When will the order approving or denying the purchase at probate become final?	New section.
Subpart H—Renunciation of Interest	Subpart H—Renunciation of Interest.	See below for specific sections.
30.180 May I give up an inherited interest in trust or restricted property or trust personalty?	30.180 May I give up an inherited interest in trust or restricted property or trust personalty?	No change.
30.181 How do I renounce an inherited interest?	30.181 When may I renounce a devised or inherited interest?	Splits into two sections. Expands when someone may renounce to allow renunciation 30 days after the probate decision is mailed, before the entry of an order on rehearing, or within 30 days after mailing of the distribution for additional property.
	30.186 How do I renounce an inherited interest?	
	30.188 What steps will the judge take if I designate a recipient?	Expands the manner in which someone may renounce to allow acknowledgment before either a notary or a judge, so that someone may renounce in person at a hearing.
N/A	30.182 Who may renounce an inherited interest on behalf of an heir or devisee who dies before the hearing?	New section. Specifies who may renounce on behalf of an heir or devisee who dies before the hearing.
30.182 Who may receive a renounced interest in trust or restricted land?	30.183 Who may receive a renounced interest in trust or restricted land if the land will pass pursuant to a valid will?	Reorganizes these sections to distinguish based on whether the decedent had a will or not. No substantive change.
30.183 Who may receive a renounced interest of less than 5 percent in trust or restricted land?	30.184 Who will receive a renounced interest in trust or restricted land if the land will pass by intestate succession?	
30.184 Who may receive a renounced interest in trust personalty?	30.185 Who may receive a renounced interest in trust personalty?	Deletes paragraph (c) of the current section, which says the following, because it is not directly relevant to the probate process: ''The Secretary will directly disburse and distribute trust personalty transferred by renunciation to a person or entity other than those listed in paragraph (b) of this section.''
30.185 May my designated recipient refuse to accept the interest?	30.189 May my designated recipient refuse to accept the interest?	Adds a provision allowing the designated recipient the opportunity to refuse the interest.
30.186 Are renunciations that predate the American Indian Probate Reform Act of 2004 valid?	30.190 Are renunciations that predate the American Indian Probate Reform Act of 2004 valid?	No change.
30.187 May I revoke my renunciation?	30.191 May I revoke my renunciation?	Revised when a written renunciation becomes irrevocable to when the applicable order distributing the property becomes final, rather than when the judge enters the final order in the probate proceeding.
30.188 Does a renounced interest vest in the person who renounced it?	30.187 What happens if I do not designate any eligible individual or entity to receive the renounced interest?	Reorganizes to split into two sections. No substantive change.
	30.192 Does a renounced interest vest in the person who renounced it?	
Subpart I—Summary Probate Proceedings	Subpart I—Summary Probate Proceedings.	See specific sections below.
30.200 What is a summary probate proceeding?	30.200 What is a summary probate proceeding?	Deletes that the supervising judge may determine whether the proceeding is conducted by a judge or ADM because this is an internal procedure.
		Changes the qualification for summary probate proceedings from funds-only estates with a value of $5,000 or less to funds-only estates with a value of $300 or less.
		Specifies what funds are considered in determining the value of the estate.
30.201 What does a notice of a summary probate proceeding contain?	30.206 What notice of the summary probate decision will the judge or ADM provide?	Changes the notice provided to be notice of the summary probate decision and right to challenge the decision because the proposed rule eliminates the option for a hearing and claims renunciations from the summary probate proceeding. Deletes reference to renunciations because the option to renounce will now occur after the summary probate decision is issued.

Current §	Proposed §	Summary of proposed changes
30.202 May I file a claim or renounce or disclaim an interest in the estate in a summary probate proceeding?	30.201 May I file a claim in a summary probate proceeding?	Revises to disallow claims in summary probate proceedings because the estate value is only $300 or less.
N/A	30.202 What will happen when OHA receives the summary probate file?	New section. Provides that OHA determines the distribution of estates under summary probate proceedings based on the information included in the probate file.
N/A	30.203 What will happen if the funds in the estate are insufficient to provide each heir or devisee at least one cent?	New section. Clarifies that if the funds in the estate are insufficient to provide all heirs or devisees with one cent, then the oldest heir or devisee receives all the funds.
30.203 May I request that a formal probate proceeding be conducted instead of a summary probate proceeding?	30.204 May I request that a formal probate proceeding be conducted instead of a summary probate proceeding?	Revises to eliminate the option for requesting the summary probate be conducted as a formal probate proceeding because the estate value is so small.
30.204 What must a summary probate decision contain?	30.205 What must a summary probate decision contain?	Reorganizes. Deletes reference to a proposed decision, because the judge decides the case without first releasing a proposed decision. Deletes references to claims. Adds that determination of ''Indian'' status is necessary only if relevant. Allows renunciation for 30 days after the mailing date of the decision (or within 30 days of an order on review, if applicable). Adds a statement that a formal probate proceeding will be initiated if BIA later identifies trust or restricted land that should have been included in the estate.
30.205 How do I seek review of a summary probate proceeding?	30.207 How do I seek review of a summary probate proceeding?	Deletes reference to ''de novo'' review. Clarifies that BIA may also seek review.
30.206 What happens after I file a request for de novo review?	30.208 What happens after I file a request for review?	Lengthens the time OHA has to notify the agency that prepared the probate file, all other affected agencies, and all interested parties of the request for review from 10 days to 30 days of receipt of the request for review. No longer requires a hearing on review. Clarifies that the judge may issue an order affirming, modifying, or vacating the summary probate decision. Lists who the judge must distribute the final order to and what it must include. Allows appeal to the IBIA.
30.207 What happens if nobody files for de novo review?	30.209 What will the judge or ADM do with the official record of the summary probate case?	Provides that OHA transmits the official record back to the agency originating the probate and lists what will be included in the record. Deletes provision requiring OHA to send copies to other affected agencies. (Section specifying that the order becomes final after 30 days is in proposed § 30.206(b)).
Subpart J—Formal Probate Proceedings	Subpart J—Formal Probate Proceedings.	See affected sections below.
30.210 How will I receive personal notice of the formal probate proceeding?	30.210 How will I receive personal notice of the formal probate proceeding? 30.211 How will OHA provide public notice of the formal probate proceeding?	Reorganizes to group all mailed (personal) notice into one section and all public notice into a separate section. Clarifies that the will and codicils will be mailed with the notice of the proceeding. (Section 30.114 lists who receives mailed notice of the hearing). Allows the posted notice that supplements the mailed notice to contain information for more than one hearing and specifies the minimum information that must be included for each. Adds requirement for OHA to post notice of all hearings on its website. Adds a provision for physical posting at the decedent's home agency. Clarifies that a posting in the vicinity of the designated place of hearing will occur only if OHA designates a specific hearing location and reduces the number of conspicuous places for posting from five to one. Adds that OHA may proceed with a hearing without physical posting if physical posting is not possible due to one of the listed circumstances, including when the agency office is closed or inaccessible or extenuating circumstances prevent personnel from posting. (See definition of ''extenuating circumstances,'' which includes situations such as a natural disaster affecting the agency office or travel to the agency office or other event affecting the agency office's ability to provide sustained continuous operations and services.)

Current §	Proposed §	Summary of proposed changes
30.211 Will the notice be published in a newspaper?	N/A	Deletes separate provision for publishing in a newspaper to give judge discretion to post notice in places other than the OHA website (including in a newspaper, if appropriate), for the purpose of increasing the chances of reaching individuals or entities with an interest in a probate case.
30.238 May I file a petition for rehearing if I disagree with the judge's decision in a formal probate hearing?	30.238 May I file a petition for rehearing if I disagree with the judge's decision in a formal probate hearing?	Specifies that you must be an interested party to seek a rehearing and the basis for your request must be to correct a substantive error. Expands on what issues may be raised and what evidence may be relied upon in rehearing.
30.239 Does any distribution of the estate occur while a petition for rehearing is pending?	30.239 Does any distribution of the estate occur while a petition for rehearing is pending?	No change.
30.240 How will the judge decide a petition for rehearing?	30.240 How will the judge decide a petition for rehearing?	Clarifies that the judge will consider the petition for rehearing as a petition for reopening if not timely filed. Adds provision allowing the judge to summarily deny the petition based on certain deficiencies.
30.241 May I submit another petition for rehearing?	30.241 May I submit another petition for rehearing?	No substantive change. Moves information regarding the judge's jurisdiction to § 30.242.
30.242 When does the judge's order on a petition for rehearing become final?	30.242 When does the judge's order on a petition for rehearing become final?	Includes information on when the jurisdiction of the judge terminates.
30.243 May a closed probate case be reopened?	30.243 May a closed probate case be reopened?	Deletes the chart and states by whom and the circumstances in which a closed probate case may be reopened.
	30.244 When must a petition for reopening be filed?	Splits provisions regarding deadlines for filing petitions to reopening to proposed § 30.244 to simplify the deadline to one year after discovery of the error.
	30.245 What legal standard will be applied to reopen a case?.	Clarifies that the 3-year threshold is important only with regard to the heightened legal standard that is applied to the petition to reopen after 3 years.
	30.246 What must be included in a petition for reopening?	Expands on what information must be included in a petition for reopening to justify reopening.
N/A	30.247 What is not appropriate for a petition for reopening?	New section. Clarifies what issues or objections a petition may not raise and what evidence a petition may not rely upon for a reopening, to encourage parties to address issues and bring evidence during the initial probate proceeding.
30.244 How will the judge decide my petition for reopening?	30.248 How will the judge decide my petition for reopening?	Adds provision allowing the judge to summarily deny the petition based on certain deficiencies.
30.245 What happens if the judge reopens the case? 30.246 When will the decision on reopening become final?	30.249 What happens when the judge issues an order on reopening?	Combines two sections. No substantive change.
Subpart K—Miscellaneous	Subpart N—Miscellaneous	See affected sections below.
30.250 When does the anti-lapse provision apply?	30.500 When does the anti-lapse provision apply?	Redesignated. No change.
N/A	30.501 When is joint tenancy presumed?	New section. Establishes that joint tenancy will be presumed where a testator devises the same interests to more than one person without specifying otherwise.
N/A	30.502 How does a judge resolve conflicts between the anti-lapse provision and presumption of joint tenancy?	New section. Clarifies that the judge will give priority to the presumption of joint tenancy, such that the share of the deceased devisee will go to the surviving devisees (rather than to the deceased devisee's descendants).
30.251 What happens if an heir or devisee participates in the killing of the decedent?	30.503 What happens if an heir or devisee participates in the killing of the decedent?	Redesignated. No change.
30.252 May a judge allow fees for attorneys representing interested parties?	30.504 May a judge allow fees for attorneys representing interested parties?	Redesignated. No change.
30.253 How must minors or other legal incompetents be represented?	30.505 How must minors or other legal incompetents be represented?	Redesignated. No change.
30.254 What happens when a person dies without a valid will and has no heirs?	30.506 When a decedent died intestate without heirs, what law applies to trust or restricted property?	Deletes chart. Reorganizes based on whether the decedent died before or after the date of AIPRA's enactment. Adds detail as to how interests will be distributed under the statute in each case, rather than just citing the statutory provisions.
N/A	30.507 How will trust personalty be distributed if a decedent died intestate on or after June 20, 2006, and the Act does not specify how the trust personalty should be distributed?	New section. Specifies how trust personalty is distributed in the circumstance in which AIPRA applies but fails to state how trust personalty is distributed: If the decedent has no surviving spouse or eligible heirs or trust or restricted property over which one and only one Tribe has jurisdiction.

V. Tribal Consultation and Public Hearing

The Department will be hosting the following Tribal consultation session to discuss this proposed rule:

Date	Time	Location
Tuesday, February 9, 2021	2 p.m.–5 p.m. Eastern Time	Call-in number: (800) 369–3356. Passcode: 8182564

The Department will also be holding a public hearing for anyone for whom the Department holds property in trust or restricted status or for anyone else interested in this rulemaking, as follows:

Date	Time	Location
Thursday, February 11, 2021	2 p.m.–5 p.m. Eastern Time	Call-in number: (888) 790–3548. Passcode: 6643062

Tribal consultation is reserved for officially designated representatives of federally recognized Tribes. Anyone who is not an officially designated representative of a federally recognized Tribe that is interested in this rulemaking should join the public hearing session only.

VI. Procedural Requirements

A. Regulatory Planning and Review (E.O. 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this proposed rule is not significant.

E.O. 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 E.O. 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 proposed rule in a manner consistent with these requirements. This proposed rule is also part of the Department's commitment under the Executive Order to reduce the number and burden of regulations.

B. Reducing Regulations and Controlling Regulatory Costs (E.O. 13771)

E.O. 13771 of January 30, 2017, directs Federal agencies to reduce the regulatory burden on regulated entities and control regulatory costs. E.O. 13771, however, applies only to significant regulatory actions, as defined in Section 3(f) of E.O. 12866. Therefore, E.O. 13771 does not apply to this rule.

C. Regulatory Flexibility Act

The Department of the Interior certifies that this proposed rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This proposed rule affects only individuals' estates and does not affect small entities.

D. Small Business Regulatory Enforcement Fairness Act

This proposed rule is not a major rulemaking under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This proposed rule:

(a) Does not have an annual effect on the economy of $100 million or more because this rule addresses only the transfer through probate of individuals' property held in trust or restricted status.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions because this rule affects only probates of individuals' trust or restricted property.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises because this rule affects only affects only probates of individuals' trust or restricted property.

E. Unfunded Mandates Reform Act

This proposed rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. The proposed rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

F. Takings (E.O. 12630)

This proposed rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630 because this rulemaking, if adopted, does not affect individual property rights protected by the Fifth Amendment or involve a compensable ''taking.'' A takings implication assessment is not required.

G. Federalism (E.O. 13132)

Under the criteria in section 1 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement because the rule affects only the probate of individuals' trust or restricted property. A federalism summary impact statement is not required.

H. Civil Justice Reform (E.O. 12988)

This proposed rule complies with the requirements of Executive Order 12988. Specifically, this proposed rule: (a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and (b) Meets the criteria of

section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

I. Consultation With Indian Tribes (E.O. 13175)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this proposed rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have determined that it has substantial direct effects on federally recognized Indian Tribes because the proposed rule affects the probate of trust or restricted property held by individuals, many or most of whom are likely Tribal members. Information on Tribal consultation is provided in Section IV.

J. Paperwork Reduction Act

This proposed rule does not contain any new collection of information that requires approval from the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.* OMB has previously approved the information collection requirements associated with compiling the probate file for an estate and assigned the information collection requirements OMB Control Number 1076–0169 (expires 7/31/2021). We estimate the annual burden associated with this information collection to be 617,486 hours per year. 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.

K. National Environmental Policy Act

This proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because these are ''regulations . . . whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.'' 43 CFR 46.210(i). We have also determined that the rulemaking does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

L. Effects on the Energy Supply (E.O. 13211)

This proposed rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

M. Clarity of This Regulation

We are required by Executive Orders 12866 (section 1(b)(12)), and 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and,

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you believe lists or tables would be useful, etc.

N. 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.

List of Subjects

25 CFR Part 15

Estates, Indians—law.

43 CFR Part 30

Administrative practice and procedure, Claims, Estates, Indians, Lawyers.

For the reasons given in the preamble, the Department of the Interior proposes to amend part 15 of title 25 and part 30 of title 43 of the Code of Federal Regulations as follows:

Title 25—Indians

Chapter I—Bureau of Indian Affairs, Department of the Interior

PART 15—PROBATE OF INDIAN ESTATES, EXCEPT FOR MEMBERS OF THE OSAGE NATION AND THE FIVE CIVILIZED TRIBES

■ 1. The authority citation for part 15 continues to read as follows:

Authority: 5 U.S.C. 301; 25 U.S.C. 2, 9, 372–74, 410, 2201 *et seq.;* 44 U.S.C. 3101 *et seq.*

■ 2. Revise § 15.202 to read as follows:

§ 15.202 What items must the agency include in the probate file?

(a) We will include the items listed in this section in the probate file, except as specified in paragraph (b) of this section.

(1) The evidence of death of the decedent as provided under § 15.104.

(2) A completed ''Data for Heirship Findings and Family History Form'' or successor form, certified by BIA, with the enrollment or other identifying number shown for each potential heir or devisee.

(3) Information provided by potential heirs, devisees, or the Tribes on:

(i) Whether the heirs and devisees meet the definition of ''Indian'' for probate purposes, including enrollment or eligibility for enrollment in a Tribe; or

(ii) Whether the potential heirs or devisees are within two degrees of consanguinity of an ''Indian.''

(4) If an individual qualifies as an Indian only because of ownership of a trust or restricted interest in land, the date on which the individual became the owner of the trust or restricted interest.

(5) A certified inventory of trust or restricted land, including:

(i) Accurate and adequate descriptions of all land; and

(ii) Identification of any interests that represent less than 5 percent of the undivided interests in a parcel.

(6) A statement showing the balance and the source of funds in the decedent's IIM account on the date of death.

(7) A statement showing all receipts and sources of income to and disbursements, if any, from the decedent's IIM account after the date of death.

(8) Originals or copies of all wills, codicils, and revocations that have been provided to us.

(9) A copy of any statement or document concerning any wills, codicils, or revocations the BIA returned to the testator.

(10) Any statement renouncing an interest in the estate that has been submitted to us, and the information necessary to identify any person receiving a renounced interest.

(11) Claims of creditors that have been submitted to us under §§ 15.302 through 15.305, including documentation required by § 15.305.

(12) Documentation of any payments made on requests filed under the provisions of § 15.301.

(13) All the documents acquired under § 15.105.

(14) The record of each Tribal or individual request to purchase a trust or restricted land interest at probate.

(15) The record of any individual request for a consolidation agreement, including a description, such as an Individual/Tribal Interest Report, of any lands not part of the decedent's estate that are proposed for inclusion in the consolidation agreement.

(16) Valuation reports for those interests to which the special circumstances listed in 43 CFR 30.264 apply.

(b) If the estate includes only cash and the total value of the estate does not exceed $300 on the date of death, including funds deposited and accruing on or before the date of death, then we will include only the following the probate file.

(1) The evidence of death of the decedent as provided under § 15.104.

(2) A completed ''Data for Heirship Findings and Family History Form'' or successor form, certified by BIA as an accurate summary of the information available to BIA that is relevant to the probate of the estate (this form should be completed with information provided by potential heirs, devisees, or Tribes to the greatest extent possible, but BIA is not required to obtain documentation in addition to that provided by those entities).

(3) A statement showing the balance and the source of funds in the decedent's IIM account on the date of death.

(4) Certification that the decedent's estate does not contain any interests in trust or restricted land.

(5) Originals or copies of all wills, codicils, and revocations that have been provided to BIA.

(6) A copy of any statement or document concerning any wills, codicils, or revocations the BIA returned to the testator.

■ 3. In § 15.301, revise the section heading and paragraphs (a) and (c) to read as follows:

§ 15.301 May funds for funeral services be paid from the decedent's IIM account?

(a) Before the probate case is submitted to OHA, you may request an amount of no more than $5,000 from the decedent's IIM account if:

(1) You are responsible for making the funeral arrangements on behalf of the family of a decedent who has an IIM account; and

(2) You have an immediate need to pay for funeral arrangements before burial.

* * * * *

(c) In response to a request submitted under paragraph (a) of this section, we may approve, without the need for an order from OHA, costs of no more than $5,000 from the date of death IIM account balance that are reasonable and necessary for the burial services, taking into consideration:

(1) The availability of non-trust funds, including availability of any Tribal contribution; and

(2) Any other relevant factors.

* * * * *

■ 4. Add §§ 15.404 and 15.405 to read as follows:

§ 15.404 What happens if BIA identifies additional property of a decedent after the probate decision is issued?

If, after OHA issues the probate decision, BIA identifies additional trust or restricted property of a decedent that it had not already identified at the time of the decision, then BIA will submit a petition to OHA for an order directing distribution of the additional property.

(a) The petition must identify the additional property and the source of that property (*e.g.,* inheritance or approval of a deed) and must include the following:

(1) A certified inventory describing the additional trust or restricted land, if applicable, or, if the additional property is trust personalty, documents verifying the balance and source of the additional trust personalty, and a statement that the inventory lists only the property to be added;

(2) A copy of the decision, or modification or distribution order and corresponding inventory issued in the probate case from which the property was inherited by the decedent, if applicable;

(3) A statement identifying each newly added share of any allotment that increases the decedent's total share of the ownership interest of the allotment to 5 percent or more;

(4) A copy of BIA's notification to the Tribes with jurisdiction over the interests of the list of the additional interests that represent less than 5 percent of the entire undivided ownership of each parcel (after being added to the decedent's estate) under § 15.401(b); and

(5) A certification that all interested parties have been associated to the case and their names and addresses are current.

(b) BIA may submit the petition at any time after issuance of the decision.

(c) BIA must send a copy of the petition and all supporting documentation to each interested party at the time of filing and include certification of service.

§ 15.405 What happens if BIA identifies that property was incorrectly included in a decedent's inventory?

If, after issuance of a decision, BIA identifies certain trust or restricted property or an interest therein that was incorrectly included in a decedent's inventory, then BIA will submit a petition to OHA for an order notifying all heirs or devisees of the correction and addressing any changes in distribution of property resulting from the correction.

(a) The petition must identify the property that it removed from the estate and explain why the property should not have been included, and must include the following:

(1) A newly issued certified inventory describing the trust or restricted land remaining in decedent's estate, if applicable;

(2) A copy of the decision, or modification or distribution order and corresponding inventory issued in the probate case from which BIA discovered that the property was incorrectly included in the decedent's estate, if applicable;

(3) A statement identifying each property in the decedent's estate that decreased to a total share of the ownership of the allotment to less than 5 percent as a result of the removal of property from the estate; and

(4) A certification that all interested parties have been associated to the case and their names and addresses are current.

(b) BIA may submit the petition at any time after issuance of the decision.

(c) BIA must send a copy of the petition and all supporting documentation to each interested party at the time of filing and include certification of service.

Title 43—Public Lands: Interior

PART 30—INDIAN PROBATE HEARINGS PROCEDURES

■ 5. The authority citation for part 30 continues to read as follows:

Authority: 5 U.S.C. 301, 503; 25 U.S.C. 9, 372–74, 410, 2201 *et seq.;* 43 U.S.C. 1201, 1457.

■ 6. In § 30.100, revise paragraphs (a)(5) and (7) through (9) and (c)(2) and (3) to read as follows:

§ 30.100 How do I use this part?

(a) * * *

For provisions relating to . . .	consult . . .
* * * * *	* *
(5) Formal probate proceedings before an administrative law judge or Indian probate judge	§§ 30.210 through 30.253.
* * * * *	* *
(7) Purchases at probate	§§ 30.400 through 30.424.
(8) Renunciation of interests	§§ 30.180 through 30.192.
(9) Summary probate proceedings	§§ 30.200 through 30.209.
* * * * *	* *

* * * * *

(c) * * *

(2) Sections 30.400 through 30.424 (purchases at probate);

(3) Sections 30.183 through 30.188, except for §§ 30.186(a), (b)(2), and (d) and 30.187;

* * * * *

■ 7. Amend § 30.101 by:

■ a. Revising the definition of ''Attorney decision maker (ADM)'';

■ b. Removing the definitions for ''BLM'' and ''Decision or order (or decision and order)'';

■ c. Adding in alphabetical order the definition of ''Decision'';

■ d. Removing the definition for ''De novo review'';

■ e. Adding in alphabetical order definitions for ''Distribution order'', ''Extenuating circumstances'', and ''Home agency'';

■ f. Revising the definitions of ''Indian probate judge'' and ''Interested party'';

■ g. Adding in alphabetical order definitions for ''Joint tenancy'', ''Lineal descendant'', ''Order'', and ''Petition to Complete Purchase at Probate'';

■ h. Revising the definition of ''Summary probate proceeding''; and

■ i. Adding in alphabetical order the definition ''Tenants in common''.

The revisions and additions read as follows:

§ 30.101 What definitions do I need to know?

* * * * *

Attorney decision maker (ADM) means an attorney with OHA who conducts summary probate proceedings.

* * * * *

Decision means a written document issued by a judge in a formal probate proceeding or by a judge or ADM in a summary probate proceeding making determinations as to heirs, wills, devisees, and the claims of creditors, and ordering distribution of trust or restricted land or trust personalty.

* * * * *

Distribution order means the OHA order distributing additional property that has been added to an estate under § 30.251.

* * * * *

Extenuating circumstances means circumstances including, but not limited to, situations such as a natural disaster affecting the agency office or travel to the agency office or other event affecting the agency office's ability to provide sustained continuous operations and services.

* * * * *

Home agency means the agency that serves the Tribe in which the decedent is a member or where the decedent's IIM account originated.

* * * * *

Indian probate judge (IPJ) means an attorney with OHA, to whom the Secretary has delegated the authority to hear and decide Indian probate cases, pursuant to 25 U.S.C. 372–2.

Interested party means:

(1) Any potential or actual heir, except for potential or actual heirs who may or will inherit solely as co-owners of an allotment;

(2) Any devisee under a will;

(3) Any person or entity asserting a claim against a decedent's estate;

(4) Any Indian Tribe having a statutory option to purchase the trust or restricted property interest of a decedent; or

(5) Any co-owner exercising a purchase option.

* * * * *

Joint tenancy means ownership by two or more persons of the same property, where the individuals, who are called joint tenants, share equal, undivided ownership of the property and have a right of survivorship such that upon the death of a joint tenant, the property descends to the other joint tenants by operation of law.

* * * * *

Lineal descendent means a blood relative of a person in that person's direct line of descent.

* * * * *

Order means any written direction or determination, other than a decision, issued by a judge in a probate case, including a distribution order, an order on rehearing, an order on reopening, or a reconsideration order.

* * * * *

Petition to Complete Purchase at Probate means a petition BIA files with an appraisal or valuation to request that OHA complete the purchase at probate process.

* * * * *

Summary probate proceeding means the consideration of a probate file without a hearing. A summary probate proceeding may be conducted if the estate involves only an IIM account that did not exceed $300 in value on the date of the death of the decedent.

Tenants in common means two or more people who share ownership rights in a property, but whose ownership rights are divisible from each other and, when a tenant in common dies, the property descends to that tenant's heirs or devisees rather than to the other tenant or tenants.

* * * * *

■ 8. In § 30.114, revise paragraph (b) to read as follows:

§ 30.114 Will I receive notice of the probate proceeding?

* * * * *

(b) Potential heirs who may inherit solely as co-owners of an allotment will not be sent actual notice unless they have previously filed a request for notice with BIA or OHA.

■ 9. In § 30.123, revise paragraph (a)(1) to read as follows:

§ 30.123 Will the judge determine matters of status and nationality?

(a) * * *

(1) If relevant, the status of eligible heirs or devisees as Indians;

* * * * *

■ 10. Revise § 30.124 to read as follows:

§ 30.124 When may a judge presume the death of an heir, devisee, or person for whom a probate case has been opened?

(a) When a person cannot be proven dead but evidence of death is needed, a judge may presume that an heir, devisee, or person for whom a probate case has been opened has died at a certain time if any of the following evidence is submitted:

(1) A certified copy of an official report or finding by an agency or department of the United States, State, or Tribe that a missing person is dead or presumed to be dead. The judge will use the date of death found by the agency or department, if such a finding was made. If no such finding was made, unless other evidence is submitted showing an actual date of death, the judge will use the date on which the person was reported missing as the date of death.

(2) A certified copy of an order from a court of competent jurisdiction that a missing person is dead or presumed to be dead. The judge will use the date of death found by the court, if such a finding was made. If no such finding was made, unless other evidence is submitted showing an actual date of death, the judge will use the date on which the person was reported missing as the date of death.

(3) Signed affidavits or sworn testimony by those in a position to know that facts and other records show that the person has been absent from his or her residence for no apparent reason, or has no identifiable place of residence and cannot be located, and has not been heard from for at least 6 years. If there is no evidence available that the person continued to live after the date of disappearance or the date of last contact if the person has no identifiable place of residence, the judge will use the date the person disappeared or the date of last contact as the date of death.

(4) When a person has been missing for less than 6 years but may be presumed dead due to an identified incident, such as drowning, fire, or accident, signed affidavits or sworn testimony from individuals who know the circumstances surrounding the occurrence leading to the person's disappearance. The best evidence is statements from individuals who witnessed the occurrence or saw the missing person at the scene of the occurrence shortly before it happened. If there is no evidence available that the person continued to live after the date of the identified incident, the judge will use the date of the identified incident as the date of death.

(5) When a person cannot be located by BIA or known surviving family members and was born at least 100 years before the submission of a probate case to OHA, certification from BIA or signed affidavits or sworn testimony by those in a position to know the approximate date of birth. If there is no evidence available that the person continued to live after reaching the age of 100, the judge will use the date that is 100 years after the date of birth as the date of death.

(b) A presumption of death made based on paragraph (a) of this section can be rebutted by evidence that establishes that the person is still alive or explains the individual's absence in a manner consistent with continued life rather than death.

§ 30.125 [Redesignated as § 30.129]

■ 11. Redesignate § 30.125 as § 30.129.

■ 12. Add a new § 30.125 to read as follows:

§ 30.125 May a judge order that a property interest be partitioned as a result of a devise?

(a) A judge may order a property interest to be partitioned if:

(1) A will attempts to divide an allotment into two or more distinct portions and devises at least one of those portions;

(2) The decedent was the sole owner of the allotment;

(3) The allotment is held entirely in trust or restricted status; and

(4) The devise describes the portions of the allotment in a manner that allows the judge to readily ascertain which portion of the allotment descends to each intended devisee.

(b) If the requirements of paragraph (a) of this section are not met, the judge may find that a devise of a portion of an undivided allotment fails.

§§ 30.126 and 30.127 [Removed and Reserved]

■ 13. Remove and reserve §§ 30.126 and 30.127.

Subpart G [Removed and Reserved]

■ 14. Remove and reserve subpart G.

■ 15. Revise subpart H to read as follows:

Subpart H—Renunciation of Interest

Sec.

§ 30.180 May I give up an inherited interest in trust or restricted property or trust personalty?

You may renounce an inherited or devised interest in trust or restricted property, including a life estate, or in trust personalty if you are 18 years or older and not under a legal disability.

§ 30.181 When may I renounce a devised or inherited interest?

(a) If the judge has not yet issued a decision, you may renounce a devised or inherited interest at any time before the issuance of the decision.

(b) If the judge has issued a decision, you may renounce a devised or inherited interest in any property distributed by the decision:

(1) Within 30 days from the mailing date of the decision; or

(2) Within 30 days of the order on review, in a summary probate proceeding in which a request for review has been filed; or

(3) Before the entry of an order on rehearing, in a formal probate proceeding in which a petition for rehearing is pending.

(c) You may renounce a devised or inherited interest that is added to the decedent's estate after the decision is issued pursuant to § 30.251 within 30 days of mailing the distribution order.

(d) Once the order on rehearing is issued, you may not renounce a devised or inherited interest that was distributed by the decision.

§ 30.182 Who may renounce an inherited interest on behalf of an heir or devisee who dies before the hearing?

If an individual heir or devisee dies before the hearing, a renunciation may

be made on his or her behalf by any of the following, if the judge makes a determination that the renunciation is in the best interest of the parties:

(a) An individual appointed by a probate court to act on behalf of his or her private (*i.e.,* non-Federal-trust) estate, including but not limited to a personal representative, administrator, or executor; or

(b) Someone appointed by the judge with the express approval of all the heirs or devisees of the deceased heir or devisee.

§ 30.183 Who may receive a renounced interest in trust or restricted land if the land will descend pursuant to a valid will?

A devisee may renounce an interest in trust or restricted land in favor of any one or more of the following:

(a) A lineal descendant of the testator;

(b) A person who owns an undivided trust or restricted interest in the same parcel;

(c) The Tribe with jurisdiction over the interest; or

(d) Any Indian.

§ 30.184 Who may receive a renounced interest in trust or restricted land if the land will descend by intestate succession?

(a) If the interest in trust or restricted land represents 5 percent or more of the entire undivided ownership of the parcel, you may renounce that interest in favor of one or more of the following:

(1) Eligible heirs of the decedent; or

(2) The Tribe with jurisdiction over the interest.

(b) If the interest in the trust or restricted land represents less than 5 percent of the entire undivided ownership of the parcel, you may renounce that interest in favor of only one person or entity listed in paragraph (a) of this section, or to one Indian person related to you by blood.

§ 30.185 Who may receive a renounced interest in trust personalty?

You may renounce an interest in trust personalty in favor of any person or entity.

§ 30.186 How do I renounce an inherited interest?

To renounce an interest under § 30.180, you must file with the judge a written declaration specifying the interest to be renounced. The declaration must be signed by you and acknowledged before a notary or judge.

(a) In your declaration, you may retain a life estate in a specified interest in trust or restricted land and renounce the remainder interest, or you may renounce the complete interest.

(b) If you renounce an interest in trust or restricted land, you may either:

(1) Designate an eligible person or entity meeting the requirements of § 30.182 or § 30.183 as the recipient; or

(2) Renounce without making a designation.

(c) If a distribution order to add property to the decedent's estate is issued, you may renounce an inherited interest in the property to be added by notifying the judge in writing of your intent to renounce the interest within 30 days of the mailing date of the distribution order.

§ 30.187 What happens if I do not designate any eligible individual or entity to receive the renounced interest?

If you do not designate any individual or entity to receive the renounced interest, or if you designate an individual or entity who is not eligible to receive the renounced interest, the interest will descend to the decedent's heirs or devisees as if you predeceased the decedent.

§ 30.188 What steps will the judge take if I designate a recipient?

If you choose to renounce your interests in favor of a designated recipient, the judge will determine whether the designated recipient is eligible to receive the interest. If the designated recipient is eligible, the judge must notify the designated recipient of the renunciation.

§ 30.189 May my designated recipient refuse to accept the interest?

Yes. Your designated recipient may refuse to accept the interest, in which case the renounced interest will descend to the devisees or heirs of the decedent as if you had predeceased the decedent. When the judge notifies the designated recipient of the renunciation, the judge will specify a deadline for the recipient to file a written refusal to accept the interest. If no written refusal is received before the deadline, the interest will descend to the designated recipient.

§ 30.190 Are renunciations that predate the American Indian Probate Reform Act of 2004 valid?

Any renunciation filed and included as part of a probate decision or order issued before October 27, 2004, the effective date of the American Indian Probate Reform Act of 2004, remains valid.

§ 30.191 May I revoke my renunciation?

A written renunciation is irrevocable when the applicable order distributing the renounced property becomes final.

§ 30.192 Does a renounced interest vest in the person who renounced it?

No. An interest in trust or restricted property renounced under this subpart is not considered to have vested in the renouncing heir or devisee, and the renunciation is not considered a transfer by gift of the property renounced.

■ 16. Revise subpart I to read as follows:

Subpart I—Summary Probate Proceedings

Sec.

Subpart I—Summary Probate Proceedings

§ 30.200 What is a summary probate proceeding?

(a) A summary probate proceeding is the disposition of a probate case without a formal hearing, which is conducted on the basis of the probate file received from the agency. A summary probate proceeding may be conducted by a judge or an ADM.

(b) A decedent's estate may be processed summarily if the estate involves only funds in an IIM account and the total value of the estate does not exceed $300 on the decedent's date of death, including:

(1) Funds deposited into the IIM account on or before the date of death; and

(2) Funds accrued on or before the date of death.

§ 30.201 May I file a claim in a summary probate proceeding?

No. Claims may not be filed in summary probate proceedings.

§ 30.202 What will happen when OHA receives the summary probate file?

When OHA receives a summary probate file from BIA under 25 CFR 15.202(b), OHA will determine the distribution of the estate based on the information included in the probate file

and issue a summary probate decision directing distribution of the estate.

§ 30.203 What will happen if the funds in the estate are insufficient to provide each heir or devisee at least one cent?

If the funds in the estate are insufficient to provide each of the heirs or devisees at least one cent, all of the funds will be paid to the oldest heir or devisee, whichever is applicable.

§ 30.204 May I request that a formal probate proceeding be conducted instead of a summary probate proceeding?

No. Formal probate proceedings are available only for estates that contain trust or restricted land or contain trust personalty in an amount greater than $300.

§ 30.205 What must a summary probate decision contain?

The written decision in a summary probate proceeding must be in the form of findings of fact and conclusions of law, with an order for distribution. Each decision must include the following:

(a) The name, birth date, and relationship to the decedent of each heir or devisee;

(b) A statement as to whether the heir or devisee is eligible to hold property in trust status and, if relevant, a statement of whether the heir or devisee is ''Indian'' for purposes of the Act;

(c) If the case involves a will, a statement approving or disapproving the will, interpreting provisions of an approved will as necessary, and describing the share each devisee is to receive under an approved will;

(d) In intestate cases, citation to the law of descent and distribution under which the summary probate decision is made, and description of the share each heir is to receive;

(e) A statement advising all interested parties, other than potential claimants, that they have a right to seek review under § 30.207 and that, if they fail to do so, the summary probate decision will become final 30 days after it is mailed;

(f) Notice to the heirs or devisees that each may renounce his or her right to inherit the funds in favor of one or more individuals or entities. The heir or devisee will be ordered to submit the renunciation within 30 days of the mailing date of the decision or within 30 days of an order on review if a request for review is filed by any party;

(g) A statement that the findings in a summary probate decision may not be used to determine the decedent's heirs or devisees for distribution of any trust or restricted land that may be added to the decedent's estate at a later time. If BIA identifies trust or restricted land in the decedent's estate after the completion of the summary probate process, BIA should file a petition for reopening and include all documents required for a formal probate proceeding pursuant to 25 CFR 15.202(a); and

(h) The signature of the judge or ADM and date of the probate decision.

§ 30.206 What notice of the summary probate decision will the judge or ADM provide?

When the judge or ADM issues a decision in a summary probate proceeding, the judge or ADM must mail or deliver a notice of the decision, together with a copy of the decision, to each affected agency and to each interested party.

(a) The notice must include a statement that interested parties who are adversely affected have a right to file a request for review with the judge or ADM within 30 days of the mailing date of the decision.

(b) The decision will become final at the end of the 30-day period, unless a timely request is filed.

§ 30.207 How do I seek review of a summary probate proceeding?

(a) If you are adversely affected by the written decision in a summary probate proceeding, you may seek review of the summary probate decision. To do this, you must file a request with the OHA office that issued the summary probate decision within 30 days after the date the summary probate decision was mailed. BIA may also seek review within the same deadline.

(b) The request for review must be in writing and signed, and must contain the following information:

(1) The name of the decedent;

(2) A description of your relationship to the decedent;

(3) An explanation of what errors you allege were made in the summary probate decision; and

(4) An explanation of how you are adversely affected by the decision.

§ 30.208 What happens after I file a request for review?

(a) Within 30 days of receiving a request for review, OHA will notify the agency that prepared the probate file, all other affected agencies, and all interested parties of the request.

(b) A judge will review the merits of the case, consider any allegations of errors in the summary probate decision, conduct a hearing if necessary or appropriate to address the issues raised in the request, and issue an order affirming, modifying, or vacating the summary probate decision.

(c) The judge must distribute the final order on the request to review to each affected agency and to each interested party. The order must include a notice stating that interested parties who are adversely affected, or BIA, have a right to appeal the final order to the Board within 30 days of the date on which the final order was mailed, and giving the Board's address.

§ 30.209 What will the judge or ADM do with the official record of the summary probate case?

The judge or ADM will transfer the official record of the summary probate case to the agency originating the probate, by sending all original hard copies, and transmitting all digital files, that are designated by OHA as part of the official record, including:

(a) The decision, order, and the notices thereof;

(b) A copy of the notice of hearing on review with proof of mailing, if applicable;

(c) The record of the evidence received at the hearing on review, if a hearing was held, including any transcript made of the testimony;

(d) Any wills, codicils and revocations;

(e) Any pleadings and briefs filed;

(f) Interlocutory orders;

(g) Copies of all proposed or accepted settlement agreements, consolidation agreements, and renunciations and acceptances of renunciations; and

(h) Any other documents deemed material by the judge.

Subpart J—Formal Probate Proceedings

■ 17. Revise §§ 30.210 and 30.211 to read as follows:

§ 30.210 How will I receive personal notice of the formal probate proceeding?

(a) You will receive personal notice of the formal probate proceeding hearing described in § 30.114 by first class mail that includes:

(1) The most recent will submitted with the probate case and any codicils to that will; and

(2) A certificate of mailing with the mailing date signed by the person who mailed the notice.

(b) The notice will be mailed to you at least 21 days before the date of the hearing.

(c) A presumption of actual notice exists for any person to whom OHA sent a notice under this section unless the notice is returned by the Postal Service as undeliverable to the addressee.

§ 30.211 How will OHA provide public notice of the formal probate proceeding?

(a) In addition to the mailed notice in § 30.210, OHA will also arrange for the

posting of notice of probate hearings for formal probate proceedings at least 21 days before the date of the hearing.

(b) The notice may contain information for more than one hearing and will specify the names of the decedents, the probate case numbers of the cases, the dates of the decedents' deaths, the dates of the most recent wills filed with the probate cases, and the dates, times, and places of the hearings.

(c) OHA will post the notice on its website at the following link: *https://www.doi.gov/oha/organization/phd.*

(d) Unless one of the circumstances listed in paragraph (e) of this section is present, OHA will also arrange for the physical posting of the notice in each of the following locations:

(1) The home agency;

(2) The agency with jurisdiction over each parcel of trust or restricted property in the estate, if different from the home agency;

(3) A conspicuous place in the vicinity of the designated place of hearing, if the hearing is designated for a location other than the agency listed in paragraph (d)(1) or (2) of this section; and

(4) Additional locations if the judge determines that further posting is appropriate.

(e) OHA may proceed with the hearing without physical posting of the notice if physical posting was not possible due to:

(1) The agency office being closed or inaccessible; or

(2) Extenuating circumstances preventing personnel physically posting.

■ 18. Revise §§ 30.238 through 30.246 to read as follows:

Sec.

* * * * *

* * * * *

§ 30.238 May I file a petition for rehearing if I disagree with the judge's decision in the formal probate hearing?

(a) A petition for rehearing seeking to correct a substantive error may be filed by the BIA or by an interested party who is adversely affected by the decision.

(b) A petition for rehearing must be filed with the judge within 30 days after the date on which the decision was mailed under § 30.237.

(c) A petition for rehearing must allege an error of fact or law in the decision and must state specifically and concisely the grounds on which the petition is based. The petition may be supported with newly discovered evidence or evidence that was not available at the time of the hearing.

(d) If you are an interested party and you received proper notice of the hearing:

(1) You, or BIA on your behalf, may raise an issue on rehearing only if you raised it at or before the hearing, whether or not you attended the hearing. Any issue you raise for the first time on rehearing may be denied solely because you failed to timely raise the issue; and

(2) You may only use evidence on rehearing that was submitted at or before the hearing, if that evidence was available or discoverable to you at that time. Any new evidence you submit on rehearing may be disregarded by the judge, if it was available or discoverable to you at the time the hearing was held.

(e) If the petition is based on newly discovered evidence or evidence that was unavailable at the time of the hearing, it must:

(1) Be accompanied by documentation of that evidence, including, but not limited to, one or more affidavits of a witness stating fully the content of the new evidence; and

(2) State the reasons for failure to discover and present that evidence at the hearings held before issuance of the decision.

(f) OHA will send to BIA a notice of receipt of a petition for rehearing as soon as practicable, ordering that the decedent's estate not be distributed during the pendency of the petition for rehearing. OHA will also forward a copy of the petition and any documents filed with the petition to the interested parties and affected agencies.

§ 30.239 Does any distribution of the estate occur while a petition for rehearing is pending?

The agencies must not initiate payment of claims or distribute any portion of the estate while the petition is pending, unless otherwise directed by the judge.

§ 30.240 How will the judge decide a petition for rehearing?

(a) The judge may consider a petition as a petition for reopening if the petition for rehearing is not timely filed.

(b) The judge may summarily deny the petition based on the deficiencies of the petition. A summary denial is an order in which the judge denies the petition without deciding the merits of the issues raised in the petition and is warranted if:

(1) The petition alleges mere disagreement with a decision;

(2) The petition is based on newly discovered evidence and fails to meet the requirements of § 30.238(e); or

(3) The petition is based solely on issues or evidence described in § 30.238(d)(1) or (2).

(c) If the petition fails to show proper grounds for rehearing, the judge will issue an order denying the petition for rehearing and including the reasons for denials.

(d) If the petition shows proper grounds for rehearing, the judge must:

(1) Cause copies of the petition and all papers filed by the petitioner to be served on those persons whose interest in the estate may be affected if the petition is granted;

(2) Allow all persons served a reasonable, specified time in which to respond to the petition for rehearing; and

(3) Consider with or without a hearing, the issues raised in the petition.

(e) The judge may affirm, modify, or vacate the former decision.

(f) On entry of a final order, including a summary denial, the judge must distribute the order to the petitioner, the agencies, and the interested parties. The order must include a notice stating that interested parties who are adversely affected, or BIA, have the right to appeal the final order to the Board, within 30 days of the date on which the order was mailed, and giving the Board's address.

§ 30.241 May I submit another petition for rehearing?

No. Successive petitions for rehearing may not be filed by the same party or BIA.

§ 30.242 When does the judge's order on a petition for rehearing become final?

The order on a petition for rehearing will become final on the expiration of the 30 days allowed for the filing of a notice of appeal, as provided in this part and § 4.320 of this chapter. The jurisdiction of the judge terminates when he or she issues an order finally disposing of a petition for rehearing, except for the reopening of a case under this part.

§ 30.243 May a closed probate case be reopened?

A closed probate case may be reopened if, the decision or order issued in the probate case contains an error of fact or law (including, but not limited to, a missing or improperly included heir or devisee, a found will, or an error in the distribution of property), and the error is discovered more than 30 days after the mailing date of a decision.

(a) Any interested party or BIA may seek correction of the error of fact or law by filing a petition for reopening.

(b) Reopening may also be initiated on a judge's own motion.

§ 30.244 When must a petition for reopening be filed?

(a) A petition for reopening to correct an error of fact or law in a decision or post-decision order may be filed at any time, but if a petition for reopening is filed by an interested party, or by BIA on behalf of an interested party, it must be filed within 1 year after the interested party's discovery of the alleged error.

(b) If a petition for reopening to correct an error of fact or law in the original decision is filed before the deadline to file a petition for rehearing has passed, it will be treated as a petition for rehearing.

§ 30.245 What legal standard will be applied to reopen a case?

(a) If a petition for reopening is filed within 3 years or less of the date of the decision or order, the judge may reopen the case to correct an error of fact or law in the decision or order.

(b) When a petition for reopening is filed more than 3 years after the date of the decision or order, the judge may reopen the case if the judge finds that the need to correct the error outweighs the interests of the public and heirs or devisees in the finality of the probate proceeding.

§ 30.246 What must be included in a petition for reopening?

(a) A petition for reopening must:

(1) State specifically and concisely the grounds on which the petition is based; and

(2) Include all relevant evidence in the form of documents and/or sworn affidavits supporting any allegations and relief requested in the petition.

(b) A petition filed by an interested party or by BIA on behalf of an interested party must also:

(1) State the date the interested party discovered the alleged error;

(2) Include all relevant evidence in the form of documents and/or sworn affidavits, concerning when and how the interested party discovered the alleged error;

(c) A petition filed more than 3 years after the date of the decision or order must show that the need to correct the error outweighs the interests of the public and heirs or devisees in the finality of the probate proceeding, which may be shown by addressing the following factors in the petition, as applicable:

(1) The nature of the error;

(2) The passage of time;

(3) Whether the interested party exercised due diligence in pursuing his or her rights;

(4) Whether the interested party's ancestor exercised due diligence in pursuing his or her rights and whether a failure to exercise should be imputed to the interested party;

(5) The availability of witnesses and documents;

(6) The general interest in administrative finality;

(7) The number of other estates that would be affected by the reopening, if known; and

(8) Whether the property that was in the estate is still available for redistribution if the case is reopened, if known.

■ 19. Add §§ 30.247 through 30.249 under undesignated center heading ''Decisions in Formal Proceedings'' to read as follows:

§ 30.247 What is not appropriate for a petition for reopening?

A petition for reopening may not:

(a) Raise issues or objections that were already addressed in a prior rehearing or reopening order;

(b) Raise issues or objections when the interested party had the opportunity to raise them earlier because they received proper notice of the hearing or summary decision; or

(c) Submit evidence that was available or discoverable at the time the decision was issued, or available during the rehearing period. The requirements at § 30.238(e) concerning presentation of new evidence on rehearing also apply to the presentation of new evidence on reopening.

§ 30.248 How will the judge decide my petition for reopening?

(a) The judge may summarily deny the petition for reopening based on deficiencies in the petition. A summary denial is an order in which the judge denies the petition without deciding the merits of the allegations in the petition and is warranted if:

(1) The petition alleges mere disagreement with a decision;

(2) The petition requests the same relief that was previously addressed in a rehearing order or reopening order;

(3) The petition raises only issues or objections by or on behalf of an interested party for the first time on reopening and that interested party received proper notice of the hearing or summary decision;

(4) The petition is based on newly discovered evidence and fails to meet the requirements of § 30.238(e); or

(5) The petition is based solely on issues or evidence described in § 30.245(c).

(b) If a summary denial is not warranted, the judge will review the merits of the petition to determine if the petition asserts proper grounds for reopening.

(1) If the petition fails to assert proper grounds for reopening, then the judge will issue an order denying the petition for reopening and addressing the merits of the petition.

(2) If the petition asserts proper grounds for reopening, the judge will:

(i) Cause copies of the petition and all papers filed by the petitioner to be served on those persons whose interest in the estate may be affected if the petition is granted;

(ii) Allow all persons served a reasonable, specified time in which to respond to the petition for reopening by filling responses, cross-petitions, or briefs;

(iii) Suspend further distribution of the estate or income during the reopening proceedings, if appropriate, by order to the affected agencies;

(iv) Consider, with or without a hearing, the issues raised in the petition; and

(v) Affirm, modify, or vacate the decision or order.

(c) On entry of a final order, including a summary denial, the judge must distribute the order to the petitioner, the agencies, and the interested parties. The order must include a notice stating that interested parties who are adversely affected, or BIA, have the right to appeal the final order to the Board, within 30 days of the mailing date, and giving the Board's address.

§ 30.249 What happens when the judge issues an order on reopening?

(a) Copies of the judge's order on reopening must be mailed to the petitioner, the affected agencies, and all interested parties.

(b) The judge must submit the record made on a reopening petition to the designated LTRO.

(c) The order on reopening will become final on the expiration of the 30 days allowed for the filing of a notice of appeal, as provided in this part.

§§ 30.250 and 30.251 through 30.254 [Redesignated as §§ 30.500 and 30.503 through 30.506]

■ 20. Redesignate §§ 30.250 and 30.251 through 30.254 as §§ 30.500 and 30.503 through 30.506.

Subpart K [Removed and Reserved]

■ 21. Remove and reserve subpart K.

■ 22. Add new §§ 30.250 through 30.253 under undesignated center heading ''Decisions in Formal Proceedings'' to read as follows:

§ 30.250 May a correction order be issued to correct typographical and other non-substantive errors?

If, after issuance of a decision or other probate order, it appears that the decision or other probate order contains non-substantive errors, the judge may issue a correction order to correct them. Errors are non-substantive if they are merely typographical, clerical, or their correction would not change the distribution of a decedent's property.

(a) A judge may issue a correction order for the purpose of correcting non-substantive errors on the judge's own motion. A request for correction order may also be filed by BIA or an interested party at any time.

(b) Copies of the correction order will be sent to BIA and all interested parties.

(c) The correction order is not subject to appeal to the Board.

§ 30.251 What happens if BIA identifies additional property of a decedent after the probate decision is issued?

If, after issuance of a decision, BIA identifies additional trust or restricted property of a decedent that it had not already identified at the time of the decision, then BIA will submit a petition to OHA for an order directing distribution of the additional property.

(a) OHA will accept the petition at any time after issuance of the decision.

(b) The judge will review the petition to ensure that the petition identifies the additional property and the source of that property (*e.g.,* inheritance or approval of a deed) and includes the following:

(1) A certified inventory describing the additional trust or restricted land, if applicable, or, if the additional property is trust personalty, documents verifying the balance and source of the additional trust personalty, and a statement that the inventory lists only the property to be added;

(2) A copy of the decision, or modification or distribution order and corresponding inventory issued in the probate case from which the property was inherited by the decedent, if applicable;

(3) A statement identifying each newly added share of any allotment that increases the decedent's total share of the ownership interest of the allotment to 5 percent or more;

(4) A copy of BIA's notification to the Tribes with jurisdiction over the interests of the list of the additional interests that represent less than 5 percent of the entire undivided ownership of each parcel (after being added to the decedent's estate) under 25 CFR 15.401(b); and

(5) A certification that all interested parties have been associated to the case and their names and addresses are current.

(c) The judge may, at the judge's discretion, either:

(1) Deny the request for good cause; or

(2) Address the request with or without a hearing.

(d) If the judge does not deny the petition, the judge will issue an order that directs distribution of the additional property. The order may direct that the additional property be distributed in the same manner as property already addressed in the decision, or the order may direct that the additional property be distributed in a different manner than property already addressed in the decision.

(e) The judge must furnish copies of the distribution order to the agency and to all interested parties who share in the estate. The distribution order will notify all heirs or devisees, including any surviving spouse, of the right to seek reconsideration to:

(1) Object to the findings and conclusions of the distribution order;

(2) Renounce their interest(s) in any of the additional property;

(3) Include the additional property in an existing or new consolidation agreement;

(4) Allege an error in BIA's inventory under § 30.128; or

(5) File a request to purchase the additional property at probate.

(f) The distribution order will also instruct the heirs or devisees that they must notify OHA in writing of their request for reconsideration of the distribution order within 30 days of the mailing of the distribution order, and that their right to seek reconsideration will be waived if they fail to notify OHA in writing by the deadline. For purposes of filing the request for reconsideration, the written submission will be considered to be filed with OHA on the date it is postmarked or faxed to OHA.

(g) If OHA does not receive a timely request for reconsideration, the distribution order will become final on the 45th day after the mailing date. An untimely filed request for reconsideration will not be considered by OHA and will not disturb the finality of the distribution order.

§ 30.252 What happens if BIA identifies that property was incorrectly included in a decedent's inventory?

If, after issuance of a decision, BIA identifies certain trust or restricted property or an interest therein that was incorrectly included in a decedent's inventory, then BIA will submit a petition to OHA for an order notifying all heirs or devisees of the correction and addressing any changes in distribution of property resulting from the correction.

(a) OHA will accept the petition at any time after issuance of the decision.

(b) The judge will review the petition to ensure that it identifies the property that it removed from the estate, explains why the property should not have been included, and includes the following:

(1) A newly issued certified inventory describing the trust or restricted land remaining in decedent's estate, if applicable;

(2) A copy of the decision, or modification or distribution order and corresponding inventory issued in the probate case from which BIA discovered that the property was incorrectly included in the decedent's estate, if applicable;

(3) A statement identifying each property in the decedent's estate that decreased to a total share of the ownership of the allotment to less than 5 percent as a result of the removal of property from the estate; and

(4) A certification that all interested parties have been associated to the case and their names and addresses are current.

(c) The judge may, at the judge's discretion, either:

(1) Deny the request for good cause; or

(2) Address the request with or without a hearing.

(d) If the judge does not deny the petition, the judge will issue an order that addresses any modifications to the distribution of the decedent's property resulting from the correction of the inventory. The order may find that the correction of the inventory does not modify the distribution of any remaining property in the estate.

(e) The judge must furnish copies of the distribution order to the agency and to all interested parties who share in the estate. The distribution order will inform all heirs or devisees, including any surviving spouse, of the right to seek reconsideration to object to the findings and conclusions of the

distribution order or to allege an error in BIA's inventory under § 30.128.

(f) The distribution order will also instruct the heirs or devisees that they must notify OHA in writing of their objection to the distribution order within 30 days of the mailing of the distribution order, and that their right to seek reconsideration will be waived if they fail to notify OHA in writing by the deadline. For purposes of filing the request for reconsideration, the written submission will be considered to be filed with OHA on the date it is postmarked or faxed to OHA.

(g) If OHA does not receive a timely request for reconsideration, the distribution order will become final on the 45th day after the mailing date. An untimely filed request for reconsideration will not be considered by OHA and will not disturb the finality of the distribution order.

§ 30.253 What happens if a request for reconsideration of a distribution order is timely made?

(a) If an heir, devisee, BIA or Tribe files a timely request for reconsideration, OHA will:

(1) Send to BIA a notice of receipt of a petition for reconsideration as soon as practicable, ordering that the newly added property not be distributed or incorrectly included property not be removed, as applicable, during the pendency of the petition for reconsideration; and

(2) Forward a copy of the petition and any documents filed with the petition to the interested parties and affected agencies.

(b) The agencies must not distribute any portion of the estate while the petition is pending, unless otherwise directed by the judge.

(c) If proper grounds for reconsideration are not shown, the judge will issue an order denying the petition for reconsideration and including the reasons for the denial.

(d) If proper grounds for reconsideration are shown, the judge must:

(1) Allow all persons served a reasonable, specified time in which to submit answers or legal briefs in response to the petition; and

(2) Consider, with or without a hearing, the issues raised in the petition, including requests to renounce, requests to purchase newly added properties at probate, and requests to include newly added property in an existing or new consolidation agreement.

(e) The judge will not reconsider findings made in the decision; the judge will only reconsider findings made in the distribution order regarding the distribution of the additional property or modification to distribution resulting from the inventory correction, as applicable.

(f) The judge may affirm, modify, or vacate the distribution order.

(g) On entry of a final order, the judge must distribute the order to the petitioner, the agencies, and the interested parties. The order must include notice stating that interested parties who are adversely affected, or BIA, have the right to appeal the final order to the Board, within 30 days of the date on which the order was mailed, and giving the Board's address.

(h) Neither BIA nor any interested party may file successive petitions for reconsideration.

(i) The order on a petition for reconsideration will become final on the expiration of the 30 days allowed for the filing of a notice of appeal, as provided in this part and § 4.320 of this chapter.

■ 23. Add subpart M to read as follows:

Subpart M—Purchase at Probate

Sec.

§ 30.400 What may be purchased at probate?

(a) The judge may allow an eligible purchaser to purchase at probate all or part of the trust or restricted land in the estate of a person who died on or after June 20, 2006. Any interest in trust or restricted land, including a life estate that is part of the estate (*i.e.* a life estate owned by the decedent but measured by the life of someone who survives the decedent), may be purchased at probate, except as provided in paragraph (b) of this section.

(b) Purchase of minerals-only real property interests (*i.e.,* an allotment that does not include a surface interest) may be considered for purchase at probate only if sufficient evidence of the fair market value of the real property interest is submitted. No interest in a minerals-only property may be purchased at probate on the basis of the value of the minerals themselves.

§ 30.401 Who may purchase at probate?

An eligible purchaser at probate is any of the following:

(a) Any devisee or eligible heir who is receiving an interest in the same parcel of land by devise or descent in the probate proceeding;

(b) Any person who owns an undivided trust or restricted interest in the same parcel of land;

(c) The Indian Tribe with jurisdiction over the parcel containing the interest; or

(d) The Secretary on behalf of the Tribe.

§ 30.402 Does property purchased at probate remain in trust or restricted status?

Yes. The property interests purchased at probate must remain in trust or restricted status.

§ 30.403 Is consent required for a purchase at probate?

(a) Except as provided in paragraphs (b) and (c) of this section, to purchase at probate a decedent's interest in trust or restricted property, the eligible purchaser must have the consent of:

(1) The heir or devisee of the share to be purchased;

(2) Any surviving spouse whose share is to be purchased and who receives a life estate under 25 U.S.C. 2206(a)(2)(A) or (D); or

(3) Any recipient of an interest received under an approved consolidation agreement whose share is to be purchased.

(b) If consent is required from an heir or devisee for a purchase at probate, the heir or devisee may notify OHA at any time after the request for purchase at probate is filed that the heir or devisee is not willing to consent to sell.

(1) To notify OHA, the heir or devisee must state, either on record at the probate hearing, or in writing to OHA, that the heir or devisee is not willing to consent to sell the property under any circumstances and/or is not willing to consider any bids to purchase the property interest.

(2) When OHA receives such notice, it will deny the request to purchase the property interest to which the notice applies.

(c) If you are the Tribe with jurisdiction over the parcel containing the interest, you do not need the consent of those listed under paragraph (a) of this section if the following five conditions are met:

(1) The interest will descend by intestate succession;

(2) The judge determines based on the Department's records that the decedent's interest at the time of death was less than 5 percent of the entire undivided ownership of the parcel of land;

(3) The heir or surviving spouse was not residing on the property at the time of the decedent's death;

(4) The heir or surviving spouse is not a member of your Tribe or eligible to become a member; and

(5) The interest is not included in an approved consolidation agreement.

(d) BIA may purchase an interest in trust or restricted land on behalf of the Tribe with jurisdiction over the parcel containing the interest if BIA obtains consent under paragraph (a) of this section or the conditions in paragraph (c) of this section are met.

§ 30.404 How do I initiate a purchase at probate?

Any eligible purchaser may initiate a purchase at probate by submitting a written request to OHA to purchase at probate.

§ 30.405 When may I initiate a purchase at probate?

(a) To initiate a purchase at probate during the initial probate proceeding, the eligible purchaser must submit the written request before the completion of the first probate hearing.

(b) If a property interest the eligible purchaser would like to purchase has been added to the decedent's estate under § 30.251, the purchaser must submit the written request within 30 days of the mailing of the distribution order issued under § 30.251(d).

§ 30.406 May I withdraw my request to purchase at probate?

At any point before the purchase is complete, a purchaser may withdraw a request to purchase at probate. In order to withdraw a request to purchase, the requester must file with OHA a written statement that the request is withdrawn. The requester is not required to provide reasons or justification for withdrawal of the request.

§ 30.407 How will OHA address requests to purchase at probate?

The judge has discretion to deny a request to purchase at probate in the decision or at any time thereafter. If one or more requests to purchase at probate are timely filed, OHA will address those requests in the probate decision (or reconsideration order if the request to purchase is for property that has been added to the decedent's estate under § 30.251) and either deny the requests at that time or provide instructions for continuing the purchase at probate process.

§ 30.408 What will OHA include in the probate decision or reconsideration order when a purchase at probate request is pending?

(a) If a purchase at probate request is pending at the time the probate decision (or reconsideration order under § 30.251) is issued, and is not denied in the decision (or reconsideration order), the decision (or reconsideration order) will include the following to address the request:

(1) A list of all requests to purchase at probate that have been submitted;

(2) Notification to the parties as to whether consent of the applicable heirs or devisees is required to approve the requested purchase; and

(3) Direction to BIA to obtain an appraisal or valuation for each interest for which a purchase at probate request has been submitted.

(b) If the purchase of the interest requires consent of the applicable heirs or devisees, the probate decision or reconsideration order will also:

(1) Direct the heirs or devisees to submit written notification within 30 days of the mailing date of the decision or reconsideration order that the heirs or devisees would consider selling the interest to an eligible purchaser during the probate process if a bid is made for fair market value or greater;

(2) Inform the heirs or devisees that OHA may consider failure to provide such written notification as a refusal to consent to sell the property during probate, and may rely on such refusal to deny the request to purchase at probate; and

(3) Direct BIA to postpone seeking an appraisal/valuation of that property until BIA receives future notice from OHA that at least one heir or devisee has filed the written notification that the heir or devisee would consider selling the interest.

§ 30.409 How will a pending purchase at probate request affect how the decedent's property is distributed?

When the decision (or distribution order following a reconsideration order under § 30.251) becomes final, BIA may distribute the estate as stated in the decision or distribution order. Any property interest that is the subject of a pending request for purchase at probate will be conveyed with an encumbrance, which will remain on the property interest until the request is fully addressed. The encumbrance does not affect distribution of trust personalty.

§ 30.410 How will the purchase at probate process continue after the decision or reconsideration order is issued?

After a decision or reconsideration order is issued:

(a) If consent is required for the purchase of an interest, and an heir or devisee does not submit written notification that he or she would consider selling the interest by the deadline OHA established, the request to purchase the applicable property interest(s) is denied by operation of law. In such cases, OHA will notify the BIA that it may remove the encumbrance remaining on the applicable property interest(s).

(b) If the heirs or devisees submit the written notification that they would consider selling the interest by the deadline OHA established, then OHA will notify BIA that it may obtain an approval/valuation of the property.

(c) In any other instances in which a purchase request is denied, BIA may remove any encumbrance remaining on the applicable property interest(s).

§ 30.411 How will the interests to be purchased at probate be valued?

(a) For each parcel for which a request to purchase has been submitted, BIA will obtain appraisal(s) or other fair market valuation(s) in compliance with the Uniform Standards of Professional Appraisal Practice (USPAP) or other

approved valuation methods under 25 U.S.C. 2214.

(b) Any appraisal/valuation must be made on the basis of the fair market value of the parcel as of the date of the decedent's death.

(c) No valuation document filed by the BIA, aside from an appraisal, will be used to determine the fair market value of trust land during a purchase at probate unless the document clearly states that it assesses the fair market value of the real property interest or is accompanied by a certification that it does so.

§ 30.412 What will OHA do when it receives BIA's notification that an appraisal/valuation has been completed?

When OHA receives BIA's notification that an appraisal/valuation has been completed and BIA files a Petition to Complete Purchase at Probate, OHA will issue an Order to Submit Bids to all potential bidders to submit bids for property interests with pending purchase at probate requests.

(a) Potential bidders may submit bids even if they have not previously submitted a request to purchase at probate.

(b) OHA will identify the individuals/entities who are eligible to submit bids for each property interest available for purchase at probate.

§ 30.413 Who are potential bidders?

(a) The Tribe will be the only potential bidder and no other bids will be accepted if:

(1) The Tribe with jurisdiction over the property submits the only request to purchase within the deadline; and

(2) The requirements of § 30.403(c) (*i.e.* consent of the heir is not required) are met.

(b) In other situations, potential bidders may include:

(1) Any eligible purchaser who has satisfied the requirements of §§ 30.404 and 30.405;

(2) Eligible heirs;

(3) Eligible devisees;

(4) The Indian Tribe with jurisdiction over the property interest; and

(5) Co-owners of trust or restricted interests in the same allotment who have previously notified BIA in writing that they wish to receive probate notices concerning that allotment.

§ 30.414 What will be contained in the Order to Submit Bids?

For each property for which a request to purchase at probate is pending, the Order to Submit Bids will include:

(a) A finding of the fair market value of the interest to be sold, determined in accord with the appraisal/valuation provided by the BIA under § 30.411;

(b) Information concerning where a copy of the appraisal/valuation may be viewed;

(c) Direction to potential bidders to submit bids to purchase the property that are equal to or greater than the fair market value;

(d) A deadline by which OHA must receive bids from all potential bidders; and

(e) A statement that if no bids are submitted by the deadline, the request to purchase will be denied.

§ 30.415 What may I do if I do not agree with the determination of fair market value in the Order to Submit Bids?

(a) You may object to the determination of fair market value stated in the Order to Submit Bids if:

(1) You are the heir, devisee, or surviving spouse whose interest is to be sold;

(2) You filed a written request to purchase; or

(3) Any potential bidder or other party who may be affected by the determination of the fair market value.

(b) To object to the determination of fair market value:

(1) You must file a written objection with OHA no later than 45 days after the mailing date of the Order to Submit Bids.

(2) The objection must:

(i) State the reasons for the objection; and

(ii) Include any supporting documentation showing why the fair market value should be modified.

(3) You must provide copies of the written objection and any supporting documentation to all parties who have an interest in the purchase of the property.

(c) Any party who may be affected by the determination of the fair market value may file a response to the written objection with OHA no later than 45 days after the date the written objection was served on the interested parties. Any document supporting the party's response must be submitted with the response.

(d) The judge will consider any timely submitted written objection and responses, and will determine whether to modify the finding of fair market value, with or without a valuation hearing. OHA will issue a Modified Order to Submit Bids that addresses the objection and responses.

(e) If you were directed to submit a bid, you may preserve your right to submit a bid by filing the written objection instead of a bid.

§ 30.416 How does OHA decide whether a bid is successful?

OHA will decide that a bid is successful if it meets the following requirements.

(a) The bid is equal to or greater than the fair market value of the interest and was timely filed.

(b) In cases in which consent of an heir, devisee, or surviving spouse is required for the purchase, the applicable heir devisee, or surviving spouse accepts a bid.

(1) OHA may hold a hearing for the purpose of determining whether the applicable heir, devisee, or surviving spouse accepts a bid.

(2) If multiple bids are submitted, the applicable heir, devisee, or surviving spouse may choose which bid to accept.

(3) If the applicable heir, devisee, or surviving spouse does not accept any bid for his or her property interest, the request to purchase that property interest at probate will be denied.

§ 30.417 How does the judge notify the parties whether there was a successful bid?

(a) When a judge determines that a bid is successful, the judge will issue a Notice of Successful Bid to all bidders, OST, the BIA agency that prepared the probate file, and the BIA agency having jurisdiction over the interest sold. The Notice of Successful Bid will include the following information:

(1) The parcel and interest sold;

(2) The identity of the successful bidder;

(3) The amount of the successful bid; and

(4) Instructions to the successful bidder to submit payment for the interest.

(b) If no successful bids are received, the judge will issue an order denying the request to purchase the property.

§ 30.418 When must the successful bidder pay for the interest purchased?

The successful bidder makes payment, according to the instructions in the Notice of Successful Bid, of the full amount of the purchase price no later than 30 days after the mailing date of the Notice of Successful Bid.

§ 30.419 What happens after the successful bidder submits payment?

When the judge is notified by BIA that BIA has received payment, the judge will issue an order:

(a) Approving the sale and stating that title must transfer as of the date the order becomes final; and

(b) For the sale of an interest subject to a life estate, directing allocation of the proceeds of the sale and accrued income among the holder of the life

estate and the holders of any remainder interests using 25 CFR part 179.

§ 30.420 What happens if the successful bidder does not submit payment within 30 days?

(a) If the successful bidder fails to pay the full amount of the bid within 30 days, the judge will issue an order denying the request to purchase or the bid (whichever is applicable) and the interest in the trust or restricted property will be distributed as determined by the judge in the decision or distribution order.

(b) The time for payment may not be extended.

(c) Any partial payment received will be returned.

§ 30.421 When does a purchased interest vest in the purchaser?

If the request to purchase (or a bid submitted by a potential bidder) is approved, the purchased interest vests in the purchaser on the date OHA's order approving the sale becomes final.

§ 30.422 What will happen to any lease income received or accrued from purchased land interests before the purchased interest vests in the purchaser?

Any lease income received or accrued from a property interest before the date the purchased interest vests in the purchaser will be paid to the heir(s), devisee(s), or surviving spouse from whom purchase of the interest was made based on the fractional ownership interests in the parcel as determined in the decision or distribution order.

§ 30.423 What may I do if I disagree with the judge's determination to approve or deny a purchase at probate?

If you are an interested party who is adversely affected by the judge's order to approve or deny a purchase at probate, you may file an appeal to the Board within 30 days after the mailing date of OHA's order approving or denying the purchase at probate.

§ 30.424 When will the order approving or denying the purchase at probate become final?

The order to approve or deny the purchase at probate becomes final at the end of the 30-day appeal period, unless a timely appeal is filed.

§§ 30.500 and 30.503 through 30.506 [Designated as Subpart N]

■ 24. Designate newly redesignated §§ 30.500 and 30.503 through 30.506 as subpart N and add a heading for subpart N to read as follows:

Subpart N—Miscellaneous

■ 25. Add §§ 30.501 and 30.502 to read as follows:

§ 30.501 When is joint tenancy presumed?

A judge will presume that a testator intended to devise interests in joint tenancy when:

(a) A testator devises trust or restricted interests in the same parcel of land to more than one person; and

(b) The will does not contain clear and express language stating that the devisees receive the interests as tenants in common.

§ 30.502 How does a judge resolve conflicts between the anti-lapse provision and the presumption of joint tenancy?

If the presumption of joint tenancy and anti-lapse provisions conflict, then the judge will give priority to the presumption of joint tenancy and the share of the deceased devisee will descend to the surviving devisees.

■ 26. Revise newly redesignated § 30.506 to read as follows:

§ 30.506 When a decedent died intestate without heirs, what law applies to trust or restricted property?

The law that applies to trust or restricted property when a decedent died intestate without heirs depends upon whether the decedent died before June 20, 2006 or on or after June 20, 2006.

(a) When the judge determines that a decedent died before June 20, 2006, intestate without heirs, the judge will apply 25 U.S.C. 373a or 25 U.S.C. 373b to address distribution of trust or restricted property in the decedent's estate. If it is necessary to determine the value of an interest in land located on the public domain, to properly apply 25 U.S.C. 373b, the judge will determine fair market value based on an appraisal or other valuation method developed by the Secretary under 25 U.S.C. 2214. If the interest in land located on the public domain is valued at more than $50,000, the judge's decision concerning distribution of that interest will be a recommended decision only.

(b) When the judge determines that a decedent died intestate on or after June 20, 2006, without surviving lineal descendants, parents, or siblings who are eligible heirs, the judge will apply provisions of the Act to determine distribution of trust or restricted land in the decedent's estate.

(1) If the decedent died without surviving lineal descendants, parents, or siblings who are eligible heirs, and the decedent owned at least 5 percent of an allotment, that interest will be distributed either to the Indian Tribe with jurisdiction over the interest or, if there is no Indian Tribe with jurisdiction, then split equally among the co-owners of the parcel as of the decedent's date of death, subject to the exceptions and limitations detailed in 25 U.S.C. 2206(a)(2)(B)–(C).

(2) If the decedent died without surviving lineal descendants who are eligible heirs, and the decedent owned less than 5 percent of an allotment, that interest will be distributed either to the Indian Tribe with jurisdiction over the interest or, if there is no Indian Tribe with jurisdiction, then split equally among the co-owners of the parcel as of the decedent's date of death, subject to the exceptions and limitations concerning small fractional interests detailed in 25 U.S.C. 2206(a)(2)(D).

(3) For either paragraph (b)(1) or (2) of this section, the judge will also determine whether the decedent had a surviving spouse, and whether the surviving spouse is entitled to a life estate.

■ 27. Add § 30.507 to read as follows:

§ 30.507 How will trust personalty be distributed if decedent died intestate on or after June 20, 2006, and the Act does not specify how the trust personalty should be distributed?

When the judge determines that a decedent died intestate on or after June 20, 2006, without a surviving spouse or eligible heirs under the Act, and without trust or restricted land over which one, and only one, Indian Tribe has jurisdiction, the judge will direct distribution of trust personalty, including trust funds that were on deposit in the decedent's IIM account or owing to the decedent as of the decedent's date of death, as follows:

(a) To the decedent's surviving children, grandchildren, great-grandchildren, parents, or siblings who are not eligible heirs under the Act, in the order set forth in 25 U.S.C. 2206(a)(2)(B).

(b) If trust personalty does not descend under paragraph (a) of this section, then to the decedent's surviving nieces and nephews, in equal shares.

(c) If trust personalty does not descend under paragraph (b) of this section, then to the Indian Tribe in which the decedent was enrolled at the time the decedent died.

(d) If trust personalty does not descend under paragraph (c) of this section, then:

(1) To the Indian Tribe in which the decedent's biological parents were enrolled, if both were enrolled in the same Tribe;

(2) To the Indian Tribes in which the decedent's biological parents were enrolled, in equal shares, if each of the decedent's biological parents was enrolled in a different Tribe; or

(3) If only one biological parent was enrolled in an Indian Tribe, to the

Indian Tribe in which that biological parent was enrolled.

(e) If trust personalty does not descend under paragraph (d) of this section, then:

(1) To the Indian Tribe in which the decedent's biological grandparents were enrolled; if all enrolled biological grandparents were enrolled in the same Tribe;

(2) To the Indian Tribes in which the decedent's biological grandparents were enrolled, in equal shares, if two or more of the decedent's biological grandparents were enrolled in different Tribes; or

(3) If only one biological grandparent was enrolled in an Indian Tribe, to the Indian Tribe in which that biological grandparent was enrolled.

(f) If trust personalty does not descend under paragraph (e) of this section, then to an Indian Tribe selected by the judge, in consideration of the following factors:

(1) The origin of the funds in the decedent's IIM account;

(2) The Tribal designator contained in the owner identification number or IIM account number assigned to the decedent by BIA; and

(3) The geographic origin of the decedent's Indian ancestors.

Tara Sweeney,

Assistant Secretary—Indian Affairs.

Scott Cameron,

Principal Deputy Assistant Secretary for Policy, Management and Budget.

[FR Doc. 2020–28306 Filed 1–6–21; 8:45 am]

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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 158

[Docket ID: DOD–2020–OS–0015]

RIN 0790–AK81

Operational Contract Support (OCS) Outside the United States

AGENCY: Office of the Under Secretary of Defense for Acquisition and Sustainment, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: The DoD is issuing this rule to update the policies and procedures for operational contract support (OCS) outside the United States. These changes include broadening the range of applicable operational scenarios, eliminating content internal to the Department, and making updates to comply with law and policy. Changes include designating contractor personnel as part of the DoD total force, incorporating requirements for accountability and reporting, and clarifying responsibilities. Through these updates, the Department will also address open recommendations from the Government Accountability Office (GAO). OCS is a segment of the GAO High Risk Area of DoD Contract Management and while the latest update in March 2019 acknowledged progress, GAO cited the need to revise and reissue guidance to address several open recommendations.

DATES: Comments must be received by March 8, 2021.

ADDRESSES: You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) number and title, by any of the following methods:

- *Federal Rulemaking 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 and docket number or RIN for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Donna M. Livingston, 703–692–3032, *donna.m.livingston.civ@mail.mil.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Purpose of the Rule

The Joint Force relies on contracted support in nearly every mission and operational setting. Operational Contract Support (OCS) is how the Department plans for and integrates contracted capabilities and associated contractor personnel providing support to operations within a designated geographic area. Since 2007, the Department has been heavily focused on better oversight, management, and accounting of contractors supporting U.S. military operations. Concurrently, there has been increasing demand from commanders for more visibility of contractor personnel. Successfully planning for, procuring, and integrating contracted support requires that commanders have a full understanding of what contracted support is needed and when; how requirements can be optimized and executed; and how the Department includes contracted support as part of the total force. The existing part describes, in detail, the specific DoD policy, responsibilities, and procedures that enable and substantiate OCS and enable both the DoD and its commercial partners to plan for contractor support when operating with U.S. Armed Forces in applicable operations. Contractors are currently required to load their employees' information in the Synchronized Predeployment Operational Tracker—Enterprise System (SPOT–ES) when an employee deploys under a contract to support U.S. military operations overseas, and this revision neither increases nor decreases the burden of this requirement. The changes resulting from the revised rule increase transparency of new policies and better inform the DoD's commercial partners.

B. Background

Operational contract support was born in the aftermath of significant reporting on DoD acquisition and contracting operations in Iraq and Afghanistan, including the 2008 ''Commission on Army Acquisition and Program Management in Expeditionary Operations'' and the 2011 ''Commission on Wartime Contracting in Iraq and Afghanistan.'' The Commission on Wartime Contracting in Iraq and Afghanistan published findings that identified deficiencies related to contract management and oversight that required DoD's attention. As a result, the DoD has invested heavily in efforts to address these findings and enhance oversight, better define contract requirements, and improve the visibility and accounting of contractors supporting U.S. operations overseas. There has been persistent scrutiny of the DoD's progress to close these deficiencies, namely by the GAO. The GAO has reviewed the Departments' progress on OCS on multiple occasions, and classified OCS as a segment within the DoD Contract Management High Risk Area. In the last report (GAO–19–157SP) published in March 2019 (available at *https://www.gao.gov/products/GAO-19-157SP*), GAO recognized the progress made on OCS and affirmed that it could remove its high-risk status. Removal could come quickly once the DoD successfully completes the few remaining GAO recommendations. By implementing the GAO recommendations, updating internal policies especially DoD Instruction 3020.41 ''Operational

Contract Support'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/302041p.pdf*), and revising this CFR part, the DoD will address the vital need for greater efficiency and accountability. Improved policy and guidance will foster an environment focused on operational planning of contracted support to operations and improved readiness, and will result in cost savings by reducing the potential for waste, fraud, and abuse.

C. Summary of Major Provisions

This proposed rule: (1) Broadens the types of operations when contracted support may be employed, beyond contingency operations; (2) describes and clarifies contractors' responsibilities related to theater admission requirements for their personnel deploying in support of operations outside the United States; (3) clarifies contractors' responsibilities to provide personnel who meet specific medical and dental fitness standards; (4) details the services the U.S. Government is authorized to provide to contractors; and (5) removes all internally facing information to promote efficiency and streamline communication with the public.

To address GAO recommendations to improve the ability to track contracts and contractor personnel in contingency and other operations and to help ensure that DoD possesses the capability to collect and report statutorily required information and to clarify responsibilities and procedures, § 158.5(g) was updated to address SPOT minimum reporting requirements, system requirements, and references to the SPOT business rules were included which include area specific requirements.

D. Legal Authority

The legal authority for this rule is found in Section 861, *Memorandum of Understanding on Matters Relating to Contracting,* of the *National Defense Authorization Act for Fiscal Year 2008* (Pub. L. 110–181), and Section 854, *Additional Contractor Requirements and Responsibilities Relating to Alleged Crimes By or Against Contractor Personnel in Iraq and Afghanistan,* of the *Duncan Hunter National Defense Authorization Act for Fiscal Year 2009* (Pub. L. 110–417).

II. Regulatory History

An interim final rule for this part was published on December 29, 2011 (76 FR 81807). The DoD adopted the interim final rule as a final rule without change on December 3, 2013 (78 FR 72573). The 2011 rule action procedurally closed gaps that existed in planning, oversight, and management of DoD contractors supporting contingency operations. The rule was necessary to address legislative mandates, remove confusion with other policies, and better reflect the practices and procedures in place at that time. The rule was crucial at the time due to the sustained employment of a large number of contractors in the U.S. Central Command area of responsibility; the importance of contractor oversight in support of counter-insurgency operations in Afghanistan; and the requirement to manage contractors effectively during the withdrawal of U.S. forces from Iraq in 2011.

III. Regulatory Analysis

A. Regulatory Planning and Review

a. Executive Orders

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. This rule has been designated a ''not significant regulatory action'' and has been determined not to be economically significant under section 3(f) of Executive Order 12866.

Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs''

This rule is not significant under Executive Order 12866; therefore, it is not subject to the requirements of Executive Order 13771.

b. Summary

This rule broadens the range of operations in which contracted support may be employed; updates requirements for the development of contractor oversight plans; increases visibility and accountability; reinforces requirements for adequate military personnel necessary to execute contract oversight; and describes U.S. Government standards for medical care available to deployed contractor personnel, when authorized. It also updates policy resulting from changes in law and policy. Lastly, the rule has been streamlined to show only information relevant to the public and removes internally facing responsibilities and procedures.

c. Affected Population

The existing rule provides information relevant to contractors and their personnel that may provide contracted support to the DoD during applicable operations outside the United States. The following populations are expected to continue to be stakeholders in the content of the revised rule:

- Contractor personnel—Provides information and describes the requirements the DoD imposes on employees of commercial industry partners who may be employed in support of DoD operations conducted outside the United States.
- CCompanies or organizations—Provides information for commercial industry partners to understand how contractor personnel are managed and accounted for and includes deployment requirements necessary to provide support to DoD in applicable operations.

d. Costs

A negligible burden reduction to the public may be achieved by the clarifications and increased transparency provided by this revision. Contractors may save time by having increased access to DoD policy requirements and in avoiding unnecessary duplication or providing personnel not suitable or prepared to support applicable operations outside the United States. The changes implemented by this rule are not expected to alter significantly the baseline burden that was calculated as part of the most recent SPOT–ES system collection, Control Number 0704–0460, approved by the OMB in 2019 in accordance with the Public Law 96–511, ''Paperwork Reduction Act.''

Collection instrument (SPOT database)	2016 approved estimates	2019 approved estimates
Estimation of Respondent Burden Hours		
Number of Respondents	1670	964.
Number of Responses per Respondent	56	77.
Number of Total Annual Responses	93,520	74,561.
Response Time (Amount of time needed to complete the collection instrument)	.5	.5.
Respondent Burden Hours (Total Annual Responses multiplied by Response Time) Please compute these into hours).	46,760	37,291.
Labor Cost of Respondent Burden		
Number of Responses	93,520	74,561 (decrease of 18,959).
Response Time per Response	.5	.5.
Respondent Hourly Wage	$36.00	$32.11.
Labor Burden per Response (Response Time multiplied by Respondent Hourly Wage)	$18.00	$16.06.
Total Labor Burden (Number of Respondents multiplied by Response Time multiplied by Respondent Hourly Wage).	$1,683,360	$1,197,077 (decrease of $486,283).

The burden and cost decreased due to contractor deployments to ongoing contingencies having been reduced since 2016. Thus, the number of responses required was reduced from 93,520 to 74,561. This drove the associated calculations down and resulted in a decrease in cost of $486,283. In addition, the difference in the respondent hourly range is attributed to the respondent labor category from a management labor category in 2016 to human resources specialist in 2019. Wage information is based on data from the Department of Labor Statistics (*https://www.bls.gov/oes/current/oes_nat.htm*).

Based on data from the Federal Procurement Data System—Next Generation for contract actions for fiscal year 2019 with a place of performance outside the United States, approximately 15,742 of 2.4 million (or 1 percent), are to small businesses. This amounts to $2,438,406,319 of $36,747,264,771 (or less than 8 percent) of contracts obligated to small businesses worldwide.

e. Benefits

OCS is a force multiplier, giving commanders more options, and supports force optimization. When properly planned for and integrated into operations, OCS can be leveraged to support the Secretary of Defense's objective of restoring military readiness and to close any gaps in fulfilling requirements associated with maintenance, material, intelligence information, or translation services, which can be filled by either short- or long-term commercial capabilities. This rule most significantly improves and refines DoD policy for planning and integrating contracted support in applicable operations. The Department has been working for more than a decade to establish OCS as a core defense capability; one that minimizes risk, increases readiness and flexibility, and improves effectiveness. This rule codifies policy that implements a programmatic approach and improves oversight of contracted support, reducing the likelihood that historical instances of waste, fraud, and abuse will be repeated. This rule furthermore ensures contractors supporting applicable operations are fully prepared to meet the requirements necessary to support operations outside the United States.

f. Alternatives

The DoD has considered the following alternatives:

- No action—maintain the status quo. If no action is taken, the significant improvements made to accounting and managing, planning for, and overseeing contracted support will not be codified, raising the risk that past mismanagement will persist, resulting in significant waste, fraud, and abuse. In addition, the rule must be updated and published before an update to the associated DoD issuance, DoD Instruction 3020.41, ''Operational Contract Support (OCS),'' may be issued. Publishing the updated policy is required to remove the OCS element of DoD Contract Management as a GAO High-Risk Area.
- Publish proposed rule. Codify changes in policy and statute that result in improved management of contract requirements, contractor management and visibility and accountability of contractors. These improvements will support removing OCS as a sub-area under the GAO High Risk Area of DoD Contract Management.

In summary, if the status quo is maintained, resolution of the GAO recommendations cannot be implemented.

B. Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. 601)

The DoD certifies that this rule, if promulgated, does not have a significant economic impact on a substantial number of small entities. Based on data from the Federal Procurement Data System—Next Generation for contract actions for fiscal year 2019 with a place of performance outside the United States, approximately 15,742 of 2.4 million (or 1 percent), are to small businesses. This amounts to $2,438,406,319 of $36,747,264,771 (or less than 8 percent) of contracts obligated to small businesses worldwide. Therefore, the requirements of the Regulatory Flexibility Act do not apply.

C. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.* generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The DoD will submit a report containing the final rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

D. Sec. 202, Public Law 104–4, ''Unfunded Mandates Reform Act''

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA)

(2 U.S.C. 1532) requires agencies to assess anticipated costs and benefits before issuing any rule whose mandates require spending in any one year of $100 million in 1995 dollars, updated annually for inflation. This rule will not mandate any requirements for State, local, or tribal governments.

E. Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

It has been determined that 32 CFR part 158 does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. This SPOT–ES system collection has been reviewed and approved by the OMB and assigned OMB Control Number 0704–0460 (cleared through September 30, 2022). The SPOT–ES collection package encapsulated the requirement for all DoD, Department of State (DOS), and United States Agency for International Development (USAID) contractor personnel to register in the SPOT–ES database. Within the current collection, 87 percent of contractor personnel records were related to DoD contracts and less than 13 percent were from other government agencies. This collection of information does not require collection to be conducted in a manner inconsistent with the guidelines delineated in 5 CFR 1320.5(d)(2).

System of Records Notices (SORNs) and Privacy Impact Assessments (PIAs) (*https://www.dmdc.osd.mil/appj/dwp/documents.jsp*) have been accomplished under SORN Identifier DMDC 18 DoD (*https://dpcld.defense.gov/Privacy/SORNsIndex/DOD-wide-SORN-Article-View/Article/570569/dmdc-18-dod/*), ''Synchronized Predeployment Operational Tracker Enterprise Suite.''

F. Executive Order 13132, ''Federalism''

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications. The changes in this rule will not have a substantial effect on State and local governments and do not implicate federalism.

List of Subjects in 32 CFR Part 158

Accountability/visibility, Accounting, Armed forces, Combating trafficking in persons, Deployment and redeployment, Government contracts, Medical clearances, Passports and visas, Planning, Security measures, Support to contractors, Transportation.

■ Accordingly, 32 CFR part 158 is proposed to be revised to read as follows:

PART 158—OPERATIONAL CONTRACT SUPPORT (OCS) OUTSIDE THE UNITED STATES

Sec.
158.1 Purpose.
158.2 Applicability.
158.3 Definitions.
158.4 Policy.
158.5 Procedures.
158.6 Guidance for contractor medical and dental fitness.

Authority: Public Law 110–181; Public Law 110–417.

§ 158.1 Purpose.

This part establishes policy, assigns responsibilities, and provides procedures for operational contract support (OCS), including contract support integration, contracting support, management, and deployment of defense contractor personnel in applicable operations outside the United States.

§ 158.2 Applicability.

This part applies to contracts and contractor personnel supporting DoD Components operating outside the United States in contingency operations, humanitarian assistance, or peace operations and other activities, including operations and exercises as determined by a Combatant Commander or as directed by the Secretary of Defense.

§ 158.3 Definitions.

Unless otherwise noted, the following terms and their definitions are for the purposes of this part.

Acquisition. The acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.

Applicable operations. Contingency operations, humanitarian assistance, or peace operations conducted outside the United States and other activities, including operations and exercises outside the United States as determined by a combatant commander (CCDR) or as directed by the Secretary of Defense.

Austere environment. Areas where applicable operations may be conducted that are in remote, isolated locations, where access to modern comforts and resources may be limited or non-existent.

Civil augmentation program. External support contracts designed to augment Military Department logistics capabilities with contracted support in both preplanned and short-notice operations.

Contingency contract. A legally binding agreement for supplies, services, and/or construction let by a U.S. Government contracting officer in the operational area, or that has a prescribed area of performance within an operational area.

Contingency operation. A military operation that is either designated by the Secretary of Defense as a contingency operation or becomes a contingency operation as a matter of law as defined in 10 U.S.C. 101(a)(13).

Contract administration. The processes and procedures of contracting, from contract award through closeout, that includes oversight efforts by contracting professionals and designated non-contracting personnel to ensure that supplies, services, and/or construction are delivered and/or performed in accordance with the terms and conditions of the contract.

Contract support integration. The coordination and synchronization of contracted support executed in a designated operational area in support of military operations.

Contracting. Purchasing, renting, leasing, or otherwise obtaining supplies or services from nonfederal sources. Contracting includes description (but not determination) of supplies and services required, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration. It does not include making grants or cooperative agreements.

Contracting officer. A person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer. ''Administrative contracting officer (ACO)'' refers to a contracting officer who is administering contracts. ''Termination contracting officer (TCO)'' refers to a contracting officer who is settling terminated contracts. A single contracting officer may be responsible for duties in any or all of these areas.

Contracting Officer's Representative (COR). An individual, including a contracting officer's technical representative (COTR), designated and authorized in writing by the contracting officer to perform specific technical or administrative functions.

Contracting support. The coordination of contracts and execution of contracting authority by a warranted contracting officer that legally binds commercial entities to perform contractual requirements in support of DoD operational requirements.

Contractor management. The oversight and integration of contractor personnel and associated equipment providing support to military operations.

Contractor personnel. Any individual, employed by a firm, corporation, partnership, or association, employed under contract with the DoD to furnish services, supplies, or construction. Contractor personnel may include U.S. citizens and host nation and third country national (TCN) individuals.

Contractor personnel accountability. The process of identifying, capturing, and recording the personally identifiable information and assigned permanent duty location of an individual contractor employee through the use of a designated database.

Contractor personnel visibility. Information on the daily location, movement, status, and identity of contractor personnel.

Contractors Authorized to Accompany the Force (CAAF). Contractor personnel and all tiers of subcontractor personnel authorized to accompany U.S. Armed Forces in applicable operations outside of the United States who have been afforded this status through the issuance of a Letter of Authorization (LOA). CAAF generally include all U.S. citizen and TCN employees not normally residing within the operational area whose area of performance is in the direct vicinity of the U.S. Armed Forces and who are routinely co-located with the U.S. Armed Forces. In some cases, CCDR subordinate commanders may designate mission-essential host nation (HN) or local national (LN) contractor personnel (*e.g.,* interpreters) as CAAF. CAAF includes contractor personnel previously identified as contractors deploying with the force. CAAF status does not apply to contractor personnel within U.S. territory working in support of contingency operations outside the United States.

Defense contractor. Any individual, firm, corporation, partnership, association, or other legal non-Federal entity that enters into a contract directly with the DoD to furnish services, supplies, or construction.

DoD Components. Includes the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff (CJCS) and the Joint Staff, the Combatant Commands (CCMDs), the Office of the Inspector General of the Department of Defense, the Defense Agencies, and the DoD Field Activities.

Essential contractor service. A service provided by a firm or an individual under contract to the DoD to support mission-essential functions, such as support of vital systems, including ships owned, leased, or operated in support of military missions or roles at sea; associated support activities, including installation, garrison, and base support services; and similar services provided to foreign military sales customers under the Security Assistance Program. Services are essential if the effectiveness of defense systems or operations has the potential to be seriously impaired by the interruption of these services, as determined by the appropriate functional commander or civilian equivalent.

Expeditionary Contract Administration (ECA). Contract administration conducted during joint or other expeditionary operations. Formerly known as the Contingency Contract Administrative Services or CCAS.

Expeditionary operations. Activities organized to achieve a specific objective in a foreign country.

External support contracts. Contracts awarded by contracting organizations whose contracting authority does not derive directly from the theater support contracting head(s) of contracting activity or from systems support contracting authorities.

Host nation (HN). A nation that permits, either in writing or other official invitation, government representatives or agencies and/or agencies of another nation to operate, under specified conditions, within its borders.

Hostile environment. Operational environment in which local government forces, whether opposed to or receptive to operations that a unit intends to conduct, do not have control of the territory and population in the intended operational area.

Isolated personnel. U.S. military, DoD civilians, and contractor personnel (and others designated by the President or Secretary of Defense) who are unaccounted for as an individual or a group while supporting an applicable operation and are, or may be, in a situation where they must survive, evade, resist, or escape.

Law of war. The treaties and customary international law binding on the United States that regulate: The resort to armed force; the conduct of hostilities and the protection of war victims in international and non-international armed conflict; belligerent occupation; and the relationships between belligerent, neutral, and non-belligerent States. Sometimes also called the ''law of armed conflict'' or ''international humanitarian law,'' the law of war is specifically intended to address the circumstances of armed conflict.

Letter of authorization (LOA). A document issued by a contracting officer or his or her designee that authorizes contractor personnel to accompany the force to travel to, from, and within an operational area, and outlines U.S. Government authorized support authorizations within the operational area, as agreed to under the terms and conditions of the contract. For more information, see 48 CFR subpart 225.3.

Local national (LN). An individual who is a permanent resident of the nation in which the United States is conducting operations.

Long-term care. A variety of services that help a person with comfort, personal, or wellness needs. These services assist in the activities of daily living, including such things as bathing and dressing. Sometimes known as custodial care.

Mission-essential functions. Those organizational activities that must be performed under all circumstances to achieve DoD component missions or responsibilities, as determined by the appropriate functional commander or civilian equivalent. Failure to perform or sustain these functions would significantly affect the DoD's ability to provide vital services or exercise authority, direction, and control.

Non-CAAF. Personnel who are not designated as CAAF, such as LN employees and non-LN employees who are permanent residents in the operational area or TCNs not routinely residing with the U.S. Armed Forces (and TCN expatriates who are permanent residents in the operational area), who perform support functions away from the close proximity of, and do not reside with, the U.S. Armed Forces. U.S. Government-furnished support to non-CAAF is typically limited to force protection, emergency medical care, and basic human needs (*e.g.,* bottled water, latrine facilities, security, and food when necessary) when performing their jobs in the direct vicinity of the U.S. Armed Forces.

Operational area. An overarching term encompassing more descriptive terms (such as area of responsibility and joint operations area) for geographic areas where military operations are conducted.

Operational contract support (OCS). The ability to orchestrate and synchronize the provision of integrated contract support and management of contractor personnel providing support to command-directed operations within a designated operational area.

Operationally critical support. A critical source of supply for airlift, sealift, intermodal transportation services, or logistical support that is essential to the mobilization, deployment, or sustainment of the U.S. Armed Forces in applicable operations.

Prime contractor. Any supplier, distributor, vendor, or firm that has entered into a contract with the United States government.

Replacement centers. Centers at selected installations that ensure necessary accountability, training, and processing actions are taken to prepare personnel for onward movement and deployment to a designated operational area.

Requiring activity. A military or other designated supported organization that identifies the need for and receives contracted support to meet mission requirements during military operations.

Subcontractor. Any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

Synchronized Pre-deployment Operational Tracker-Enterprise System (SPOT–ES). A common joint database used to maintain contractor personnel visibility and accountability in applicable operations. References to SPOT–ES in this part will refer to that system or any database system that supersedes it for use in OCS.

Systems support contract. Contracts awarded by Military Service acquisition program management offices that provide fielding support, technical support, maintenance support, and, in some cases, repair parts support, for selected military weapon and support systems.

Theater business clearance. A CCDR policy or process to ensure visibility of and control over systems support and external support contracts executing or delivering support in designated areas of operations.

Theater support contract. A type of contract awarded by contracting officers deployed to an operational area serving under the direct contracting authority of the Military Service component, special operations force command, or designated joint contracting authority for the designated operation.

Total force. The organizations, units, and individuals that comprise the DoD resources for implementing the National Security Strategy. It includes DoD Active and Reserve Component military personnel, military retired members, DoD civilian personnel (including foreign national direct- and indirect-hires, as well as nonappropriated fund employees), contractors, and host-nation support personnel. (For source information, see paragraph (a) of appendix A to this part.)

Uncertain environment. Operational environment in which host government forces, whether opposed to or receptive to operations that a unit intends to conduct, do not have totally effective control of the territory and population in the intended operational area.

§ 158.4 Policy.

It is DoD policy that:

(a) Defense contractor personnel are part of the total force. (See paragraph (a) of appendix A of this part).

(b) DoD Components implement OCS functions, including contract support integration, contracting support, and contractor management, during applicable operations.

(c) DoD Components will use contracted support only in appropriate situations, consistent with 48 CFR subpart 7.5, 48 CFR subpart 207.5, and Office of Federal Procurement Policy (OFPP) Policy Letter 11–01 (available at *https://www.federalregister.gov/documents/2011/09/12/2011-23165/publication-of-the-office-of-federal-procurement-policy-ofpp-policy-letter-11-01-performance-of*), and paragraph (b) of appendix A to this part.

(d) Generally, contractors are responsible for providing their employees with all life, mission, medical, logistics, and administrative support necessary to perform the contract. However, in many operations, especially in those in which conditions are austere, hostile, and/or non-permissive, the contracting officer may decide it is in the interest of the U.S. Government to allow for selected life, mission, medical, logistics, and administrative support to be provided to contractor personnel to ensure continuation of essential contractor services. Contractors authorized to accompany the force (CAAF) may receive U.S. Government-furnished support commensurate with the operational situation in accordance with the terms of the contract.

(e) A common joint database (*i.e.,* the Synchronized Predeployment and Operational Tracker-Enterprise Suite (SPOT–ES) or its successor) will be used to maintain contractor personnel visibility and accountability in applicable operations. References to SPOT–ES in this part will refer to that system or any database system that supersedes it for contractor personnel visibility and accountability.

(f) Solicitations and contracts will:

(1) Require defense contractors to provide personnel who are ready to perform contract duties in applicable operations and environments by verifying the medical, dental, and psychological fitness of their employees and, if applicable, by ensuring currency of any professional qualifications and associated certification requirements needed for employees to perform contractual duties.

(2) Incorporate contractual terms and clauses into the contract that are consistent with applicable host nation (HN) laws and agreements or designated operational area performance considerations.

(g) Contracts for highly sensitive, classified, cryptologic, or intelligence projects and programs must implement this rule to the maximum extent possible, consistent with applicable laws, Executive orders, presidential directives, and relevant DoD issuances. To the extent that contracting activities are unable to comply with this rule, they should submit a request for a waiver to the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)). Waiver requests should include specific information providing the rationale regarding the inability to comply with this rule.

§ 158.5 Procedures.

(a) *Planning considerations and requirements; requirements for publication.* CCDRs will make management policies and specific OCS requirements for contractual support available to affected contractor personnel. The Geographic Combatant Commander (GCC) OCS web page will set forth the following:

(1) Theater business clearance (TBC) requirements for contracts currently being performed and delivering contracted support in the CCDR's AOR.

(2) Restrictions imposed by applicable local laws, international law, status of forces agreements (SOFAs), and other agreements with the HN.

(3) CAAF-related deployment requirements, including, but not limited to:

(i) Pre-deployment and required individual protective equipment (IPE) training.

(ii) Physical health standards.

(iii) Immunization and medical requirements.

(iv) Deployment procedures and theater reception.

(4) Reporting requirements for accountability and visibility of contractor personnel and associated contracts.

(5) Operational security (OPSEC) plans and restrictions.

(6) Force protection policies.

(7) Personnel recovery procedures.

(8) Availability of medical and other authorized U.S. Government support (AGS).

(9) Redeployment procedures, including disposition of U.S. Government-furnished equipment.

(b) *Contractual relationships.* The contract provides the only legal basis for the contractual relationship between the DoD and the contractor. The contracting officer is the only individual with the legal authority to enter into such a binding relationship with the contractor.

(1) Commanders have the ability to restrict installation access, and contractor personnel must comply with applicable CCDR and local commander force protection policies. However, military commanders or unit personnel do not have contracting authority over contractors or contractor personnel and may not direct contractors or contractor personnel to perform contractual tasks. Moreover, the contract does not provide a basis for commanders to exercise operational control or tactical control over contractors or their personnel or to assign or attach contractors or their personnel to a command or organization.

(2) The contract must specify:

(i) The terms and conditions under which the contractor is to perform, including minimum acceptable professional and technical standards.

(ii) The method by which the contracting officer will notify the contractor of the deployment procedures to process contractor personnel who are deploying to the operational area.

(iii) The specific contractual support terms and agreement between the contractor and DoD.

(iv) The appropriate flow-down of provisions and clauses to subcontractors and state that the service performed by contractor personnel is not considered to be active duty or active service. For more information, see paragraph (c) in appendix A to this part, and 38 U.S.C. 106, ''Active Duty Service Determinations for Civilian or Contractual Groups.''

(3) The contract must contain applicable clauses to ensure efficient deployment, accountability, visibility, protection, and redeployment of contractor personnel and detail authorized levels of health service, sustainment, and other support that is authorized to be provided to contractor personnel supporting applicable operations outside the United States.

(c) *Restrictions on contractors performing inherently governmental functions.* (1) Paragraph (c) of appendix A of this part, 48 CFR subpart 7.5, 48 CFR subpart 207.5; Public Law 105–270 and Office of Management and Budget Circular No. A–76 (available at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A76/a76_incl_tech_correction.pdf*) bar inherently governmental functions and duties from private sector performance.

(2) Contractor personnel may provide support during applicable operations, including, but not limited to:

(i) Transporting munitions and other supplies.

(ii) Providing communications support.

(iii) Performing maintenance functions for military equipment.

(iv) Providing force protection and private security services.

(v) Providing foreign language interpretation and translation services.

(vi) Providing logistics services, such as billeting and messing.

(vii) Intelligence surveillance and reconnaissance support.

(viii) Commercial air assets.

(3) The requiring official will review each service performed by contractor personnel in applicable operations on a case-by-case basis to ensure compliance with paragraph (b) of appendix A of this part and applicable laws and international agreements.

(4) Restrictions on use of contractor personnel for private security services. A contractor may be authorized to provide private security services only if such authorization is consistent with applicable U.S., local, and international law, including applicable agreements with the HN or other applicable international agreements, and 32 CFR part 159. For more information, see paragraph (b) of appendix A of this part and 48 CFR subpart 252.2, which provide specific procedures and guidance.

(d) *Combating trafficking in persons.* Trafficking in persons is a violation of U.S. law and internationally recognized human rights, and is incompatible with DoD core values.

(1) 48 CFR subpart 222.17 and 48 CFR 52.222–50 also known and referred to as Combating Trafficking in Persons, describe how contractors, contracting officers and their representatives, and commanders must deter activities such as prostitution, forced labor, and other related activities contributing to trafficking in persons. For more information, see paragraph (d) of appendix A to this part.

(2) Contracts in support of applicable operations will include terms and provisions that require that the contractor remove personnel from the performance of the contract and return any of its personnel who have been determined to have engaged in any of the activities mentioned in paragraph (h)(4)(v)(H) of this section from the operational area to the home of record, point of origin, or an authorized location at the end of contract performance or sooner as directed by the contracting officer. Once notified of such an incident, the contracting officer will notify the commander responsible in the AOR and provide any information required to support an investigation. For more information, see 48 CFR subpart 222.17.

(e) *CAAF designation, legal status, credentialing, and security clearance requirements*—(1) *CAAF designation.* (i) CAAF designation is provided to contractor personnel, including all tiers of subcontractor personnel, through a letter of authorization (LOA). CAAF generally include all U.S. citizen and third country national (TCN) employees not normally residing within the operational area whose area of performance is in the direct vicinity of the U.S. Armed Forces and who routinely are co-located with the U.S. Armed Forces, especially in non-permissive environments. Personnel co-located with the U.S. Armed Forces will be afforded CAAF status through an LOA.

(ii) In some cases, CCDRs or subordinate commanders may designate mission-essential HN or LN contractor personnel as CAAF unless otherwise precluded by HN law, a SOFA, or other agreement. In general, LNs are only afforded CAAF status when they assume great personal risk to perform an essential function.

(iii) Personnel who do not receive a CAAF designation are referred to as non-CAAF. Individuals' CAAF status may change depending on where their employers or the provisions of their contract details them to work. CAAF designation may affect, but does not necessarily affect, a person's legal status under the law of war and the treatment to which that person is entitled under

the 1949 Geneva Conventions if that person falls into the power of the enemy during international armed conflict. Although CAAF are regarded as ''persons authorized to accompany the armed forces,'' personnel who are not CAAF may also receive this status under the law of war. For more information, see § 4.15 of paragraph (e) of appendix A of this part. In addition, although CAAF designation and access to AGS often coincide, CAAF status does not determine AGS provided.

(2) *Legal status.* In implementing this part, the DoD Component heads must abide by applicable laws, regulations, international agreements, and DoD policy as they relate to contractor personnel performing contractual support in support of applicable operations.

(i) *HN and third country laws.* All contractor personnel must comply with applicable HN and third country laws. The applicability of HN and third country laws may be affected by international agreements (*e.g.,* agreements between the United States and the HN) and customary international law (*e.g.,* limits imposed by customary international law on the reach of third country laws).

(A) U.S., HN, or other countries may hire contractor personnel whose status may change (*e.g.,* from non-CAAF to CAAF) depending on where in the operational AOR their employers or the provisions of their contracts detail them to work.

(B) CCDRs, as well as subordinate commanders, Military Service Component commanders, the Directors of the Defense Agencies, and Directors of DoD Field Activities should recognize limiting factors regarding the employment of LN and TCN personnel. Limiting factors include, but are not limited to:

(*1*) Imported labor worker permits.

(*2*) Workforce and hour restrictions.

(*3*) Medical, life, and disability insurance coverage.

(*4*) Taxes, customs, and duties.

(*5*) Cost of living allowances.

(*6*) Hardship differentials.

(*7*) Access to classified information.

(*8*) Hazardous duty pay.

(ii) *U.S. laws.* U.S. citizens and CAAF, with some exceptions, are subject to U.S. laws and U.S. Government regulations.

(A) All U.S. citizen and TCN CAAF are subject to potential prosecutorial action under the criminal jurisdiction of the United States, including, but not limited to, 18 U.S.C. 3261, also known and referred to in this part as the Military Extraterritorial Jurisdiction Act of 2000 (MEJA). MEJA extends U.S. federal criminal jurisdiction to certain contractor personnel for offenses committed outside U.S. territory.

(B) The March 10, 2008, Secretary of Defense Memorandum states that contractor personnel are subject to prosecution pursuant to 10 U.S.C. Chapter 47, also known and referred to in this part as the Uniform Code of Military Justice (UCMJ), when serving overseas in support of a declared war or contingency, and provides guidance to commanders on the exercise of this UCMJ jurisdiction.

(C) Other U.S. law may allow prosecution of offenses by contractor personnel (*e.g.,* 18 U.S.C. 7).

(3) *1949 Geneva Conventions.* The 1949 Geneva Conventions, including the Geneva Convention Relative to the Treatment of Prisoners of War, may be applicable to certain contractor personnel who fall into the power of the enemy during international armed conflict.

(i) All contractor personnel may be at risk of injury or death incidental to enemy actions while supporting military operations.

(ii) Contractor personnel with CAAF status will receive an appropriate identification card required by the Geneva Convention Relative to the Treatment of Prisoners of War, consistent with paragraph (f) of appendix A to this part.

(iii) CAAF may be used in support of applicable operations, consistent with the terms of U.S. Government authorization. If they fall into the power of the enemy during international armed conflict, contractor personnel with CAAF status are entitled to prisoner of war status.

(4) *Credentialing.* Contracts must require CAAF to receive an identification card with the Geneva Convention's category of persons authorized to accompany the armed forces. For more information, see paragraphs (f) through (h) of appendix A to this part. At the time of identification card issuance, CAAF must present their SPOT–ES-generated LOA as proof of eligibility.

(i) Sponsorship must incorporate the processes for confirming eligibility for an identification card. The sponsor is the person affiliated with the DoD or another Federal agency that takes responsibility for verifying and authorizing an applicant's need for a Geneva Convention identification card. A DoD official or employee must sponsor applicants for a common access card (CAC).

(ii) Individuals who have multiple DoD personnel category codes (*e.g.,* an individual who is both a reservist and a contractor) will receive a separate identification card in each personnel category for which they are eligible. Individuals under a single personnel category code may not hold multiple current identification cards of the same form.

(5) *Security clearance requirements.* To the extent necessary, the contract must require the contractor to provide personnel who have the appropriate security clearance or who are able to satisfy the appropriate background investigation requirements to obtain access required to perform contractual requirements in support of the applicable operation.

(f) *Considerations for support to contractors*—(1) *U.S. Government support.* Generally, contracts supporting applicable operations must require contractors to provide to their personnel all life, mission, medical, and administrative support necessary to perform the contractual requirements and meet CCDR guidance posted on the GCC OCS web page. In some operations, especially those in which conditions are austere, uncertain, or non-permissive, the CCDR may decide it is in the U.S. Government's interest for the DoD to allow contractor personnel access to selected AGS. The contract must state the level of access to AGS in its terms and conditions.

(i) In operations where conditions are austere, uncertain, or non-permissive, the contracting officer will consult with the requiring activity to determine if it is in the U.S. Government's interests to allow for selected life, mission, medical, and administrative support to certain contractor personnel.

(ii) The solicitation and contract must specify the level of AGS that the U.S. Government will provide to contractor personnel and what support provided to the contractor personnel is reimbursable to the U.S. Government.

(iii) Access to DoD benefits facilitated by the identification card may be granted to contractors under certain circumstances. For more information, see paragraph (i) of appendix A to this part.

(2) *IPE.* When necessary or directed by the CCDR, the contracting officer will include language in the contract authorizing the issuance of military IPE (*e.g.,* chemical, biological, radiological, nuclear (CBRN) protective ensemble, body armor, ballistic helmet) to contractor personnel as part of AGS.

(i) Typically, IPE will be issued by the central issue facility at the deployment center before deployment to the designated operational area and must be accounted for and returned to the U.S. Government or otherwise accounted for,

in accordance with appropriate DoD Component regulations, directives, and instructions.

(ii) Contractor personnel deployment training will include training on the proper care, fitting, and maintenance of protective equipment, whether issued by the U.S. Government or provided by the contractor in accordance with the contractual requirements. This training will include practical exercises within mission-oriented protective posture levels.

(iii) When the terms and conditions of a contract require a contractor to provide IPE, such IPE must meet minimum standards as defined by the contract.

(3) *Clothing.* Contractors, or their personnel, must provide their own personal clothing, including casual and work clothing required to perform the contract requirements.

(i) Generally, CCDRs will not authorize the issuance of military clothing to contractor personnel or will not allow the wearing of military or military look-alike uniforms. Contractor personnel are prohibited from wearing military clothing unless specifically authorized in writing by the CCDR. However, a CCDR or subordinate joint force commander (JFC) deployed forward may authorize contractor personnel to wear standard uniform items for operational reasons. Contracts must include terms and clauses that require that this authorization be provided in writing by the CCDR and that the uniforms are maintained in the possession of authorized contractor personnel at all times.

(ii) When commanders issue any type of standard uniform item to contractor personnel, care must be taken to ensure that contractor personnel are distinguishable from military personnel through the use of distinctive patches, arm bands, nametags, or headgear, consistent with force protection measures, and that contractor personnel carry the CCDR's written authorization with them at all times.

(4) *Weapons.* Contractor personnel are not authorized to possess or carry firearms or ammunition during applicable operations, except as provided in paragraph (h)(2)(ii) of this section and 32 CFR part 159. The contract will provide the terms and conditions governing the possession of firearms by contractor personnel. Information on all weapons authorized for contractors and their personnel will be entered into the SPOT–ES database.

(5) *Mortuary affairs.* The DoD Mortuary Affairs Program, as described in paragraph (j) of appendix A to this part, covers all CAAF who die while performing contractual requirements in support of the U.S. Armed Forces. Mortuary affairs support and transportation will be provided on a reimbursable basis for the recovery, identification, and disposition of remains and personal effects of CAAF.

(i) Every effort must be made to identify remains and account for un-recovered remains of contractor personnel and their dependents who die in military operations, training accidents, and other incidents. The remains of contractor personnel who die as the result of an incident in support of military operations are afforded the same dignity and respect afforded to military remains. For more information, see paragraph (k) of appendix A to this part.

(ii) The DoD may provide mortuary affairs support and transportation on a reimbursable basis for the recovery, identification, and disposition of remains and personal effects of non-CAAF at the request of the Department of State (DOS) and in accordance with this rule, applicable agreements with the HN, and applicable contract provisions. The Under Secretary of Defense for Personnel and Readiness (USD(P&R)) will coordinate this support with the DOS, including for cost reimbursement to the DoD Component for the provision of this support.

(iii) The responsibility for coordinating the transfer of non-CAAF remains to the HN or affected nation resides with the GCC in coordination with the DOS, through the respective embassies, or through the International Committee of the Red Cross, the International Federation of the Red Cross or Red Crescent Societies, as appropriate, and in accordance with applicable contract clauses.

(6) *Medical support and evacuation.* Generally, the DoD will provide only resuscitative care, stabilization, and hospitalization at military medical treatment facilities (MTFs) and assistance with patient movement in emergencies where loss of life, limb, or eyesight could occur. The DoD Foreign Clearance Guide (FCG) and the GCC OCS web pages contain theater-specific contract language to provide contract terms to clarify available healthcare for contractor personnel. During operations in austere, uncertain, or hostile environments, CAAF may encounter situations in which they cannot access adequate medical support in the local area.

(i) All costs associated with the treatment and transportation of contractor personnel to the selected civilian facility are reimbursable to the U.S. Government and are the responsibility of contractor personnel, their employers, or their health insurance providers. For more information, see paragraph (l) of appendix A to this part. Nothing in this paragraph is intended to affect the allowability of costs incurred under a contract.

(ii) Medical support and evacuation procedures:

(A) All CAAF will normally be afforded emergency medical and dental care if injured while supporting applicable operations. Additionally, non-CAAF who are injured while in the vicinity of the U.S. Armed Forces while supporting applicable operations also normally will receive emergency medical and dental care. Emergency medical and dental care includes medical care situations in which life, limb, or eyesight is jeopardized. Examples of emergency medical and dental care include:

(*1*) Examination and initial treatment of victims of sexual assault.

(*2*) Refills of prescriptions for life-dependent drugs.

(*3*) Repair of broken bones, lacerations, and infections.

(*4*) Traumatic injuries to the teeth.

(B) MTFs normally will not authorize or provide primary medical or dental care to CAAF. When required and authorized by the CCDR or subordinate JFC, this support must be specifically authorized under the terms and conditions of the contract and detailed in the corresponding LOA. Primary care is not authorized for non-CAAF. Primary care includes:

(*1*) Routine inpatient and outpatient services.

(*2*) Non-emergency evacuation.

(*3*) Pharmaceutical support (with the exception of emergency refills of prescriptions for life-dependent drugs).

(*4*) Non-emergency dental services.

(*5*) Other medical support, as determined by the CCDR or JFC based on recommendations from the cognizant medical authority and the existing capabilities of the forward-deployed MTFs.

(C) The DoD will not provide long-term care to contractor personnel.

(D) The CCDR or subordinate commander has the authority to quarantine or restrict movement of contractor personnel. For more information, see paragraph (m) of appendix A to this part.

(E) When CAAF are evacuated for medical reasons from the designated operational area to MTFs funded by the Defense Health Program, normal reimbursement policies will apply for services rendered by the facility. If CAAF require medical evacuation

outside the United States, the sending MTF staff will assist the CAAF in making arrangements for transfer to a civilian facility of the CAAF's choice. When U.S. forces provide emergency medical care to LN contractor personnel, these patients will use HN transportation means, when possible, for evacuation or transportation to their local medical systems. For more information, see paragraph (n) of appendix A to this part.

(7) *Other AGS.* 48 CFR subpart 225.3 lists types of support that may be authorized for contractor personnel who are deployed with or otherwise provide support to applicable operations, which may include transportation to and within the operational area, mess operations, quarters, phone service, religious support, and laundry.

(i) Contractor personnel of U.S. owned-contractors who are supporting DoD activities may be authorized the use of the military postal service. For more information, see paragraph (o) of appendix A to this part. The extent of postal support will be set forth in the contract. The provisions for postal support in such contracts must be reviewed and approved by the applicable CCDR, or the designated representative, and the Military Department concerned before execution of the contract.

(ii) Morale, welfare, and recreation and exchange services are authorized for contractor personnel who are U.S. citizens supporting DoD activities outside the United States. For more information, see paragraphs (p) and (q) of appendix A to this part.

(g) *Accountability and visibility of contracts and contractor personnel.* (1) During applicable operations, contractors will use SPOT–ES as follows:

(i) All CAAF will register in SPOT–ES by name.

(ii) Non-CAAF will be registered in SPOT–ES by name if they are performing on a DoD contract for at least 30 consecutive days unless a lesser number of days is requested by the CCDR or if they require access to a U.S. or coalition-controlled installation. Contracting officers will ensure non-CAAF who require access to U.S. or coalition-controlled installations are registered in SPOT–ES before requesting or receiving installation access.

(iii) All private security contractor personnel and all other contractor personnel authorized to carry weapons, regardless of the length of the performance or contract value, will register in SPOT–ES by name.

(iv) During operations other than contingency operations, humanitarian assistance, or peace operations, contractors will use SPOT–ES in situations required by the CCDR and as follows:

(2) To account for:

(i) All U.S. citizen and TCN contractor personnel.

(ii) All private security contractor personnel and all other contractor personnel authorized to carry weapons, where the designated area and place of performance are outside the United States, regardless of the length of performance or contract value.

(3) The contracting officer will account for an estimated total number of LNs employed under the contract, by country or on a monthly basis.

(4) Contract linguists will register in SPOT–ES in the same manner as other contractor personnel and will also be tracked using the Contract Linguist Enterprise-wide Database. For more information, see paragraph (r) of appendix A to this part.

(5) LNs should be registered in SPOT–ES by name to improve data quality and reduce confusion during a transition to accountability requirements during a contingency operation, which will require by-name accountability.

(6) The DoD has designated SPOT–ES as the joint web-based database to assist the CCDRs in maintaining awareness of the nature, extent, and potential risks and capabilities associated with contracted support for contingency operations, humanitarian assistance, and peacekeeping operations, or military exercises designated by the CCDR. To facilitate integration of contractors and other personnel, as directed by the USD(A&S) or the CCDR, and to ensure the accurate forecasting and provision of accountability, visibility, force protection, medical support, personnel recovery, and other related support, the following procedures will help establish, maintain, and validate the accuracy of information in the database.

(i) SPOT–ES will:

(A) Serve as the central repository for deployment status and reporting on the contractor personnel as well as other U.S. Government agency contractor personnel, as applicable. For additional information, see paragraph (s) of appendix A to this part.

(B) Track information for all DoD contracts that are awarded in support of applicable operations outside of the United States, in accordance with the SPOT Business Rules and as directed by the USD(A&S), 48 CFR subpart 225.3, or the CCDR. SPOT–ES will collect and report on:

(*1*) The total number of contractor personnel working under contracts entered into as of the end of each calendar quarter.

(*2*) The total number of contractor personnel performing security functions under contracts entered into with the DoD.

(*3*) The total number of contractor personnel killed or wounded who were performing under any contracts entered into with the DoD.

(C) Provide personnel accountability via unique identifier (*e.g.,* Electronic Data Interchange Personnel Identifier or Foreign Identification Number) of contractor personnel and other personnel, as directed by the USD(A&S), 48 CFR subpart 225.3, or the CCDR.

(D) Contain, or link to, minimum contract information necessary to:

(*1*) Establish and maintain accountability of the personnel in paragraph (g) of this section.

(*2*) Maintain information on specific equipment related to the performance of private security contracts.

(*3*) Maintain oversight information on the contracted support in applicable operations.

(E) Comply with:

(*1*) The personnel identity protection program requirements found in paragraphs (t) and (u) of appendix A to this part.

(*2*) The DoD Information Enterprise architecture. For more information, see paragraph (v) of appendix A to this part.

(*3*) The interoperability and secure sharing of information requirements found in paragraphs (w) through (y) of appendix A to this part.

(ii) Before registering in SPOT–ES, contracting officers, company administrators, and U.S. Government administrators or authorities must meet minimum training requirements in the SPOT Business Rules.

(iii) The contractor must enter all required data into SPOT–ES before its employees may deploy to or enter a theater of operations, and maintain such data, as directed by the USD(A&S), 48 CFR subpart 225.3, or the CCDR.

(iv) The contracting officer will enter the DoD contract services or capabilities for all contracts that are awarded in support of applicable operations, including theater support, external support, and systems support contracts, into SPOT–ES consistent with 48 CFR 252.225–7040.

(v) In accordance with applicable acquisition policy and regulations and under the terms and conditions of each affected contract, all contractors awarded contracts that support applicable operations must input employee data and maintain accountability, by name, of designated

contractor personnel in SPOT–ES as required by 48 CFR 252.225–7040.

(A) Contractors must maintain current status of the daily location of their employees and, when requested, submit to the COR up-to-date, real-time information reflecting all personnel deployed or to be deployed in support of applicable operations.

(B) Prime contractors must enter up-to-date information regarding their subcontractors at all tiers into SPOT–ES.

(vi) In all cases, users providing classified information in response to the requirements of this part must report and maintain that information on systems approved for the level of classification of the information provided.

(7) The contracting officer or his or her designee will ensure a SPOT–ES-generated LOA has been issued to all CAAF who are approved to deploy, as required by 48 CFR 252.225–7040, and selected non-CAAF (*e.g.,* LN and non-LN employees who are permanent residents in the operational area, or TCNs not routinely residing with the U.S. Armed Forces who perform support functions away from the close proximity of, and do not reside with, the U.S. Armed Forces, and private security contractors), pursuant to 48 CFR subpart 225.3, or as otherwise designated by the CCDR.

(i) The contract will require that all contractor personnel issued an LOA carry the LOA with them at all times.

(ii) Reserved.

(h) *Theater admission requirements.* Special area, country, and theater personnel clearance documents must be current, in accordance with the DoD FCG, and coordinated with affected agencies to ensure that entry requirements do not adversely affect accomplishment of mission requirements.

(1) CAAF employed in support of DoD missions are considered DoD-sponsored personnel for DoD FCG purposes.

(2) Contracting officers must ensure contracts include a requirement for contractor personnel to meet theater personnel clearance requirements and obtain personnel clearances through the Aircraft and Personnel Automated Clearance System before entering a designated theater of operations. For more information, see paragraph (z) of appendix A to this part.

(3) Contracts must require contractor personnel to obtain proper identification credentials, such as passports, visas, and other documents required to enter and exit a designated operational area, and have a required Geneva Conventions identification card, or other appropriate DoD credential from the deploying center.

(i) *Deployment procedures.* Contracts must contain terms and conditions that detail the need for contractors to follow these credentialing requirements, as required by 48 CFR subpart 225.3, 48 CFR 252.225–7040, and as outlined in the DoD FCG. At a minimum, contracting officers must ensure that contracts address operational area-specific contract requirements and the means by which the DoD will inform contractor personnel of the requirements and procedures applicable to their deployment.

(1) *Deployment center designation.* A formally designated group, joint, or Military Department deployment center will be used to conduct deployment and redeployment processing for CAAF, unless contractor-performed theater admission preparation is authorized or waived by the CCDR or designee pursuant to DoDI 3020.41, ''Operational Contract Support (OCS).'' If the contract contains clauses that specify another U.S. Government-authorized process that incorporates all the functions of a deployment center, such process may also be used by a contractor to conduct deployment and redeployment processing for CAAF.

(2) *Medical preparation.* (i) In accordance with 32 CFR 158.7, contracts must require that contractors provide medically and physically qualified contractor personnel to perform duties in applicable operations, as outlined in the contract.

(A) Any CAAF deemed unsuitable to deploy during the deployment process due to medical or dental reasons will not be authorized to deploy.

(B) The Secretary of Defense may direct immunizations as mandatory for CAAF performing essential contractor services.

(C) For contracts that employ CAAF who are U.S. citizens, the contract must require that contractors make available the medical and dental records of deploying employees who authorize release for this purpose based on this section, applicable cognizant medical authority guidance, and relevant Military Department policy. These records should include current panographic x-rays. For more information see paragraph (aa) of appendix A to this part.

(ii) U.S. Government personnel may not involuntarily immunize contractor personnel or require contractor personnel to disclose their medical records involuntarily. Therefore, the contracting officer will provide contractors time to notify and/or hire employees who voluntarily consent to U.S. Government medical requirements, including to receiving U.S. Government-required immunizations and disclosing their private medical information to the U.S. Government.

(iii) All CAAF will receive medical threat pre-deployment briefings at the deployment center to communicate health risks and countermeasures in the designated operational area. For more information, see paragraph (bb) of appendix A to this part.

(A) In accordance with GCC or JFC plans and orders, contracts must include terms and conditions that fully specify health readiness and force health protection capability, either as a responsibility of the contractor or the DoD Components, to ensure appropriate medical staffing in the operational area.

(B) Health surveillance activities must include plans for CAAF. For more information, see paragraphs (bb) and (cc) of appendix A to this part. Section 158.7 of this rule further addresses deoxyribonucleic acid (DNA) collection and other medical requirements.

(3) *Training.* Joint training policy and guidance for the Military Services, including contractors, is provided. For more information, see paragraph (dd) of appendix A to this part. CCDRs will place standing training requirements on the GCC OCS web pages for reference by contractors. Other training requirements that are specific to an applicable operation will be placed on the GCC OCS web pages shortly after identifying the requirement so that contracting officers can incorporate the training requirement into the appropriate contracts as soon as possible. Training requirements:

(i) Must be included, or incorporated by reference in contracts employing contractor personnel supporting applicable operations.

(ii) Include specific requirements established by the CCDR and training required in accordance with this rule, 32 CFR part 159, and paragraphs (ee) through (hh) of appendix A to this part.

(4) *Deployment center procedures.* Affected contracts must require that all CAAF deploying from outside the operational area process through a designated deployment center or a U.S. Government-authorized, contractor-performed deployment processing facility before deploying to an applicable operation and redeploy in the same manner. Upon receiving the contracted company's certification that employees meet deployability requirements, the contracting officer or representative will digitally sign the LOA, which CAAF will then present to officials at the deployment center. The

deployment process includes, but is not limited to:

(i) Verifying registration in SPOT–ES.

(ii) Issuing applicable U.S. Government-furnished equipment.

(iii) Verifying the completion of medical and dental screening before arrival.

(iv) Administering required theater-specific immunizations and medications not available through healthcare providers in the general public.

(v) Verifying and, when necessary, providing required training, country and cultural awareness briefings, and other training and briefings, as required by the CCDR. Examples of required training include, but are not limited to:

(A) Law of war, including the 1949 Geneva Conventions.

(B) Law and policy applicable to detainee operations and intelligence interrogation operations, as appropriate.

(C) General orders.

(D) Standards of conduct.

(E) Force protection.

(F) Personnel recovery.

(G) First aid.

(H) Combatting trafficking in persons.

(I) OPSEC.

(J) Anti-terrorism.

(K) Counterintelligence reporting.

(L) The use of CBRN protective ensemble.

(M) Deployment health threats briefing.

(5) *Certification.* Contracts supporting applicable operations must include terms and conditions requiring contractors to certify to the authorized U.S. Government representative, before deployment, that each individual has completed all required deployment processing actions.

(6) *Legal.* Contractor personnel are not entitled to military legal assistance in-theater or at the deployment center. Individual contractor personnel must have their personal legal affairs in order (*e.g.,* preparing and completing powers of attorney, wills, trusts, and estate plans) before reporting to deployment centers.

(7) *Waivers.* For required contracted support of 17 days or less in an operational area, the CCDR or designee may waive a portion of the formal procedural requirements pursuant to DoDI 3020.41, ''Operational Contract Support (OCS),'' which may include the CCDR or designee waiving the requirement in writing for processing through a deployment center. However, the CCDR or designee may not waive the requirements to possess proper identification cards and to establish and maintain accountability for all contractor personnel, or any medical requirement without the prior approval of the cognizant medical authority or their designee. If a contract authorizes contractor personnel to be armed, the requirements of paragraphs (c)(4) and (k)(2) of this section may not be waived.

(j) *Reception*—(1) *Designated reception site.* In applicable operations, all CAAF must enter into the operational area through a designated reception site.

(i) Based upon a visual inspection of the LOA, the site will verify that contractor personnel are entered in SPOT–ES and meet theater-specific entry requirements.

(ii) Contractor personnel already in the designated operational area when a contingency is declared must report to the designated reception site as soon as it is operational based on the terms and conditions of the contract.

(iii) When entering a designated reception site for theater entry processing, if any CAAF does not have the proper documentation to perform in an area, he or she will be refused entry into the theater, and the contracting officer will notify the contractor to take the necessary action to resolve the issue. Should the contractor fail to take action, the CAAF individual will be sent back to his or her departure point, or directed to report to the Military Service Component command or Defense Agency responsible for that specific contract for theater entrance processing.

(2) *Contractor integration.* It is critical that CAAF brought into an operational area are properly integrated into the military operation through a formal reception process. At a minimum, they will:

(i) Meet theater entry requirements and be authorized to enter the theater.

(ii) Be accounted for in SPOT–ES.

(iii) Possess any required IPE, including CBRN protective ensemble.

(iv) Be authorized any contractually required AGS and force protection.

(k) *In-theater management*—(1) *Conduct and discipline.* Contract terms and conditions must require that CAAF comply with CCDR theater orders, applicable directives, laws, and regulations. Non-CAAF who require base access to perform contractual requirements must follow base force protection and security-related procedures, as applicable.

(i) The contracting officer may appoint a designee (usually a COR) as a liaison between the contracting officer and the contractor and requiring activity. This designee monitors and reports contractor performance and requiring activity concerns to the contracting officer. In emergency situations (*e.g.,* enemy or terrorist actions or natural disaster), the cognizant military commander may recommend or issue warnings or messages urging contractor personnel to take emergency actions to remove themselves from harm's way or to take other appropriate self-protective measures. During armed conflict, contractor personnel are not exempt from the authority that commanders may exercise to control the movement of persons and vehicles within the immediate vicinity of operations. For more information, see §§ 5.2.2.1, 13.8, and 14.6 of paragraph (e) of appendix A to this part.

(ii) The contractor is responsible for disciplining contractor personnel, as necessary and appropriate. However, in accordance with paragraph (h)(1) of 48 CFR 252.225–7040, the contracting officer may direct the contractor, at its own expense, to remove and replace any contractor personnel who jeopardize or interfere with mission accomplishment, who threaten force protection measures, or who fail to comply with or violate applicable requirements of the contract. Such action may:

(A) Include contractor personnel whose actual field performance (certification or professional standard) is below the contractual requirement.

(B) Be taken at U.S. Government discretion without prejudice to the contractor's rights under any other provision of the contract. A commander also has the authority to take certain actions affecting contractor personnel, such as the ability to revoke or suspend security access or impose restrictions from access to military installations or specific worksites.

(iii) CAAF, or individuals employed by or accompanying the Military Services outside the United States, are subject to potential prosecutorial action under the criminal jurisdiction of the United States, pursuant to Sections 7, 2441, 2442, or 3261 of Title 18, U.S.C., or other provisions of U.S. law, including the UCMJ.

(A) Commanders possess significant authority to act whenever criminal acts are committed by anyone subject to the MEJA and UCMJ that relates to or affects the commander's responsibilities. This includes situations in which the alleged offender's precise identity or actual affiliation is undetermined. The March 10, 2008, Secretary of Defense Memorandum provides guidance to commanders on the exercise of this UCMJ jurisdiction over DoD contractor personnel serving with or accompanying the U.S. Armed Forces overseas during declared war and in contingency operations.

(B) Contracting officers will ensure that contractors are aware of their

employees' status and liabilities as CAAF and the required training associated with this status.

(C) CCDRs retain authority to respond to an incident, restore safety and order, investigate, apprehend suspected offenders, and otherwise address the immediate needs of the situation.

(iv) The Department of Justice may prosecute misconduct under applicable Federal laws, including MEJA and 18 U.S.C. 2441. Contractor personnel also are normally subject to the domestic criminal law of the local country. When confronted with disciplinary problems involving contractor personnel, commanders should seek the assistance of their legal staff, the contracting officer responsible for the contract, and the contractor's management team.

(v) In the event of an investigation of reported offenses allegedly committed by or against contractor personnel, appropriate investigative authorities will keep the contracting officer informed, to the extent possible without compromising the investigation, if the alleged offense has a potential contract performance implication.

(2) *Force protection and weapons issuance.* CCDRs must include contractor personnel in their force protection planning and communicate the results to contracting activities and contractors via the GCC OCS web page. In general, contractors are responsible for the security of their own personnel. Contractor personnel working within a U.S. military facility or in close proximity to the U.S. Armed Forces may receive incidentally the benefits of measures taken to protect the U.S. Armed Forces. For more information, see paragraph (ee) of appendix A to this part. However, where additional security is needed to achieve force protection, and it is not operationally or cost effective for contractors to do so individually, the commander may determine it is in the interests of the U.S. Government to provide security for contractor personnel. When security is provided through military means, contractor personnel should receive a level of force protection equal to that of DoD civilian employees.

(i) When the CCDR deems military force protection and legitimate civil authority are unavailable or insufficient, he or she may authorize, in writing, contractor personnel to be armed for self-defense purposes only. In authorizing contractor personnel to be armed, the contractor, the armed contractor personnel, and the U.S. military must adhere to:

(A) Applicable U.S., HN, and international law;

(B) Relevant SOFAs and other agreements;

(C) Other arrangements with local authorities; and

(D) The rules for the use of force, and guidance and orders regarding the possession, use, safety, accountability of weapons and ammunition that are issued by the CCDR.

(ii) Depending on the operational situation and the specific circumstances of contractor personnel, the contractor may apply for its personnel to be armed for self-defense purposes on a case-by-case basis. The appropriate Staff Judge Advocate (or their designee) to the CCDR will review all applications to ensure there is a legal basis for approval. In reviewing applications, CCDRs will apply the criteria mandated for arming contractor personnel for private security services consistent with 32 CFR part 159.

(A) In such cases, the contractor will validate to the contracting officer, or designee, that the contractor personnel have received weapons familiarization, qualification, and briefings regarding the rules for the use of force, in accordance with CCDR policies.

(B) Acceptance of weapons by contractor personnel is voluntary. In accordance with paragraph (j) of 48 CFR 252.225–7040, the contract must require contractors to ensure that applicable U.S. law does not prohibit personnel from possessing firearms.

(C) Contracts must require all contractor personnel to comply with applicable CCDR and local commander force protection policies. When armed for personal protection, the contract may only authorize contractor personnel to use force for self-defense and must require contractors to ensure that U.S. law does not prohibit its personnel from possessing firearms, in accordance with paragraph (j) of 48 CFR 252.225–7040. Unless not subject to local laws or HN jurisdiction by virtue of an international agreement or customary international law, the contract must include terms and conditions setting forth that the inappropriate use of force could subject contractor personnel to U.S. and/or local or HN prosecution and civil liability.

(3) *Personnel recovery, missing persons, and casualty reporting.* (i) The DoD personnel recovery program applies to all CAAF regardless of their citizenship. For more information, see paragraph (ii) of appendix A to this part. If a CAAF individual becomes isolated or unaccounted for, the contractor must promptly file a search and rescue incident report to the theater's personnel recovery architecture (*e.g.,* the component personnel recovery coordination cell or the CCMD joint personnel recovery center).

(ii) Upon recovery following an isolating event, a CAAF returnee must enter the first of the three phases of reintegration. For more information, see paragraph (jj) of appendix A to this part. The contractor must offer the additional phases of reintegration to the returnee to ensure his or her physical and psychological well-being while adjusting to the post-captivity environment.

(iii) The contractor must report all CAAF and non-CAAF casualties. For more information, see paragraph (s) of appendix A to this part.

(l) *Redeployment procedures.* The considerations in this section apply during the redeployment of CAAF. At the end of the performance period of a contract, or in cases of early redeployment, CAAF must complete the redeployment process to adjust AGS requirements and turn in U.S. Government-provided equipment.

(1) *Preparation for redeployment.* CAAF must complete intelligence out-briefs and customs and immigration briefings and inspections in accordance with CCDR policy and applicable HN law. CAAF are subject to customs and immigration processing procedures at all designated stops and their final destination during their redeployment. CAAF returning to the United States are subject to U.S. reentry customs requirements in effect at the time of reentry.

(2) *Transportation out of theater.* The terms and conditions of the contract will state whether the U.S. Government will provide transportation out of theater.

(i) Upon completion of the deployment or other authorized release, the U.S. Government must provide contractor personnel transportation from the theater of operations to the location from which they deployed, in accordance with each individual's LOA and unless otherwise directed. If commercial transportation is not available, it should be stated in the LOA in accordance with paragraph (l) of appendix A to this part. CAAF are also required to depart from the operational area through the designated reception site.

(ii) Before redeployment, the contractor personnel, through his or her contractor, will coordinate exit times and transportation with the continental U.S. replacement center or designated reception site.

(3) *Redeployment center procedures.* In most instances, the deployment center or site that prepared the CAAF for deployment will serve as the return

processing center. As part of CAAF redeployment processing, the designated reception site personnel will screen contractor records, recover U.S. Government-issued identification cards and equipment, and conduct debriefings, as appropriate. The returning CAAF will spend the minimum amount of time possible at the return processing center in order to complete the necessary administrative procedures.

(i) Contractor personnel must return all U.S. Government-issued identification and access badges (*e.g.,* badges, key cards, and other access devices, including CACs).

(ii) Contractor personnel must return any issued clothing and equipment and report any lost, damaged, or destroyed clothing and equipment in accordance with procedures of the issuing facility. Contractor personnel also will receive a post-deployment medical briefing on signs and symptoms of potential diseases (*e.g.,* tuberculosis (TB)). As some countries hosting an intermediate staging base may not permit certain items to enter their territory, certain clothing and equipment, whether issued by the contractor, purchased by the employee, or provided by the DoD, may not be permitted to be removed from the AOR. In this case, CCDR or JFC guidance and contract terms and conditions will provide alternate methods of accounting for U.S. Government-issued equipment and clothing.

(4) *Update to SPOT–ES.* Contracting officers or their designated representatives must verify that contractors have updated SPOT–ES to reflect their employee's change in status within three days of a contractor employee's redeployment, close out the deployment, and collect or revoke the LOA.

(5) *Transportation to home destination.* Transportation of CAAF from the deployment center or site to their home destinations is the employer's responsibility.

§ 158.6 Guidance for contractor medical and dental fitness.

(a) *General.* (1) DoD contracts requiring the deployment of CAAF must include medical and dental fitness requirements as specified in this section. Under the terms and conditions of their contracts, contractors will employ personnel who meet such medical and dental requirements. Replacement of non-medically qualified contractor personnel already deployed to theater will be at the contractor's cost.

(2) The GCC concerned will establish force health protection policies and programs for the protection of all forces assigned or attached to their command in accordance with force health protection (FHP) standards and applicable medical and dental standards of fitness in order to promote and sustain a healthy and fit force. For more information, see paragraph (kk) of appendix A to this part. When the requiring activity requests exceptions to these standards through the contracting officer, the CCDR concerned will establish a process for reviewing such exceptions and ensuring that a mechanism is in place to track and archive all approved and denied waivers, including the medical condition supporting the basis for the waiver.

(3) The GCC concerned will ensure that processes and procedures are in place to remove contractor personnel in theater who are not medically qualified, once so identified by a healthcare provider. The GCC concerned will ensure development of appropriate procedures and criteria for requiring removal of contractor personnel identified as ''no longer medically qualified,'' and post such language on the GCC OCS web page. Contracting officers will incorporate the language into clauses for all contracts for performance in the AOR.

(4) Unless otherwise stated in the contract terms and conditions, all medical evaluations and treatment are the contractor's responsibility.

(b) *Medical and dental evaluations.* (1) All CAAF deploying in support of an applicable operation must be medically, dentally, and psychologically fit for deployment pursuant to paragraph (kk) of appendix A to this part and CCDR guidance. Fitness specifically includes the ability to accomplish the tasks and duties unique to a particular operation and the ability to tolerate the environmental and operational conditions of the deployed location. Under the terms and conditions of their contracts, contractors will employ medically, dentally, and psychologically fit contractor personnel to perform contractual duties.

(2) All CAAF must undergo a medical and dental assessment within 12 months before arrival at the designated deployment center or U.S. Government-authorized contractor-performed deployment processing facility. This assessment, conducted by the contractor's medical health provider, should emphasize diagnosing system disease conditions (*e.g.,* cardiovascular, pulmonary, orthopedic, neurologic, endocrinologic, dermatologic, psychological, visual, auditory, dental) that may preclude the CAAF from performing the functional requirements of the contract, especially in the austere work environments encountered in some applicable operations.

(3) CAAF will receive a health threat and countermeasures briefing from the applicable Military Service before deployment to the operational area. For more information, see paragraph (bb) of appendix A to this part.

(4) In general, CAAF who have any of the medical conditions listed in paragraph (j) of this section should not be deployed.

(5) Individuals who are deemed ''not medically fit'' at the deployment center or at any period during the deployment process based upon an individual assessment by a licensed medical provider, or who require extensive preventive dental care (see paragraph (j)(2)(xxv) of this section), are not authorized to deploy.

(6) Non-CAAF shall be medically screened by a U.S. Government designee when required by the requiring activity and the contract, for the class of labor under consideration (*e.g.,* LNs working in a dining facility).

(7) Contracts will require contractors to replace individuals who develop conditions that cause them to become medically unqualified to perform contractual requirements at any time during contract performance.

(8) Contracts must require that CAAF complete a post-deployment health assessment in the Defense Medical Surveillance System at the end of their deployment or within 30 days of redeployment. For more information, see paragraph (bb) of appendix A to this part.

(c) *Glasses and contact lenses.* (1) If contractor personnel require vision correction, they must have two pairs of glasses, and if applicable, eyeglass inserts for a chemical protective mask. The contractor personnel may also provide a written prescription to the supporting military medical component in order to prepare eyeglass inserts for use in a compatible chemical protective mask. If the type of protective mask to be issued is known and time permits, the military medical component should attempt to complete the preparation of eyeglass inserts before deployment.

(2) Wearing contact lenses in a field environment is not recommended and is at the contractor personnel's own risk due to the potential for irreversible eye damage caused by debris, chemical or other hazards present, and the lack of ophthalmologic care in a field environment.

(d) *Medications.* Other than those force health protection prescription products provided by the U.S.

Government to CAAF and selected non-CAAF, contracts must require that contractor personnel deploy with a minimum 90-day supply of any required medications obtained at their own expense. For more information, see paragraph (bb) of appendix A to this part.

(1) Contractor personnel must know that deployed medical units are equipped and staffed to provide emergency care to healthy adults and are unable to provide or replace many medications required for routine treatment of chronic medical conditions, such as high blood pressure, heart conditions, and arthritis.

(2) The contract must require contractor personnel to review both the amount of the medication and its suitability in the foreign area with their personal physician and make any necessary adjustments before deploying. The contract must also hold the contractor personnel responsible for the re-supply of required medications.

(e) *Comfort items.* The contract must require that contractor personnel take spare hearing-aid batteries, sunglasses, insect repellent, sunscreen, and any other supplies related to their individual physical requirements. DoD sources will not provide these items.

(f) *Immunizations.* A list of immunizations, both those required for entry into the designated area of operations and those recommended by medical authorities, will be produced by the cognizant medical authority for each deployment; posted to the GCC OCS web page and DoD FCG; and incorporated in contracts for performance in the designated AOR.

(1) The GCC, upon the recommendation of the cognizant medical authority, will provide contractor personnel who are deploying to the applicable theater of operation guidance and a list of immunizations required to protect against communicable diseases assessed to be a potential hazard to their health. The cognizant medical authority will prepare and maintain this list.

(2) The contract must require that CAAF be immunized appropriately before completing the pre-deployment process.

(3) During pre-deployment processing, the DoD will provide contractor personnel, at no cost to the contractor, any theater-specific immunizations and medications not available to the general public. Contractor personnel must obtain all other immunizations before arrival at the deployment center, documented on the International Certificate of Vaccinations of Prophylaxis as approved by the World Health Organization or the Department of Health and Human Services Centers for Disease Control and Prevention Form 731. However, the contract must stipulate that CAAF and selected non-CAAF obtain all other necessary immunizations before their arrival at the deployment center. The TB skin test is required for all contractor personnel within three months before they are deployed.

(4) The DoD will provide theater-specific medical supplies and force health protection prescription products to CAAF and selected non-CAAF. Additionally, these personnel will receive deployment medication information sheets for all vaccines or deployment-related medications that are to be dispensed or administered.

(5) Contractors will ensure that individuals with a positive TB skin test be evaluated for targeted diagnosis and treatment of latent TB infection in accordance with the procedures outlined in the World Health Organization Guidelines on the Management of Latent Tuberculosis Infection.

(6) The contract must stipulate that CAAF and selected non-CAAF bring a current copy of the International Certificate of Vaccination or Prophylaxis to the pre-deployment processing center and to the operational area.

(g) *Human Immunodeficiency Virus (HIV) Testing.* HIV testing is not mandatory for contractor personnel unless specified by the GCC CCDR or by host nation requirements. HIV testing, if required, must occur within one year before deployment.

(h) *Armed Forces Repository of Specimen Samples for the Identification of Remains (AFRSSIR).* For identification of remains purposes, contractors whose CAAF members are U.S. citizens will obtain a dental panograph and will forward a specimen sample suitable for DNA analysis to, and ensure it is on file with, the AFRSSIR before or during deployment processing and recorded in SPOT–ES. The DoD Components must ensure that all contracts require CAAF who are U.S. citizens to provide DNA specimen samples for AFRSSIR as a condition of deployment. For more information, see paragraph (ll) of appendix A to this part.

(1) All CAAF who are U.S. citizens processing through a deployment center will have a DNA specimen sample collected and forwarded to the AFRSSIR for storage. Contracts must require contractors to verify in SPOT–ES or its successor that AFRSSIR has received the DNA specimen sample or that the contractor has collected the DNA specimen sample.

(2) If CAAF who are U.S. citizens do not process through a deployment center, or the contractor is authorized to process its own personnel, the contract must require that the contractor collect and forward DNA specimen samples for all contractor personnel who are deployed as CAAF to the AFRSSIR. Regardless of what specimen collection and storage arrangements are made, all contractors deploying CAAF who are U.S. citizens must provide the CAAF's name and Social Security number, location of the DNA specimen sample, facility contact information, and retrieval plan to AFRSSIR. If the AFRSSIR is not used and a CAAF who is a U.S. citizen becomes a casualty, the contractor must be able to retrieve identification media for use by the Armed Forces Medical Examiner (AFME) or other competent authority to conduct a medical-legal investigation of the incident and identification of the victim or victims. These records must be retrievable within 24 hours for forwarding to the AFME when there is a reported incident that would necessitate their use for identifying human remains. The contractor shall have access to the location of its employees' fingerprint, medical, and dental records, including panographs.

(3) AFRSSIR is responsible for implementing special rules and procedures to ensure the protection of privacy interests in regards to the specimen samples and any DNA analysis of those samples. Specimen samples shall only be used for the purposes outlined in paragraph (ll) of appendix A to this part.

(i) *Pre-existing medical conditions.* All evaluations of pre-existing medical conditions should occur before contractor personnel deploy. Personnel who have pre-existing medical conditions may deploy if:

(1) The condition is not of such a nature it is likely to have a medically grave outcome or a negative impact on mission execution if it unexpectedly worsens.

(2) The condition is stable and reasonably anticipated by the pre-deployment medical evaluator not to worsen during the deployment under contractor-provided medical care in-theater in light of the physical, physiological, psychological, environmental, and nutritional effects of the duties and location.

(3) Any required ongoing health care or medications must be available or accessible to contractor personnel, independent of the military health system, and not be subject to special

handling, storage, or other requirements (*e.g.,* refrigeration requirements and/or cold chain, electrical power requirements) that cannot be met in the specific theater of operations.

(4) The condition does not and is not anticipated to require duty limitations that would preclude performance of contractual requirements or to require accommodation by the DoD component or requiring activity. When necessary, the cognizant medical authority (or delegated representative) is the appropriate authority to evaluate the suitability of an individual's limitations in theater.

(5) There is no need for routine out-of-theater evacuation for continuing diagnostics or other evaluations.

(j) *Conditions usually precluding medical clearance.* This section is not intended to be comprehensive. A list of all possible diagnoses, including relevant severity levels that should preclude approval by the cognizant medical authority or designee would be too expansive to list in this part. These are minimum requirements. Contractor personnel may have additional medical clearance requirements based on their occupation and local laws. It is the responsibility of the contractor to ensure that its employees' medical clearances comply with any applicable local occupation-specific medical requirements.

(1) In general, individuals with the conditions in paragraph (b) of § 158.7, based on an individual assessment pursuant to paragraph (bb) of appendix A to this part, will not normally be approved for deployment to provide contractual support in applicable operations. The medical evaluator must carefully consider whether climate; altitude; the nature of available food and housing available; the nature of medical, behavioral health, and dental services; or other environmental or operational factors may prove hazardous to the deploying person's heath because of a known physical or mental condition.

(2) Medical clearance for deployment of persons with any of the conditions in this section shall be granted by the contracting officer only after consultation with the appropriate cognizant medical authority or a designated representative. The cognizant medical authority makes recommendations and serves as the GCC's advisor on conditions precluding the medial clearance of deploying personnel; however, the geographic CCDR is the final approval or disapproval authority except as provided in paragraph (k)(3) of this section. The cognizant medical authority or designated representative may determine if adequate treatment facilities and specialist support are available at the duty station for:

(i) Physical or psychological conditions resulting in the inability to wear IPE effectively, if wearing IPE may be reasonably anticipated or required in the deployed location.

(ii) Conditions that prohibit immunizations or use of force health protection prescription products required for the specific deployment. Depending on the applicable threat assessment, required force health protection prescription products, vaccines, and countermeasures may include atropine, epinephrine, and/or 2-pam chloride auto-injectors, certain antimicrobials, antimalarials, and/or pyridostigmine bromide.

(iii) Any chronic medical conditions that require frequent clinical visits, fail to respond to adequate conservative treatment, or necessitate significant limitation of physical activity.

(iv) Any medical conditions that require durable medical equipment or appliances or periodic evaluation or treatment by medical specialists not readily available in theater (*e.g.,* Continuous Positive Airway Pressure (CPAP) machine for sleep apnea).

(v) Any unresolved acute or chronic illness or injuries that would impair duty performance in a deployed environment during the duration of the deployment.

(vi) Active TB or known blood-borne diseases that may be transmitted to others in a deployed environment. (For HIV infections, see paragraph (j)(2)(xvii) of this section.)

(vii) An acute exacerbation of a physical or mental health condition that could affect duty performance.

(viii) Recurrent loss of consciousness for any reason.

(ix) Any medical condition that could result in sudden incapacitation including a history of stroke within the last 24 months, seizure disorders, and diabetes mellitus type I or II, treated with insulin or oral hypoglycemic agents.

(x) Hypertension not controlled with medication or that requires frequent monitoring to achieve control.

(xi) Pregnancy.

(xii) Cancers for which individuals are receiving continuing treatment or that require periodic specialty medical evaluations during the anticipated duration of the deployment.

(xiii) Precancerous lesions that have not been treated or evaluated and that require treatment or evaluation during the anticipated duration of the deployment.

(xiv) Any medical conditions that require surgery or for which surgery has been performed that requires rehabilitation or additional surgery to remove devices.

(xv) Asthma that has a Forced Expiratory Volume-1 (FEV–1) of less than or equal to 50 percent of predicted FEV–1 despite appropriate therapy, that has required hospitalization at least two times in the last 12 months, or that requires daily systemic oral or injectable steroids.

(xvi) Any musculoskeletal conditions that significantly impair performance of duties in a deployed environment.

(xvii) HIV antibody positive with the presence of progressive clinical illness or immunological deficiencies. The contracting officer should consult the cognizant medical authority in all instances of HIV seropositivity before medical clearance for deployment.

(xviii) Hearing loss. The requirement for use of a hearing aid does not necessarily preclude deployment. However, the individual must have sufficient unaided hearing to perform duties safely.

(xix) Loss of vision. Best corrected visual acuity must meet job requirements to perform duties safely.

(xx) Symptomatic coronary artery disease.

(xxi) History of myocardial infarction within one year of deployment.

(xxii) History of coronary artery bypass graft, coronary artery angioplasty, carotid endarterectomy, other arterial stenting, or aneurysm repair within one year of deployment.

(xxiii) Cardiac dysrhythmias or arrhythmias, either symptomatic or requiring medical or electrophysiologic control, such as the presence of an implanted defibrillator and/or pacemaker.

(xxiv) Heart failure.

(xxv) Individuals without a dental exam within the last 12 months or who are likely to require dental treatment or reevaluation for oral conditions that are likely to result in dental emergencies within 12 months.

(xxvi) Psychotic and/or bipolar disorders. For detailed guidance on deployment-limiting psychiatric conditions or psychotropic medications, see paragraph (mm) of appendix A to this part.

(xxvii) Psychiatric disorders under treatment with fewer than three months of demonstrated stability.

(xxviii) Clinical psychiatric disorders with residual symptoms that impair duty performance.

(xxix) Mental health conditions that pose a substantial risk for deterioration

or recurrence of impairing symptoms in the deployed environment.

(xxx) Chronic medical conditions that require ongoing treatment with antipsychotics, lithium, or anticonvulsants.

(k) *Exceptions to medical standards (waivers).* If a contractor believes an individual CAAF with one of the conditions listed in paragraphs (j)(2)(i) through (xxx) of this section can accomplish his or her tasks and duties and tolerate the environmental and operational conditions of the deployed location, the contractor may request a waiver for that individual through the contracting officer to the CCDR for approval.

(1) It is unlikely that the CCDR will grant waivers for contractor personnel. Thus, the contractor must provide an explanation as to why it has no other qualified employees available who meet the medical standards to fulfill the deployed duties. Contractors will include a summary of a detailed medical evaluation or consultation concerning the medical condition or conditions in the requests for waivers. Since maximization of mission accomplishment and the protection of the health of personnel are the ultimate goals, justification for the waiver will include:

(i) Statement indicating the CAAF individual's experience.

(ii) The position the CAAF individual will occupy and the nature and scope of contractual duties assigned.

(iii) Any known specific hazards of the position.

(iv) Anticipated availability and need for care while deployed.

(v) The benefit expected to accrue from the waiver.

(2) Medical clearance to deploy or continue serving in a deployed environment for persons with any of the conditions in paragraphs (j)(2)(i) through (xxx) of this section must have the concurrence of the cognizant medical authority, or designee, who will recommend approval or disapproval to the GCC. The GCC, or designee, is the final decision authority for approvals and disapprovals.

(3) For CAAF employees working with Special Operations Forces personnel who have conditions in paragraphs (j)(2)(i) through (xxx) of this section, medical clearance may be granted by the contracting officer after consultation with the appropriate Theater Special Operations Command (TSOC) surgeon. The TSOC surgeon, in coordination with the CCMD cognizant medical authority and senior in-theater medical authority, will ascertain the capability and availability of treatment facilities and specialist support in the general duty area versus the operational criticality of the particular SOF member. The TSOC surgeon will recommend approval or disapproval to the TSOC Commander. The TSOC Commander is the final approval or disapproval authority.

Appendix A to Part 158—Related Policies

The Operational Contract Support Outside the United States Program is supported by the following policies:

(a) DoD Directive 5124.02, ''Under Secretary of Defense for Personnel and Readiness (USD(P&R))'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/512402p.pdf*).

(b) DoD Instruction 1100.22, ''Policy and Procedures for Determining Workforce Mix'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/110022p.pdf*).

(c) DoD Directive 1000.20, ''Active Duty Service Determinations for Civilian or Contractual Groups'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/100020p.pdf*).

(d) DoD Instruction, ''Combating Trafficking in Persons (CTIP)'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/220001p.pdf*).

(e) DoD Law of War Manual (June 2015, Updated Dec. 2016) (available at *https://ogc.osd.mil/images/law_war_manual_december_16.pdf*).

(f) DoD Instruction 1000.01, ''Identification (ID) Cards Required by the Geneva Conventions'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/100001p.pdf*).

(g) DoD Instruction 1000.13, ''Identification (ID) Cards for Members of the Uniformed Services, Their Dependents, and Other Eligible Individuals'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/100013p.pdf).*

(h) DoD Manual 1000.13, ''DoD Identification (ID) Cards: ID Card Life-Cycle'' Volume 1 (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/100013_vol1.pdf).*

(i) DoD Manual 1000.13, ''DoD Identification (ID) Cards: ID Card Life-Cycle'', Volume 2 (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/100013_vol2.pdf*).

(j) DoD Directive 1300.22, ''Mortuary Affairs Policy'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/130022p.pdf*).

(k) DoD Instruction 1300.18, ''Department of Defense (DoD) Personnel Casualty Matters, Policies, and Procedures'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130018p.pdf*).

(l) DoD Instruction 4515.13, ''Air Transportation Eligibility'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/451513p.PDF*).

(m) DoD Instruction 6200.03, ''Public Health Emergency Management (PHEM) within the DoD'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/620003p.pdf*).

(n) DoD Instruction 6000.11, ''Patient Movement (PM)'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/600011p.pdf*).

(o) DoD 4525.6–M, ''Department of Defense Postal Manual'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/452506m.pdf*).

(p) DoD Instruction 1015.10, ''Military Morale, Welfare, and Recreation (MWR) Programs'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/101510p.pdf*).

(q) DoD Directive 1330.21, ''Armed Services Exchange Regulations'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/133021p.pdf*).

(r) DoD Directive 5160.41E, ''Defense Language, Regional Expertise, and Culture (LREC) Program'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/516041Ep.pdf*).

(s) Synchronized Predeployment and Operational Tracker (SPOT) Business Rules (available at *https://www.acq.osd.mil/LOG/PS/spot.html*).

(t) DoD 5400.11–R, ''Department of Defense Privacy Program'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/540011r.pdf*).

(u) DoD Manual 6025.18, ''Implementation of the Health Insurance Portability and Accountability Act (HIPPA) Privacy Rule in DoD Health Care Programs'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/602518m.pdf*).

(v) DoD Directive 8000.01, ''Management of the Department of Defense Information Enterprise (DoD IE)'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/800001p.pdf*).

(w) DoD Instruction 8320.02, ''Sharing Data, Information, and Information Technology (IT) Services in the Department of Defense'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/832002p.pdf*).

(x) DoD Instruction 8330.01, ''Interoperability of Information Technology (IT), Including National Security Systems (NSS)'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/833001p.pdf*).

(y) DoD Instruction 8500.01, ''Cybersecurity'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/850001_2014.pdf*).

(z) DoD Directive 4500.54E, ''DoD Foreign Clearance Program (FCP)'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/450054E.pdf*).

(aa) DoD Directive 6485.02E, ''DoD Human Immunodeficiency Virus (HIV)/Acquired Immune Deficiency Syndrome (AIDS) Prevention Program (DHAPP) to Support Foreign Militaries'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/648502E.pdf*).

(bb) DoD Instruction 6490.03, ''Deployment Health'' (available at *https://*

www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/649003p.pdf).

(cc) DoD Directive 6490.02E, ''Comprehensive Health Surveillance'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/649002Ep.pdf*).

(dd) CJCS Instruction 3500.01H, ''Joint Training Policy for the Armed Forces of the United States'' (available at *https://www.jcs.mil/Portals/36/Documents/Library/Instructions/3500_01.pdf*).

(ee) DoD Instruction 2000.12, ''DoD Antiterrorism (AT) Program'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/200012p.pdf*).

(ff) DoD Directive 2310.01, ''DoD Detainee Program'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/231001e.pdf*).

(gg) DoD Directive 2311.01, ''DoD Law of War Program'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/231101e.pdf*).

(hh) DoD Directive 3115.09, ''DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/311509p.pdf*).

(ii) DoDD 3002.01, ''Personnel Recovery in the Department of Defense'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/300201p.pdf*).

(jj) DoD Instruction 3002.03, ''DoD Personnel Recovery—Reintegration of Recovered Personnel'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/300203p.pdf*).

(kk) DoD Directive 6200.04, ''Force Health Protection (FHP)'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/620004p.pdf*).

(ll) DoD Instruction 5154.30, ''Armed Forces Medical Examiner System (AFMES) Operations'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/515430p.pdf*).

(mm) Assistant Secretary of Defense for Health Affairs Memorandum, ''Policy Guidance for Deployment-Limiting Psychiatric Conditions and Medications,'' November 7, 2006 (available at *http://www.ha.osd.mil/policies/2006/061107_deployment-limiting_psych_conditions_meds.pdf*).

Dated: October 30, 2020.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–27694 Filed 1–6–21; 8:45 am]

BILLING CODE 5001–06–P

POSTAL SERVICE

39 CFR Part 111

Extra Services Refund Time Limit

AGENCY: Postal Service™.

ACTION: Proposed rule; revision; additional comment period.

SUMMARY: The Postal Service is revising its pending proposal to amend *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM®) in subsection 604.9.2 to revise the time limit for extra service refunds.

DATES: Submit comments on or before February 8, 2021.

ADDRESSES: Mail or deliver written comments to the manager, Product Classification, U.S. Postal Service, 475 L'Enfant Plaza SW, Room 4446, Washington, DC 20260–5015. If sending comments by email, include the name and address of the commenter and send to *PC Federal Register@usps.gov,* with a subject line of ''Extra Services Refund Time Limit''. Faxed comments are not accepted.

Confidentiality

All submitted comments and attachments are part of the public record and subject to disclosure. Do not enclose any material in your comments that you consider to be confidential or inappropriate for public disclosure.

You may inspect and photocopy all written comments, by appointment only, at USPS® Headquarters Library, 475 L'Enfant Plaza SW, 11th Floor North, Washington, DC 20260. These records are available for review on Monday through Friday, 9 a.m.–4 p.m., by calling 202–268–2906.

FOR FURTHER INFORMATION CONTACT: Sheila Marano at (202) 268–4257, Adaisja Johnson at (202) 268–6724, or Garry Rodriguez at (202) 268–7281.

SUPPLEMENTARY INFORMATION: On May 14, 2020, the Postal Service published a notice of proposed rulemaking (85 FR 28917–28918) to revise the time limit for extra service refunds on all classes of mail except Priority Mail Express®. The Postal Service has elected to issue a second revised proposed rule that also includes revising the timelines for Priority Mail Express® with an extra service.

Currently, DMM Exhibit 604.9.2.1, *Postage and Fees Refunds,* provides that for Priority Mail Express with an extra service a customer must apply for an extra service refund no sooner than 10 days, or no later than 30 days, and for all other classes of mail with an extra service a customer must apply for an extra service refund no sooner than 10 days, or no later than 60 days, from the date the service was purchased.

Certain extra services (*e.g.,* Certified Mail®) have workflow timelines that extend beyond the current 10-day limit to initially file for a refund. As a result, to meet the required workflow timelines for these extra services, and for consistency in application of the refund processes, the Postal Service is proposing to extend the current Priority Mail Express with an extra service timelines to no sooner than 30 days, or no later than 60 days. For all other classes of mail with an extra service, the 10-day time limit will be extended to a 30-day time limit before a customer can file for a refund.

We believe this proposed revision will provide customers with a more efficient process and a more consistent customer experience.

Although exempt from the notice and comment requirements of the Administrative Procedure Act (5 U.S.C. 553(b), (c)) regarding proposed rulemaking by 39 U.S.C. 410(a), the Postal Service invites public comments on the following proposed revisions to *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), incorporated by reference in the Code of Federal Regulations. *See* 39 CFR 111.1.

We will publish an appropriate amendment to 39 CFR part 111 to reflect these changes.

Accordingly, 39 CFR part 111 is proposed to be amended as follows:

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

PART 111—GENERAL INFORMATION ON POSTAL SERVICE

■ 1. The authority citation for 39 CFR part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 13 U.S.C. 301–307; 18 U.S.C. 1692–1737; 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001–3011, 3201–3219, 3403–3406, 3621, 3622, 3626, 3632, 3633, and 5001.

■ 2. Revise the *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM) as follows:

Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM)

* * * * *

600 Basic Standards for All Mailing Services

* * * * *

604 Postage Payment Methods and Refunds

* * * * *

9.0 Exchanges and Refunds

* * * * *

9.2 Postage and Fee Refunds

* * * * *

9.2.1 General Standards

* * * * *

Exhibit 9.2.1 Postage and Fees Refunds

Customers must apply for a refund within the time limits in the chart below.

Mail type or service	When to apply (from mailing date)	
	No sooner than	No later than
* * *	* *	* *
[Revise the text of the ''Priority Mail Express with an Extra Service'' line item to read as follows:]		
Priority Mail Express with an Extra Service(s) (9.2.4h)	30 days	60 days.
* * *	* *	* *
[Revise the text of the ''Extra Services'' line item to read as follows:]		
All other classes of mail with an Extra Service(s) (9.2.4h)	30 days	60 days.
* * *	* *	* *

9.2.4 Postage and Fee Refunds Not Available

Refunds are not made for the following:

* * * * *

[Revise the text of item h to read as follows:]

h. Fees paid for extra services, as allowed under 9.2.3, when refund request is made by the mailer less than 30 days, or more than 60 days, from the date the service was purchased, unless otherwise authorized by the manager, Revenue and Field Accounting (see 608.8.0 for address).

* * * * *

9.5 Priority Mail Express Postage and Fees Refunds

* * * * *

9.5.4 Conditions for Refund

A postage refund request, as allowed under 9.0, must be made within the timelines provided in Exhibit 9.2.1.

* * * * *

Ruth Stevenson,

Attorney, Federal Compliance.

[FR Doc. 2020–27802 Filed 1–6–21; 8:45 am]

BILLING CODE P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 281 and 282

[EPA–R06–UST–2018–0701; FRL–10014–71–Region 6]

Arkansas: Final Approval of State Underground Storage Tank Program Revisions and Incorporation by Reference

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to the Resource Conservation and Recovery Act (RCRA or Act), the Environmental Protection Agency (EPA) is proposing to approve revisions to the State of Arkansas's Underground Storage Tank (UST) program submitted by the State. This action is based on EPA's determination that these revisions satisfy all requirements needed for program approval. This action also proposes to codify EPA's approval of Arkansas's state program and to incorporate by reference those provisions of the State regulations that we have determined meet the requirements for approval. The provisions will be subject to EPA's inspection and enforcement authorities under sections 9005 and 9006 of RCRA subtitle I and other applicable statutory and regulatory provisions.

DATES: Send written comments by February 8, 2021.

ADDRESSES: Submit any comments, identified by EPA–R06–UST–2018–0701, by one of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the on-line instructions for submitting comments.

2. *Email: lincoln.audray@epa.gov.*

Instructions: Direct your comments to Docket ID No. EPA–R06–UST–2018–0701. EPA's policy is that all comments received will be included in the public docket without change and may be available online at *https://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *https://www.regulations.gov,* or email. The Federal *https://www.regulations.gov* website is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *https://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties, and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

You can view and copy the documents that form the basis for this codification at the Environmental Protection Agency, Region 6, 1201 Elm

Street, Suite #500, Dallas, Texas 75270. This facility is open from 8:30 a.m. to 4:30 p.m. Monday through Friday, excluding Federal holidays and facility closures due to COVID–19. We recommend that you telephone Audray Lincoln, Environmental Protection Specialist at (214) 665–2239, before visiting the Region 6 office. Interested persons wanting to examine these documents should make an appointment with the office at least two weeks in advance. The documents are also available in the docket for this rulemaking at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Audray Lincoln, Region 6, Project Officer, LUST Prevention/Corrective Action Section (LCRPU), Land Chemical and Redevelopment Division, EPA Region 6, 1201 Elm Street, Suite #500, Dallas, Texas 75270, phone number (214) 665–2239, email address *lincoln.audray@epa.gov.* Out of an abundance of caution for members of the public and our staff, the EPA Region 6 office will be closed to the public to reduce the risk of transmitting COVID–19. We encourage the public to submit comments via *https://www.regulations.gov,* as there will be a delay in processing mail and no courier or hand deliveries will be accepted. Please call or email the contact listed above if you need alternative access to material indexed but not provided in the docket.

SUPPLEMENTARY INFORMATION: In the final rules section of this **Federal Register**, the EPA is approving the State's UST program submittal as a direct rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no relevant adverse comments are received in response to this action, no further activity is contemplated. If the EPA receives relevant adverse comments, the direct final rule will be withdrawn, and all public comments received will be addressed in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. For additional information, see the direct final rule published in the ''Rules and Regulations'' section of this **Federal Register**.

Authority: This proposed rule is issued under the authority of Sections 2002(a), 9004, and 7004(b) of the Solid Waste Disposal Act, as amended, 42 U.S.C. 6912, 6991c, 6991d, and 6991e.

Dated: October 27, 2020.

Kenley McQueen,

Regional Administrator, Region 6.

[FR Doc. 2020–24241 Filed 1–6–21; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register
Vol. 86, No. 4
Thursday, January 7, 2021

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

Establishment of the Urban Agriculture and Innovative Production Advisory Committee and Solicitation of Nominations for Membership on the Advisory Committee

AGENCY: Natural Resources Conservation Service, United States Department of Agriculture (USDA).

ACTION: Notice.

SUMMARY: The Secretary of USDA announces the establishment of the Urban Agriculture and Innovative Production Advisory Committee (Urban Ag Advisory Committee). The Committee will advise the Secretary on the development of policies and outreach relating to urban, indoor, and other emerging agricultural production practices; and other aspects of the implementation section of Subtitle A, Section 222 of the Reorganization Act of 1994. This notice also solicits nominations for membership on the Urban Ag Advisory Committee.

DATES: January 7, 2021.

ADDRESSES: We will consider nominations that are postmarked by March 8, 2021 to Ronald Harris, Designated Federal Officer, Director of Outreach and Partnerships, Natural Resources Conservation Service, Department of Agriculture, 1400 Independence Avenue SW, Room 6006–S, Washington, DC 20250; or send by email to: *Ronald.Harris@usda.gov*. Ronald Harris, as the Designated Federal Officer will acknowledge receipt of nominations.

FOR FURTHER INFORMATION CONTACT: Ronald Harris; telephone: (202) 720–6646; email: *Ronald.Harris@usda.gov*.

SUPPLEMENTARY INFORMATION

Urban Ag Advisory Committee Purpose

Section 12302 of the Agriculture Improvement Act of 2018 (Pub. L. 115–334, the 2018 Farm Bill) directs the Secretary of the USDA to establish an ''Urban Agriculture and Innovative Production Advisory Committee'' to advise the Secretary on the development of policies and outreach relating to urban, indoor, and other emerging agricultural production practices; and any other aspects of the implementation of section 222 of the Reorganization Act of 1994 (Pub. L. 103–354). The Urban Ag Advisory Committee will advise the Secretary of Agriculture on the development of policies and outreach relating to urban, indoor, and other emerging agricultural production practices; and will further develop recommendations.

In addition, the Urban Ag Advisory Committee will advise the Director of the Office of Urban Agriculture and Innovative Production on policies, initiatives, and outreach administered by that office. The Urban Ag Advisory Committee will evaluate and review ongoing research and extension activities relating to urban, indoor, and other innovative agricultural practices; identify new and existing barriers to successful urban, indoor, and other emerging agricultural production practices; and provide additional assistance and provide advice to the Director as appropriate.

Urban Ag Advisory Committee Membership

The Urban Ag Advisory Committee is expected to meet not less than 3 times each year, with meetings held at various locations across the United States. There will be 12 members appointed to the Urban Ag Advisory Committee. Of the members first appointed to this Urban Ag Advisory Committee, as determined by the Secretary:

- 4 of the members will be appointed for a term of 3 years;
- 4 of the members will be appointed for a term of 2 years; and
- 4 of the members will be appointed for a term of 1 year.

Future members will be appointed for a term of 3 years. An initial appointee of the Urban Ag Advisory Committee may serve an additional consecutive term if the member is reappointed by the Secretary.

The Urban Ag Advisory Committee will be composed of individuals representing a broad spectrum of the following representation:

- 4 agricultural producers, of whom—
  - 2 are agricultural producers in an urban area or urban cluster; and
  - agricultural producers who use innovative technology;
- 2 representatives from an institution of higher education or extension program;
- 1 representative of a nonprofit organization, which may include a public health, environmental, or community organization;
- 1 representative of business and economic development, which may include a business development entity, a chamber of commerce, a city government, or a planning organization;
- 1 individual with supply chain experience, which may include a food aggregator, wholesale food distributor, food hub, or an individual who has direct-to-consumer market experience;
- 1 individual from a financing entity; and
- 2 individuals with related experience or expertise in urban, indoor, and other emerging agriculture production practices, as determined by the Secretary.

Nominees to the Urban Ag Advisory Committee will be evaluated on a number of criteria, including expertise or experience with urban, indoor, and other emerging agricultural practices.

Serving as an Urban Ag Advisory Committee member will not constitute employment by, or the holding of, an office of the United States for the purpose of any Federal law. Persons selected for membership on the Urban Ag Advisory Committee will not receive compensation from USDA for their service as Urban Ag Advisory Committee members, except that while away from home or regular place of business the member will be eligible for travel expenses paid by USDA, including per diem in lieu of subsistence, at the same rate as a person employed intermittently in the government service, under 5 U.S.C. 5703.

Equal opportunity practices, in line with the USDA policies, will be followed in all appointments to the Urban Ag Advisory Committee.

To ensure that the recommendations of the Urban Ag Advisory Committee have taken into account the needs of the diverse groups served by the Department, membership should include, to the extent practicable, individuals with demonstrated ability to

represent minorities, women, and persons with disabilities.

Member Nominations

Any interested person or organization may nominate qualified individuals for membership. Interested candidates may nominate themselves. Individuals who wish to be considered for membership on the Urban Ag Advisory Committee must submit a nomination with information, including a background disclosure form (Form AD–755).

Nominations should be typed and include the following:

1. A brief summary, no more than two pages, explaining the nominee's qualifications to serve on the Urban Ag Advisory Committee and addressing the criteria described above.

2. A resume providing the nominee's background, experience, and educational qualifications.

3. A completed background disclosure form (Form AD–755) signed by the nominee *https://www.ocio.usda.gov/sites/default/files/docs/2012/AD-755-Approved_Master-exp-3.31.22_508.pdf.*

4. Any recent publications by the nominee relative to urban agriculture or innovations in urban agricultural production (if appropriate).

5. Letters of endorsement (optional).

Send typed nominations to Ronald Harris, Designated Federal Officer, Director of Outreach and Partnerships, Natural Resources Conservation Service, Department of Agriculture, 1400 Independence Avenue SW, Room 6006–S, Washington, DC 20250; telephone: (202) 720–6646; email: *Ronald.Harris@usda.gov.* Ronald Harris, the Designated Federal Officer, will acknowledge receipt of nominations.

Equal Opportunity Statement

To ensure that recommendations of the Urban Ag Advisory Committee take into account the needs of underserved and diverse communities served by the USDA, membership will include, to the extent practicable, individuals representing minorities, women, and persons with disabilities. USDA prohibits discrimination in all of its programs and activities on the basis of race, sex, color, national origin, gender, religion, age, sexual orientation, or disability. Additionally, discrimination on the basis of political beliefs and marital status or family status is also prohibited by statutes enforced by USDA (not all prohibited bases apply to all programs). Persons with disabilities who require alternate means for communication of program information (Braille, large print, audio tape, etc.) should contact USDA's Technology and Accessible Resources Give Employment Today Center at (202) 720–2600 (voice and TDD). USDA is an equal opportunity provider and employer.

Dated: December 28, 2020.

Cikena Reid,

Committee Management Officer, USDA.

[FR Doc. 2020–29077 Filed 1–6–21; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF AGRICULTURE

Economic Research Service

Notice of Intent to Request New Information Collection

AGENCY: Economic Research Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and Office of Management and Budget (OMB) implementing regulations, the U.S. Department of Agriculture Economic Research Service (ERS) invites the general public and other Federal agencies to take this opportunity to comment on a proposed new information collection for a study of ''Conservation Auction Behavior: Effects of Default Offers and Score Updating.''

DATES: Written comments on this notice must be received on or before March 8, 2021 to be assured of consideration.

ADDRESSES: Address all comments concerning this notice to Steven Wallander, Rural and Resource Economics Division, Economic Research Service, U.S. Department of Agriculture, 1400 Independence Ave. SW, Mail Stop 1800, Washington DC 20250–0002. Submit electronic comments to *steve.wallander@usda.gov* .

All written comments will be available for public inspection during regular business hours (8:30 a.m. to 5:00 p.m. (Eastern time), Monday through Friday). To arrange access to the comments, contact Steven Wallander at the email address listed above.

All responses to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments and replies will be a matter of public record. 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 shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: For further information contact Steven Wallander at the mailing address listed above or by phone: (202) 694–5546.

SUPPLEMENTARY INFORMATION: *Title:* Conservation Auction Behavior: Effects of Default Offers and Score Updating.

OMB Number: To be assigned by OMB.

Expiration Date: Three years from approval date.

Type of Request: New information collection.

Abstract: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–12) and OMB regulations at 5 CFR part 1320 (60 FR 44978, August 29, 1995), this notice announces USDA Economic Research Services' intention to request approval from the Office of Management and Budget (OMB) for a new data collection effort.

This data collection will use an online simulated auction experiment with former participants in the USDA Conservation Reserve Program (CRP) general signup and university students to (1) study the anchoring effect of using a high-scoring default offer in the CRP enrollment software rather than an active-choice default, and (2) study how the timing of information about final ranking score in the software influences responsive to baseline ranking scores. Outputs for the experiment will be used to inform potential updates to the CRP software and enrollment software as well as future lab experiments on general conservation auctions.

USDA's Conservation Reserve Program (CRP) enrolls environmentally sensitive cropland in long-term contracts. Enrolled landowners receive annual rental payments for establishing the approved conservation vegetative cover and not farming the land. Most land is enrolled through the CRP General Signup, a multi-unit, sealed-bid, reverse auction. Offers are ranked on both quality and price. Participants can increase the probability that their offer is accepted by agreeing to a higher quality conservation cover practice or lowering their asking price (annual payment). By encouraging better practices and lower payments, the auction design improves the cost effectiveness of the CRP.

The CRP general signup is a fairly complex decision environment in which participants must decide whether to select one of several dozen possible higher cost but higher scoring practices and whether to ask for lower annual rental payments in order to increase the likely that their offer is accepted into the program. A larger literature in other domains finds that in complex decision environments the initial option presented can have a significant anchoring effect in which final choices are closer to that default option than they would be otherwise. The current CRP general signup software uses an ''active choice'' default, in which the cover practice and annual rental choices are initially blank. Additional literature on complex decision-making environments finds that the way in which information is provided can influence outcome. The current CRP general signup software provides participants with their ranking score at the end of a series of offer selection screens. Providing live updating of that score earlier in the software could make respondents more sensitive to the underlying program incentives.

Using a stylized version of the enrollment software to create a simulated (artefactual) CRP auction, the study will experimentally test the impacts on final practice and payment offers from two behavioral interventions: (i) A high-quality default starting offer; and (ii) live updates on the offer score at the point of offer selection. In addition, to assess the external validity (generalizability) of conducting experiments with students, a common practice in the literature on conservation auction design, this study will run the experiment with both a sample of university students (drawn from the full population of undergraduate and graduate students at the University of Delaware) and a sample of former participants in the General Signup to test whether the two populations respond differently to the behavioral interventions.

The information to be collected in this proposed initiative is necessary to test the expected behavioral responses to these changes in the auction information environment. Such responses cannot be estimated using observational data because there is not systematic variation in the information environment. In addition, such responses cannot be estimated using mathematical programming models because the underlying psychological drivers of anchoring effects are highly context specific. By using experiments, we will be able to identify whether the effects observed in other complex decision-making environments are also likely in the context of a large conservation auction like the CRP. We plan to use these experiments to inform possible future redesigns of the CRP general signup software and enrollment process by the Farm Service Agency (FSA), future experiments using simulated conservation auctions, and the overall effort to extrapolated from the larger literature on conservation auction experiments that relied primarily on students as subjects.

Participation in this experiment will be voluntary, and subjects will be recruited using multiple waves of mail and email communications. During each session, subjects will participate in four rounds of a conservation auction: One practice round and three actual rounds. Within each round, subjects will be assigned a different field for potential enrollment and, based on the characteristics of that field, will make a decision about which conservation cover practice to select and what annual rental payment to ask for. Sessions will be conducted using an on-line auction portal developed by the University of Delaware. Participants can sign into the web page and make their offers at any point during a two-week enrollment period. Recruitment will occur in multiple waves until the required number of subjects is met.

Each session will last for an average 30 minutes, including watching an introductory video that explains the auction rules and software. Subjects will receive a show-up fee of $10. In addition to the show-up fee, subjects will receive compensation based on the decisions they make during the course of the experiment. After the enrollment period for each recruitment wave closes, one of the three auction rounds will be randomly selected and the highest-ranking offers will be ''accepted'' and receive a virtual payment. The number of winning offers will depend upon the complete pool of bids. Higher quality and lower cost offers will be more likely to get accepted but will receive lower payments if they are accepted. Payment levels are higher for the farmer population than for the student population since the lower level of incentives for students is one of the major reasons that many conservation auction studies use only a student population. We expect the winning bids to receive an average of $40 for farmers and $15 for students, not including the show-up fee. In designing our experimental procedures and payment levels, we took into consideration academic standards, statistical power considerations, budgetary limitations, and discussions between OMB and ERS regarding this and other approved experimental research.

Authority: These data will be collected under the legal authority of 7 U.S.C. 2204(a).

ERS intends to protect respondent information under the Privacy Act of 1974 and 7 U.S.C. 2276. ERS has decided not to invoke the Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA). The complexity and cost necessary to invoke CIPSEA is not justified given the nature of the collection; the collection will be conducted by the University of Delaware and hosted in non-government owned computer systems, where CIPSEA compliance cannot be assured.

Affected Public: Half of the respondents will be farmers or farmland owners who previously participated in at least one CRP general signup. The other half will be students at the University of Delaware.

Estimated Number of Respondents and Respondent Burden: Since recruitment will occur through multiple waves to reach the target number of participants, the total respondent burden for participation time will be constant and the total respondent burden for recruitment will depend upon the participation rate. Under lower participation rates, the respondent burden of recruitment is higher. Since students will be recruited through email and farmers will be recruited through mail, the burden per subject for recruitment is slightly lower (3 minutes) for students than for farmers (5 minutes). For all subjects who opt to participate, the expected time to complete the experiment online is 30 minutes.

Under a conservative assumption that the participation rate will be 10 percent of the sampled population for farmers and 25 percent of the sampled population for students, the public respondent burden for this information collection is estimated to be 2,033 hours. The calculations are shown in the table below based on a sample of 10,000 farmers that results in 1,000 farmer participants and a sample of 4,000 students that results in a sample of 1,000 student participants. At higher participation rates of 20 percent for farmers and 33 percent for students, the total respondent burden would be 1,567 hours.

SAMPLE BURDEN HOURS: 10% RESPONSE RATE FOR FARMERS, 25% RESPONSE RATE FOR STUDENTS

	Sample size	Responses			Non-Response			
		Count	Minutes/ response	Subtotal burden hours	Count	Minutes/ response	Subtotal burden hours	Total burden hours
Farmer Population:								
Recruitment	10,000	1,000	5	83.3	9,000	5	750.0	833.3
Participation	.....	1,000	30	500.0	.....	.....	.....	500.0
Total	.....	.....	.....	.....	.....	.....	.....	1,333.3
Student Population:								
Recruitment	4,000	1,000	3	50.0	3,000	3	150.0	200.0
Participation	.....	1,000	30	500.0	.....	.....	.....	500.0
Total	.....	.....	.....	.....	.....	.....	.....	700.0
Total Both Populations	.....	.....	.....	.....	.....	.....	.....	2,033.3

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; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments should be sent to the address in the preamble. All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Spiro Stefanou,

Administrator, Economic Research Service.

[FR Doc. 2021–00004 Filed 1–6–21; 8:45 am]

BILLING CODE 3410–18–P

DEPARTMENT OF AGRICULTURE

Forest Service

Black Hills Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Black Hills Resource Advisory Committee (RAC) will conduct a virtual meeting. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with Title II of the Act. RAC information can be found at the following website: *https://www.fs.usda.gov/detail/blackhills/workingtogether/advisorycommittees/?cid=STELPRD3807565.*

DATES: The meeting will be held on Thursday, January 28, 2021, at 5:30 p.m.

All meetings are subject to cancellation. For updated status of meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

ADDRESSES: The meeting will be held virtually along with a conference call line. For virtual meeting information, please contact the person listed under *For Further Information Contact.* Detailed instructions on how to attend the meeting virtually will be sent out via email with a news release approximately one week prior to the meeting.

Written comments may be submitted as described under *Supplementary Information.* All comments, including names and addresses, when provided, are placed in the record and available for public inspection and copying. The public may inspect comments received at the Mystic Ranger District Office. Please call ahead to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Kelly Warnke, Committee Coordinator, by phone at 605–716–1978 or by email at *kelly.warnke@usda.gov.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to further review and recommend projects for funding under the Secure Rural School allocations to Custer, Lawrence, and Pennington Counties for 2017, 2018 and 2019.

The meeting is open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to provide comments with regards to this meeting's agenda and for comments to be included with the meeting minutes/records, comments must be submitted in writing by Friday January 22, 2021. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments must be sent to Kelly Warnke, Mystic Ranger District, 8221 Mount Rushmore Road, Rapid City, South Dakota 57702; by email to *kelly.warnke@usda.gov,* or via facsimile to 605–343–7134.

Meeting Accommodations: If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices, or other reasonable accommodation. For access to the facility or proceedings, please contact the person listed in the section titled *For Further Information Contact.* All reasonable accommodation requests are managed on a case-by-case basis.

Dated: 1/4/2021.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2021–00024 Filed 1–6–21; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Office of Partnerships and Public Engagement

Public 2501 Stakeholder Call

AGENCY: OPPE, USDA.

ACTION: Notice of public 2501 Stakeholder Call.

SUMMARY: In accordance with the 2018 Farm Bill, this notice announces the intention of the OPPE to host a public teleconference to solicit stakeholder feedback for its Outreach and Assistance for Socially Disadvantaged Farmers and Ranchers and Veteran Farmers and Ranchers Grant Program, also known as the 2501 Program.

DATES: The teleconference will be held on January 25, 2021, 1:00 p.m.—3:00 p.m. EST. Comments on this notice must be received by 5:00 p.m. EST on January 25, 2021, to be assured of consideration.

ADDRESSES: OPPE invites interested persons to participate in the call with the following call-in instructions:

Call-in number: 888–251–2949
Passcode: 1813982#

Comments may be submitted by Email at: *2501grants@usda.gov.*

Instructions: All items submitted by electronic mail must include the Agency name and docket number [USDA–OPPE].

FOR FURTHER INFORMATION CONTACT: U.S. Department of Agriculture, Attention: Kenya Nicholas, Program Director, 1400 Independence Ave., SW, Mail Stop 0601, Washington, DC 20250, Office 202–720–6350 and/or email at: *2501grants@usda.gov.*

SUPPLEMENTARY INFORMATION: The 2501 Program was created through the 1990 Farm Bill to assist socially disadvantaged farmers, ranchers, and foresters, who have historically experienced limited access to USDA loans, grants, training, and technical assistance. The 2014 Farm Bill expanded the program's reach to assist veterans.

Under this program, grants are awarded to higher education institutions and nonprofit and community-based organizations to extend USDA's engagement efforts in these communities. Projects funded under the 2501 Program include but are not limited to conferences, workshops, and demonstrations on various farming techniques, and connecting underserved farmers and ranchers to USDA local officials to increase awareness of USDA's programs and services while filling the needs for increased partnerships. Since 2010, the 2501 program has awarded 533 grants totaling more than $138 million.

Jacqueline Davis-Slay,

Deputy Director, Office of Partnerships and Public Engagement.

[FR Doc. 2021–00015 Filed 1–6–21; 8:45 am]

BILLING CODE 3412–89–P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

Rural Housing Service

Rural Utilities Service

[Docket No. RUS–20–WATER–0032]

OneRD Annual Notice of Guarantee Fee Rates, Periodic Retention Fee Rates, Loan Guarantee Percentage and Fee for Issuance of the Loan Note Guarantee Prior to Construction Completion for Fiscal Year 2021; correction

AGENCY: Rural Business-Cooperative Service, Rural Housing Service, and Rural Utilities Service, USDA.

ACTION: Notice; correction.

SUMMARY: The Rural Business-Cooperative Service (RBCS), Rural Housing Service (RHS), and the Rural Utilities Service (RUS), agencies of the Rural Development mission area within the U.S. Department of Agriculture (USDA), published a document on Tuesday, September 1, 2020, announcing the Guarantee Fee rates, Guarantee percent for Guaranteed Loans, the Periodic Retention Fee, and Fee for Issuance of the Loan Note Guarantee Prior to Construction Completion for FY 2021, to be used when applying for guarantee loans under the aforementioned guarantee loan types. The document was missing a guarantee percentage specific to the State of Alaska and information regarding collection of the periodic guarantee retention fee.

FOR FURTHER INFORMATION CONTACT: For information specific to this notice contact Michele Brooks, Director, Regulations Management, Rural Development Innovation Center—Regulations Management, USDA, 1400 Independence Avenue SW, STOP 1522, Room 4266, South Building, Washington, DC 20250–1522. Telephone: (202) 690–1078. Email *michele.brooks@wdc.usda.gov.* For information regarding implementation contact your respective Rural Development State Office listed here: *http://www.rd.usda.gov/browse-state.*

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of September 1, 2020, in FR Doc 2020–19288, on page 54344, the chart is corrected to read as follows:

Loan type	Guarantee fee (percentage)	Periodic guarantee retention fee (percentage)	Loan guarantee percentage	Fee for issuance of loan note guarantee prior to construction completion (percentage)
B&I	3.0	0.5	80	0.5
B&I Reduced Fee	1.0	0.5	80	0.5
A B&I project in a high cost, isolated rural area of the State of Alaska that is not connected to a road system	1.0	0.5	90	0.5
CF	1.5	0.5	80	0.5
REAP	1.0	0.25	80	0.5
WWD	1.0	N/A	80	0.5

On page 54344, in the first column, after the table, add the following sentence at the end of the first paragraph: ''For loans where the Loan Note Guarantee is issued between October 1 and December 31, the first periodic retention fee payment is due January 31 of the second year following the date the Loan Note Guarantee was issued.''

Bette B. Brand,

Deputy Undersecretary, Rural Development.

[FR Doc. 2021–00005 Filed 1–6–21; 8:45 am]

BILLING CODE 3410–XY–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Texas Advisory Committee

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meetings.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act (FACA) that the Texas Advisory Committee (Committee) will hold a series of meetings via Webex on Thursday, February 11, Thursday, February 18, Thursday, February 25, and Thursday, March 4, and Monday 15, 2021 at 2:00 p.m. Central Time. The purpose of the meetings is for reviewing the Committee's advisory memorandum on Hurricane Harvey.

DATES: These meetings will be held on:

- Thursday, February 11, 2021 at 2:00 p.m. CT
- Thursday, February 18, 2021 at 2:00 p.m. CT
- Thursday, February 25, 2021 at 2:00 p.m. CT
- Thursday, March 4, 2021 at 2:00 p.m. CT
- Monday, March 15, 2021 at 2:00 p.m. CT

Access for the public can register at:

- Thursday, February 11: *https://tinyurl.com/y5lvuq9u*
- Thursday, February 18: *https://tinyurl.com/y6h7opct*
- Thursday, February 25: *https://tinyurl.com/y2gr37t4*
- Thursday, March 4: *https://tinyurl.com/y6yzv46m*
- Monday, March 15: *https://tinyurl.com/y2vfa3l6*

FOR FURTHER INFORMATION CONTACT: Brooke Peery, Designated Federal Officer (DFO) at *bpeery@usccr.gov* or by phone at (202) 701–1376. The most up-to-date draft of the advisory memorandum will be available to the public 48 hours before each meeting. Please email Brooke Peery at *bpeery@usccr.gov* if you would like a copy of the draft.

Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are entitled to make comments during the open period at the end of the meeting. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the meeting. Written comments may be mailed to the Western Regional Office, U.S. Commission on Civil Rights, 300 North Los Angeles Street, Suite 2010, Los Angeles, CA 90012 or email Brooke Peery (DFO) at *bpeery@usccr.gov.*

Records and documents discussed during the meeting will be available for public viewing prior to and after the meeting at *https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzkoAAA.*

Please click on the ''Meeting Details'' and ''Documents'' links. Records generated from this meeting may also be inspected and reproduced at the Regional Programs Unit, as they become available, both before and after the meeting. Persons interested in the work of this Committee are directed to the Commission's website, *https://www.usccr.gov,* or may contact the Regional Programs Unit at the above email or street address.

Agenda

I. Welcome & Roll Call
II. Approval of Minutes
III. Discussion on Draft
IV. Public Comment
V. Adjournment

Dated: January 4, 2021.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2021–00043 Filed 1–6–21; 8:45 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Washington Advisory Committee

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meetings.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Washington Advisory Committee (Committee) will hold a series of meetings via Webex on

Monday, January 11, and Monday, February 1, and Wednesday, February 17, 2021 from 2:30 p.m.–4:00 p.m. Pacific Time. The purpose of the meetings is for the Committee to begin planning their upcoming panels on police use of force and accountability.

DATES: These meetings will be held on:

- Monday, January 11, 2021 from 2:30 p.m.–4:00 p.m. Pacific Time
- Monday, February 1, 2021 from 2:30 p.m.–4:00 p.m. Pacific Time
- Wednesday, February 17, 2021 from 2:30 p.m.–4:00 p.m. Pacific Time

January 11th PUBLIC WEBEX REGISTRATION LINK: *https://tinyurl.com/ycnnynbr*

February 1st PUBLIC WEBEX REGISTRATION LINK: *https://tinyurl.com/ya9xp7zj*

February 17th PUBLIC WEEX REGISTRATION LINK: *https://tinyurl.com/y8l3pojk*

FOR FURTHER INFORMATION CONTACT: Brooke Peery, Designated Federal Officer (DFO), at *bpeery@usccr.gov* or by phone at (202) 701–1376.

SUPPLEMENTARY INFORMATION: Members of the public may listen to the discussion. This meeting is available to the public through the above listed toll free number. An open comment period will be provided to allow members of the public to make a statement as time allows. The conference call operator will ask callers to identify themselves, the organization they are affiliated with (if any), and an email address prior to placing callers into the conference room. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be mailed to the Western Regional Office, U.S. Commission on Civil Rights, 300 N Los Angeles St., Suite 2010, Los Angeles, CA 90012 or email Brooke Peery at *bpeery@usccr.gov.*

Records generated from this meeting may be inspected and reproduced at the

Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available at: *https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzkZAAQ.*

Please click on the ''Meeting Details'' and ''Documents'' links. Persons interested in the work of this Committee are also directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Unit office at the above email or street address.

Agenda

I. Welcome & Roll Call
II. Approval of Minutes
III. Discussion on Panels
IV. Public Comment
V. Adjournment

Dated: January 4, 2021.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2021–00042 Filed 1–6–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; NIST Associates Information System

AGENCY: National Institute of Standards and Technology (NIST), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before March 8, 2021.

ADDRESSES: Interested persons are invited to submit written comments by mail to Maureen O'Reilly, Management Analyst, NIST to *PRAcomments@doc.gov*). Please reference OMB Control Number 0693–0067 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Mary Clague, NIST Technology Partnerships Office, 301–975–4188, *mary.clague@nist.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

NIST Associates (NA) will include guest researchers, research associates, contractors, and other non-NIST employees that require access to NIST campuses or NIST resources. The NIST Associates Information System (NAIS) information collection instrument(s) are completed by the incoming NAs. The NAs will be requested to provide personal identifying data including home address, date and place of birth, employer name and address, and basic security information. The data provided by the collection instruments will be input into NAIS, which automatically populates the appropriate forms, and is routed through the approval process. NIST's Office of Security receives security forms through the NAIS process and is able to allow preliminary access to NAs to the NIST campuses or resources. The data collected will also be the basis for further security investigations as necessary.

II. Method of Collection

The information is collected in paper format.

III. Data

OMB Control Number: 0693–0067.
Form Number(s): None.
Type of Review: Revision and extension of a current information collection.
Affected Public: Individuals or households.
Estimated Number of Respondents: 4,000.
Estimated Time Per Response: 40 minutes.
Estimated Total Annual Burden Hours: 2,667.
Estimated Total Annual Cost to Public: $0.
Respondent's Obligation: Mandatory.
Legal Authority:

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2021–00056 Filed 1–6–21; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA775]

Western Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Western Pacific Fishery Management Council (Council) will hold an Intersessional Fisher Data Collection and Research Committee (FDCRC) meeting to discuss and make recommendations on fishery data collection and management issues in the Western Pacific Region.

DATES: The FDCRC will meet on Thursday, January 21, 2021, between 1 p.m. and 5 p.m., Hawaii Standard Time. For specific times and agendas, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The meeting will be held by web conference via WebEx. Audio and visual portions for all of the web conferences can be accessed at: *https://wprfmc.webex.com/wprfmc/onstage/g.php?MTID=e3e70e10f64290c1a9428b8175c2627d2.* Web conference access information and instructions for providing public comments will be posted on the Council website at *www.wpcouncil.org.* For assistance with the web conference connection, contact the Council office at (808) 552–8220.

FOR FURTHER INFORMATION CONTACT: Kitty M. Simonds, Executive Director, Western Pacific Fishery Management Council; telephone: (808) 522–8220.

SUPPLEMENTARY INFORMATION:

The Intersessional FDCRC meeting will be held on January 21, 2021, from 1 p.m. to 5 p.m. Hawaii Standard Time (HST) (noon to 4 p.m. Samoa Standard Time (SST); 9 a.m. to 1 p.m. on January 22, 2021, Chamorro Standard Time (ChST)). Opportunities to present oral public comment will be provided at the end of the agenda. The order of the agenda may change, and will be announced in advance at the meetings. The meetings may run past the scheduled times noted above to complete scheduled business.

Schedule and Agenda for the APT Meeting

Thursday, January 21, 2021, 1 p.m.–5 p.m.

1. Welcome remarks and introductions
2. Round robin updates on impacts of COVID on data collection
3. Data collection improvement updates
   A. Status of mandatory license and reporting regulations development and implementation
1. Guam
2. Commonwealth of the Northern Mariana Islands
3. American Samoa
   B. Implementation of the Catchit-Logit electronic reporting
   C. Pacific Island Fishery Science Center fishery-dependent data collection improvements
4. Discussion on addressing the 2019 Pacific Islands Fishery Monitoring and Assessment Planning Summit recommendations
   A. Moving towards electronic self-reporting
   B. Moving creel surveys to Marine Recreational Information Program
   C. Moving towards electronic technologies for the market sampling
   D. Improved data collection coordination and effective outreach and communication
5. Strategic planning session for the FDCRC Technical Committee
6. Public Comment
7. Other business
8. Discussions and recommendations

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, (808) 522–8220 (voice) or (808) 522–8226 (fax), at least 5 days prior to the meeting date.

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

Dated: January 4, 2021.

Rey Israel Marquez,

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

[FR Doc. 2021–00049 Filed 1–6–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA681]

Endangered and Threatened Species; Notice of Initiation of a 5-Year Review of Indo-Pacific Reef-building Corals

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

ACTION: Notice; request for information.

SUMMARY: NMFS announces the initiation of a 5-year review for 15 Indo-Pacific reef-building corals (*Acropora globiceps, Acropora jacquelineae, Acropora lokani, Acropora pharaonis, Acropora retusa, Acropora rudis, Acropora speciosa, Acropora tenella, Anacropora spinosa, Euphyllia paradivisa, Isopora crateriformis, Montipora australiensis, Pavona diffluens, Porites napopora,* and *Seriatopora aculeata*). NMFS is required by the Endangered Species Act (ESA) to conduct 5-year reviews to ensure that the listing classifications of species are accurate. The 5-year review must be based on the best scientific and commercial data available at the time of the review. We request submission of any such information on these 15 coral species, particularly information on the status, threats, and recovery of the species that has become available since their listing, effective September 10, 2014.

DATES: To allow us adequate time to conduct this review, we must receive your information no later than February 8, 2021.

ADDRESSES: You may submit information on this document, identified by NOAA–NMFS–2020–0151, by either of the following methods:

- *Electronic Submission:* Submit electronic information via the Federal e-Rulemaking Portal. Go to *www.regulations.gov* and enter NOAA–NMFS–2020–0151. Click on the ''Comment Now!'' icon and complete the required fields. Enter or attach your comments.
- *Email:* Submit written comments to Lance Smith at *Lance.Smith@noaa.gov.*

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the specified period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive or protected information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous submissions (enter ''N/A'' in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Lance Smith at (808) 725–5131 or *Lance.Smith@noaa.gov.*

SUPPLEMENTARY INFORMATION: This notice announces our review of the following Indo-Pacific reef-building coral species listed as threatened under the ESA: *Acropora globiceps, Acropora jacquelineae, Acropora lokani, Acropora pharaonis, Acropora retusa, Acropora rudis, Acropora speciosa, Acropora tenella, Anacropora spinosa, Euphyllia paradivisa, Isopora crateriformis, Montipora australiensis, Pavona diffluens, Porites napopora,* and *Seriatopora aculeata.* Section 4(c)(2)(A) of the ESA requires that we conduct a review of listed species at least once every 5 years. This will be the first review of these species since they were listed in 2014. The regulations in 50 CFR 424.21 require that we publish a notice in the **Federal Register** announcing species currently under active review. On the basis of such reviews under ESA Section 4(c)(2)(B), we determine whether any species should be removed from the list (*i.e.,* delisted) or reclassified from endangered to threatened or from threatened to endangered (16 U.S.C. 1533(c)(2)(B)). As described by the regulations in 50 CFR 424.11(e), the Secretary shall delist a species if the Secretary finds that, after conducting a status review based on the best scientific and commercial data available: (1) The species is extinct; (2) the species does not meet the definition

of an endangered species or a threatened species; and/or (3) the listed entity does not meet the statutory definition of a species. Any change in Federal classification would require a separate rulemaking process.

Background information on each of the 15 species is available on the NMFS website at: *https://www.fisheries.noaa.gov/corals.*

Public Solicitation of New Information

To ensure that the reviews are complete and based on the best available scientific and commercial information, we are soliciting new information from the public, governmental agencies, Tribes, the scientific community, industry, environmental entities, and any other interested parties concerning the status of *Acropora globiceps, Acropora jacquelineae, Acropora lokani, Acropora pharaonis, Acropora retusa, Acropora rudis, Acropora speciosa, Acropora tenella, Anacropora spinosa, Euphyllia paradivisa, Isopora crateriformis, Montipora australiensis, Pavona diffluens, Porites napopora,* and *Seriatopora aculeata.* Categories of requested information include: (1) Species biology including, but not limited to, population trends, distribution, abundance, demographics, and genetics; (2) habitat conditions including, but not limited to, amount, distribution, and important features for conservation; (3) status and trends of threats to the species and its habitats; (4) conservation measures that have been implemented that benefit the species, including, but not limited to, monitoring data demonstrating effectiveness of such measures; and (5) other new information, data, or corrections including, but not limited to, taxonomic or nomenclatural changes, and improved analytical methods for evaluating extinction risk.

If you wish to provide information for the reviews, you may submit your information and materials electronically or via mail (see **ADDRESSES** section). We request that all information be accompanied by supporting documentation such as maps, bibliographic references, or reprints of pertinent publications. We also would appreciate the submitter's name, address, and any association, institution, or business that the person represents; however, anonymous submissions will also be accepted.

(Authority: 16 U.S.C. 1531 *et seq.*)

Dated: January 4, 2021.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2021–00031 Filed 1–6–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA644]

Endangered and Threatened Species; Initiation of a 5-Year Review of Staghorn Coral, Elkhorn Coral, Pillar Coral, Rough Cactus Coral, Lobed Star Coral, Mountainous Star Coral, and Boulder Star Coral

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

ACTION: Notice of initiation of 5-Year Review; request for information.

SUMMARY: NMFS announces a 5-year review of staghorn coral (*Acropora cervicornis*), elkhorn coral (*Acropora palmata*), pillar coral (*Dendrogyra cylindrus*), rough cactus coral (*Mycetophyllia ferox*), lobed star coral (*Orbicella annularis*), mountainous star coral (*Orbicella faveolata*), and boulder star coral (*Orbicella franksi*) under the Endangered Species Act of 1973 (ESA). A 5-year review is based on the best scientific and commercial data available at the time of the review; therefore, we are requesting submission of any such information on staghorn coral, elkhorn coral, pillar coral, rough cactus coral, lobed star coral, mountainous star coral, and boulder star coral that has become available since their original listings as threatened species or the most recent status review for staghorn and elkhorn coral in 2014.

DATES: To allow us adequate time to conduct this review, we must receive your information no later than March 8, 2021.

However, we will continue to accept new information about any listed species at any time.

ADDRESSES: Submit your comments, identified by NOAA–NMFS–2020–0147, by either of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal e-Rulemaking Portal.

1. Go to *www.regulations.gov/document?D=NOAA-NMFS-2020-0147,*

2. Click the ''Comment Now!'' icon, complete the required fields, and

3. Enter or attach your comments.

- *Email:* Submit written comments to *alison.moulding@noaa.gov.*

Instructions: We may not consider comments if they are sent by any other method, to any other address or individual, or received after the end of the specified period. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. We will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Alison Moulding at the above email address or by phone at 727–551–5607.

SUPPLEMENTARY INFORMATION: On May 9, 2006, we listed elkhorn coral and staghorn coral as threatened under the ESA (71 FR 26852). On September 10, 2014, we listed lobed star coral, mountainous star coral, boulder star coral, rough cactus coral, and pillar coral as threatened and reaffirmed the status of elkhorn coral and staghorn coral as threatened (79 FR 53852). Section 4(c)(2)(A) of the ESA requires that we conduct a review of listed species at least once every 5 years. The ESA's implementing regulations at 50 CFR 424.21 require that we publish a notice in the **Federal Register** announcing those species currently under active review. On the basis of this review, under section 4(c)(2)(B), we determine whether these species should be delisted or reclassified from endangered to threatened or from threatened to endangered. As described in 50 CFR 424.11(e), the Secretary will delist a species if the Secretary finds that, after conducting a status review based on the best scientific and commercial data available: (1) The species is extinct; (2) the species does not meet the definition of an endangered species or threatened species; or (3) the listed entity does not meet the statutory definition of a species. Changes to the listing status of a species can only be made following publication of a proposed rule with an opportunity for public comment and our consideration of the comments before making a final determination to reclassify or delist the species.

Public Solicitation of New Information

To ensure that the 5-year review is complete and based on the best available scientific and commercial information, we are soliciting new

information from the public, governmental agencies, Tribes, the scientific community, industry, environmental entities, and any other interested parties concerning the status of staghorn coral, elkhorn coral, pillar coral, rough cactus coral, lobed star coral, mountainous star coral, and boulder star coral.

The 5-year review considers the best scientific and commercial data and all new information that has become available since the listing determination or most recent status review. Categories of requested information include (A) species biology including, but not limited to, population trends, distribution, abundance, demographics, and genetics; (B) habitat conditions including, but not limited to, amount, distribution, and suitability; (C) conservation measures that have been implemented that benefit the species; (D) status and trends of threats; and (E) other new information, data, or corrections including, but not limited to, taxonomic or nomenclature changes and improved analytical methods.

If you wish to provide information for this 5-year review, you may submit your information and materials electronically at *www.regulations.gov* or via email (see **ADDRESSES** section). We request that all information be accompanied by supporting documentation such as maps, bibliographic references, or reprints of pertinent publications. We also would appreciate the submitter's name, address, and any association, institution, or business that the person represents; however, anonymous submissions will also be accepted.

(Authority: 16 U.S.C. 1531 *et seq.*)

Dated: January 4, 2021.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2021–00032 Filed 1–6–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Rehabilitation Training: Disability Innovation Fund—Career Advancement Initiative Model Demonstration Project

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice.

SUMMARY: The U.S. Department of Education (Department) is issuing a notice inviting applications for fiscal year (FY) 2021 for the Disability Innovation Fund—Career Advancement Initiative Model Demonstration Project, Assistance Listing Number 84.421C. The Department intends to fund a multi-site model demonstration project designed to assist State vocational rehabilitation (VR) agencies, in partnership with other entities, to develop career pathways focused on career advancement. This competition will help VR-eligible individuals with disabilities, including previously served VR participants in employment who re-enter the VR program, to advance in high-demand, high-quality careers, such as science, technology, engineering, and math (STEM), including computer science, careers; to enter career pathways in industry-driven sectors through pre-apprenticeships, registered apprenticeships and Industry Recognized Apprenticeship Program (IRAP); to improve and maximize competitive integrated employment outcomes, economic self-sufficiency, independence, and inclusion in society; and to reduce reliance on public benefits (*e.g.,* Supplemental Security Income (SSI)/Social Security Disability Insurance (SSDI), and/or Temporary Assistance for Needy Families (TANF), and State or local benefits). This notice relates to the approved information collection under OMB control number 1820–0018.

DATES:

Applications Available: January 7, 2021.

Deadline for Transmittal of Applications: April 7, 2021.

Date of Pre-Application Meeting: The Office of Special Education and Rehabilitative Services (OSERS) will post a PowerPoint presentation that provides general information about the Rehabilitation Services Administration's (RSA) discretionary grants and a PowerPoint presentation specifically about the Disability Innovation Fund—Career Advancement Initiative Model Demonstration Projects at *https://ncrtm.ed.gov/RSAGrantInfo.aspx.* OSERS will conduct a pre-application meeting specific to this competition via conference call to respond to questions. Information about the pre-application meeting will be available at *https://ncrtm.ed.gov/RSAGrantInfo.aspx* prior to the date of the call. OSERS invites you to send questions to *84.421C@ed.gov* in advance of the pre-application meeting. The teleconference information, including the 84.421C pre-application meeting summary of the questions and answers, will be available at *https://ncrtm.ed.gov/RSAGrantInfo.aspx* within six days after the pre-application meeting.

Deadline for Intergovernmental Review: May 7, 2021.

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at *www.govinfo.gov/content/pkg/FR–2019–02–13/pdf/2019–02206.pdf.*

FOR FURTHER INFORMATION CONTACT: Cassandra P. Shoffler, U.S. Department of Education, 400 Maryland Avenue SW, Room 5065A, Potomac Center Plaza, Washington, DC 20202–2800. Telephone: (202) 245–7827. Email: *84.421C@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the Disability Innovation Fund (DIF) Program, as provided by the Further Consolidated Appropriations Act, 2020 (Pub. L. 116–94), is to support innovative activities aimed at improving the outcomes of individuals with disabilities, as defined in section 7(20)(B) of the Rehabilitation Act of 1973, as amended, including activities aimed at improving the education and post-school outcomes of children receiving SSI and their families that may result in long-term improvement in the SSI child recipient's economic status and self-sufficiency.

Priorities: This competition contains an absolute priority and an invitational priority. We are establishing the absolute priority for the FY 2021 grant competition, and any subsequent year in which we make awards from the list of unfunded applications from this competition, in accordance with section 437(d)(1) of the General Education Provisions Act (GEPA), 20 U.S.C. 1232(d)(1).

Absolute Priority: This priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This priority is:

Career Advancement Initiative Model Demonstration Project.

Background:

Though always permissible under the Vocational Rehabilitation (VR) program, the amendments to the Rehabilitation

Act of 1973 (Rehabilitation Act) made by the Workforce Innovation and Opportunity Act (WIOA) clarified and emphasized that individuals with disabilities were eligible for VR services for the purpose of advancing in employment. Among the stated purposes of WIOA, Congress included—

> To improve the quality and labor market relevance of workforce investment, education, and economic development efforts to provide America's workers with the skills and credentials necessary to *secure and advance in* employment with family-sustaining wages.

WIOA Section 2, Paragraph (3); 29 U.S.C. 3101(3) (emphasis added). As such, the VR program is not solely intended to place individuals with disabilities in entry-level jobs, but, rather, to assist them to obtain, retain, advance in, or regain employment, consistent with their unique strengths, resources, priorities, concerns, abilities, capabilities, and informed choice, through the services and supports identified on their individualized plans for employment (IPE).

While the VR program has a long history of helping individuals with disabilities secure employment, there is room for improvement in helping individuals with disabilities move off of public benefits and advance in employment, which as used in section 102(a)(1)(B) of the Rehabilitation Act, includes both advancing within current employment and advancing into new employment.

Our examination of RSA–911 data for program year (PY) 2019, located at *https://rsa.ed.gov/performance-data/rsa-911-policy-directive,* demonstrates that, of 361,421 new applicants, 105,760 (29 percent) reported their primary source of support as SSI, SSDI, or TANF. Of the 128,866 individuals who exited the VR program in competitive integrated employment (CIE), 15,233 (12 percent) indicated that their primary source of support was still SSI, SSDI, or TANF.

The U.S. Department of Labor Federal Minimum Wage website, *https://www.dol.gov/general/topic/wages/minimumwage,* indicates that the Federal minimum wage for covered nonexempt employees is $7.25 per hour. There are numerous States with minimum wage laws. In cases where an employee is subject to both the State and Federal minimum wage laws, the employee is entitled to the higher of the two minimum wages. Participants who exited the VR program in CIE reported a median wage of $12 per hour and median 30 hours worked per week. Approximately 80 percent of participants earned less than $17 per hour. Of the 128,866 individuals who exited the VR program in CIE, 28,926 (22 percent) indicated that they had private insurance through their employer and 3,309 (3 percent) indicated that they were not yet eligible for private insurance through their employer.

The 10 most common occupations, reported by fully one third of the participants who exited in CIE, were:

1. Stock Clerks and Order Fillers;
2. Customer Service Representatives;
3. Janitors and Cleaners, Except Maids and Housekeeping Cleaners;
4. Laborers and Freight, Stock, and Material Movers, Hand;
5. Retail Salespersons;
6. Cashiers;
7. Combined Food Preparation and Serving Workers, including Fast Food;
8. Food Preparation Workers;
9. Production Workers, All Other; and
10. Dishwashers.

Wages at this level, in combination with less than full-time work in these positions and without employer-provided medical benefits, provide little opportunity for individuals to reduce their reliance on public benefits (*e.g.,* SSI, SSDI, and/or TANF, and State or local benefits), and the wages suggest that there is room for many individuals with disabilities to advance in employment and their careers. To emphasize the point, individuals who earned $20 per hour or more reported their top five occupations as:

1. Registered Nurses;
2. Heavy and Tractor-Trailer Truck Drivers;
3. Managers, All Other;
4. Teachers and Instructors, All Other; and
5. Accountants and Auditors.

The Department believes that career pathways provide a mechanism for VR agencies to assist VR eligible individuals with disabilities, including previously served VR participants in employment who re-enter the VR program, to obtain or advance in employment or change careers.

In FY 2015, RSA awarded four Career Pathways for Individuals with Disabilities projects under the Demonstration and Training program. Early results from States that received these awards are encouraging. In 2015, Nebraska VR created the Career Pathways Advancement Project and employed the upskill/backfill model of career pathways advancement for their former VR participants in five career pathways based upon the State's economy's needs: Information Technology; Manufacturing; Transportation, Distribution, and Logistics; Healthcare; and Architecture/Construction (Moore, D., Haines, K., Drudik, J., Arter, Z., and Foley, S. (2020). Upskill/Backfill Model of Career Pathways Advancement: The Nebraska Vocational Rehabilitation Approach. *Journal of Applied Rehabilitation Counseling, 51*(3), 1–14). The results of Nebraska's project demonstrate that this model does assist former clients in advancing in their careers, as well as obtaining CIE that comes with higher income and benefits (Moore et al., 2020). As former clients are increasing their skills or ''getting upskilled'' (*e.g.,* through credentialed training programs) and advancing in their careers, new clients can fill the newly vacated positions (Moore et al., 2020). In Georgia, the project focused on expanding pre-employment transition services to students with disabilities and transition services to VR eligible students, thereby increasing the number of participants who achieved a recognized post-secondary credential from 12 in FY 2016 to 353 in FY 2020. In Kentucky, the focus was on career pathways STEM events, employer engagement, and workforce partnerships, which resulted in an increase in employment outcomes from 168 in FY 2017 to 294 in FY 2019. In Virginia, the focus was on sustainable strategies, including business-driven strategies and credential training, which resulted in an increase in the number of credentials obtained from 8 in FY 2016 to 56 in FY 2020 and an increase in the number of individuals whose cases were closed in competitive integrated employment outcomes from 7 in FY 2016 to 32 in FY 2020.

Further, Congress made career pathways a necessary, if not foundational, part of WIOA's workforce reforms. States, for example, are required to include career pathways in their workforce development systems, WIOA section 101(d)(3)(B); career pathways are required in training programs, WIOA section 101(d)(5)(C); and local workforce development boards are required to include career pathways in their local plans, WIOA sections 107(d)(5), 108(b)(3).

As earning a degree or certificate may be part of a successful career pathway, RSA–911 data show that while many VR customers are pursuing degrees or certificates, there are opportunities for many more to do so. Of the 875,275 individuals in receipt of VR services through an IPE during PY 2019, 154,239 participants (18 percent) were enrolled in some form of postsecondary education or career/technical training, 80,916 (9 percent) received either Associate, Bachelor, or Graduate School training, 31,258 (4 percent) received vocational training and 194 participants

were taking part in Registered Apprenticeship Training.

This competition will provide an opportunity and flexibility for a State VR agency, given additional funding and the full range of resources available through the VR program, to demonstrate the effectiveness of providing the career pathways services needed by VR-eligible individuals, including those participating in the VR program and those who are not receiving services in the VR program for reasons such as assignment to closed priority categories under an order of selection. This includes previously served VR participants in employment who re-enter the VR program, to obtain, change careers to, advance in, or maximize employment in fields that provide a true living wage and freedom from public support.

VR agencies, whether applying alone or in a consortium with multiple State VR agencies, must implement career advancement initiative model demonstration projects by establishing career pathway and work-based learning partnerships with employers, community colleges and postsecondary institutions, entities that make up the workforce development systems, entities that provide registered apprenticeships, pre-apprenticeships and IRAPs, comprehensive rehabilitation centers, local or State educational agencies (LEAs or SEAs), and providers or other Federal or State agencies (*i.e.,* State Apprenticeships Programs, Employment Networks under Social Security, Department of Labor, etc.), as appropriate to the career pathway or pathways chosen and the industries or types of professions served. The models must be implemented at multiple local sites to ensure replicability and delivered through a coordinated system.

Assistance to individuals could include, as appropriate for the individual, pre-apprenticeship, registered apprenticeship and IRAP training or postsecondary training and graduate-level postsecondary education, registered apprenticeships in formal trades, other work-based learning experiences, community college and technical college education and training, or other appropriate training and education opportunities to achieve the advancement in employment specified as the individual's vocational goal.

In sum, this competition is designed to help VR-eligible individuals with disabilities, including previously served VR participants in employment who re-enter the VR program, to advance in or change to high-demand, high-quality careers, such as STEM careers.[1] This also includes individuals who enter career pathways in industry-driven sectors through pre-apprenticeships, registered apprenticeships and IRAPs; to improve and maximize CIE outcomes, economic self-sufficiency, independence, and inclusion in society; and to reduce reliance on public benefits (*e.g.,* Supplemental Security Income (SSI)/Social Security Disability Insurance (SSDI)).

Priority:

This priority establishes model demonstration projects in which State vocational rehabilitation (VR) agencies, whether applying alone or in a consortium, by developing and using career pathways, will assist VR eligible individuals with disabilities, including previously served VR participants in employment who re-enter the VR program, to advance in their careers. Projects should help these individuals obtain promotional opportunities with a current employer or a different employer; obtain additional responsibility and compensation by advancing in a formal career or job series; obtain industry recognized credentials that result in additional responsibilities, compensation, and benefits; improve and maximize CIE outcomes, economic self-sufficiency, independence, and inclusion in society; and/or reduce reliance on public benefits (*e.g.,* SSI, SSDI, and/or TANF, and State or local benefits).

As used in this competition, *career pathway* means a combination of rigorous and high-quality education, training, and other services that—

(a) Aligns with the skill needs of industries in the economy of the State or regional economy involved;

(b) Prepares an individual to be successful in any of a full range of secondary or postsecondary education options, including apprenticeships registered under the Act of August 16, 1937 (commonly known as the ''National Apprenticeship Act''; 50 Stat. 664, chapter 663; 29 U.S.C. 50 *et seq.*);

(c) Includes counseling to support an individual in achieving the individual's education and career goals;

(d) Includes, as appropriate, education offered concurrently with and in the same context as workforce preparation activities and training for a specific occupation or occupational cluster;

(e) Organizes education, training, and other services to meet the particular needs of an individual in a manner that accelerates the educational and career advancement of the individual to the extent practicable;

(f) Enables, as appropriate, an individual to attain a secondary school diploma or its recognized equivalent, and at least one recognized postsecondary credential; and

(g) Helps an individual enter or advance within a specific occupation or occupational cluster (*i.e.,* a group of occupations and broad industries based on common knowledge and skills, job requirements, or worker characteristics).

Project Requirements: Under this priority, the model demonstration proposed by an applicant must, at a minimum—

(a) Develop and implement a collaborative model that demonstrates a rationale[2] in the use of career pathways to enable VR eligible individuals with disabilities, including previously served VR participants in employment who re-enter the VR program, to advance in their careers, such as obtaining promotional opportunities with a current employer or a different employer; obtaining additional responsibility and compensation by advancing in a formal career or job series; increasing the number of hours worked; and obtaining industry recognized credentials that result in additional responsibilities, compensation, and benefits;

(1) The model project must involve providing access to existing career pathways, creating a new pathway, or both;

(2) The model project must propose multiple partnerships and multiple pathways to serve different populations, provided that the applicant identify any separate personnel, activities, and budgets;

(3) The model project must propose to serve diverse geographic regions, including urban, suburban, rural and Tribal communities, if applicable.

(b) Establish partnerships between the VR agencies and appropriate employers, agencies, and entities that are critical to the development of the career pathway or pathways used in the model. These partnerships could include two-year and four-year institutions of higher education, American Job Centers, and

[1] This competition is aligned with the aims of the Federal Government's five-year strategic plan for STEM education entitled *Charting A Course for Success: America's Strategy for STEM Education* (Plan) published in December 2018, including the Plan's overarching goal to Increase Diversity, Equity, and Inclusion in STEM. *https://www.whitehouse.gov/wp-content/uploads/2018/12/STEM-Education-Strategic-Plan-2018.pdf.*

[2] For purposes of this priority, ''demonstrates a rationale'' means a key project component included in the project's logic model is informed by research or evaluation findings that suggest the project component is likely to improve relevant outcomes, as defined in 34 CFR 77.1.

other workforce training providers, such as registered apprenticeship and pre-apprenticeship providers, comprehensive support service providers, and on-the-job and customized training providers);

(c) Include the following career pathway components:

(1) Alignment of secondary and postsecondary education, training, and employment, such as skilled trades and STEM careers important to local, regional, or State economies;

(2) Rigorous, sequential, connected, and efficient curricula that connect education and skills training courses and that integrate education with training, as appropriate;

(3) Multiple entry and exit points for VR participants entering and exiting training;

(4) Comprehensive, coordinated and personalized support services that are designed to ensure the individual's success in completing education and training programs:

(i) Financial literacy, benefits counseling, childcare, physical health and mental health services and transportation;

(ii) Educational supports (*e.g.,* tutors, on-campus supports such as writing labs, math labs, and disability services);

(iii) Self-advocacy training (*e.g.,* mentoring, peer relationships, understanding how to request services and supports); and

(iv) Appropriate assistive technology services and devices;

(5) Flexible design of education and training programs and services to meet the particular needs of VR participants, including flexible work schedules, alternative class times and locations, and the innovative use of technology; and

(6) Education and training programs that focus on advancing in employment and are designed to develop the following knowledge and skills:

(i) Comprehensive career development counseling and guidance, including self-exploration and career exploration and career planning and management;

(ii) Career and technical skills leading to advancement in careers, including the skilled trades and STEM careers; and

(iii) Soft skills (*e.g.,* understanding, communication, teamwork, networking, problem solving, critical thinking and professionalism, learning styles, identifying strengths and weaknesses);

(d) Collaborate with other federally funded career pathway initiatives conducting activities relevant to the work of its proposed project; and

(e) Develop and conduct an evaluation of the project's performance that documents the relationship between participants' engagement with or use of specific practices and strategies implemented by the project and key outcomes.

Application Requirements: Under this priority, to be considered for funding, an application must include the following:

(a) A detailed review of the literature that supports the potential effectiveness of the proposed model, its components, and processes to improve career advancement for individuals with disabilities;

(b) A logic model that communicates how the demonstration project will achieve its outcomes and provides a framework for project evaluation. The logic model must:

(1) Depict, at a minimum, the goals, activities, outputs, and outcomes of the proposed model demonstration project; and

(2) Demonstrate how the specific career pathways components developed and implemented in the project are thought to affect project outcomes. Project activities that demonstrate a rationale and are depicted in the logic model must be specifically noted;

(c) A description of the applicant's plan, methods, and criteria for implementing the project, including a description of—

(1) A cohesive, articulated model of partnership and coordination among the participating agencies and organizations;

(2) The coordinated set of practices and strategies in the use and development of career pathways that are aligned with employment, training, and education programs and reflect the needs of employers and VR-eligible individuals, including previously served VR participants in employment who re-enter the VR program to advance in their careers;

(3) The model demonstration project's proposed sites and targeted occupational clusters, and the proposed criteria for selecting such sites and occupational clusters. State VR agencies applying as a group must also identify the shared geographic area and describe how they will coordinate their project activities, including the data collection and evaluation, within the shared area;

(4) How the proposed project will—

(i) Provide access to existing career pathways, create new pathways, or both, incorporating the six required career pathway components: Secondary and postsecondary education and training aligned with targeted industry sector needs; rigorous, sequential, connected and efficient curricula; multiple entry and exit points; comprehensive support services; flexible design of education, training, work settings and assistive technology; and focus on the attainment of secondary education, recognized postsecondary credentials, sector-specific employment, and related knowledge and skills in order to advance in employment;

(ii) Identify local workforce needs, aligned with the skill needs of targeted industry sectors important to local, regional, or State economies;

(iii) Involve employers in the project design and in partnering with project staff to develop integrated community settings for assessments, job shadowing, internships, apprenticeships, and other paid and unpaid work experiences that are designed to lead to career advancement competitive for individuals with disabilities;

(iv) Provide technical assistance or other resources (*e.g.,* trainings) for employers as needed on topics or strategies related to career advancement for VR eligible individuals with disabilities, including previously served VR participants in employment who re-enter the VR program;

(v) Collaborate with participating agencies and organizations, including career pathway partners; and

(vi) Develop strategies and conduct outreach activities to identify VR-eligible individuals with disabilities, including previously served VR participants in employment who re-enter the VR program, whom the career pathways approach could assist in changing careers or advancing their careers. Note: If a project proposes multiple career pathways, the plan must separately describe the strategies and outreach activities that will be used to identify VR-eligible individuals with disabilities, including previously served VR participants in employment who re-enter the VR program;

(d) A memorandum of understanding between the State VR agency and its proposed partners in developing and implementing the project. In the case of a consortium, the application must also include a signed agreement among the constituent State VR agencies that designates the agency legally authorized to submit the application on behalf of the group; binds each agency to every statement, assurance, and obligation in the application; and details the agencies' assigned roles and responsibilities, in accordance with 34 CFR 75.128 and 75.129;

(e) A plan for evaluating the project's performance, including documenting the relationship between program participation and the project's goals and objectives:

Specifically, the evaluation plan must include a description of—

(1) Project goals, measurable objectives, and operational definitions;

(2) The data to be collected;

(3) How the data will be analyzed; and

(4) How the outcomes for individuals with disabilities served by the project compared with the outcomes of individuals with VR-eligible individuals with disabilities, including previously served VR participants, not receiving project services;

(f) For each career pathway accessed or created through the project, the evaluation plan must provide the following information:

(1) Description of the career pathway, including the respective occupational cluster(s) or career field(s), stackable credentials, and multiple entry/exit points; and

(2) Collection of the following data, at minimum:

(i) The relevant RSA–911 Case Service Report data for each project participant, including disability and other demographic data;

(ii) The number of participants who entered the career pathway;

(iii) The number of participants who completed training in the career pathway;

(iv) The number of participants who attained one or more recognized postsecondary credential and the types of credentials attained;

(v) The number of participants who achieved CIE through the project;

(vi) The corresponding weekly wage and employer-provided medical benefits received by these participants before and after receiving services;

(vii) The corresponding weekly hours worked by these participants before and after receiving services;

(viii) The number of participants who receive a promotion or additional responsibilities resulting in an increase in salary; and;

(ix) The number of participants who report public benefits (*e.g.,* SSI, SSDI, and/or TANF, and State or local benefits) as their primary source of support at the time they exit in CIE;

(g) A plan for systematic dissemination of project findings and knowledge gained that will assist State and local agencies in adapting or replicating the model career pathways developed and implemented by the project. This plan could include elements such as development of a website or community of practice, and participation in national and State conferences;

(h) An assurance that, based on the informed choice of the VR participant, the employment goal for all individuals served under this project will be CIE, including customized or supported employment;

(i) An assurance that the project will collaborate with other federally funded career pathway initiatives conducting activities relevant to its work; and

(j) An assurance that the project will train employers, including businesses, to collaborate with VR on working with employees or trainees with disabilities.

Within this absolute priority, we are particularly interested in applications that address the following invitational priority.

Invitational Priority: Under 34 CFR 75.105(c)(1) we do not give an application that meets this invitational priority a competitive or absolute preference over applications that do not meet the invitational priority.

This priority is:

Career pathway projects that focus on individuals with intellectual or developmental disabilities.

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed priorities. Section 437(d)(1) of GEPA, however, allows the Secretary to exempt from rulemaking requirements regulations governing the first grant competition under a new or substantially revised program authority. This is the first grant competition for this program under the authority given in the Further Consolidated Appropriations Act, 2020, and, therefore, qualifies for this exception. To ensure timely grant awards, the Secretary has decided to forego public comment on the absolute priority under section 437(d)(1) of GEPA. This priority will apply to the FY 21 grant competition and any subsequent year in which we make awards from the list of unfunded applications for this competition.

Program Authority: Further Consolidated Appropriations Act, 2020 (Pub. L. 116–94), 133 Stat. 2590–91.

Note: Projects must be awarded and operated in a manner consistent with the nondiscrimination requirements contained in the U.S. Constitution and the Federal civil rights laws.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance) in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474.

II. Award Information

Type of Award: Discretionary grants negotiated as cooperative agreements.

Estimated Available Funds: $110,000,000.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2022 from the list of unfunded applications from this competition.

Estimated Range of Awards: $3,548,387.10 to $18,333,333.33 (frontloaded for the 60-month project period).

Maximum Award: We will not make an award exceeding $18, 333,333.33 for a single budget period of 60 months.

Estimated Number of Awards: 6 (if all awards are made at the estimated maximum amount) to 31 (if all awards are made at the estimated minimum amount).

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

Note: The Final Performance Report must be completed and submitted by the end of the project period, September 30, 2026. Therefore, all project activities (other than work on the evaluation and final performance report) must conclude earlier than 60 months to allow time for the evaluation and final performance report to be completed and submitted by the end of the project period of September 30, 2026.

Note: Applicants under this competition are required to provide detailed budget information for each of the five years of this project and for the total grant.

III. Eligibility Information

1. *Eligible Applicants:* State VR agencies or State VR agencies applying as a consortium under 34 CFR 75.128.

2. a. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

b. *Indirect Cost Rate Information:* This program uses an unrestricted indirect cost rate. For more information regarding indirect costs, or to obtain a negotiated indirect cost rate, please see *www2.ed.gov/about/offices/list/ocfo/intro.html.*

c. *Administrative Cost Limitation:* This program does not include any program-specific limitation on administrative expenses. All administrative expenses must be reasonable and necessary and conform

to the Cost Principles described in 2 CFR part 200 subpart E of the Uniform Guidance.

3. *Subgrantees:* Under the Further Consolidated Appropriations Act, 2020, a grantee under this competition may award subgrants for a portion of the funds to other public and private, nonprofit entities to directly carry out project activities described in the grantee's application. Under 34 CFR 75.708(e), a grantee may contract for supplies, equipment, and other services in accordance with 2 CFR part 200.

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at *www.govinfo.gov/content/pkg/FR–2019–02–13/pdf/2019–02206.pdf,* which contain requirements and information on how to submit an application.

2. *Submission of Proprietary Information:* Given the types of projects that may be proposed in applications for the Disability Innovation Fund, your application may include business information that you consider proprietary. In 34 CFR 5.11 we define ''business information'' and describe the process we use in determining whether any of that information is proprietary and, thus, protected from disclosure under Exemption 4 of the Freedom of Information Act (5 U.S.C. 552, as amended).

Because we plan to make successful applications available to the public, you may wish to request confidentiality of business information.

Consistent with Executive Order 12600, please designate in your application any information that you believe is exempt from disclosure under Exemption 4. In the appropriate Appendix section of your application, under ''Other Attachments Form,'' please list the page number or numbers on which we can find this information. For additional information please see 34 CFR 5.11(c).

3. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

4. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

5. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to no more than 45 pages and (2) use the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1'' margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the recommended page limit does apply to all of the application narrative.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 and are as follows:

(a) *Need for project and significance of the project (10 points)*

(1) The Secretary considers the need for the proposed project and the significance of the proposed project.

(2) In determining the need for the proposed project and the significance of the proposed project, the Secretary considers the following factors:

(i) The national significance of the proposed project.

(ii) The magnitude of the need for the services to be provided or the activities to be carried out by the proposed project.

(iii) The extent to which the proposed project is likely to build local capacity to provide, improve, or expand services that address the needs of target population.

(b) *Quality of the project design* (20 points)

(1) The Secretary considers the quality of the design of the proposed project.

(2) In determining the quality of the design of the proposed project, the Secretary considers the following factors:

(i) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable.

(ii) The extent to which the design of the proposed project reflects up-to-date knowledge from research and effective practice.

(iii) The extent to which the results of the proposed project are to be disseminated in ways that will enable others to use the information or strategies.

(iv) The extent to which the proposed project represents an exceptional approach to the priority or priorities established for the competition.

(v) The extent to which performance feedback and continuous improvement are integral to the design of the proposed project.

(c) *Quality of project services* (20 points)

(1) The Secretary considers the quality of the services to be provided by the proposed project.

(2) In determining the quality of services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers the following factors:

(i) The extent to which the services to be provided by the proposed project involve the collaboration of appropriate partners for maximizing the effectiveness of project services.

(ii) The extent to which the services to be provided by the proposed project are appropriate to the needs of the intended recipients or beneficiaries of those services.

(iii) The likely impact of the services to be provided by the proposed project on the intended recipients of those services.

(iv) The likelihood that the services to be provided by the proposed project will lead to improvements in skills necessary to gain employment or build capacity for independent living.

(d) *Quality of the project evaluation (20 points)*

(1) The Secretary considers the quality of the evaluation to be conducted of the proposed project.

(2) In determining the quality of the evaluation, the Secretary considers the following factors:

(i) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project.

(ii) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible.

(iii) The extent to which the evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes.

(iv) The extent to which the methods of evaluation will, if well implemented, produce promising evidence (as defined in 34 CFR 77.1(c)) about the project's effectiveness.

(e) *Quality of project personnel (15 points)*

(1) The Secretary considers the quality of the personnel who will carry out the proposed project.

(2) In determining the quality of project personnel, Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers the following factors:

(i) The qualifications, including relevant training and experience, of the project director or principal investigator.

(ii) The qualifications, including relevant training and experience, of key project personnel.

(iii) The extent to which time commitments of the project director and other key personnel are appropriate and adequate to meet the objectives of the proposed project.

(f) *Adequacy of resources* (15 points)

(1) The Secretary considers the adequacy of resources for the proposed project.

(2) In determining the adequacy of resources for the proposed project, the Secretary considers the following factors:

(i) The relevance and demonstrated commitment of each partner in the proposed project to the implementation and success of the project.

(ii) The extent to which the costs are reasonable in relation to the number of persons to be served and to the anticipated results and benefits.

(iii) The potential for the incorporation of project purposes, activities, or benefits into the ongoing program of the agency or organization at the end of the Federal funding.

(iv) The adequacy of support, including facilities, equipment, supplies, and other resources, from the applicant organization or the lead applicant organization.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.205, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 3474.10, the Secretary may impose specific conditions and, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.206(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

5. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with—

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115—232) (2 CFR 200.216);

(c) Promoting the freedom of speech and religious liberty in alignment with *Promoting Free Speech and Religious Liberty* (E.O. 13798) and *Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities* (E.O. 13864) (2 CFR 200.300, 200.303, 200.339, and 200.341);

(d) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(e) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in

the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit semiannual and annual performance reports that provide the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

(c) Under 34 CFR 75.250(b), the Secretary may provide a grantee with additional funding for data collection and reporting. In this case, the Secretary establishes a data collection period.

5. *Performance Measures:* The Government Performance and Results Act of 1993 (GPRA) directs Federal departments and agencies to improve the effectiveness of their programs by engaging in strategic planning, setting outcome-related goals for programs, and measuring program results against those goals.

For the purposes of GPRA and Department reporting under 34 CFR 75.110, we have established the following performance measures for this program:

(a) Of the individuals participating in the project, their average hourly wage at the time they exit in CIE.

(b) Of the individuals participating in the project, their average hours worked per week at the time they exit in CIE.

(c) Of the individuals participating in the project, the number and percentage who exit in CIE with employer-provided medical benefits.

(d) Of the individuals participating in the project, the number and percentage who report their income as the primary source of support at the time they exit in CIE.

(e) Of the individuals participating in the project, the number and percentage who report public benefits (*e.g.,* SSI, SSDI, and/or TANF, and State or local benefits) as their primary source of support at the time they exit in CIE.

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: Whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Mark Schultz,

Commissioner, Rehabilitation Services Administration, Delegated the authority to perform the functions and duties of the Assistant Secretary for the Office of Special Education and Rehabilitative Services.

[FR Doc. 2021–00149 Filed 1–5–21; 4:15 pm]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket ID ED–2020–FSA–0151]

Privacy Act of 1974; Matching Program

AGENCY: Federal Student Aid, Department of Education.

ACTION: Notice of a new matching program.

SUMMARY: This provides notice of the re-establishment of the matching program between the U.S. Department of Education (Department) and the Social Security Administration (SSA), which sets forth the terms, safeguards, and procedures under which the SSA will disclose to the Department data related to the Medical Improvement Not Expected (MINE) disability data of beneficiaries and recipients under title II and title XVI of the Social Security Act from the SSA system of records entitled the Disability Control File (DCF) and the Master Beneficiary Record (MBR). This matching program will enable the Department to contact the individuals who have a balance on a loan under title IV of the Higher Education Act of 1965, as amended (HEA), have a title IV loan written off due to default, or have an outstanding service obligation under the Teacher Education Assistance for College and Higher Education (TEACH) Grant Program to inform those borrowers and TEACH Grant recipients of the total and permanent disability (TPD) process. Once informed, those borrowers who

wish to apply for a discharge may do so more efficiently and effectively.

DATES: Submit your comments on the proposed re-establishment of the matching program on or before February 8, 2021.

The matching program will go into effect 30 days after the publication of this notice, on January 7, 2021, unless comments have been received from interested members of the public requiring modification and republication of the notice. The matching program will continue for 18 months after the effective date and may be renewed for up to an additional 12 months if, within 3 months prior to the expiration of the 18 months, the respective Data Integrity Boards of the Department and SSA determine that the conditions specified in 5 U.S.C. 552a(o)(2)(D) have been met.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments submitted by fax or by email or those submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

- *Federal eRulemaking Portal:* Go to *www.regulations.gov* to submit your comments electronically. Information on using *Regulations.gov,* including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under the ''help'' tab.
- *Postal Mail, Commercial Delivery, or Hand Delivery:* If you mail or deliver your comments about the matching program, address them to the Brenda Vigna, Division Chief, Federal Student Aid, U.S. Department of Education, 830 First Street NE, Washington, DC 20202–5320.

Privacy Note: The Department's policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at *www.regulations.gov.* Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Ron Bennett, Group Director Program Technical & Business Support Group, Federal Student Aid, U.S. Department of Education, 830 First Street, NE, Washington, DC 20202–5320.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), you may call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: We provide this notice in accordance with Privacy Act of 1974, as amended (Privacy Act) (5 U.S.C. 552a); Office of Management and Budget (OMB) Final Guidance Interpreting the Provisions of Public Law 100–503, the Computer Matching and Privacy Protection Act of 1988, 54 FR 25818 (June 19, 1989); and OMB Circular No. A–108.

Participating Agencies: The U.S. Department of Education and the Social Security Administration.

Authority for Conducting the Matching Program: The Department's legal authority to enter into the matching program and to disclose information thereunder is sections 420N(c), 437(a)(1), 455(a)(1), and 464(c)(1)(F)(ii & iii) of the HEA (20 U.S.C. 1070g–2(c), 1087(a)(1), 1087e(a)(1)), and 1087dd((c)(1)(F)(ii & iii), the regulations promulgated pursuant to those sections (34 CFR 674.61(b), 682.402(c), 685.213, and 686.42(b)), and subsection (b)(3) of the Privacy Act (5 U.S.C. 552a(b)(3)).

SSA's legal authority to disclose information as part of this matching program is section 1106 of the Social Security Act (42 U.S.C. 1306), the regulations promulgated pursuant to that section (20 CFR part 401), and subsection (b)(3) of the Privacy Act (5 U.S.C. 552a(b)(3)).

Purpose(S): This matching program will enable the Department to contact the individuals who have a balance on a loan under title IV of the HEA, have a title IV loan written off due to default, or have an outstanding service obligation under the TEACH Grant Program to inform those borrowers and TEACH Grant recipients of the TPD process. Once informed, those borrowers who wish to apply for a discharge may do so more efficiently and effectively.

Categories of Individuals: The individuals whose records are used in the matching program are described as follows:

The Department will disclose to SSA from the system of records entitled ''National Student Loan Data System (NSLDS)'' (18–11–06) individuals who owe a balance on one or more title IV, HEA loans, who have a title IV, HEA loan written off due to default, or who have an outstanding service obligation under the TEACH Grant Program.

Categories of Records: The records used in the matching program are described as follows:

The Department will disclose to SSA from the system of records entitled ''National Student Loan Data System (NSLDS)'' (18–11–06) the name, date of birth (DOB), and Social Security number (SSN) of the individuals identified in the preceeding section. These individuals will be matched with SSA data recorded in the DCF, which originate from the Supplemental Security Income Record and Special Veterans Benefits (SSR/SVB), 60–0103, and the MBR, SSA/ORSIS 60–0090, in order to provide ED with Medical Improvement Not Expected disability data.

System(s) of Records: The Department will disclose records to SSA from its system of records identified as ''National Student Loan Data System (NSLDS)'' (18–11–06), as last published in the **Federal Register** in full on September 9, 2019 (84 FR 47265).

SSA will disclose records back to the Department from its systems of records identified as the ''Disability Control File (DCF)'' and the ''Master Beneficiary Record (MBR).'' The DCF, which originates from the SSR/SVB, 60–0103, was last fully published in the **Federal Register** at 71 FR 1830 on January 11, 2006, and updated on December 10, 2007 (72 FR 69723), July 3, 2018 (83 FR 31250–31251), and November 1, 2018 (83 FR 54969). The MBR, 60–0090, was last fully published in the **Federal Register** at 71 FR 1826 on January 11, 2006, and updated on December 10, 2007 (72 FR 69723), July 5, 2013 (78 FR 40542), July 3, 2018 (83 FR 31250–31251), and November 1, 2018 (83 FR 54969).

Subsection (b)(3) of the Privacy Act (5 U.S.C. 552a(b)(3)) authorizes a Federal agency to disclose a record about an individual that is maintained in a system of records, without the individual's prior written consent, when the disclosure is pursuant to a routine use published in a System of Records Notice (SORN) as required by 5 U.S.C. 552a(e)(4)(D) and is compatible with the purposes for which the records were collected. SSA and ED determined that their systems of records contain appropriate routine use disclosure authority and that the use is compatible with the purpose for which the information was collected.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (such as, braille, large print, audiotape, or compact disc) on request to Lisa Tessitore, Program Operations Specialist, Federal Student Aid, U.S. Department of Education, 830 First Street NE, Washington, DC 20202–5320. Telephone: (202) 377–3249.

Electronic Access to This Document: The official version of this document is the document published in the **Federal**

Register. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Mark Brown,

Chief Operating Officer, Federal Student Aid.

[FR Doc. 2021–00046 Filed 1–6–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Savannah River Site

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open virtual meeting.

SUMMARY: This notice announces an online virtual meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Savannah River Site. The Federal Advisory Committee Act requires that public notice of this online virtual meeting be announced in the **Federal Register**.

DATES: Monday, January 25, 2021; 1:00 p.m.–3:30 p.m.

ADDRESSES: Online Virtual Meeting. To attend, please send an email to: *srscitizensadvisoryboard@gmail.com* by no later than 4:00 p.m. ET on Friday, January 22, 2021.

To Submit Public Comments: Public comments will be accepted via email prior to and after the meeting. Comments received by no later than 4:00 p.m. ET on Friday, January 22, 2021 will be read aloud during the virtual meeting. Comments will also be accepted after the meeting, by no later than 4:00 p.m. ET on Monday, February 1, 2021. Please submit comments to *srscitizensadvisoryboard@gmail.com.*

FOR FURTHER INFORMATION CONTACT: Amy Boyette, Office of External Affairs, U.S. Department of Energy, Savannah River Operations Office, P.O. Box A, Aiken, SC 29802; Phone: (803) 952–6120; email: *amy.boyette@srs.gov.*

SUPPLEMENTARY INFORMATION: *Purpose of the Board:* The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda

—Meeting Rules and Agenda Review
—Opening and Chair Update
—Agency Updates
—Break
—Committee Round Robin:
- Facilities Disposition & Site Remediation Committee
- Nuclear Materials Committee
- Strategic & Legacy Management Committee
- Waste Management Committee
- Administrative & Outreach Committee

—Board Discussion of EM SSAB Charges
—Reading of Public Comments
—Voting
- EM SSAB Charge Document #1
- EM SSAB Charge Document #2
- 2021 Committee Chairs

—Adjourn

Public Participation: The online virtual meeting is open to the public. Written statements may be filed with the Board either before or after the meeting as there will not be opportunities for live public comment during this online virtual meeting. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to submit public comments should email them as directed above.

Minutes: Minutes will be available by writing or calling Amy Boyette at the address or telephone number listed above. Minutes will also be available at the following website: *https://cab.srs.gov/srs-cab.html.*

Signed in Washington, DC, on January 4, 2021.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2021–00029 Filed 1–6–21; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Number: PR21–13–000.

Applicants: Rocky Mountain Natural Gas LLC.

Description: § 284.123 Rate Filing: Negotiated Rate Agreement Filing (CFEi) to be effective 1/1/2021.

Filed Date: 12/30/20.

Accession Number: 202012305028.

Comments/Protests Due: 5 p.m. ET 1/20/2021.

Docket Numbers: RP21–341–000.

Applicants: Iroquois Gas Transmission System, L.P.

Description: § 4(d) Rate Filing: 122920 Negotiated Rates—Mercuria Energy America, LLC R–7540–02 to be effective 1/1/2021.

Filed Date: 12/29/20.

Accession Number: 20201229–5121.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: RP21–342–000.

Applicants: Algonquin Gas Transmission, LLC.

Description: § 4(d) Rate Filing: AGT Negotiated Rate—eff 12–30–2020 to be effective 12/30/2020.

Filed Date: 12/29/20.

Accession Number: 20201229–5141.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: RP21–343–000.

Applicants: Dauphin Island Gathering Partners.

Description: § 4(d) Rate Filing: Negotiated Rate Filing 12–29–2020 to be effective 1/1/2021.

Filed Date: 12/29/20.

Accession Number: 20201229–5179.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: RP21–344–000.

Applicants: Kinder Morgan Louisiana Pipeline LLC.

Description: § 4(d) Rate Filing: Rate Schedule ITS-Removal of Authorized Overrun Filing to be effective 2/1/2021.

Filed Date: 12/30/20.

Accession Number: 20201230–5001.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: RP21–345–000.

Applicants: Texas Eastern Transmission, LP.

Description: § 4(d) Rate Filing: TETLP EPC FEB 2021 FILING to be effective 2/1/2021.

Filed Date: 12/30/20.

Accession Number: 20201230–5030.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: RP21–346–000.

Applicants: NEXUS Gas Transmission, LLC.

Description: § 4(d) Rate Filing: Negotiated Rates—Various 1–1–2021 Releases to be effective 1/1/2021.

Filed Date: 12/30/20.

Accession Number: 20201230–5045.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: RP21–347–000.

Applicants: Algonquin Gas Transmission, LLC.

Description: § 4(d) Rate Filing: Negotiated Rate—Yankee Gas 510802

Release eff 12–31–2020 to be effective 12/31/2020.

Filed Date: 12/30/20.

Accession Number: 20201230–5077.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: RP21–348–000.

Applicants: Algonquin Gas Transmission, LLC.

Description: § 4(d) Rate Filing: AGT Negotiated Rates—Various Releases eff 1–1–2021 to be effective 1/1/2021.

Filed Date: 12/30/20.

Accession Number: 20201230–5147.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: RP21–349–000.

Applicants: Transcontinental Gas Pipe Line Company.

Description: § 4(d) Rate Filing: Negotiated Rates—Cherokee AGL—Replacement Shippers—Jan 2021 to be effective 1/1/2021.

Filed Date: 12/30/20.

Accession Number: 20201230–5155.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: RP21–350–000.

Applicants: El Paso Natural Gas Company, L.L.C.

Description: § 4(d) Rate Filing: Negotiated Rate Agreement Filing (CFEi) to be effective 1/1/2021.

Filed Date: 12/30/20.

Accession Number: 20201230–5217.

Comments Due: 5 p.m. ET 1/11/21.

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 31, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–29328 Filed 1–6–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission received the following electric rate filings:

Pipeline Rate and Refund Report Filings:

Docket Numbers: RP21–322–000.

Applicants: Stagecoach Pipeline & Storage Company LL.

Description: Stagecoach Pipeline & Storage Company LLC Notification of Bankruptcy Court Approval under RP21–322.

Filed Date: 12/29/20.

Accession Number: 20201229–5395.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: RP21–341–000.

Applicants: Iroquois Gas Transmission System, L.P.

Description: § 4(d) Rate Filing: 122920 Negotiated Rates—Mercuria Energy America, LLC R–7540–02 to be effective 1/1/2021.

Filed Date: 12/29/20.

Accession Number: 20201229–5121.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: RP21–342–000.

Applicants: Algonquin Gas Transmission, LLC.

Description: § 4(d) Rate Filing: AGT Negotiated Rate—eff 12–30–2020 to be effective 12/30/2020.

Filed Date: 12/29/20.

Accession Number: 20201229–5141.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: RP21–343–000.

Applicants: Dauphin Island Gathering Partners.

Description: § 4(d) Rate Filing: Negotiated Rate Filing 12–29–2020 to be effective 1/1/2021.

Filed Date: 12/29/20.

Accession Number: 20201229–5179.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: RP21–344–000.

Applicants: Kinder Morgan Louisiana Pipeline LLC.

Description: § 4(d) Rate Filing: Rate Schedule ITS-Removal of Authorized Overrun Filing to be effective 2/1/2021.

Filed Date: 12/30/20.

Accession Number: 20201230–5001.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: RP21–345–000.

Applicants: Texas Eastern Transmission, LP.

Description: § 4(d) Rate Filing: TETLP EPC FEB 2021 FILING to be effective 2/1/2021.

Filed Date: 12/30/20.

Accession Number: 20201230–5030.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: RP21–346–000.

Applicants: NEXUS Gas Transmission, LLC.

Description: § 4(d) Rate Filing: Negotiated Rates—Various 1–1–2021 Releases to be effective 1/1/2021.

Filed Date: 12/30/20.

Accession Number: 20201230–5045.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: RP21–347–000.

Applicants: Algonquin Gas Transmission, LLC.

Description: § 4(d) Rate Filing: Negotiated Rate—Yankee Gas 510802 Release eff 12–31–2020 to be effective 12/31/2020.

Filed Date: 12/30/20.

Accession Number: 20201230–5077.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: RP21–348–000.

Applicants: Algonquin Gas Transmission, LLC.

Description: § 4(d) Rate Filing: AGT Negotiated Rates—Various Releases eff 1–1–2021 to be effective 1/1/2021.

Filed Date: 12/30/20.

Accession Number: 20201230–5147.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: RP21–349–000.

Applicants: Transcontinental Gas Pipe Line Company.

Description: § 4(d) Rate Filing: Negotiated Rates—Cherokee AGL—Replacement Shippers—Jan 2021 to be effective 1/1/2021.

Filed Date: 12/30/20.

Accession Number: 20201230–5155.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: RP21–350–000.

Applicants: El Paso Natural Gas Company, L.L.C.

Description: § 4(d) Rate Filing: Negotiated Rate Agreement Filing (CFEi) to be effective 1/1/2021.

Filed Date: 12/30/20.

Accession Number: 20201230–5217.

Comments Due: 5 p.m. ET 1/11/21.

Docket Number: PR21–13–000.

Applicants: Rocky Mountain Natural Gas LLC.

Description: § 284.123 Rate Filing: Negotiated Rate Agreement Filing (CFEi) to be effective 1/1/2021.

Filed Date: 12/30/20.

Accession Number: 202012305028.

Comments/Protests Due: 5 p.m. ET 1/20/2021.

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 31, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–29327 Filed 1–6–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL21–27–000]

Whitetail Solar 3, LLC; Notice of Institution of Section 206 Proceeding and Refund Effective Date

On December 31, 2020, the Commission issued an order in Docket No. EL21–27–000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e, instituting an investigation into whether Whitetail Solar 3, LLC's proposed rate schedule is unjust, unreasonable, unduly discriminatory, or preferential, or otherwise unlawful. *Whitetail Solar 3, LLC,* 173 FERC 61,288 (2020).

The refund effective date in Docket No. EL21–27–000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**.

Any interested person desiring to be heard in Docket No. EL21–27–000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214 (2020), within 21 days of the date of issuance of the order.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFile'' link at *http://www.ferc.gov.* In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Dated: December 31, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–29325 Filed 1–6–21; 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 electric rate filings:

Docket Numbers: ER10–1338–004.

Applicants: Southern Indiana Gas and Electric Company, Inc.

Description: Triennial Market Power Analysis for Central Region of Southern Indiana Gas and Electric Company, Inc.

Filed Date: 12/30/20.

Accession Number: 20201230–5360.

Comments Due: 5 p.m. ET 3/1/21.

Docket Numbers: ER10–2127–020.

Applicants: Invenergy TN LLC.

Description: Triennial Market Power Analysis for Southeast Region of Invenergy TN LLC.

Filed Date: 12/31/20.

Accession Number: 20201231–5035.

Comments Due: 5 p.m. ET 3/2/21.

Docket Numbers: ER10–2134–013.

Applicants: Hardee Power Partners Limited.

Description: Triennial Market Power Analysis for Southeast Region of Hardee Power Partners Limited.

Filed Date: 12/31/20.

Accession Number: 20201231–5034.

Comments Due: 5 p.m. ET 3/2/21.

Docket Numbers: ER10–2877–003.

Applicants: Cobb Electric Membership Corporation.

Description: Triennial Market Power Analysis for Southeast Region of Cobb Electric Membership Corporation.

Filed Date: 12/30/20.

Accession Number: 20201230–5258.

Comments Due: 5 p.m. ET 3/1/21.

Docket Numbers: ER10–3079–018.

Applicants: Tyr Energy, LLC.

Description: Triennial Market Power Analysis for Southeast Region of Tyr Energy, LLC.

Filed Date: 12/30/20.

Accession Number: 20201230–5359.

Comments Due: 5 p.m. ET 3/1/21.

Docket Numbers: ER10–3109–013.

Applicants: Washington County Power, LLC.

Description: Triennial Market Power Analysis for Southeast Region of Washington County Power, LLC.

Filed Date: 12/30/20.

Accession Number: 20201230–5371.

Comments Due: 5 p.m. ET 3/1/21.

Docket Numbers: ER12–637–006.

Applicants: Calhoun Power Company, LLC.

Description: Triennial Market Power Analysis for Southeast Region of Calhoun Power Company, LLC.

Filed Date: 12/30/20.

Accession Number: 20201230–5358.

Comments Due: 5 p.m. ET 3/1/21.

Docket Numbers: ER17–615–004; ER10–2184–028; ER10–2192–036; ER10–2178–036; ER11–2014–026; ER11–2013–026; ER13–1536–020; ER11–2005–026.

Applicants: Albany Green Energy, LLC, CER Generation, LLC, Constellation Energy Commodities Group Maine, LLC, Constellation NewEnergy, Inc., Cow Branch Wind Power, LLC, CR Clearing, LLC, Exelon Generation Company, LLC, Wind Capital Holdings, LLC.

Description: Triennial Market Power Analysis for Southeast Region of Exelon Southeast MBR Entities.

Filed Date: 12/30/20.

Accession Number: 20201230–5242.

Comments Due: 5 p.m. ET 3/1/21.

Docket Numbers: ER20–1505–002.

Applicants: Basin Electric Power Cooperative.

Description: Triennial Market Power Analysis for Central Region of Basin Electric Power Cooperative.

Filed Date: 12/30/20.

Accession Number: 20201230–5229.

Comments Due: 5 p.m. ET 3/1/21.

Docket Numbers: ER21–251–001.

Applicants: Degrees3 Transportation Solutions, LLC.

Description: Tariff Amendment: Amendment to 1 to be effective 10/30/2020.

Filed Date: 12/31/20.

Accession Number: 20201231–5017.

Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–775–000.

Applicants: NorthWestern Corporation.

Description: § 205(d) Rate Filing: SA 305 16th Rev—NITSA with Stillwater Mining Company to be effective 3/1/2021.

Filed Date: 12/30/20.

Accession Number: 20201230–5220.

Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–776–000.

Applicants: East Coast Power and Gas, LLC.

Description: Tariff Cancellation: Cancellation Filing to be effective 12/31/2020.

Filed Date: 12/31/20.

Accession Number: 20201231–5000.

Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–777–000.

Applicants: NSTAR Electric Company.

Description: § 205(d) Rate Filing: Large Generator Interconnection Agreement -MMWEC, Stony Brook?Ludlow to be effective 12/31/2020.

Filed Date: 12/31/20.

Accession Number: 20201231–5002.

Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–778–000.

Applicants: Niagara Mohawk Power Corporation, New York Independent System Operator, Inc.

Description: § 205(d) Rate Filing: Reimbursement Agreement (SA 2590) between NMPC and NY Transco to be effective 12/11/2020.

Filed Date: 12/31/20.

Accession Number: 20201231–5004.

Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–779–000.

Applicants: NorthWestern Corporation.

Description: Compliance filing: Order No. 864 Compliance Filing (Montana OATT) to be effective 1/27/2020.

Filed Date: 12/31/20.

Accession Number: 20201231–5011.

Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–780–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original ISA, SA No. 5863; Queue No. AE2–249 to be effective 12/3/2020.

Filed Date: 12/31/20.

Accession Number: 20201231–5016.

Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–781–000.

Applicants: Duke Energy Carolinas, LLC.

Description: § 205(d) Rate Filing: Revisions to Rate Schedule Nos. 315, 316, 317, and 335 to be effective 1/1/2021.

Filed Date: 12/31/20.

Accession Number: 20201231–5020.

Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–782–000.

Applicants: ISO New England Inc., New England Power Pool Participants Committee.

Description: § 205(d) Rate Filing: ISO–NE & NEPOOL; Change to Implement New Methodology for Calculating FCM DDBT to be effective 3/2/2021.

Filed Date: 12/31/20.

Accession Number: 20201231–5026.

Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–783–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 3330R3 City of Nixa, Missouri to be effective 12/1/2020.

Filed Date: 12/31/20.

Accession Number: 20201231–5032.

Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–784–000.

Applicants: New York State Electric & Gas Corporation.

Description: § 205(d) Rate Filing: Revisions to 2020 Facilities Agreement Update to be effective 1/1/2021.

Filed Date: 12/31/20.

Accession Number: 20201231–5033.

Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–785–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 3751 NorthWestern Energy NITSA and NOA to be effective 12/1/2020.

Filed Date: 12/31/20.

Accession Number: 20201231–5037.

Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–786–000.

Applicants: Trans Bay Cable LLC.

Description: § 205(d) Rate Filing: Annual TRBAA Filing—2020 to be effective 1/1/2021.

Filed Date: 12/31/20.

Accession Number: 20201231–5038.

Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–787–000.

Applicants: ISO New England Inc.

Description: § 205(d) Rate Filing: ISO–NE; Updates to CONE, Net CONE, and Capacity Performance Payment Rate to be effective 3/2/2021.

Filed Date: 12/31/20.

Accession Number: 20201231–5060.

Comments Due: 5 p.m. ET 1/21/21.

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 31, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–29324 Filed 1–6–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL21–28–000]

PJM Interconnection, L.L.C.; Potomac Electric Power Company; Notice of Institution of Section 206 Proceeding and Refund Effective Date

On December 30, 2020, the Commission issued an order in Docket No. EL21–28–000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e, instituting an investigation into whether Potomac Electric Power Company's proposed depreciation rates are unjust, unreasonable, unduly discriminatory, or preferential, or otherwise unlawful. *PJM Interconnection, L.L.C.,* 173 FERC 61,286 (2020).

The refund effective date in Docket No. EL21–28–000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**.

Any interested person desiring to be heard in Docket No. EL21–28–000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214 (2020), within 21 days of the date of issuance of the order.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this

document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFile'' link at *http://www.ferc.gov.* In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Dated: December 31, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–29326 Filed 1–6–21; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2019–0668; FRL–10019–17–OAR]

Guidance on the Preparation of Clean Air Act Section 179B Demonstrations for Nonattainment Areas Affected by International Transport of Emissions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: Notice is hereby given that the Environmental Protection Agency (EPA) has posted on its website a final guidance document titled, ''Guidance on the Preparation of Clean Air Act Section 179B Demonstrations for Nonattainment Areas Affected by International Transport of Emissions.''

FOR FURTHER INFORMATION CONTACT: For general questions concerning this final guidance document, please contact Gobeail McKinley, U.S. EPA, Office of Air Quality Planning and Standards, Air Quality Policy Division, C539–04, Research Triangle Park, NC 27711, telephone (919) 541–5246, email at *mckinley.gobeail@epa.gov.* For questions about the technical issues discussed in Section 6 of this guidance, please contact Barron Henderson, U.S. EPA, Office of Air Quality Planning and Standards, Air Quality Assessment Division, Research Triangle Park, NC 27711, telephone (919) 541–2760, email at *henderson.barron@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

How can I get copies of this guidance document and other related information?

Docket: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2019–0668. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information may not be publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy. Publicly available docket materials are available electronically through *https://www.regulations.gov.*

Agency Website: The EPA has established the EPA Guidance Portal website for posting of all active final guidance documents. The EPA Guidance Portal can be accessed at the following website: *https://epa.gov/guidance/.*

The EPA has a website to house information related to the international transport of air pollution at: *https://www.epa.gov/ground-level-ozone-pollution/international-transport-air-pollution.* The website includes the EPA's draft and final Clean Air Act (CAA) section 179B guidance documents, a recording of and the slides presented during the public webinar held on February 12, 2020, and other technical information and resources related to the international transport of air pollution. The website provides related information that the public may find useful.

What's the purpose of the EPA's guidance?

The purpose of this new final guidance document is to assist state, local, and tribal air agencies that are considering the development of a demonstration, under section 179B of the CAA, that a nonattainment area would be able to attain, or would have attained, the relevant National Ambient Air Quality Standard (NAAQS) but for air pollutant emissions emanating from outside the United States. The guidance describes and provides examples of the kinds of information and analyses that the U.S. Environmental Protection Agency (EPA) recommends air agencies consider including in a CAA section 179B demonstration. The guidance also describes a weight of evidence approach that the EPA intends to use when evaluating CAA section 179B demonstrations. This nonbinding guidance is intended to assist air agencies considering the preparation of a CAA section 179B demonstration but does not limit the types of information or analyses that could be provided as part of any such demonstration under the CAA.

The EPA has the authority under CAA section 179B to assess such an international transport demonstration when evaluating a state implementation plan (SIP) submitted in response to a nonattainment designation or reclassification of an area, or when the EPA determines whether a nonattainment area has or has not failed to attain the standard by the attainment date (and thus would become subject to additional CAA requirements). If the EPA determines that such a demonstration is approvable, the EPA will provide certain regulatory relief as described in CAA section 179B. If the EPA approves a CAA section 179B demonstration showing that an area in the future would attain the relevant NAAQS but for international emissions, then the air agency would not be subject to the SIP requirement to provide an attainment demonstration. If the EPA approves a CAA section 179B demonstration showing that a nonattainment area would have attained the relevant NAAQS based on past air quality data but for international emissions, then the nonattainment area would not be subject to reclassification to a higher classification and would not be subject to additional regulatory requirements that come with a higher classification.

In addition to describing the kinds of information and analyses that may be helpful to include in a CAA section 179B demonstration, this guidance provides:

- A review of the existing regulatory framework for considering CAA section 179B demonstrations;
- A review of other existing regulatory mechanisms that may be more appropriate alternatives to CAA section 179B in certain situations;
- Recommended timeframes for the CAA section 179B demonstration development and submittal process; and

• Background on the nature of intracontinental and intercontinental transport of air pollution.

The EPA accepted comments on the draft guidance from January 9, 2020, through March 10, 2020. The EPA received comments from 15 entities. All comments received by the EPA are included in the docket for this guidance. The EPA thoroughly considered the points raised in the comments in the development of this final guidance.

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

This action is a significant guidance document 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.

2. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not considered an Executive Order 13771 deregulatory or regulatory action. This action is considered a significant guidance action. There are no quantified cost estimates for this guidance because it does not create regulatory requirements for states. To the extent the clarifications in the guidance influence the behaviors of states, this guidance could help a state develop an approvable CAA section 179B demonstration, which in turn would be expected to reduce the state's burden associated with implementing nonattainment area requirements.

3. Executive Order 13609: Promoting International Regulatory Cooperation

This guidance does not impact regulatory cooperation because it is not a regulation.

4. Executive Order 13777: Enforcing the Regulatory Reform Agenda

This guidance is not being issued as a result of the agency's regulatory reform agenda or through a recommendation from the Agency's Regulatory Reform Task Force because it is not a regulation.

5. Executive Order 13891: Promoting the Rule of Law Through Improved Agency Guidance Documents

This guidance complies with all the requirements of Executive Order 13891.

Dated: December 18, 2020.

Panagiotis Tsirigotis,

Director, Office of Air Quality Planning and Standards.

[FR Doc. 2021–00026 Filed 1–6–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–10016–84–OAR]

Official Release of the MOVES3 Motor Vehicle Emissions Model for SIPs and Transportation Conformity

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: The Environmental Protection Agency (EPA) is announcing the availability of the MOtor Vehicle Emission Simulator model (MOVES3) for official purposes outside of California. MOVES3 is the latest state-of-the art upgrade to EPA's modeling tools for estimating emissions from cars, trucks, buses, and motorcycles based on the latest data and regulations. MOVES3 is available for use in state implementation plans (SIPs) and transportation conformity analyses outside of California. This notice starts a two-year grace period before MOVES3 will need to be used as the latest EPA emissions model in new regional emissions analyses and a two-year grace period before MOVES3 will need to be used in new hot-spot analyses for transportation conformity determinations outside of California.

DATES: EPA's announcement of the MOVES3 emissions model for SIPs and transportation conformity analyses in states other than California is effective January 7, 2021. This announcement starts a two-year transportation conformity grace period that ends on January 9, 2023. After this date, MOVES3 will need to be used as the latest EPA emissions model in both regional emissions analyses and in hot-spot analysis for new transportation conformity analyses outside of California.

FOR FURTHER INFORMATION CONTACT: For technical model questions regarding the official release or use of MOVES3, please email EPA at *mobile@epa.gov.* For questions about SIPs, contact Rudy Kapichak at *Kapichak.Rudolph@epa.gov,* 734–214–4574. For transportation conformity questions, contact Astrid Terry at *Terry.Astrid@epa.gov,* 734–214–4812.

SUPPLEMENTARY INFORMATION: The contents of this notice are as follows:

I. General Information

A. Does this action apply to me?

Entities potentially impacted by the approval of MOVES3 are those that adopt, approve, or fund transportation plans, transportation improvement programs (TIPs), or projects under title 23 U.S.C. or title 49 U.S.C. Chapter 53 and those that develop and submit SIPs to EPA. Regulated categories and entities affected by today's action include:

Category	Examples of regulated entities
Local government.	Local air quality and transportation agencies, including metropolitan planning organizations (MPOs).
State government.	State air quality and transportation agencies.
Federal government.	Department of Transportation (Federal Highway Administration (FHWA) and Federal Transit Administration (FTA)).

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by the release of MOVES. Other entities not listed in the table could also be affected. To determine whether your organization is affected by this action, you should carefully examine the transportation conformity applicability requirements in 40 CFR 93.102. If you have questions regarding the applicability of this action to a particular entity, consult the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. How can I get copies of MOVES3 and other related information?

The official version of the MOVES3 model, along with user guides and supporting documentation, are available on EPA's MOVES website: *www.epa.gov/moves.* Individuals who wish to receive EPA announcements related to the MOVES3 model should subscribe to the EPA–MOBILENEWS email listserv, which can be done at EPA's website at: *www.epa.gov/moves/forms/epa-mobilenews-listserv.*

Available guidance on how to apply MOVES3 for SIPs and transportation conformity purposes can be found on EPA's transportation conformity website, *www.epa.gov/state-and-local-transportation/policy-and-technical-guidance-state-and-local-*

transportation,[1] including ''Policy Guidance on the Use of MOVES3 for State Implementation Plan Development, Transportation Conformity, General Conformity, and Other Purposes'' (EPA–420–B–20–044, November 2020).[2]

EPA will continue to update these websites as other MOVES support materials and guidance are developed or updated.

II. What is MOVES3?

MOVES3 is EPA's latest motor vehicle emissions model for state and local agencies to estimate volatile organic compounds (VOCs), nitrogen oxides (NOx), particulate matter ($PM_{2.5}$ and PM_{10}), carbon monoxide (CO), and other precursors from cars, trucks, buses, and motorcycles for SIP purposes and conformity determinations outside of California.[3] The model is based on analyses of millions of emission test results and considerable advances in the Agency's understanding of vehicle emissions.

The first model in the MOVES series, called MOVES2010, was released in December of 2009. MOVES2010 was followed by two minor updates, MOVES2010a and MOVES2010b. Both of these minor MOVES2010 revisions enhanced model performance. MOVES2014, released in 2014, was a major revision to MOVES2010b and included new data, new emissions standards, and new functional improvements and features. It incorporated substantial new data for emissions, fleet, and activity developed since the release of MOVES2010. MOVES2014 was also followed by two minor updates, MOVES2014a and MOVES2014b.[4]

MOVES3 incorporates new regulations, features and significant new data, as detailed in the MOVES3 technical reports. Notably, MOVES3 incorporates:

- Improvements to heavy-duty (HD) diesel running emission rates based on manufacturer in-use testing data from hundreds of HD trucks;
- Updated emission rates for HD gasoline and compressed natural gas (CNG) trucks;
- Updated light-duty (LD) vehicle emission rates for hydrocarbons (HC), CO and NOx-based on in-use testing data;
- Updated LD PM rates for Model Year (MY) 2004 and later, incorporating data on gasoline direct injection engines;
- New fuel characteristic data from EPA fuel compliance submissions;
- Updated fuel effect calculations to better characterize the base fuel used to develop LD base emission rates;
- The effects of the HD Phase 2 GHG rule;[5]
- The effects of the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule on light-duty fuel economy;[6]
- ''Off-network idle'' emissions beyond the idling that is already considered in the MOVES drive cycles; and
- Several improvements to the MOVES interface, user inputs and outputs.

MOVES3 also includes a variety of activity updates, most notably:

- Vehicle start and idling activity patterns are based on real-world instrumented vehicle data collected by a telecommunications company for LD vehicles and the Department of Energy's (DOE) National Renewable Energy Lab (NREL) for HD vehicles;
- Default hotelling activity has been substantially reduced from what was included in MOVES2014 based on the NREL instrumented truck data;
- National vehicle miles travelled (VMT) and vehicle population inputs have been updated with newer historical data from the Federal Highway Administration (FHWA) and more recent forecasts from DOE; and
- National onroad vehicle default fuel, regulatory class, and age distributions are based on newer vehicle registration data.

MOVES3 includes the capability to estimate vehicle exhaust and evaporative emissions as well as brake wear and tire wear emissions for criteria pollutants and precursors. However, MOVES3 does not include the capability to estimate emissions of re-entrained road dust. To estimate emissions from re-entrained road dust, practitioners should continue to use the latest approved methodologies.[7]

The structure of MOVES3 is fundamentally the same as MOVES2014, although there are new format options for some inputs, and the model run time may differ depending on the type of run and user inputs and computer configuration. As for emissions, EPA performed a comparison of MOVES3 to MOVES2014b using default information in MOVES3 at the national level, and for two sample urban counties with different local travel patterns and ambient conditions. In general, compared to MOVES2014b, MOVES3 national emission estimates are slightly lower for most criteria pollutants in future years. However, in the two sample urban counties, NO_X emissions estimates were higher in future years. This is due to higher running emissions from heavy-duty trucks outweighing declines from heavy-duty hotelling. Note that results will vary based on the pollutant selected and that area's local inputs. Based on our testing, MOVES run time at the Default and County Scale should be about the same or faster than runs with MOVES2014b. In addition, MOVES3 run time at the Project Scale may be notably longer compared to MOVES2014 depending on the type of run, user inputs and computer configuration.

III. SIPs and MOVES3

EPA has articulated its policy regarding the use of MOVES3 in SIP development in its ''Policy Guidance on the Use of MOVES3 for State Implementation Plan Development, Transportation Conformity, General Conformity and Other Purposes'' (EPA–420–B–20–044, November 2020). Today's notice highlights certain aspects of the guidance, but state and local governments should refer to the guidance for more detailed information on how and when to use MOVES3 in reasonable further progress SIPs, attainment demonstrations, maintenance plans, inventory updates, and other SIP submissions.

MOVES3 should be used in ozone, CO, PM, and nitrogen dioxide (NO_2) SIP development as expeditiously as possible, as there is no grace period for the use of MOVES3 in SIPs. The Clean Air Act requires that SIP inventories and control measures be based on the most current information and applicable models that are available when a SIP is developed.[8] However, EPA also

[1] Interested parties can find these documents under either the ''Emission Models and Conformity'' or ''Project-Level Conformity'' topics on this website.

[2] This guidance, along with the other EPA guidance referenced in this document, is listed in the EPA guidance portal at *www.epa.gov/guidance/guidance-documents-managed-office-air-and-radiation.*

[3] MOVES can also model emissions in the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Nonattainment and maintenance areas located in California use the latest approved version of the Emission FACtor (EMFAC) model.

[4] In the remainder of this notice, ''MOVES2014'' refers to all of the MOVES2014 models: MOVES2014, MOVES2014a, and MOVES2014b.

[5] 81 FR 7348, October 25, 2016.

[6] 85 FR 24174, April 30, 2020.

[7] See EPA's notice of availability, ''Official Release of the January 2011 AP–42 Method for Estimating Re-Entrained Road Dust from Paved Roads,'' published in the **Federal Register** on February 4, 2011 (76 FR 6328).

[8] See Clean Air Act section 172(c)(3). Also see the discussion of emissions inventory requirements in the ''Fine Particulate Matter National Ambient Air Quality Standards: State Implementation Plan Requirements'' rule (81 FR 58029, August 24, 2016)

Continued

recognizes the time and level of effort that certain states may have already undertaken in SIP development using a version of MOVES2014. States should consult with their EPA Regional Office if they have questions about how MOVES3 affects SIPs under development in specific nonattainment or maintenance areas. Early consultation can facilitate EPA's adequacy finding for SIP motor vehicle emissions budgets for transportation conformity purposes or EPA's SIP approval.

States should use the latest version of MOVES that is available at the time that a SIP is developed. All states other than California should use MOVES3 for SIPs that will be submitted in the future so that they are based on the most accurate estimates of emissions possible. However, state and local agencies that have already completed significant work on a SIP with a version of MOVES2014 (*e.g.,* attainment modeling has already been completed with MOVES2014) may continue to rely on the earlier version of MOVES. It would be unreasonable to require the states to revise these SIPs with MOVES3 since significant work has already occurred based on the latest information available at the time the SIP was developed, and EPA intends to act on these SIPs in a timely manner.

The Clean Air Act does not require states that have already submitted SIPs or will submit SIPs shortly after the release of a new model to revise these SIPs simply because a new motor vehicle emissions model is now available.[9] States can choose to use MOVES3 in these SIPs, for example, if it is determined that it is appropriate to update motor vehicle emissions budgets (''budgets'') with the model for future conformity determinations. However, as stated above, states should use MOVES3 where SIP development is in its initial stages or has not progressed far enough along that switching from a previous model version would create a significant adverse impact on state resources.

Incorporating MOVES3 into the SIP now could assist areas in mitigating possible transportation conformity difficulties in the future after the MOVES3 conformity grace period ends. New regional emissions analyses using EPA's emissions model that are started after the grace period is over must be based on MOVES3 (40 CFR 93.111), so having MOVES3-based SIP budgets in place at that time could provide more consistency with transportation conformity determinations.

IV. Transportation Conformity and MOVES3

In today's notice, EPA is announcing the availability of MOVES3 for use in transportation conformity analyses outside of California. EPA is also establishing a two-year grace period before MOVES3 will need to be used in regional emissions analysis for transportation conformity determinations and in hot-spot analyses for project-level transportation conformity determinations which use EPA's emissions model. The MOVES3 grace period for regional emissions and hot-spot analyses applies to the use of MOVES3 and any future minor revisions that occur during the grace period.

Transportation conformity is a Clean Air Act requirement to ensure that federally supported highway and transit activities are consistent with (''conform to'') the SIP. Conformity to a SIP means that a transportation activity will not cause or contribute to new air quality violations; worsen existing violations; or delay timely attainment of national ambient air quality standards or any interim milestones. Transportation conformity applies in nonattainment and maintenance areas for transportation-related pollutants: Ozone, CO, $PM_{2.5}$, PM_{10} and NO_2. EPA's transportation conformity regulations (40 CFR parts 51.390 and 93 Subpart A) describe how federally funded and approved highway and transit projects meet these statutory requirements.

The remainder of this section describes how the transportation conformity grace period was determined and summarizes how it will be implemented, including those circumstances when the grace period could be shorter than two years for regional emissions analyses. However, for complete explanations of how MOVES3 is to be implemented for transportation conformity, including details about using MOVES3 during the grace period, refer to ''Policy Guidance on the Use of MOVES3 for State Implementation Plan Development, Transportation Conformity, General Conformity and Other Purposes'' (EPA–420–B–20–044).

A. Why is EPA establishing a two-year conformity grace period?

Section 176(c)(1) of the Clean Air Act states that ''. . .[t]he determination of conformity shall be based on the most recent estimates of emissions, and such estimates shall be determined from the most recent population, employment, travel, and congestion estimates. . .''. Additionally, the transportation conformity rule (40 CFR 93.111) requires conformity analyses to be based on ''the latest emissions estimation model available,'' and further states that this requirement is satisfied if the most current version of EPA's motor vehicle emissions model is used. When EPA announces a new emissions model, such as MOVES3, we establish a grace period before the model needs to be used for transportation conformity purposes (40 CFR 93.111(b)). In consultation with DOT, EPA must consider the degree of change in the emissions model and the effects of the new model on the transportation planning process (40 CFR 93.111(b)(2)). The transportation conformity rule provides that EPA will establish a grace period for new emissions models of between three and 24 months (40 CFR 93.111(b)(1)).

EPA articulated its intentions for establishing the length of a conformity grace period in the preamble to the 1993 transportation conformity rule (November 24, 1993; 58 FR 62211):

''EPA and DOT [the Department of Transportation] will consider extending the grace period if the effects of the new emissions model are so significant that previous SIP demonstrations of what emission levels are consistent with attainment would be substantially affected. In such cases, States should have an opportunity to revise their SIPs before MPOs must use the model's new emissions factors.''

In consultation with DOT, EPA considered the degree of change in MOVES3 and the effects of the new model on the transportation planning process (40 CFR 93.111(b)(2)). EPA considered the time it will take state and local transportation and air quality agencies to conduct and provide technical support for analyses. State and local agencies will need to become familiar with the MOVES3 emissions model and may need to convert existing data for use in MOVES3. Since 1993, the fundamental purpose of section 93.111(b) of the transportation conformity rule has been to provide a sufficient amount of time for MPOs and other state and local agencies to learn and employ new emissions models. The transition to a new emissions model for conformity involves more than learning to use the new model and preparing input data and model output. After model start-up is complete, state and local agencies also need to consider how the model affects regional emissions analysis results and whether SIP and/or

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and in the ''Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area State Implementation Plan Requirements'' rule (83 FR 63022, December 6, 2018).

[9] *Sierra Club* v. *EPA,* 356 F.3d. 296, 308 (DC Cir. 2004) (''To require states to revise completed plans every time a new model is announced would lead to significant costs and potentially endless delays in the approval processes.'')

transportation plan/TIP changes are necessary to assure future conformity determinations.

The two-year conformity grace period also provides sufficient time for state and local agencies to learn and apply new technical guidance and training courses that reflect MOVES3. EPA is working to update guidance documents and training courses as quickly as possible. EPA will notify MOVES3 users when these important materials are available. Training courses are anticipated to be provided in the form of webinars and other courses and address different levels of State and local expertise.

In addition, many agencies will be implementing the transition to PM and CO hot-spot analyses with MOVES3 for applicable projects in those nonattainment and maintenance areas, with each analysis potentially involving multiple state and local agencies. States with CO hot-spot protocols that were previously approved into the SIP (40 CFR 93.123(a)(1)) that are based on a previous model will need time to revise them. Additional time is necessary to revise previously approved CO hot-spot protocols, and the SIP revision process and state requirements can vary. Finally, EPA considered the general time and monetary resource constraints in which state and local agencies currently operate. Upon considerations of all these factors, EPA is establishing a two-year grace period, which begins today and ends on January 9, 2023, before MOVES3 needs to be used for new transportation conformity analyses outside of California.

B. Circumstances When Grace Period Will Be Shorter Than Two Years

The grace period for regional emissions analyses will be shorter than two years for a given pollutant if an area revises its SIP and motor vehicle emissions budgets with MOVES3 and such budgets have been found adequate or approved into the SIP prior to the end of the two-year grace period. In this case, the new regional emissions analysis must use MOVES3 if the conformity determination is based on a MOVES3-based budget (40 CFR 93.111).

Areas that are designated nonattainment or maintenance for multiple pollutants may rely on both MOVES3 and MOVES2014 to determine conformity for different pollutants during the grace period. For example, if an area revises a previously submitted (but not approved) MOVES2014-based PM_{10} SIP with MOVES3 and EPA finds these revised MOVES3 budgets adequate for conformity, such budgets would apply for conformity on the effective date of the **Federal Register** notice announcing EPA's adequacy finding. In this example, if the area is nonattainment for PM_{10} and ozone, the MOVES3 grace period would end for PM_{10} regional emissions analyses once EPA found the new MOVES3-based SIP budgets adequate. However, MOVES2014 could continue to be used for ozone-related regional emissions analyses begun before the end of the MOVES3 grace period.[10] In addition, the length of the grace period for hot-spot analyses would not be affected by an early submission of MOVES3-based budgets. In this example, the two-year grace period for PM_{10} hot-spot analyses would continue to apply even if the grace period is shortened for regional PM_{10} conformity analyses. EPA Regional Offices should be consulted for questions regarding such situations in multi-pollutant areas.

In addition, in most cases, if the state revises previously approved budgets based on an earlier EPA emissions model, the revised MOVES3 budgets could not be used for conformity purposes until EPA approves them, *i.e.,* approves the SIP revision. In general, submitted SIPs cannot supersede approved budgets until the submitted SIP is approved. See 40 CFR 93.118(e)(1).

However, 40 CFR 93.118(e)(1) allows an approved budget to be replaced by an adequate budget if EPA's approval of the initial budgets specifies that the budgets being approved may be replaced in the future by new adequate budgets. This flexibility has been used in limited situations in the past. In such cases, the MOVES3-based budgets would be used for conformity purposes once they have been found adequate, if requested by the state in its SIP submission and specified in EPA's SIP approval. States should consult with their EPA Regional Office to determine if this flexibility applies to their situation.

C. Use of MOVES3 for Regional Emissions Analyses During the Grace Period

During the conformity grace period, areas should use interagency consultation to examine how MOVES3 will impact their future transportation plan and TIP conformity determinations, including regional emissions analyses. Isolated rural areas should also consider how future regional emissions analyses will be affected when the MOVES3 grace period ends. Areas should carefully consider whether the SIP and budgets should be revised with MOVES3 or if transportation plans and TIPs should be revised before the end of the conformity grace period, since doing so may be necessary to ensure conformity in the future.

Finally, the transportation conformity rule provides flexibility for completing conformity determinations based on regional emissions analyses that use MOVES2014 that are started before the end of the grace period. Regional emissions analyses that are started during the grace period can use either MOVES2014 or MOVES3. The interagency consultation process should be used if it is unclear if a MOVES2014-based analysis was begun before the end of the grace period. If there are questions about which model should be used in a conformity determination, the EPA Regional Office can be consulted.

When the grace period ends on January 9, 2023, MOVES3 will become the only EPA motor vehicle emissions model for regional emissions analyses for transportation conformity in states other than California. In general, this means that all new transportation plan and TIP conformity determinations started after the end of the grace period must be based on MOVES3, even if the SIP is based on MOVES2014 or an older version of the MOVES model.

D. Use of MOVES3 for Project-Level Hot-Spot Analyses During the Conformity Grace Period

The MOVES3 grace period also applies to the use of MOVES3 for CO, PM_{10} and $PM_{2.5}$ hot-spot analyses. Sections 93.116 and 93.123 of the transportation conformity regulation contain the requirements for when a hot-spot analysis is required for project-level conformity determinations.[11] The transportation conformity rule provides flexibility for analyses that are started before the end of the grace period. A conformity determination for a transportation project may be based on a previous model if the analysis was begun before or during the grace period, and if the final environmental document for the project is issued no more than

[10] In this example, such an area would use MOVES3 to develop a regional emissions analysis for PM_{10} for comparison to the revised MOVES3-based budgets (*e.g.,* PM_{10} budgets). The regional emissions analysis for ozone could be based on MOVES2014 for the VOC and NOx budgets in the ozone SIP for the remainder of the conformity grace period.

[11] In CO nonattainment and maintenance areas, a hot-spot analysis is required for all non-exempt projects, with quantitative hot-spot analyses being required for larger, congested intersections and other projects (40 CFR 93.123(a)(1)). In addition, in $PM_{2.5}$ and PM_{10} nonattainment and maintenance areas, the transportation conformity regulation requires that a quantitative hot-spot analysis be completed for certain projects (see 40 CFR 93.123(b)(1)).

three years after the issuance of the draft environmental document (40 CFR 93.111(c)). Interagency consultation should be used if it is unclear if a previous analysis was begun before the end of the grace period. For CO, PM_{10} and $PM_{2.5}$ hot-spot analyses that start during the grace period, project sponsors can choose to use MOVES2014 or MOVES3.

EPA encourages sponsors to use the consultation process to determine which option may be most appropriate for a given situation. Any new CO, PM_{10} or $PM_{2.5}$ hot-spot analyses for conformity purposes begun after the end of the grace period must be based on MOVES3. EPA has guidance on how to conduct quantitative $PM_{2.5}$ and PM_{10} hot-spot modeling for transportation conformity purposes, and on how to use MOVES for a CO hot-spot analysis. EPA will be updating these guidance documents with MOVES3; until that time, the MOVES2014-based guidance may still generally be used for MOVES3. See EPA's ''Project-level Conformity'' website, *www.epa.gov/state-and-local-transportation/project-level-conformity-and-hot-spot-analyses,* for the latest information and guidance documents on how to conduct CO, PM_{10} and $PM_{2.5}$ hot-spot modeling for transportation conformity purposes.

Any new, quantitative CO, PM_{10} or $PM_{2.5}$ hot-spot analysis for conformity purposes begun after the end of the grace period using EPA's emissions model must use MOVES3. The interagency consultation process should be used if it is unclear whether these conditions are met. For questions about which model should be used in a project-level conformity determination, consult with your EPA Regional Office.

E. FHWA's CO Categorical Hot-Spot Finding

FHWA released the most recent CO categorical hot-spot finding for intersection projects on July 17, 2017, that was based on MOVES2014a.[12] During the MOVES3 grace period, a project sponsor outside of California may continue to rely on the categorical finding for applicable projects that are determined through interagency consultation to be covered by the finding's parameters. Any new CO hot-spot analyses for conformity purposes begun after the end of the MOVES3 grace period may no longer rely on the July 2017 CO categorical hot-spot finding because the finding was based on MOVES2014.

F. CO Hot-Spot Protocols That Were Previously Approved Into the SIP

Section 93.123(a)(1) of the transportation conformity regulation allows areas to develop alternate procedures for determining localized CO hot-spot analyses, when developed through interagency consultation and approved by the EPA Regional Administrator. Some states have chosen in the past to develop such procedures based on previous EPA emissions models.

During the MOVES3 grace period, areas with previously approved CO hot-spot protocols based on MOVES2014 may continue to rely on these protocols. Once the MOVES3 two-year grace period ends, new CO hot-spot analyses for conformity purposes will need to be based on MOVES3 and thus may no longer rely on a CO hot-spot protocols based on MOVES2014.

Dated: November 24, 2020.

Karl J. Simon,

Director, Transportation and Climate Division, Office of Transportation and Air Quality.

[FR Doc. 2021–00023 Filed 1–6–21; 8:45 am]

BILLING CODE 6560–50–P

[12] See *www.epa.gov/state-and-local-transportation/project-level-conformity-and-hot-spot-analyses#cohotspot.*

ENVIRONMENTAL PROTECTION AGENCY

[FRL–10016–65–OMS]

Cross-Media Electronic Reporting: Authorized Program Revision Approval, State of Tennessee

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the Environmental Protection Agency (EPA) approval of the State of Tennessee's request to revise/modify certain of its EPA-authorized programs to allow electronic reporting.

DATES: EPA approves the authorized program revisions/modifications as of January 7, 2021.

FOR FURTHER INFORMATION CONTACT: Shirley M. Miller, CROMERR Program Manager, U.S. Environmental Protection Agency, Office of Information Management, Mail Stop 2824T, 1200 Pennsylvania Avenue NW, Washington, DC 20460, (202) 566–2908, *miller.shirley@epa.gov*.

SUPPLEMENTARY INFORMATION: On October 13, 2005, the final Cross-Media Electronic Reporting Rule (CROMERR) was published in the **Federal Register** (70 FR 59848) and codified as part 3 of title 40 of the CFR. CROMERR establishes electronic reporting as an acceptable regulatory alternative to paper reporting and establishes requirements to assure that electronic documents are as legally dependable as their paper counterparts. Subpart D of CROMERR requires that state, tribal or local government agencies that receive, or wish to begin receiving, electronic reports under their EPA-authorized programs must apply to EPA for a revision or modification of those programs and obtain EPA approval. Subpart D provides standards for such approvals based on consideration of the electronic document receiving systems that the state, tribe, or local government will use to implement the electronic reporting. Additionally, § 3.1000(b) through (e) of 40 CFR part 3, subpart D provides special procedures for program revisions and modifications to allow electronic reporting, to be used at the option of the state, tribe or local government in place of procedures available under existing program-specific authorization regulations. An application submitted under the subpart D procedures must show that the state, tribe or local government has sufficient legal authority to implement the electronic reporting components of the programs covered by the application and will use electronic document receiving systems that meet the applicable subpart D requirements.

On September 3, 2020, the Tennessee Department of Environmental Conservation (TDEC) submitted an application titled MyTDEC Forms for revisions/modifications to its EPA-approved programs under title 40 CFR to allow new electronic reporting. EPA reviewed TDEC's request to revise/modify its EPA-authorized programs and, based on this review, EPA determined that the applications met the standards for approval of authorized program revisions/modifications set out in 40 CFR part 3, subpart D. In accordance with 40 CFR 3.1000(d), this notice of EPA's decision to approve the State of Tennessee's request to revise/modify its following EPA-authorized programs under 40 CFR parts 123 and 403, to allow electronic reporting under 40 CFR parts 122, 125, and 403–471, is being published in the **Federal Register**:

Part 123: EPA-Administered Permit Programs: the National Pollutant Discharge Elimination System (NPDES) Reporting under CFR 122 & 125

Part 403: General Pretreatment Regulations for Existing and New

Sources of Pollution Reporting under CFR 403–471

TDEC was notified of EPA's determination to approve its application with respect to the authorized programs listed above.

Dated: December 11, 2020.

Jennifer Campbell,

Office Director, Office of Information Management.

[FR Doc. 2021–00057 Filed 1–6–21; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

TIME AND DATE: Tuesday, January 12, 2021 at 10:00 a.m. and its continuation on January 14, 2021 at 10:00 a.m.

PLACE: 1050 First Street, NE, Washington, DC (This meeting will be a virtual meeting).

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Compliance matters pursuant to 52 U.S.C. 30109.

Matters concerning participation in civil actions or proceedings or arbitration.

* * * * *

CONTACT PERSON FOR MORE INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Laura E. Sinram,

Acting Secretary and Clerk of the Commission.

[FR Doc. 2021–00191 Filed 1–5–21; 4:15 pm]

BILLING CODE 6715–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than February 8, 2021.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Marathon MHC and Marathon Bancorp, Inc., both of Wausau, Wisconsin;* to become a mutual bank holding company and a mid-tier stock bank holding company, respectively, by acquiring the voting shares of Marathon Bank, Wausau, Wisconsin, in connection with the conversion of Marathon Bank from mutual to stock form and a minority stock issuance by Marathon Bancorp, Inc.

Board of Governors of the Federal Reserve System, December 18, 2020.

Ann Misback,

Secretary of the Board.

[FR Doc. 2021–00184 Filed 1–5–21; 4:15 pm]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–21–20QO]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled ''Pilot Implementation of the Violence Against Children and Youth Survey (VACS) in the United States'' to the Office of Management and Budget (OMB)for review and approval. CDC previously published a ''Proposed Data Collection Submitted for Public Comment and Recommendations'' notice on July 28, 2020 to obtain comments from the public and affected agencies. CDC did not receive public comments related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) 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;

(b) Evaluate the accuracy of the agencies 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;

(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; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570. 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. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–5806. Provide written comments within 30 days of notice publication.

Proposed Project

Pilot Implementation of the Violence Against Children and Youth Survey (VACS) in the United States—New—National Center for Injury Prevention and Control (NCIPC), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Violence against children is a global human rights violation that spans every country worldwide and affects a billion children each year. In the US, many youth are the victims of multiple forms

of violence and abuse. An estimated 10 million children in the US have experienced child abuse and neglect. Each day, about a dozen youth are victims of homicide and more than 100 times that number (~1,400) are treated annually in emergency rooms for physical assault injuries.

Youth are also involved in high levels of peer violence, which is one of the leading causes of death for people ages 10–24. A body of research has shown that the impact of violence against children goes far beyond the initial incident, and that those who have experienced emotional, physical, and sexual violence can experience severe short to long-term health and social consequences. Given the serious and lasting impact on children, it is critical to understand the magnitude and nature of violence against children in order to develop effective prevention and response strategies. Currently, data to guide state and local violence prevention and response efforts in the United States are quite limited. While some studies have provided information on the risks and impact on violence against children, they are mostly limited in scale and cannot be generalized to the scope of violence against youth across the US or for specific regions.

VACS is a methodology which CDC has conducted in 24 countries globally to measure the magnitude of physical, sexual, and emotional violence against children as well as associated risk and protective factors. VACS has contributed to research throughout the world, demonstrating the high prevalence of violence against children in a variety of countries and cultures, and have proven to be critical tools that can fill data gaps in ways that are vital to informing strategic planning and evidence-based public health efforts in many countries. However, VACS have not been implemented in the U.S., and the existing representative datasets of violence against youth in the U.S. have significant limitations that prevent the data from being actionable for prevention planning by public health departments at the local level. VACS in the U.S will help fill this gap with rigorous probability-based estimates of the problem of youth violence combined with an internationally tested approach to embed the VACS survey into the local strategic planning process of local public health partners.

The present project will implement a pilot testing for the adapted VACS survey and methodology in two contexts: (1) a representative sample of 13–24 year old youth in Baltimore and (2) a convenience sample of 13–24 year old youth in rural Garrett County, Maryland to test the VACS in-person methodology in a rural location. Data will be collected through in-person probability-based household surveys, which will be conducted using a combination of interviewer-administration and Audio Computer-Assisted Self-Interview Software on tablets. Data will be analyzed using statistical software to account for the complexity of the survey design to compute weighted counts, percentages, and confidence intervals using probability-based survey data at the local level.

The findings from this pilot study will be used primarily to better understand the feasibility and effectiveness of implementing VACS in the U.S., which will ultimately determine the magnitude of violence against children and underlying risk and protective factors in order to make recommendations to national and international agencies and non-governmental organizations on developing strategies to identify, treat and prevent violence against children. CDC is requesting three years approval from OMB for this collection with a total estimated annualized burden of 800 hours There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (hours)
Head of Household	Invitation letter	3,121	1	2/60
	Screener Questionnaire	2,808	1	3/60
	Head of Household Consent	702	1	2/60
	Head of Household Questionnaire	632	1	15/60
Youth ages 13–24 in Baltimore or Garrett County, Maryland.	Youth participant consent/assent	632	1	3/60
	Core Youth Participant Questionnaire	377	1	1

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2021–00002 Filed 1–6–21; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–21–1080]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled HIV Outpatient Study to the Office of Management and Budget (OMB) for review and approval. CDC previously published a ''Proposed Data Collection Submitted for Public Comment and Recommendations'' notice on September 14, 2020 to obtain comments from the public and affected agencies. CDC did not receive comments related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) 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;

(b) Evaluate the accuracy of the agencies 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;

(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; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570. 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. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street, NW, Washington, DC 20503 or by fax to (202) 395–5806. Provide written comments within 30 days of notice publication.

Proposed Project

HIV Outpatient Study (HOPS) (OMB Control No. 0920–1080, Exp. 9/30/2021)—Extension—National Center for HIV/AIDS, Hepatitis, STD and TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Centers for Disease Control and Prevention requests OMB approval to continue collecting information for HIV Outpatient Study (HOPS). The study is based on a prospective longitudinal cohort of adults living with HIV in outpatient care at eight well-established private HIV care practices and university-based clinics in the U.S. The HOPS study sites are located in six cities: Tampa, Florida; Washington, DC; Stony Brook, New York; Chicago, Illinois; Denver, Colorado; and Philadelphia, Pennsylvania. The study currently collects information on a maximum of 2,700 outpatients per year. A portion of HOPS participants are lost to follow-up each year (most due to transferring out of the HOPS clinics), and our target goal is to enroll up to 450 new participants (50–60 per site) annually. Patients are approached during one of their routine clinic visits and invited to participate in the HOPS.

There are two sources of information for the HOPS. First, clinical data are abstracted on ongoing basis from the medical records of study participants. Medical records provide data in five general categories: demographics and risk behaviors for HIV infection; symptoms; diagnosed conditions (definitive and presumptive); medications prescribed (including dose, duration, and reasons for stopping); and all laboratory values, including CD4+ T lymphocyte (CD4+) cell counts, plasma HIV–RNA determinations, and genotype, phenotype, and trophile results. Clinic charts also provide data about visit frequency, AIDS, and death. Medical records abstraction is conducted by trained study staff and does not impose ongoing burden on HOPS participants, however, CDC does account for burden associated with the initial study consent and orientation process. The estimated burden per response is 15 minutes.

The second source of HOPS information is the annual behavioral assessment, an optional activity scheduled in conjunction with the participant's annual clinic visit. For convenience, the behavioral assessment can be completed in either of two modes: A brief Telephone Audio-Computer Assisted Self-Interview (T–ACASI) survey or an identical Web-based Audio-Computer Assisted Self-Interview (ACASI). Data collection includes: Age, sex at birth, use of alcohol and drugs, cigarette smoking, adherence to antiretroviral medications, types of sexual intercourse, condom use, and disclosure of HIV status to partners. The estimated burden per response is seven minutes.

The core areas of HOPS research extending through the present HIV treatment era include (i) investigating and characterizing (new) problems associated with long-term HIV infection and its treatments using the longitudinal cohort data, (ii) monitoring death rates and causes of death, (iii) characterizing the optimal patient management strategies to reduce HIV related morbidity and mortality (*e.g.,* effectiveness of antiretroviral therapies and other clinical interventions), (iv) assessing sexual and drug use behaviors and other patient reported outcomes that supplement data from chart abstraction, and (v) investigating disparities in the HIV care continuum by various demographic factors. In recent years, the HOPS has been instrumental in bringing attention to emerging issues in chronic HIV infection with actionable opportunities for prevention, including cardiovascular disease, fragility fractures, renal and

hepatic disease, and cancers. The HOPS remains an important source for multiyear trend data concerning conditions and behaviors for which data are not readily available elsewhere, including: rates of opportunistic illnesses, rates of comorbid conditions (*e.g.,* hypertension, obesity, diabetes) and antiretroviral drug resistance.

OMB approval is requested for three years. The estimated number of participants in the annual behavioral assessment will increase from 2,500 respondents to 2,700 respondents, resulting in an increase of 23 burden hours. There are no changes to the information collection forms or methods. Participation is voluntary and there are no costs to respondents other than their time. The total estimated annualized burden is 428 hours.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
HOPS study Patients	Behavioral survey	2,700	1	7/60
HOPS Study Patients	Consent form	450	1	15/60

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2021–00003 Filed 1–6–21; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Child Care and Development Fund (CCDF) ACF–696T Financial Report (OMB #0970–0195)

AGENCY: Office of Child Care, Administration for Children and Families, HHS.

ACTION: Request for public comment.

SUMMARY: The Administration for Children and Families (ACF) is requesting a 3-year extension of the form ACF–696T: Child Care and Development Fund Annual Financial Report. This form is currently approved under the ACF Generic Clearance for Financial Reports (OMB #0970–0510; expiration May 31, 2021), and ACF is proposing to reinstate the previous OMB number under which this form had been approved. There are no changes requested to the form.

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: Copies of the proposed collection of information can be obtained and comments may be forwarded by emailing *infocollection@acf.hhs.gov.* Alternatively, copies can also be obtained by writing to the Administration for Children and Families, Office of Planning, Research, and Evaluation (OPRE), 330 C Street SW, Washington, DC 20201, Attn: ACF Reports Clearance Officer. All requests, emailed or written, should be identified by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: The ACF–696T Financial Report along with the instruction for completion of Form ACF–696T Financial Reporting Form for the Child Care and Development Fund (CCDF) are being submitted for renewal with no changes. The form collects CCDF financial expenditures data for the 221 Tribal Lead Agencies that receive CCDF funding. This report form is submitted annually by the referenced CCDF grant recipients. The form collects expenditures data for all respondents that receive CCDF funding.

Respondents: The 221 Tribal Lead Agencies that receive CCDF funding.

ANNUAL BURDEN ESTIMATES

Instrument	Annual number of respondents	Annual number of responses per respondent	Average burden hours per response	Annual burden hours
Child Care and Development Fund ACF–696T Financial Report	221	1	5	1,105

Estimated Total Annual Burden Hours: 1,105.

Comments: The Department specifically requests comments on (a) 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; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Authority: Section 658G(d), Pub. L. 113–186, 128 Stat. 1971.

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2021–00017 Filed 1–6–21; 8:45 am]

BILLING CODE 4184–43–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Mental Health Care Services for Unaccompanied Alien Children (New Collection)

AGENCY: Office of Refugee Resettlement, Administration for Children and Families, Department of Health and Human Services.

ACTION: Request for public comment.

SUMMARY: The Office of Refugee Resettlement (ORR), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), is inviting public comments on the proposed collection. The request consists of several forms that allow the Unaccompanied Alien Children (UAC) Program to provide mental health care services to UAC.

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: Copies of the proposed collection of information can be obtained and comments may be forwarded by emailing *infocollection@acf.hhs.gov.* Alternatively, copies can also be obtained by writing to the Administration for Children and Families, Office of Planning, Research, and Evaluation (OPRE), 330 C Street SW, Washington, DC 20201, Attn: ACF Reports Clearance Officer. All requests, emailed or written, should be identified by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description

1. Initial Mental Health Evaluation (Form MH–1): This instrument is used by clinicians to document the UAC's mental state upon arrival to the care provider facility. It includes an assessment of the UAC's current mental state, psychiatric history, and substance use history.

2. Columbia Suicide Severity Rating Scale (SSRS) Risk Assessment (Form MH–2): This instrument is used by clinicians to assess suicide risk for UAC who verbalize or demonstrate suicidal thoughts or behavior. It is a shorter version of the standard Columbia SSRS used to triage mental health care for UAC, a tool designed to support suicide

risk assessment through a series of simple, plain-language questions that anyone can ask. The Columbia SSRS includes the most essential, evidence-supported questions required for a thorough assessment. Further information about the Columbia SSRS can be found at *https://cssrs.columbia.edu/the-columbia-scale-c-ssrs/about-the-scale/.*

3. Mental Health Group Event (Form MH–3): This instrument is used by clinicians to document group counseling or community meetings held at the care provider program.

4. Clinical Contact Log (Form MH–4): This instrument is used by clinicians to document the following mental health services: Individual counseling, group counseling, community meetings, family counseling sessions, screenings/evaluations, and collateral contact with services providers involved in the UAC's case. Mental Health Group Events (Form MH–3) may be linked to a Clinical Contact Log entry.

5. Mental Health Referral (Form MH–5): This instrument is used by clinicians and/or medical coordinators to refer a UAC for community-based mental health care services (assessments/evaluations, psychotherapy, medical referrals, and treatment), acute and long-term psychiatric hospitalizations, and referrals to out-of-network residential treatment centers.

6. Mental Health Service Report (Form MH–6): This instrument is used by clinicians and/or medical coordinators to document the provision of community-based mental health care services (assessments/evaluations, psychotherapy, medical referrals, and treatment), acute and long-term psychiatric hospitalizations, and referrals to out-of-network residential treatment centers. In addition, the UAC interview portion of the Out-of-Network Site Visit Report (Form M–3B), which is part of a different information collection request, is accessible from within this instrument.

7. Mental Health Task (Form MH–7): This instrument is auto-generated to create reminders for clinicians and/or medical coordinators of tasks that must be completed. Clinicians and/or medical coordinators may edit the instrument after it is generated.

Respondents: ORR grantee and contractor staff, and UAC.

ANNUAL BURDEN ESTIMATES

Instrument	Annual total number of respondents	Annual total number of responses per respondent	Average burden minutes per response	Annual total burden hours
Initial Mental Health Evaluation (Form MH–1)	216	241	60	52,056
Columbia SSRS Risk Assessment (Form MH–2)	216	5	45	810
Mental Health Group Event (Form MH–3)	216	156	10	5,616
Clinical Contact Log (Form MH–4)	216	11,194	10	402,984
Mental Health Referral (Form MH–5)	216	24	45	3,888
Mental Health Service Report (Form MH–6)	216	31	45	5,022
Mental Health Task (Form MH–7)	216	55	5	990
Estimated Annual Burden Hours Total:	.....	.....	.....	471,366

Comments: The Department specifically requests comments on (a) 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; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Authority: 6 U.S.C. 279; 8 U.S.C. 1232; *Flores* v. *Reno Settlement Agreement,* No. CV85–4544–RJK (C.D. Cal. 1996).

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2021–00001 Filed 1–6–21; 8:45 am]

BILLING CODE 4184–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Child Care and Development Fund (CCDF) ACF–696 Financial Report (OMB #0970–0163)

AGENCY: Office of Child Care, Administration for Children and Families, HHS.

ACTION: Request for public comment.

SUMMARY: The Administration for Children and Families (ACF) is requesting a 3-year extension of the form ACF–696: Child Care and Development Fund (CCDF) Quarterly Financial Report. This form is currently approved under the ACF Generic Clearance for Financial Reports (OMB #0970–0510; expiration May 31, 2021), and ACF is proposing to reinstate the previous OMB number under which this form had been approved. There are no changes requested to the form.

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: Copies of the proposed collection of information can be obtained and comments may be forwarded by emailing *infocollection@acf.hhs.gov.* Alternatively, copies can also be obtained by writing to the Administration for Children and Families, Office of Planning, Research, and Evaluation (OPRE), 330 C Street SW, Washington, DC 20201, Attn: ACF Reports Clearance Officer. All requests, emailed or written, should be identified by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: The ACF–696 Financial Report along with the instructions for completion of Form ACF–696, Financial Reporting Form for CCDF are being submitted for renewal with no changes under a previous OMB number. The form collects CCDF financial expenditures data for the 50 States, the District of Columbia, and five U.S. Territories that receive CCDF funding (American Samoa, Commonwealth of

Northern Mariana Islands, Guam, Puerto Rico, and Virgin Islands). This report form is submitted quarterly by the referenced CCDF grant recipients. The form collects expenditures data for all respondents that receive CCDF funding.

Respondents: The 50 states, the District of Columbia, and five U.S. Territories that receive CCDF funding (American Samoa, Commonwealth of Northern Mariana Islands, Guam, Puerto Rico, and Virgin Islands).

ANNUAL BURDEN ESTIMATES

Instrument	Annual number of respondents	Annual number of responses per respondent	Average burden hours per response	Annual burden hours
Child Care and Development Fund ACF–696 Financial Report	56	4	5	1,120

Estimated Total Annual Burden Hours: 1,120.

Comments: The Department specifically requests comments on (a) 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; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Authority: Section 658G(d), Pub. L. 113–186, 128 Stat. 1971.

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2021–00016 Filed 1–6–21; 8:45 am]

BILLING CODE 4184–43–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Delayed Deployment Date for Modification of Test Program Regarding Electronic Foreign Trade Zone Admission Applications for Expanded Zone Identification Numbers

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This notice announces that the deployment date for the expanded zone identification number modifications to the electronic Foreign Trade Zone admission applications test is delayed until April 25, 2021. On September 25, 2020, U.S. Customs and Border Protection published a notice in the **Federal Register** announcing modifications to the electronic FTZ admission applications test including, *inter alia,* the expansion of the zone identification number from seven to nine digits. These zone identification number changes were to have been implemented on January 25, 2021, and this notice announces that the deployment date in the Automated Commercial Environment is delayed until April 25, 2021.

DATES: The expanded zone identification number will be implemented as of April 25, 2021. This test will continue until concluded by way of announcement in the **Federal Register**.

ADDRESSES: Comments concerning this notice and any aspect of this test may be submitted at any time during the test via email to Cargo & Conveyance Security, Office of Field Operations, U.S. Customs and Border Protection, at *FTZe214Test@cbp.dhs.gov,* with a subject line identifier reading ''Comment on Electronic FTZ Admission Application FRN.''

FOR FURTHER INFORMATION CONTACT: For operational questions, contact Lydia Jackson, Cargo & Conveyance Security, Office of Field Operations, U.S. Customs and Border Protection, at 202–344–3055 or *FTZe214Test@cbp.dhs.gov.* For technical questions, contact Arnold Buratty, Cargo Systems Program Directorate, Office of Information and Technology, U.S. Customs and Border Protection, at 571–468–5309 or *Arnold.Buratty@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

On September 25, 2020, U.S. Customs and Border Protection (CBP) published a notice entitled ''Modification of Test Program Regarding Electronic Foreign Trade Zone Admission Applications'' in the **Federal Register** (85 FR 60479). The test is part of the National Customs Automation Program (NCAP), which was established by Subtitle B of Title VI—Customs Modernization in the North American Free Trade Agreement (NAFTA) Implementation Act (Customs Modernization Act) (Pub. L. 103–182, 107 Stat. 2057, 2170, December 8, 1993) (19 U.S.C. 1411). The notice announced modifications to the electronic Foreign Trade Zone (FTZ) admission applications test including, *inter alia,* the expansion of the zone identification (ID) number from seven to nine digits. The deployment date in the Automated Commercial Environment (ACE) for the modifications regarding the expanded zone ID number was to have been January 25, 2021.

Subsequent to publishing the September 25, 2020, notice in the **Federal Register**, CBP published the relevant updates in the ACE FTZ chapter of the CBP and Trade Automated Interface Requirements (CATAIR), available at: *https://www.cbp.gov/trade/ace/catair.* CBP has assessed stakeholder readiness and determined that a delayed deployment date in ACE for the modifications regarding the expanded zone ID number is in the best interests of all parties involved. Delaying the deployment date will allow for the required programming modifications on the part of trade participants (specifically by allowing additional time to code and test) and will also provide CBP with more time to coordinate with local zone operators (who will be receiving new zone ID numbers). Accordingly, the deployment date in ACE for the modifications of the electronic FTZ admission application test regarding the expanded zone ID number is April 25, 2021.

Dated: December 31, 2020.

William A. Ferrara,

Executive Assistant Commissioner, Office of Field Operations.

[FR Doc. 2021–00006 Filed 1–6–21; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2020–0035; OMB No. 1660–0072]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; Flood Mitigation Assistance (FMA); Building Resilient Infrastructure and Communities (BRIC); Pre-Disaster Mitigation (PDM)

AGENCY: Federal Emergency Management Agency, Department of Homeland Security (DHS).

ACTION: 30-Day notice and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection described below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. While this information collection continues to include the Flood Mitigation Assistance (FMA) and Pre-Disaster Mitigation (PDM) programs, it introduces the Building Resilient Infrastructure and Communities (BRIC) program, and addresses the process for using a BRIC fiscal year (FY) 20 National Competition Panel Review Expression of Interest Form to solicit panel members to review competitive BRIC grant applications. After reviewing all the comments submitted, FEMA has decided to use the BRIC FY20 National Competition Panel Review Expression of Interest Form to solicit interest from potential panelists.

DATES: Written comments must be received on or before February 8, 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: Jennie Orenstein, Grants Policy Branch Chief, Federal Insurance and Mitigation Administration, FEMA, *Jennie.Orenstein@fema.dhs.gov,* (202) 212–4071. 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: This collection of information is necessary to implement grants for the Flood Mitigation Assistance (FMA) program, Pre-Disaster Mitigation (PDM), and Building Resilient Infrastructure and Communities (BRIC) program.

The FMA program is authorized pursuant to Section 1366 of the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4104c). FMA was created as part of the National Flood Insurance Reform Act (NFIRA) of 1994, Public Law 103–325. The Biggert-Waters Flood Insurance Reform Act of 2012 (BW–12), Public Law 112–141, consolidated the Repetitive Flood Claims (RFC) and Severe Repetitive Loss grant (SRL) programs into FMA. Under FMA, cost-share requirements were changed to allow more Federal funds for properties with repetitive flood claims. The FMA program, under 44 CFR part 79, provides funding for measures taken to reduce or eliminate the long-term risk of flood damage to buildings, manufactured homes, and other structures insured under the National Flood Insurance Program (NFIP).

PDM was authorized under Section 203 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), Public Law 93–288, as amended by Section 102 of the Disaster Mitigation Act of 2000, Public Law 106–390 (42 U.S.C. 5133). As a result of amendments by the Disaster Recovery Reform Act of 2018 (DRRA), the PDM program is being replaced with the BRIC program. Therefore, PDM is established as a legacy program. The PDM program provided grants for cost-effective mitigation actions prior to a disaster event to reduce overall risks to the population and structures while also reducing reliance on funding from actual disaster declarations. While the last cycle of the PDM program awards were made in Fiscal Year (FY) 2019, information collection will continue through FY 2020–2021 for grant monitoring and closeout.

The Disaster Recovery Reform Act of 2018, Section 1234, National Public Infrastructure Pre-Disaster Hazard Mitigation, amended Section 203 of the Stafford Act (42 U.S.C. 5133) to authorize BRIC. The BRIC program is designed to promote a national culture of preparedness and public safety through encouraging investments to protect our communities and infrastructure and through strengthening national mitigation capabilities to foster resilience. The BRIC program seeks to fund effective and innovative projects that will reduce risk, increase resilience, and serve as a catalyst to encourage the whole community to invest in and adopt policies related to mitigation.

The guiding principles of the BRIC program are to (1) support state and local governments, tribes, and territories through capability and capacity-building to enable them to identify mitigation actions and implement projects that reduce risks posed by natural hazards; (2) encourage and enable innovation while allowing flexibility, consistency, and effectiveness; (3) promote partnerships and enable high-impact investments to reduce risk from natural hazards with a focus on critical services and facilities, public infrastructure, public safety, public health, and communities; (4) provide a significant opportunity to reduce future losses and minimize impacts on the Disaster Relief Fund; and (5) support the adoption and enforcement of building codes, standards, and policies that will protect the health, safety, and general welfare of the public, take into account future conditions, and have long-lasting impacts on community risk reduction, including for critical services and facilities and for future disaster costs. The BRIC program will distribute funds annually and apply a federal/non-federal cost share.

In accordance with OMB Circular A–102, FEMA requires that all parties interested in receiving FEMA mitigation grants to submit an application package for grant assistance. Applications and sub-applications for the BRIC and FMA programs are submitted via the FEMA Grants Outcome (GO) system. Information necessary for the ongoing monitoring and closeout of the PDM program for FY 2019 and prior will be collected via the e-Grants system. The FEMA GO and e-Grants systems have been developed to meet the intent of the e-Government initiative, authorized by Public Law 106–107. This initiative requires that all government agencies both streamline grant application processes and provide for the means to electronically create, review, and submit a grant application via the internet.

To increase transparency in decision-making while building capability and partnerships, FEMA will convene a National Review Panel to score applications and sub-applications based on qualitative evaluation criteria. The qualitative criteria are narrative submissions to allow applicants and sub-applicants the flexibility to fully explain the strengths of the proposed project. Qualitative evaluation criteria have graded scales of point scoring.

The BRIC program will need to solicit volunteers from State, local, Tribal, and territorial governments (SLTTs) and

Other Federal Agencies (OFAs) to review applications that are routed to the qualitative panel reviews. The volunteers will review and score applications based on a pre-determined scoring criterion.

This proposed information collection previously published in the **Federal Register** on October 27, 2020, with a 60-day public comment period. The comment period closed on December 28, 2020. FEMA received one comment with two parts via *www.regulations.gov* in response to Information Collection 1660–0072. A summary of the comment and FEMA's response is provided below.

The first part of the comment stated that because ''community'' is used in program descriptions, applications and sub-applications submitted by SLTTs for BRIC and FMA grants should include additional information such as evidence of public outreach and education on proposed mitigation activities and public comment on the proposed mitigation activities. In response, while FEMA appreciates this comment, the **Federal Register** notice for this information collection was published to solicit feedback about the expression of interest form created to solicit potential panelists for the BRIC application review process. Adding additional requirements to BRIC applications and sub-applications is outside the scope of this matter.

The second part of the comment seeks additional information about the makeup of the qualitative panel, the review process, and whether panelists will be compensated for their participation in the review process. In response, FEMA provides the following information.

BRIC applications and sub-applications will be reviewed for Eligibility and Completeness (E&C) by FEMA's respective regional offices. During the E&C review, projects that are submitted to the national competition will also be provided a technical score. Technical scores are made up of 100 points, which are binary points. After applications have gone through the E&C review, they will be forwarded to the National Technical Review (NTR). Projects that are marked as standard or decentralized during the E&C review will be reviewed and issued an NTR memo. After NTR has concluded, the projects that are submitted to the national competition will be sent to the qualitative panels. During the qualitative panels, applications will be reviewed by representatives from the SLTTs and OFAs that comprise the panel and scored based on a gradient scale. Qualitative scoring has a total of 100 possible points. The scoring is made up of six (6) criteria, all ranging in different point value. The panelists will leverage their mitigation experience and expertise during the review to assess the degree to which subapplications meet the six BRIC qualitative evaluation criteria. The subapplication's final qualitative score will be calculated by averaging the qualitative scores from each panelist. The six criteria include the following: (1) Risk Reduction/Resiliency Effectiveness possible 35 points, (2) Future Conditions possible 15 points, (3) Implementation Measures possible 15 points, (4) Population Impacted possible 15 points, (5) Outreach Activities possible 5 points, and (6) Leveraging Partners possible 15 points. More information on the background, evaluation process and scoring, and criteria can be found here: *https://www.fema.gov/sites/default/files/2020-08/fema_bric-qualitative-criteria_support_document_08-2020.pdf* . For the qualitative panels, each application will be reviewed and scored by three (3) volunteer panel members. The panelists will not be compensated for their participation.

Collection of Information

Title: Mitigation Grant Programs.

Type of Information Collection: Revision of a currently approved collection.

OMB Number: 1660–0072.

FEMA Forms: Building Resilient Infrastructure and Communities (BRIC) FY20 National Competition Panel Review Expression of Interest Form.

Abstract: FEMA's FMA and BRIC programs use an automated grant application and management system called FEMA GO. The Pre-Disaster Mitigation program uses an automated grant application and management system called e-Grants. These grant programs provide funding for the purpose of reducing or eliminating the risks to life and property from hazards. The FEMA GO and e-Grants systems include all the application information needed to apply for funding under these grant programs. FEMA and SLTTs will use the information submitted via the FY20 National Competition Panel Review Expression of Interest Form to solicit volunteers from SLTTs and OFAs to review applications that are routed to the BRIC qualitative panel reviews. The volunteers will review, and score applications based on a pre-determined scoring criterion.

Affected Public: Federal Government; State, local, Tribal, and territorial governments; Individuals or Households.

Estimated Number of Respondents: 436.

Estimated Number of Responses: 5,364.

Estimated Total Annual Burden Hours: 58,248.

Estimated Total Annual Respondent Cost: $3,324,211.

Estimated Respondents' Operation and Maintenance Costs: None.

Estimated Respondents' Capital and Start-Up Costs: None.

Estimated Total Annual Cost to the Federal Government: $7,586,635.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Millicent L Brown,

Acting Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2021–00027 Filed 1–6–21; 8:45 am]

BILLING CODE 9111–BW–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[212A2100DD/AAKC001030/A0A501010.999900 253G]

Advisory Board for Exceptional Children

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of meeting.

SUMMARY: The Bureau of Indian Education (BIE) is announcing that the Advisory Board for Exceptional Children will hold an online meeting. The purpose of the meeting is to meet the mandates of the Individuals with Disabilities Education Act of 2004

(IDEA) for Indian children with disabilities. Due to the COVID–19 pandemic and for the safety of all individuals, it will be necessary to conduct an online meeting.

DATES: The BIE Advisory Board meeting will be held Wednesday, January 27, 2021 from 8 a.m. to 4 p.m. Mountain Standard Time (MST) and Thursday, January 28, 2021 from 8 a.m. to 4 p.m. Mountain Standard Time (MST).

ADDRESSES: All Advisory Board activities and meetings will be conducted online. See the **SUPPLEMENTARY INFORMATION** section of this notice for information on how to join the meeting. Public comments can be emailed to the DFO at *Jennifer.davis@indianaffairs.gov;* or faxed to (602) 265–0293 Attention: Jennifer Davis, DFO; or mailed or hand delivered to the Bureau of Indian Education, Attention: Jennifer Davis, DFO, 2600 N Central Ave., Suite 800, Phoenix, AZ 85004.

FOR FURTHER INFORMATION CONTACT: Jennifer Davis, Designated Federal Officer, Bureau of Indian Education, 2600 N Central Ave., Suite 800, Phoenix, Arizona 85004, *Jennifer.davis@indianaffairs.gov,* or (202) 860–7845 or (602) 240–8597.

SUPPLEMENTARY INFORMATION: In accordance with the Federal Advisory Committee Act, the BIE is announcing the Advisory Board will hold its next meeting online. The Advisory Board was established under the Individuals with Disabilities Act of 2004 (20 U.S.C. 1400 *et seq.*) to advise the Secretary of the Interior, through the Assistant Secretary-Indian Affairs, on the needs of Indian children with disabilities. The meeting is open to the public.

The following items will be on the agenda:

- Update Reports regarding special education from: BIE Central Office, BIE/Division of Performance and Accountability (DPA), BIE/Associate Deputy Directors for Tribally Controlled Schools, Bureau Operated Schools and Navajo Region Schools.
- The BIE's Office of Sovereignty in Indian Education—will provide an overview and update of the Tribal Education Department (TED) grant program.
- The Chief Academic Office—will provide an overview and Update of the BIE's Standards, Assessments, and Accountability System
- Public Commenting Sessions will be provided during both meeting days.

○ On Wednesday, January 27, 2021 from 11 a.m. to 11:30 a.m. MST, public comments can be provided via webinar or telephone conference call. Please use the same online access codes as listed below for the January 27th meeting.

○ On Thursday, January 28, 2021 from 1 p.m. to 1:30 p.m. MST, public comments can be provided via webinar or telephone conference call. Please use the same online access codes as listed below for the January 28th meeting.

○ Public comments can be emailed to the DFO at *Jennifer.davis@indianaffairs.gov;* or faxed to (602) 265–0293 Attention: Jennifer Davis, DFO; or mailed or hand delivered to the Bureau of Indian Education, Attention: Jennifer Davis, DFO, 2600 N Central Ave., Suite 800, Phoenix, Arizona 85004.

To Access the January 27, 2021 Meeting

You can join the meeting on January 27, 2021 through any of the following means:

- From your computer, tablet or smartphone using *https://global.gotomeeting.com/join/172073373.*
- Using your phone in the United States, by dialing +1 (669) 224–3412 and using Access Code: 172–073–373.
- From a video-conferencing room or system by dialing or typing in: 67.217.95.2 or *inroomlink.goto.com,* Meeting ID: 172 073 373, or by dialing directly: 172073373@67.217.95.2 or 67.217.95.2##172073373. If you are new to GoToMeeting you can get the app by using this link: *https://global.gotomeeting.com/install/172073373.*

To Access the January 28, 2021 Meeting

You can join the meeting on January 28, 2021 through any of the following means:

- From your computer, tablet or smartphone using *https://global.gotomeeting.com/join/491120013.*
- Using your phone in the United States, by dialing +1 (646) 749–3112 and using Access Code: 491–120–013.
- From a video-conferencing room or system by dialing in or type: 67.217.95.2 or *inroomlink.goto.com,* Meeting ID: 491 120 013, or dialing directly: 491120013@67.217.95.2 or 67.217.95.2##491120013. If you are new to GoToMeeting you can get the app by using this link: *https://global.gotomeeting.com/install/491120013.*

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 5 U.S.C. Appendix 5; 20 U.S.C. 1400 *et seq.*

Tara Sweeney,

Assistant Secretary—Indian Affairs.

[FR Doc. 2020–29322 Filed 1–6–21; 8:45 am]

BILLING CODE 4337–15–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Federal Council on the Arts and the Humanities

Arts and Artifacts Indemnity Panel Advisory Committee Meeting

AGENCY: Federal Council on the Arts and the Humanities; National Foundation on the Arts and the Humanities.

ACTION: Notice of Meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, notice is hereby given that the Federal Council on the Arts and the Humanities will hold a meeting of the Arts and Artifacts Domestic Indemnity Panel.

DATES: The meeting will be held on Wednesday, February 17, 2021, from 12:00 p.m. until adjourned.

ADDRESSES: The meeting will be held by videoconference originating at the National Endowment for the Arts, Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Elizabeth Voyatzis, Committee Management Officer, 400 7th Street SW, Room 4060, Washington, DC 20506, (202) 606–8322; *evoyatzis@neh.gov.*

SUPPLEMENTARY INFORMATION: The purpose of the meeting is for panel review, discussion, evaluation, and recommendation on applications for Certificates of Indemnity submitted to the Federal Council on the Arts and the Humanities, for exhibitions beginning on or after April 1, 2021. Because the meeting will consider proprietary financial and commercial data provided in confidence by indemnity applicants, and material that is likely to disclose trade secrets or other privileged or confidential information, and because it is important to keep the values of objects to be indemnified and the methods of transportation and security measures confidential, I have determined that that the meeting will be closed to the public pursuant to subsection (c)(4) of section 552b of Title 5, United States Code. I have made this determination under the authority granted me by the Chairman's

Delegation of Authority to Close Advisory Committee Meetings, dated April 15, 2016.

Dated: January 4, 2021.

Caitlin Cater,

Attorney-Advisor, National Endowment for the Humanities.

[FR Doc. 2021–00036 Filed 1–6–21; 8:45 am]

BILLING CODE 7536–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2020–0162]

Information Collection: Voluntary Reporting of Planned New Reactor Applications; Withdrawal

AGENCY: Nuclear Regulatory Commission.

ACTION: Renewal of existing information collection; request for comment; withdrawal.

SUMMARY: On December 29, 2020, the U.S. Nuclear Regulatory Commission (NRC) inadvertently issued an information collection titled, ''Voluntary Reporting of Planned New Reactor Applications'' in the **Federal Register**. The information collection is being withdrawn because it duplicates a document previously published in the **Federal Register** on December 1, 2020.

DATES: The withdrawal of Information Collection: Voluntary Reporting of Planned New Reactor Applications takes effect on January 7, 2021.

ADDRESSES: Please refer to Docket ID NRC–2020–0162 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–2020–0162. 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.*
- *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 or 301–415–4737 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: David C. Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION: The NRC is withdrawing Information Collection: Voluntary Reporting of Planned New Reactor Applications published in the **Federal Register** on December 29, 2020 (85 FR 85673). The information collection is a duplicate of a notice previously published in the **Federal Register** on December 1, 2020 (85 FR 77279). The comment period for the information collection published on December 1, 2020 ends on February 1, 2021, as stated in the original notice (85 FR 77279).

Dated: December 31, 2020.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2020–29320 Filed 1–6–21; 8:45 am]

BILLING CODE 7590–01–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* January 7, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 28, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 188 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2021–62, CP2021–64.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–29314 Filed 1–6–21; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Parcel Select Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* January 7, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 28, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Parcel Select Contract 46 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2021–63, CP2021–65.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–29315 Filed 1–6–21; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express and Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* January 7, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby

gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 28, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express & Priority Mail Contract 122 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2021–60, CP2021–62.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–29312 Filed 1–6–21; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Parcel Select Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* January 7, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 21, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Parcel Select Contract 45 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2021–51, CP2021–53.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–29305 Filed 1–6–21; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* January 7, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 28, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 686 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2021–58, CP2021–60.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–29310 Filed 1–6–21; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and Parcel Select Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* January 7, 2021.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 28, 2020, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail & Parcel Select Contract 5 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2021–56, CP2021–58.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–29308 Filed 1–6–21; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, First-Class Package Service, and Parcel Select Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* January 7, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 28, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail, First-Class Package Service, and Parcel Select Service Contract 8 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2021–66, CP2021–68.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–29318 Filed 1–6–21; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* January 7, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 28, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 186 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2021–57, CP2021–59.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–29309 Filed 1–6–21; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* January 7, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 21, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 184 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2021–52, CP2021–54.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–29306 Filed 1–6–21; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* January 7, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 28, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 687 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2021–64, CP2021–66.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–29316 Filed 1–6–21; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* January 7, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 28, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 187 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2021–61, CP2021–63.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–29313 Filed 1–6–21; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Board of Governors; Sunshine Act Meeting

DATE AND TIME: January 14, 2021, at 3:00 p.m.

PLACE: Potomac, MD.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

Thursday, January 14, 2021, at 3:00 p.m.

1. Strategic Items.
2. Administrative Items.

GENERAL COUNSEL CERTIFICATION: The General Counsel of the United States Postal Service has certified that the meeting may be closed under the Government in the Sunshine Act.

CONTACT PERSON FOR MORE INFORMATION: Michael J. Elston, Secretary of the Board, U.S. Postal Service, 475 L'Enfant Plaza SW, Washington, DC 20260–1000. Telephone: (202) 268–4800.

Michael J. Elston,

Secretary.

[FR Doc. 2021–00117 Filed 1–5–21; 4:15 pm]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* January 7, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 21, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 185 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2021–53, CP2021–55.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–29307 Filed 1–6–21; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, & First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* January 7, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 28, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail, & First-Class Package Service Contract 73 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2021–59, CP2021–61.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–29311 Filed 1–6–21; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* January 7, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 28, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 189 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2021–65, CP2021–67.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–29317 Filed 1–6–21; 8:45 am]

BILLING CODE 7710–12–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2020–0066]

Notice on Penalty Inflation Adjustments for Civil Monetary Penalties

AGENCY: Social Security Administration.

ACTION: Notice announcing updated penalty inflation adjustments for civil monetary penalties for 2021.

SUMMARY: The Social Security Administration is giving notice of its updated maximum civil monetary penalties. These amounts are effective from January 15, 2021 through January 14, 2022. These figures represent an annual adjustment for inflation. The updated figures and notification are required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

FOR FURTHER INFORMATION CONTACT: David Rodriguez, Senior Counsel, Room 3–ME–1, 6401 Security Boulevard, Baltimore, MD 21235–6401, 410–965–3498. For information on eligibility or filing for benefits, call the Social Security Administration's national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit the Social Security Administration's internet site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION: On June 27, 2016, pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act),[1] we published an interim final rule to adjust the level of civil monetary penalties (CMP) under Sections 1129 and 1140 of the Social Security Act, 42 U.S.C. 1320a–8 and 1320b–10, respectively, with an initial ''catch-up'' adjustment effective August 1, 2016.[2] We announced in the interim final rule that for any future adjustments, we would publish a notice in the **Federal Register** to announce the new amounts. The annual inflation adjustment in subsequent years must be a cost-of-living adjustment based on any increases in the October Consumer Price Index for All Urban Consumers (CPI–U) (not seasonally adjusted) each year.[3] Inflation adjustment increases must be rounded to the nearest multiple of $1.[4] We last updated the maximum penalty amounts effective January 15, 2020.[5] Based on Office of Management and Budget (OMB) guidance,[6] the information below serves as public notice of the new maximum penalty amounts for 2021. The adjustment results in the following new maximum penalties, which will be effective as of January 15, 2021.

Section 1129 CMPs (42 U.S.C. 1320a–8):

$8,116.00 (current maximum per violation for fraud facilitators in a position of trust) × 1.01182 (OMB-issued inflationary adjustment multiplier) = $8,211.93. When rounded to the nearest dollar, the new maximum penalty is $8,212.00.

$8,606.00 (current maximum per violation for all other violators) × 1.01182. (OMB-issued inflationary adjustment multiplier) = $8,707.72. When rounded to the nearest dollar, the new maximum penalty is $8,708.00.

Section 1140 CMPs (42 U.S.C. 1320b–10):

$10,705.00 (current maximum per violation for all violations other than broadcast or telecasts) × 1.01182 (OMB-issued inflationary adjustment multiplier) = $10,831.53. When rounded to the nearest dollar, the new maximum penalty is $10,832.00.

$53,524.00 (current maximum per violative broadcast or telecast) × 1.01182 (OMB-issued inflationary adjustment multiplier) = $54,156.65. When rounded to the nearest dollar, the new maximum penalty is $54,157.00.

Gail S. Ennis,

Inspector General, Social Security Administration.

[FR Doc. 2021–00007 Filed 1–6–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2020–0177]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel JAGUAR SHARK (Motor Yacht); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is

[1] *See https://www.congress.gov/bill/114th-congress/house-bill/1314/text. See also* 81 FR 41438, *https://www.federalregister.gov/documents/2016/06/27/2016-13241/penalty-inflation-adjustments-for-civil-money-penalties.*

[2] *See* 81 FR 41438, *https://www.federalregister.gov/documents/2016/06/27/2016-13241/penalty-inflation-adjustments-for-civil-money-penalties.*

[3] *See* OMB Memorandum, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, M–16–06, p. 1 (February 24, 2016), *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2016/m-16-06.pdf. See also* 81 FR 41438, *https://www.federalregister.gov/documents/2016/06/27/2016-13241/penalty-inflation-adjustments-for-civil-money-penalties.*

[4] OMB Memorandum, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, M–16–06, p. 3 (February 24, 2016), *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2016/m-16-06.pdf. See also* 81 FR 41438, *https://www.federalregister.gov/documents/2016/06/27/2016-13241/penalty-inflation-adjustments-for-civil-money-penalties.*

[5] *See* 85 FR 1369, *https://www.federalregister.gov/documents/2020/01/10/2020-00236/notice-on-penalty-inflation-adjustments-for-civil-monetary-penalties.*

[6] *See* OMB Memorandum, Implementation of Penalty Inflation Adjustments for 2021, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements of 2015, M–21–10 (December 23, 2020), *https://www.whitehouse.gov/wp-content/uploads/2020/12/M-21-10.pdf.*

authorized to grant waivers of the U.S.-build requirements of the coastwise trade laws to allow the carriage of no more than twelve passengers for hire on vessels, which are three years old or more. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before February 8, 2021.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2020–0177 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2020–0177 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2020–0177, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Russell Haynes, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone 202–366–3157, Email *Russell.Haynes@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel JAGUAR SHARK is:

—*Intended Commercial Use of Vessel:* ''Live aboard Charter boat.''
—*Geographic Region Including Base of Operations:* ''Alaska (Excluding Waters in SE Alaska)'' (Base of Operations: Homer, Alaska)
—*Vessel Length and Type:* 41' Motor Yacht

The complete application is available for review identified in the DOT docket as MARAD–2020–0177 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the vessel name, state the commenter's interest in the waiver application, and address the waiver criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov.,* keyword search MARAD–2020–0177 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Department of Transportation, Maritime Administration, Office of Legislation and Regulations, MAR–225, W24–220, 1200 New Jersey Avenue SE, Washington, DC 20590. Include a cover letter setting forth with specificity the basis for any such claim and, if possible, a summary of your submission that can be made available to the public.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

Dated: January 4, 2021.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2021–00011 Filed 1–6–21; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2020–0172]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel BALAM (Sailing Catamaran); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirements of the coastwise trade laws to allow the carriage of no more than twelve passengers for hire on vessels, which are three years old or more. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before February 8, 2021.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2020–0172 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search

MARAD–2020–0172 and follow the instructions for submitting comments.

• *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2020–0172, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Russell Haynes, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone 202–366–3157, Email *Russell.Haynes@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel BALAM is:

—*Intended Commercial Use of Vessel:* ''Sailing lessons and charters''
—*Geographic Region Including Base of Operations:* ''CA'' (Base of Operations: San Diego, CA)
—*Vessel Length and Type:* 50' Sailing Catamaran

The complete application is available for review identified in the DOT docket as MARAD–2020–0172 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the vessel name, state the commenter's interest in the waiver application, and address the waiver criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov.,* keyword search MARAD–2020–0172 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Department of Transportation, Maritime Administration, Office of Legislation and Regulations, MAR–225, W24–220, 1200 New Jersey Avenue SE, Washington, DC 20590. Include a cover letter setting forth with specificity the basis for any such claim and, if possible, a summary of your submission that can be made available to the public.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

Dated: January 4, 2021.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2021–00008 Filed 1–6–21; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2020–0176]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel PACIFIC CEREMONY (Motor Vessel); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirements of the coastwise trade laws to allow the carriage of no more than twelve passengers for hire on vessels, which are three years old or more. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before February 8, 2021.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2020–0176 by any one of the following methods:

• *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2020–0176 and follow the instructions for submitting comments.

• *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2020–0176, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you

if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Russell Haynes, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone 202–366–3157, Email *Russell.Haynes@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel PACIFIC CEREMONY is:

—*Intended Commercial Use of Vessel:* ''Private Vessel Charters, Passengers Only''

—*Geographic Region Including Base of Operations:* ''California, Oregon, Washington, and Alaska (excluding waters in Southeastern Alaska).'' (Base of Operations: Seattle, WA)

—*Vessel Length and Type:* 63.3' Motor Vessel

The complete application is available for review identified in the DOT docket as MARAD–2020–0176 have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the vessel name, state the commenter's interest in the waiver application, and address the waiver criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov.,* keyword search MARAD–2020–0176 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Department of Transportation, Maritime Administration, Office of Legislation and Regulations, MAR–225, W24–220, 1200 New Jersey Avenue SE, Washington, DC 20590. Include a cover letter setting forth with specificity the basis for any such claim and, if possible, a summary of your submission that can be made available to the public.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

Dated: January 4, 2021.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2021–00013 Filed 1–6–21; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2020–0174]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel SHARED ADVENTURE II (Power Catamaran); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirements of the coastwise trade laws to allow the carriage of no more than twelve passengers for hire on vessels, which are three years old or more. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before February 8, 2021.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2020–0174 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2020–0174 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2020–0174, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Russell Haynes, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey

Avenue SE, Room W23–461, Washington, DC 20590. Telephone 202–366–3157, Email *Russell.Haynes@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel SHARED ADVENTURE II is:

—*Intended Commercial Use of Vessel:* ''Carrying passengers for hire''
—*Geographic Region Including Base of Operations:* ''Florida, Alabama, Mississippi, Louisiana, Texas, Georgia, South Carolina, North Carolina, Virginia, Pennsylvania, Maryland, Delaware, New Jersey, New York'' (Base of Operations: Fort Lauderdale, FL)
—*Vessel Length and Type:* 51' power catamaran

The complete application is available for review identified in the DOT docket as MARAD–2020–0174 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the vessel name, state the commenter's interest in the waiver application, and address the waiver criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov.,* keyword search MARAD–2020–0174 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Department of Transportation, Maritime Administration, Office of Legislation and Regulations, MAR–225, W24–220, 1200 New Jersey Avenue SE, Washington, DC 20590. Include a cover letter setting forth with specificity the basis for any such claim and, if possible, a summary of your submission that can be made available to the public.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

Dated: January 4, 2021.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2021–00014 Filed 1–6–21; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2020–0173]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel ISLAND REEF (Motor Vessel); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirements of the coastwise trade laws to allow the carriage of no more than twelve passengers for hire on vessels, which are three years old or more. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before February 8, 2021.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2020–0173 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2020–0173 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2020–0173, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Russell Haynes, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone 202–366–3157, Email *Russell.Haynes@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel ISLAND REEF is:

—*Intended Commercial Use of Vessel:* ''Snorkel, Sport Fishing, Scuba Tours''
—*Geographic Region Including Base of Operations:* ''Puerto Rico'' (Base of Operations: Fajardo, PR)

—*Vessel Length and Type:* 34' Motor Vessel

The complete application is available for review identified in the DOT docket as MARAD–2020–0173 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the vessel name, state the commenter's interest in the waiver application, and address the waiver criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov.,* keyword search MARAD–2020–0173 or visit the Docket Management Facility (see ADDRESSES for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Department of Transportation, Maritime Administration, Office of Legislation and Regulations, MAR–225, W24–220, 1200 New Jersey Avenue SE, Washington, DC 20590. Include a cover letter setting forth with specificity the basis for any such claim and, if possible, a summary of your submission that can be made available to the public.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

Dated: January 4, 2021.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2021–00010 Filed 1–6–21; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2020–0171]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel HECHT YEAH (Motor Vessel); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirements of the coastwise trade laws to allow the carriage of no more than twelve passengers for hire on vessels, which are three years old or more. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before February 8, 2021.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2020–0171 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2020–0171 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2020–0171, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Russell Haynes, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone 202–366–3157, Email *Russell.Haynes@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel HECHT YEAH is:

—*Intended Commercial Use of Vessel:* ''Bareboat Charter''

—*Geographic Region Including Base of Operations:* ''Puerto Rico'' (Base of Operations: Fajardo, Puerto Rico)

—*Vessel Length and Type:* 73.3' Motor Vessel

The complete application is available for review identified in the DOT docket as MARAD–2020–0171 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments

should refer to the vessel name, state the commenter's interest in the waiver application, and address the waiver criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov.,* keyword search MARAD–2020–0171 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Department of Transportation, Maritime Administration, Office of Legislation and Regulations, MAR–225, W24–220, 1200 New Jersey Avenue SE, Washington, DC 20590. Include a cover letter setting forth with specificity the basis for any such claim and, if possible, a summary of your submission that can be made available to the public.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

Dated: January 4, 2021.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2021–00009 Filed 1–6–21; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2020–0178]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel MAYAN STAR (Sailboat); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirements of the coastwise trade laws to allow the carriage of no more than twelve passengers for hire on vessels, which are three years old or more. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before February 8, 2021.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2020–0178 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2020–0178 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2020–0178, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Russell Haynes, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone 202–366–3157, Email *Russell.Haynes@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant, the intended service of the vessel MAYAN STAR is:

—*Intended Commercial Use of Vessel:* ''Bare Boat Charters''
—*Geographic Region Including Base of Operations:* ''California'' (Base of Operations: Marina Del Rey, CA)
—*Vessel Length and Type:* 51.0' Sailboat

The complete application is available for review identified in the DOT docket as MARAD–2020–0178 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the vessel name, state the commenter's interest in the waiver application, and address the waiver criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach

additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov.,* keyword search MARAD–2020–0178 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Department of Transportation, Maritime Administration, Office of Legislation and Regulations, MAR–225, W24–220, 1200 New Jersey Avenue SE, Washington, DC 20590. Include a cover letter setting forth with specificity the basis for any such claim and, if possible, a summary of your submission that can be made available to the public.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

* * * * *

Dated: January 4, 2021.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.

Secretary, Maritime Administration.

[FR Doc. 2021–00012 Filed 1–6–21; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF THE TREASURY

Interest Rate Paid on Cash Deposited To Secure U.S. Immigration and Customs Enforcement Immigration Bonds

AGENCY: Departmental Offices, Treasury.

ACTION: Notice.

SUMMARY: For the period beginning January 1, 2021, and ending on March 31, 2021, the U.S. Immigration and Customs Enforcement Immigration Bond interest rate is .09 per centum per annum.

DATES: Rates are applicable January 1, 2021 to March 31, 2021.

ADDRESSES: Comments or inquiries may be mailed to Will Walcutt, Supervisor, Funds Management Branch, Funds Management Division, Fiscal Accounting, Bureau of the Fiscal Services, Parkersburg, West Virginia 26106–1328.

You can download this notice at the following internet addresses: *http://www.treasury.gov* or *http://www.federalregister.gov.*

FOR FURTHER INFORMATION CONTACT: Ryan Hanna, Manager, Funds Management Branch, Funds Management Division, Fiscal Accounting, Bureau of the Fiscal Service, Parkersburg, West Virginia 261006–1328 (304) 480–5120; Will Walcutt, Supervisor, Funds Management Branch, Funds Management Division, Fiscal Accounting, Bureau of the Fiscal Services, Parkersburg, West Virginia 26106–1328, (304) 480–5117.

SUPPLEMENTARY INFORMATION: Federal law requires that interest payments on cash deposited to secure immigration bonds shall be ''at a rate determined by the Secretary of the Treasury, except that in no case shall the interest rate exceed 3 per centum per annum.'' 8 U.S.C. 1363(a). Related Federal regulations state that ''Interest on cash deposited to secure immigration bonds will be at the rate as determined by the Secretary of the Treasury, but in no case will exceed 3 per centum per annum or be less than zero.'' 8 CFR 293.2. Treasury has determined that interest on the bonds will vary quarterly and will accrue during each calendar quarter at a rate equal to the lesser of the average of the bond equivalent rates on 91-day Treasury bills auctioned during the preceding calendar quarter, or 3 per centum per annum, but in no case less than zero. [FR Doc. 2015–18545] In addition to this Notice, Treasury posts the current quarterly rate in Table 2b—Interest Rates for Specific Legislation on the TreasuryDirect website.

The Deputy Assistant Secretary for Public Finance, Gary Grippo, having reviewed and approved this document, is delegating the authority to electronically sign this document to Heidi Cohen, **Federal Register** Liaison for the Department, for purposes of publication in the **Federal Register**.

Heidi Cohen,

Federal Register Liaison.

[FR Doc. 2021–00055 Filed 1–6–21; 8:45 am]

BILLING CODE 4810–AS–P

DEPARTMENT OF VETERANS AFFAIRS

Reimbursement for Caskets and Urns for Burial of Unclaimed Remains in a National Cemetery or a VA-Funded State or Tribal Veterans' Cemetery

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Department of Veterans Affairs (VA) is updating the monetary reimbursement rates for caskets and urns purchased for interment in a VA national cemetery or a VA-funded state or tribal veterans' cemetery of veterans who die with no known next of kin and where there are insufficient resources for furnishing a burial container. The purpose of this notice is to notify interested parties of the rates that will apply to reimbursement claims that occur during calendar year (CY) 2021.

DATES: The applicable date of this notice is January 1, 2021.

FOR FURTHER INFORMATION CONTACT: Jerry Sowders, National Cemetery Administration, Department of Veterans Affairs, 4850 Lemay Ferry Road, Saint Louis, MO, 63129. The telephone number is 314–461–6216. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: Section 2306(f) of title 38, United States Code, authorizes VA's National Cemetery Administration to furnish a casket or urn for interment in a VA national cemetery or a VA-funded state or tribal veterans' cemetery of the unclaimed remains of veterans for whom VA cannot identify a next of kin, and determines that sufficient financial resources for the furnishing of a casket or urn for burial are not available. VA implemented regulations to administer

this authority as a reimbursement benefit in 38 CFR 38.628.

Reimbursement for a claim received in any CY will not exceed the average cost of a 20-gauge metal casket or a durable plastic urn during the fiscal year (FY) preceding the CY of the claim. Average costs are determined by market analysis for 20-gauge metal caskets, designed to contain human remains, with a gasketed seal, and external rails or handles. The same analysis is completed for durable plastic urns, designed to contain human remains, which include a secure closure to contain the cremated remains.

Using this method of computation, in FY 2020, the average costs were determined to be $1,984.00 for caskets and $145.00 for urns. Accordingly, the maximum reimbursement rates payable for qualifying interments occurring during

CY 2021 are $1,984.00 for caskets and $145.00 for urns.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Brooks D. Tucker, Assistant Secretary for Congressional and Legislative Affairs, Performing the Delegable Duties of the Chief of Staff, Department of Veterans Affairs, approved this document on December 31, 2020, for publication.

Luvenia Potts,

Regulation Development Coordinator, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

[FR Doc. 2021–00025 Filed 1–6–21; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 86 Thursday,
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Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 10
Regulations Governing Take of Migratory Birds; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 10

[Docket No. FWS–HQ–MB–2018–0090; FF09M22000–201–FXMB1231090BPP0]

RIN 1018–BD76

Regulations Governing Take of Migratory Birds

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS, Service, we), define the scope of the Migratory Bird Treaty Act (MBTA or Act) as it applies to conduct resulting in the injury or death of migratory birds protected by the Act. We determine that the MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same, apply only to actions directed at migratory birds, their nests, or their eggs.

DATES: This rule is effective February 8, 2021.

ADDRESSES: Public comments submitted on the proposed rule and supplementary documents to the proposed rule, including the environmental impact statement and regulatory impact analysis, may be found at the Federal rulemaking portal *http://www.regulations.gov* in Docket No. FWS–HQ–MB–2018–0090.

FOR FURTHER INFORMATION CONTACT: Jerome Ford, Assistant Director, Migratory Birds, at 202–208–1050.

SUPPLEMENTARY INFORMATION:

Background

The Migratory Bird Treaty Act (MBTA; 16 U.S.C. 703 *et seq.*) was enacted in 1918 to help fulfill the United States' obligations under the 1916 ''Convention between the United States and Great Britain for the protection of Migratory Birds.'' 39 Stat. 1702 (Aug. 16, 1916) (ratified Dec. 7, 1916) (Migratory Bird Treaty). The list of applicable migratory birds protected by the MBTA is currently codified in title 50 of the Code of Federal Regulations at 50 CFR 10.13. In its current form, section 2(a) of the MBTA provides in relevant part that, unless permitted by regulations, it is unlawful:

> at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof. . . .

16 U.S.C. 703(a).

Section 3(a) of the MBTA authorizes and directs the Secretary of the Interior to ''adopt suitable regulations'' allowing ''hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof'' while considering (''having due regard to'') temperature zones and ''distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds.'' 16 U.S.C. 704(a). Section 3(a) also requires the Secretary to ''determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions [listed in section 2 between the United States and Canada, Mexico, Russia, and Japan]'' to adopt such regulations allowing these otherwise-prohibited activities. *Id.; see also* Convention between the United States and Great Britain for the Protection of Migratory Birds, U.S.-Gr. Brit., Aug. 16, 1916, 39 Stat. 1702, amended by the Protocol between the United States and Canada Amending the 1916 Convention for the Protection of Migratory Birds in Canada and the United States, U.S.-Can., Dec. 14, 1995, T.I.A.S. 12721; Convention between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals, U.S.-Mex., Feb. 7, 1936, 50 Stat. 1311, and Agreement Supplementing the Agreement of February 7, 1936, U.S.-Mex., Mar. 10, 1972, 23 U.S.T. 260; Convention between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and their Environment, U.S.-Japan, Mar. 4, 1972, 25 U.S.T. 3329; and Convention between the United States of American and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and their Environment, U.S.-U.S.S.R., Nov. 19, 1976, 29 U.S.T. 4647.

On December 22, 2017, the Principal Deputy Solicitor of the Department of the Interior, exercising the authority of the Solicitor pursuant to Secretary's Order 3345, issued a legal opinion, M–37050, ''The Migratory Bird Treaty Act Does Not Prohibit Incidental Take'' (M–37050 or M-Opinion). The Solicitor's interpretation marked a change from prior U.S. Fish and Wildlife Service interpretations and an earlier Solicitor's Opinion, M–37041, ''Incidental Take Prohibited Under the Migratory Bird Treaty Act.'' The Office of the Solicitor performs the legal work for the Department of the Interior, including the U.S. Fish and Wildlife Service (hereafter ''Service''). The Service is the Federal agency delegated the primary responsibility for managing migratory birds.

M–37050 thoroughly examined the text, history, and purpose of the MBTA and concluded that the MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to actions that are directed at migratory birds, their nests, or their eggs. On August 11, 2020, a district court vacated M–37050, holding that the language of the MBTA plainly prohibits incidental take, despite multiple courts failing to agree on how to interpret the relevant statutory language. *Natural Res. Defense Council* v. *U.S. Dep't of the Interior,* 2020 WL 4605235 (S.D.N.Y.). The Department of Justice filed a notice of appeal on October 8, 2020. We respectfully disagree with the district court's decision and have addressed the court's findings where appropriate in the discussion below. Moreover, M–37050 is consistent with the Fifth Circuit appellate court decision in *United States* v. *CITGO Petroleum Corp.,* 801 F.3d 477 (5th Cir. 2015), which held that the MBTA does not prohibit incidental take.

This rule addresses the Service's responsibilities under the MBTA. Consistent with the language and legislative history of the MBTA, as amended, and relevant case law, the Service defines the scope of the MBTA's prohibitions to reach only actions directed at migratory birds, their nests, or their eggs.

Provisions of the Final Rule

Scope of the Migratory Bird Treaty Act

As a matter of both law and policy, the Service hereby adopts the conclusion of M–37050 in a regulation defining the scope of the MBTA. M–37050 is available on the internet at the Federal eRulemaking Portal: *http://www.regulations.gov* in Docket No. FWS–HQ–MB–2018–0090 and at *https://www.doi.gov/solicitor/opinions.*

The text and purpose of the MBTA indicate that the MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same only criminalize actions that are specifically directed at migratory birds, their nests, or their eggs.

The relevant portion of the MBTA reads, ''it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird, [or] any part, nest, or egg of any such bird.'' 16 U.S.C. 703(a). Of the five referenced verbs, three—pursue, hunt, and capture—unambiguously require an action that is directed at migratory birds, nests, or eggs. To wit, according to the entry for each word in a contemporary dictionary:

- Pursue means ''[t]o follow with a view to overtake; to follow eagerly, or with haste; to chase.'' Webster's Revised Unabridged Dictionary 1166 (1913);
- Hunt means ''[t]o search for or follow after, as game or wild animals; to chase; to pursue for the purpose of catching or killing.'' *Id.* at 713; and
- Capture means ''[t]o seize or take possession of by force, surprise, or stratagem; to overcome and hold; to secure by effort.'' *Id.* at 215.

Thus, one does not passively or accidentally pursue, hunt, or capture. Rather, each requires a deliberate action specifically directed at achieving a goal.

By contrast, the verbs ''kill'' and ''take'' are ambiguous in that they could refer to active or passive conduct, depending on the context. *See id.* at 813 (''kill'' may mean the more active ''to put to death; to slay'' or serve as the general term for depriving of life); *id.* at 1469 (''take'' has many definitions, including the more passive ''[t]o receive into one's hold, possession, etc., by a voluntary act'' or the more active ''[t]o lay hold of, as in grasping, seizing, catching, capturing, adhering to, or the like; grasp; seize;—implying or suggesting the use of physical force'').

Any ambiguity inherent in the statute's use of the terms ''take'' and ''kill'' is resolved by applying established rules of statutory construction. First and foremost, when any words ''are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar.'' Antonin Scalia & Bryan A. Garner, Reading the Law: The interpretation of Legal Texts, 195 (2012); *see also Third Nat'l Bank* v. *Impac, Ltd.,* 432 U.S. 312, 321 (1977) (''As always, '[t]he meaning of particular phrases must be determined in context' . . . .'' (quoting *SEC* v. *Nat'l Sec., Inc.,* 393 U.S. 453, 466 (1969)); *Beecham* v. *United States,* 511 U.S. 368, 371 (1994) (the fact that ''several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well''). Section 2 of the MBTA groups together five verbs—''pursue,'' ''hunt,'' ''take,'' ''capture,'' and ''kill.'' Accordingly, the statutory construction canon of *noscitur a sociis* (''it is known by its associates'') counsels in favor of reading each verb to have a related meaning. *See Scalia & Garner* at 195 (''The canon especially holds that 'words grouped in a list should be given related meanings.''' (quoting *Third Nat'l Bank,* 432 U.S. at 322)).

Thus, when read together with the other active verbs in section 2 of the MBTA, the proper meaning is evident. The operative verbs (''pursue, hunt, take, capture, kill'') ''are all affirmative acts . . . which are directed immediately and intentionally against a particular animal—not acts or omissions that indirectly and accidentally cause injury to a population of animals.'' *Sweet Home,* 515 U.S. at 719–20 (Scalia, J., dissenting) (agreeing with the majority opinion that certain terms in the definition of the term ''take'' in the Endangered Species Act (ESA)—identical to the other prohibited acts referenced in the MBTA—refer to deliberate actions, while disagreeing that the use of the additional definitional term ''harm''—used only in the ESA—meant that ''take'' should be read more broadly to include actions not deliberately directed at covered species); *see also United States* v. *CITGO Petroleum Corp.,* 801 F.3d 477, 489 n.10 (5th Cir. 2015) (''Even if 'kill' does have independent meaning [from 'take'], the Supreme Court, interpreting a similar list in the [Endangered Species Act], concluded that the terms pursue, hunt, shoot, wound, kill, trap, capture, and collect, generally refer to deliberate actions''); *cf. Sweet Home,* 515 U.S. at 698 n.11 (Congress's decision to specifically define ''take'' in the ESA obviated the need to define its common-law meaning). We explain the meaning of the terms ''take'' and ''kill'' in the context of section 2 in turn below.

The notion that ''take'' refers to an action directed immediately against a particular animal is supported by the use of the word ''take'' in the common law. As the Supreme Court has instructed, ''absent contrary indications, Congress intends to adopt the common law definition of statutory terms.'' *United States* v. *Shabani,* 513 U.S. 10, 13 (1994). As Justice Scalia noted, ''the term ['take'] is as old as the law itself.'' *Sweet Home,* 515 U.S. at 717 (Scalia, J., dissenting). For example, the Digest of Justinian places ''take'' squarely in the context of acquiring dominion over wild animals, stating:

> [A]ll the animals which can be taken upon the earth, in the sea, or in the air, that is to say, wild animals, belong to those who take them. . . . Because that which belongs to nobody is acquired by the natural law by the person who first possesses it. We do not distinguish the acquisition of these wild beasts and birds by whether one has captured them on his own property [or] on the property of another; but he who wishes to enter into the property of another to hunt can be readily prevented if the owner knows his purpose to do so.

Geer v. *Connecticut,* 161 U.S. 519, 523 (1896) (quoting Digest, Book 41, Tit. 1, De Adquir. Rer. Dom.). Likewise, Blackstone's Commentaries provide:

> A man may lastly have a qualified property in animals *feroe naturoe, propter privilegium,* that is, he may have the privilege of hunting, taking and killing them in exclusion of other persons. Here he has a transient property in these animals usually called game so long as they continue within his liberty, and may restrain any stranger from taking them therein; but the instant they depart into another liberty, this qualified property ceases.

Id. at 526–27 (1896) (quoting 2 Blackstone Commentary 410).

Dictionary definitions of the term ''take'' at the time of MBTA enactment were consistent with this historical use in the context of hunting and capturing wildlife. For example, Webster's defined ''take'' to comprise various actions directed at reducing a desired object to personal control: ''to lay hold of; to seize with the hands, or otherwise; to grasp; to get into one's hold or possession; to procure; to seize and carry away; to convey.'' Webster's Revised Unabridged Dictionary 1469 (1913).

Thus, under common law ''[t]o 'take,' when applied to wild animals, means to reduce those animals, by killing or capturing, to human control.'' *Sweet Home,* 515 U.S. at 717 (Scalia, J., dissenting); *see also CITGO,* 801 F.3d at 489 (''Justice Scalia's discussion of 'take' as used in the Endangered Species Act is not challenged here by the government . . . because Congress gave 'take' a broader meaning for that statute.''). As is the case with the ESA, in the MBTA, ''[t]he taking prohibition is only part of the regulatory plan . . ., which covers all stages of the process by which protected wildlife is reduced to man's dominion and made the object of profit,'' and, as such, is ''a term of art deeply embedded in the statutory and common law concerning wildlife'' that ''describes a class of acts (not omissions) done directly and intentionally (not indirectly and by accident) to particular animals (not populations of animals).'' *Sweet Home,* 515 U.S. at 718 (Scalia, J., dissenting). The common-law meaning of the term ''take'' is particularly important here because, unlike the ESA, which specifically defines the term

''take,'' the MBTA does not define ''take''—instead it includes the term in a list of similar actions. Thus, the *Sweet Home* majority's ultimate conclusion that Congress's decision to define ''take'' in the ESA obviated the need to divine its common-law meaning is inapplicable here. *See id.* at 697, n.10. Instead, the opposite is true. Congress intended ''take'' to be read consistent with its common law meaning—to reduce birds to human control.

It is also reasonable to conclude that the MBTA's prohibition on killing is similarly limited to deliberate acts that result in bird deaths. *See Newton County Wildlife Ass'n* v. *U.S. Forest Serv.,* 113 F.3d 110, 115 (8th Cir. 1997) (''MBTA's plain language prohibits conduct directed at migratory birds. . . . [T]he ambiguous terms 'take' and 'kill' in 16 U.S.C. 703 mean 'physical conduct of the sort engaged in by hunters and poachers. . . .''' (quoting *Seattle Audubon Soc'y* v. *Evans,* 952 F.2d 297, 302 (9th Cir. 1991))); *United States* v. *CITGO Petroleum Corp.,* 801 F.3d 477, 489 n.10 (5th Cir. 2015) (''there is reason to think that the MBTA's prohibition on 'killing' is similarly limited to deliberate acts that effect bird deaths'').

By contrast, the *NRDC* court interpreted ''kill'' more expansively, holding that, in combination with the phrase ''by any means or in any manner,'' the MBTA unambiguously prohibits incidental killing. The court centered its reading of section 2 around its conclusion that any means of killing migratory birds is prohibited, whether the killing is the result of an action directed at a migratory bird or wholly the result of passive conduct. While the term ''kill'' can certainly be interpreted broadly in a general sense, we disagree that ''kill'' should take on its most expansive meaning in the context of section 2 of the MBTA.

Additionally, the *NRDC* court found no meaningful difference between active and passive definitions of the term ''kill.'' The court focused on one possible reading of ''kill,'' meaning ''to deprive of life,'' which could be construed as either active or passive conduct. However, the term ''kill'' can be read purely as an active verb, meaning, ''to put to death; to slay.'' When contrasted with the more passive definition as the general term for depriving of life, the difference is clear. Focusing on that difference and reading the term ''kill'' in relation to the other prohibited actions in section 2 before it, there is a compelling reason to read the term ''kill'' in an active sense. That is, all the words before the word ''kill'' are active verbs. Thus, the *NRDC* court erred in conflating the active and passive definitions of the word ''kill'' and finding no meaningful difference between the two. The cases cited by the court in footnote 13 interpreting the term ''kill'' do so in the context of criminal homicide, which unsurprisingly interprets ''kill'' in the broader sense. These cases are also inapposite because they do not interpret the term ''kill'' in relation to adjacent, related terms that could be read to limit effectively the scope of ''kill'' in its general sense. Instead, because the term ''kill'' is ambiguous in the context of section 2, we must read ''kill'' along with the preceding terms and conclude they are all active terms describing active conduct.

The *NRDC* district court predicated its broad reading of ''kill'' primarily on the notion that a narrower reading would read the term out of the Act by depriving it of independent meaning. The court reasoned that it is difficult to conceive of an activity where ''kill'' applies, but ''hunt'' and ''take'' do not. To the contrary, there are several situations where ''kill'' retains independent meaning. For example, consistent with a product's usage as authorized by the Environmental Protection Agency and based on its intended usage, a farmer could spread poisoned bait to kill birds depredating on her crops. That action is directed at birds but does not ''take'' them in the common law sense that ''take'' means to reduce wildlife to human physical control, and it could also not be fairly characterized as hunting, pursuing, or capturing them either. Instead, the action was directed at protecting the farmer's crops from the birds, but not physically possessing or controlling the birds in any way other than killing them. Likewise, a county road and highway department could use machinery to destroy bird nests under a bridge. Any chicks within those nests would likely be destroyed killing those chicks, but the maintenance workers would not ''take'' them in the common law sense. Moreover, as noted above, at least two appellate courts have specifically found that the terms ''take'' and ''kill'' are ambiguous and apply to physical conduct of hunters and poachers. *Newton County; Seattle Audubon.*

This conclusion is also supported by the Service's longstanding implementing regulations, which define ''take'' to mean ''to pursue, hunt, shoot, wound, kill, trap, capture, or collect'' or attempt to do the same. 50 CFR 10.12. The component actions of ''take'' involve direct actions to reduce animals to human control. As such, they ''reinforce[ ] the dictionary definition, and confirm[ ] that 'take' does not refer to accidental activity or the unintended results of passive conduct.'' *Brigham Oil & Gas,* 840 F. Supp. 2d at 1209.

To support an argument that the terms ''take'' and ''kill'' should be read expansively to include incidental conduct, a number of courts including the *NRDC* court, as well as the prior M-Opinion, focused on the MBTA's direction that a prohibited act can occur ''at any time, by any means, in any manner'' to support the conclusion that the statute prohibits any activity that results in the death of a bird, which would necessarily include incidental take. However, the quoted statutory language does not change the nature of those prohibited acts and simply clarifies that activities directed at migratory birds, such as hunting and poaching, are prohibited whenever and wherever they occur and whatever manner is applied, be it a shotgun, a bow, or some other creative approach to deliberately taking birds. *See generally CITGO,* 801 F.3d at 490 (''The addition of adverbial phrases connoting 'means' and 'manner,' however, does not serve to transform the nature of the activities themselves. For instance, the manner and means of hunting may differ from bow hunting to rifles, shotguns, and air rifles, but hunting is still a deliberately conducted activity. Likewise, rendering all-inclusive the manner and means of 'taking' migratory birds does not change what 'take' means, it merely modifies the mode of take.'').

The *NRDC* court countered that referencing different manners of taking birds does not give effect to the ''by any means and in any manner'' language, but instead clarifies the term ''hunt'' because the referenced activities are primarily different means of hunting. However, other actions such as poisoning bait to control birds depredating on crops would ''kill'' birds outside the context of hunting. Many other methods of hunting, capturing, pursuing, taking, or killing birds no doubt exist, and that is precisely the point. Congress used the operative language to ensure that any method employed could amount to a violation of the MBTA, so long as it involves one of the enumerated prohibited actions and is directed at migratory birds.

The prior Solicitor's Opinion, M–37041, took a different tack from the *NRDC* court and assumed that because the criminal misdemeanor provision of the MBTA is a strict-liability crime, meaning that no *mens rea* or criminal intent is required for a violation to have taken place, *any* act that takes or kills a bird must be covered as long as the act

results in the death of a bird. In making that assumption, M–37041 improperly ignored the meaning and context of the actual acts prohibited by the statute. Instead, the opinion presumed that the lack of a mental state requirement for a misdemeanor violation of the MBTA equated to reading the prohibited acts ''kill'' and ''take'' as broadly applying to actions not specifically directed at migratory birds, so long as the result is their death or injury. However, the relevant acts prohibited by the MBTA are voluntary acts directed at killing or reducing an animal to human control, such as when a hunter shoots a protected bird causing its death. The key remains that the actor was engaged in an activity the object of which was to kill or render a bird subject to human control.

By contrast, liability fails to attach to actions that are not directed toward rendering an animal subject to human control. Common examples of such actions include driving a car, allowing a pet cat to roam outdoors, or erecting a windowed building. All of these actions could foreseeably result in the deaths of protected birds, and all would be violations of the MBTA under the now-withdrawn M-Opinion if they did in fact result in deaths of protected birds, yet none of these actions have as their object rendering any animal subject to human control. Because no ''take'' has occurred within the meaning of the MBTA, the strict-liability provisions of the Act would not be triggered.

The prior M-Opinion posited that amendments to the MBTA imposing mental state requirements for specific offenses were only necessary if no mental state is otherwise required. However, the conclusion that the taking and killing of migratory birds is a strict-liability crime does not answer the separate question of what acts are criminalized under the statute. The Fifth Circuit in *CITGO* stated, ''we disagree that because misdemeanor MBTA violations are strict liability crimes, a 'take' includes acts (or omissions) that indirectly or accidentally kill migratory birds.'' The court goes on to note that ''[a] person whose car accidentally collided with the bird . . . has committed no act 'taking' the bird for which he could be held strictly liable. Nor do the owners of electrical lines 'take' migratory birds who run into them. These distinctions are inherent in the nature of the word 'taking' and reveal the strict liability argument as a non-sequitur.'' 801 F.3d at 493. Similarly, in *Mahler* v. *U.S. Forest Serv.,* 927 F. Supp. 1559 (S.D. Ind. 1996), the court described the interplay between activities that are specifically directed at birds and the strict liability standard of the MBTA:

> [A comment in the legislative history] in favor of strict liability does not show any intention on the part of Congress to extend the scope of the MBTA beyond hunting, trapping, poaching, and trading in birds and bird parts to reach any and all human activity that might cause the death of a migratory bird. Those who engage in such activity and who accidentally kill a protected migratory bird or who violate the limits on their permits may be charged with misdemeanors without proof of intent to kill a *protected* bird or intent to violate the terms of a permit. That does not mean, however, that Congress intended for ''strict liability'' to apply to all forms of human activity, such as cutting a tree, mowing a hayfield, or flying a plane. The 1986 amendment and corresponding legislative history reveal only an intention to close a loophole that might prevent felony prosecutions for commercial trafficking in migratory birds and their parts.
>
> Thus, there appears to be no explicit basis in the language or the development of the MBTA for concluding that it was intended to be applied to any and all human activity that causes even unintentional deaths of migratory birds.

927 F. Supp. at 1581 (referencing S. Rep. No. 99–445, at 16 (1986), *reprinted* in 1986 U.S.C.C.A.N. 6113, 6128). Thus, limiting the range of actions prohibited by the MBTA to those that are directed at migratory birds will focus prosecutions on activities like hunting and trapping and exclude more attenuated conduct, such as lawful commercial activity, that unintentionally and indirectly results in the death of migratory birds.

The History of the MBTA

The history of the MBTA and the debate surrounding its adoption illustrate that the Act was part of Congress's efforts to regulate the hunting of migratory birds in direct response to the extreme over-hunting, largely for commercial purposes, that had occurred over the years. *See United States* v. *Moon Lake Electric Ass'n,* 45 F. Supp. 2d 1070, 1080 (D. Colo. 1999) (''the MBTA's legislative history indicates that Congress intended to regulate recreational and commercial hunting''); *Mahler,* 927 F. Supp. at 1574 (''The MBTA was designed to forestall hunting of migratory birds and the sale of their parts''). Testimony concerning the MBTA given by the Solicitor's Office for the Department of Agriculture underscores this focus:

> We people down here hunt [migratory birds]. The Canadians reasonably want some assurances from the United States that if they let those birds rear their young up there and come down here, we will preserve a sufficient supply to permit them to go back there.

Protection of Migratory Birds: Hearing on H.R. 20080 Before the House Comm. on Foreign Affairs, 64th Cong. 22–23 (1917) (statement of R.W. Williams, Solicitor's Office, Department of Agriculture). Likewise, the Chief of the Department of Agriculture's Bureau of Biological Survey noted that he ''ha[s] always had the idea that [passenger pigeons] were destroyed by overhunting, being killed for food and for sport.'' *Protection of Migratory Birds: Hearing on H.R. 20080 Before the House Comm. on Foreign Affairs,* 64th Cong. 11 (1917) (statement of E. W. Nelson, Chief Bureau of Biological Survey, Department of Agriculture).

Statements from individual Congressmen evince a similar focus on hunting. Senator Smith, ''who introduced and championed the Act . . . in the Senate,'' *Leaders in Recent Successful Fight for the Migratory Bird Treaty Act,* Bulletin—The American Game Protective Association, July 1918, at 5, explained:

> Nobody is trying to do anything here except to keep pothunters from killing game out of season, ruining the eggs of nesting birds, and ruining the country by it. Enough birds will keep every insect off of every tree in America, and if you will quit shooting them, they will do it.

55 Cong. Rec. 4816 (statement of Sen. Smith) (1917). Likewise, during hearings of the House Foreign Affairs Committee, Congressman Miller, a ''vigorous fighter, who distinguished himself in the debate'' over the MBTA, *Leaders in Recent Successful Fight for the Migratory Bird Treaty Act, Bulletin—The American Game Protective Association,* July 1918, at 5, put the MBTA squarely in the context of hunting:

> I want to assure you . . . that I am heartily in sympathy with this legislation. I want it to go through, because I am up there every fall, and I know what the trouble is. The trouble is in shooting the ducks in Louisiana, Arkansas, and Texas in the summer time, and also killing them when they are nesting up in Canada.

Protection of Migratory Birds: Hearing on H.R. 20080 Before the House Comm. on Foreign Affairs, 64th Cong. 7 (1917) (statement of Rep. Miller).

In seeking to take a broader view of congressional purpose, the *Moon Lake* court looked to other contemporary statements that cited the destruction of habitat, along with improvements in firearms, as a cause of the decline in migratory bird populations. The court even suggested that these statements, which ''anticipated application of the

MBTA to children who act 'through inadvertence' or 'through accident,'" supported a broader reading of the legislative history. *Moon Lake,* 45 F. Supp. 2d at 1080–81. Upon closer examination, these statements are instead consistent with a limited reading of the MBTA.

One such contemporary statement cited by the court is a letter from Secretary of State Robert Lansing to the President attributing the decrease in migratory bird populations to two general issues:

- Habitat destruction, described generally as "the extension of agriculture, and particularly the draining on a large scale of swamps and meadows;" and
- Hunting, described in terms of "improved firearms and a vast increase in the number of sportsmen."

Representative Baker referenced these statements during the House floor debate over the MBTA, implying that the MBTA was intended to address both issues. *Moon Lake,* 45 F. Supp. 2d at 1080–81 (quoting H. Rep. No. 65–243, at 2 (1918) (letter from Secretary of State Robert Lansing to the President)). However, Congress addressed hunting and habitat destruction in the context of the Migratory Bird Treaty through two separate acts:

- First, in 1918, Congress adopted the MBTA to address the direct and intentional killing of migratory birds;
- Second, in 1929, Congress adopted the Migratory Bird Conservation Act to "more effectively" implement the Migratory Bird Treaty by protecting certain migratory bird habitats.

The Migratory Bird Conservation Act provided the authority to purchase or rent land for the conservation of migratory birds, including for the establishment of inviolate "sanctuaries" wherein migratory bird habitats would be protected from persons "cut[ting], burn[ing], or destroy[ing] any timber, grass, or other natural growth." Migratory Bird Conservation Act, Sec. 10, 45 Stat. 1222, 1224 (1929) (codified as amended at 16 U.S.C. 715–715s). If the MBTA was originally understood to protect migratory bird habitats from incidental destruction, enactment of the Migratory Bird Conservation Act 11 years later would have been largely superfluous. Instead, the MBTA and the Migratory Bird Conservation Act are complementary: "Together, the Treaty Act in regulating hunting and possession and the Conservation Act by establishing sanctuaries and preserving natural waterfowl habitat help implement our national commitment to the protection of migratory birds." *United States* v. *North Dakota,* 650 F.2d 911, 913–14 (8th Cir. 1981), *aff'd on other grounds,* 460 U.S. 300 (1983).

Some courts have attempted to interpret a number of floor statements as supporting the notion that Congress intended the MBTA to regulate more than just hunting and poaching, but those statements reflect an intention to prohibit actions directed at birds—whether accomplished through hunting or some other means intended to kill birds directly. For example, some Members "anticipated application of the MBTA to children who act 'through inadvertence' or 'through accident.'"

> What are you going to do in a case like this: A barefoot boy, as barefoot boys sometimes do, largely through inadvertence and without meaning anything wrong, happens to throw a stone at and strikes and injures a robin's nest and breaks one of the eggs, whereupon he is hauled before a court for violation of a solemn treaty entered into between the United States of America and the Provinces of Canada.

Moon Lake, 45 F. Supp. 2d at 1081 (quoting 56 Cong. Rec. 7455 (1918) (statement of Rep. Mondell)). "[I]nadvertence" in this statement refers to the boy's *mens rea.* As the rest of the sentence clarifies, the hypothetical boy acted "without *meaning* anything wrong," not that he acted unintentionally or accidentally in damaging the robin's nest. This is reinforced by the rest of the hypothetical, which posits that the boy threw "a stone *at* and strikes and injures a robin's nest." The underlying act is directed specifically at the robin's nest. In other statements, various members of Congress expressed concern about "sportsmen," people "killing" birds, "shooting" of game birds or "destruction" of insectivorous birds, and whether the purpose of the MBTA was to favor a steady supply of "game animals for the upper classes." *Moon Lake,* 45 F. Supp. 2d at 1080–81. One Member of Congress even offered a statement that explains why the statute is not redundant in its use of the various terms to explain what activities are regulated: "[T]hey cannot hunt ducks in Indiana in the fall, because they cannot kill them. I have never been able to see why you cannot hunt, whether you kill or not. There is no embargo on hunting, at least down in South Carolina. . . ." *Id.* at 1081 (quoting 56 Cong. Rec. 7446 (1918) (statement of Rep. Stevenson)). That Congress was animated regarding potential restrictions on hunting and its impact on individual hunters is evident from even the statements relied upon as support for the conclusion that the statute reaches incidental take.

Finally, in 1918, Federal regulation of the hunting of wild birds was a highly controversial and legally fraught subject. For example, on the floor of the Senate, Senator Reed proclaimed:

> I am opposed not only now in reference to this bill [the MBTA], but I am opposed as a general proposition to conferring power of that kind upon an agent of the Government. . . .
>
> . . . Section 3 proposes to turn these powers over to the Secretary of Agriculture. . . to make it a crime for a man to shoot game on his own farm or to make it perfectly legal to shoot it on his own farm. . . .
>
> When a Secretary of Agriculture does a thing of that kind I have no hesitancy in saying that he is doing a thing that is utterly indefensible, and that the Secretary of Agriculture who does it ought to be driven from office. . . .

55 Cong. Rec. 4813 (1917) (statement of Sen. Reed).

Federal regulation of hunting was also legally tenuous at that time. Whether the Federal Government had any authority to regulate the killing or taking of any wild animal was an open question in 1918. Just over 20 years earlier, the Supreme Court in *Geer* had ruled that the States exercised the power of ownership over wild game in trust, implicitly precluding Federal regulation. *See Geer* v. *Connecticut,* 161 U.S. 519 (1896). When Congress did attempt to assert a degree of Federal jurisdiction over wild game with the 1913 Weeks-McLean Law, it was met with mixed results in the courts, leaving the question pending before the Supreme Court at the time of the MBTA's enactment. *See, e.g., United States* v. *Shaver,* 214 F. 154, 160 (E.D. Ark. 1914); *United States* v. *McCullagh,* 221 F. 288 (D. Kan. 1915). It was not until *Missouri* v. *Holland* in 1920 that the Court, relying on authority derived from the Migratory Bird Treaty (Canada Convention) under the Treaty Clause of the U.S. Constitution, definitively acknowledged the Federal Government's ability to regulate the taking of wild birds. 252 U.S. 416, 432–33 (1920).

Given the legal uncertainty and political controversy surrounding Federal regulation of intentional hunting in 1918, it is highly unlikely that Congress intended to confer authority upon the executive branch to prohibit all manner of activity that had an incidental impact on migratory birds.

The provisions of the 1916 Canada Convention authorize only certain circumscribed activities specifically directed at migratory birds. Articles II through IV of the Convention create closed periods during which hunting of migratory species covered by the Convention may be authorized only for limited purposes, such as scientific use

or propagation. Article VII allows taking to resolve conflicts under extraordinary conditions when birds become seriously injurious to agricultural or other interests, subject to permits issued by the parties under regulations prescribed by them respectively. Additionally, Article V prohibits the taking of eggs or nests of certain protected species, except for scientific and propagating purposes under regulations issued by the parties, and Article VI prohibits transport, import, and export of protected species except for scientific or propagating purposes. *See* Canada Convention, 39 Stat. 1702.

Subsequent legislative history does not undermine a limited interpretation of the MBTA, as enacted in 1918. The ''fixed-meaning canon of statutory construction directs that ''[w]ords must be given the meaning they had when the text was adopted.'' Scalia & Garner at 78. The meaning of written instruments ''does not alter. That which it meant when adopted, it means now.'' *South Carolina* v. *United States,* 199 U.S. 437, 448 (1905).

The operative language in section 2 of the MBTA has changed little since its adoption in 1918. The current iteration of the relevant language—making it unlawful for persons ''at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess'' specific migratory birds—was adopted in 1935 as part of the Mexico Treaty Act and has remained unchanged since then. *Compare* Mexico Treaty Act, 49 Stat. 1555, Sec. 3 *with* 16 U.S.C. 703(a). As with the 1916 Canada Convention, the Mexico Convention focused primarily on hunting and establishing protections for birds in the context of take and possession for commercial use. *See* Convention between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals, 50 Stat. 1311 (Feb. 7, 1936) (Mexico Convention). Subsequent Protocols amending both these Conventions also did not explicitly address incidental take or otherwise broaden their scope to prohibit anything other than purposeful take of migratory birds. *See* Protocol between the Government of the United States and the Government of Canada Amending the 1916 Convention between the United Kingdom and the United States of America for the Protection of Migratory Birds, Sen. Treaty Doc. 104–28 (Dec. 14, 1995) (outlining conservation principles to ensure long-term conservation of migratory birds, amending closed seasons, and authorizing indigenous groups to harvest migratory birds and eggs throughout the year for subsistence purposes); Protocol between the Government of the United States of America and the Government of the United Mexican States Amending the Convention for Protection of Migratory Birds and Game Mammals, Sen. Treaty Doc. 105–26 (May 5, 1997) (authorizing indigenous groups to harvest migratory birds and eggs throughout the year for subsistence purposes).

It was not until more than 50 years after the initial adoption of the MBTA and 25 years after the Mexico Treaty Act that Federal prosecutors began applying the MBTA to incidental actions. *See* Lilley & Firestone at 1181 (''In the early 1970s, *United States* v. *Union Texas Petroleum* [No, 73–CR–127 (D. Colo. Jul. 11, 1973)] marked the first case dealing with the issue of incidental take.''). This newfound Federal authority was not accompanied by any corresponding legislative change. The only contemporaneous changes to section 2 of the MBTA were technical updates recognizing the adoption of a treaty with Japan. *See* Act of June 1, 1974, Public Law 93–300, 88 Stat. 190. Implementing legislation for the treaty with the Soviet Union also did not amend section 2. *See* Fish and Wildlife Improvement Act of 1978, Public Law 95–616, sec. 3(h), 92 Stat. 3110. Similar to the earlier Conventions, the provisions of the Japan and Russia Conventions authorized purposeful take for specific activities such as hunting, scientific, educational, and propagation purposes, and protection against injury to persons and property. However, they also outlined mechanisms to protect habitat and prevent damage from pollution and other environmental degradation (domestically implemented by the Migratory Bird Conservation Act and other applicable Federal laws). *See* Convention between the Government of the United States and the Government of Japan for the Protection of Migratory birds and Birds in Danger of Extinction, and their Environment, 25 U.S.T. 3329 (Mar. 4, 1972) (Japan Convention); Convention between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and their Environment, 29 U.S.T. 4647 (Nov. 19, 1976) (Russia Convention).

No changes were made to the section of the MBTA at issue here following the later conventions except that the Act was modified to include references to these later agreements. Certainly, other Federal laws may require consideration of potential impacts to birds and their habitat in a way that furthers the goals of the Conventions' broad statements. *See, e.g., Mahler,* 927 F. Supp. at 1581 (''Many other statutes enacted in the intervening years also counsel against reading the MBTA to prohibit any and all migratory bird deaths resulting from logging activities in national forests. As is apparent from the record in this case, the Forest Service must comply with a myriad of statutory and regulatory requirements to authorize even the very modest type of salvage logging operation of a few acres of dead and dying trees at issue in this case. Those laws require the Forest Service to manage national forests so as to balance many competing goals, including timber production, biodiversity, protection of endangered and threatened species, human recreation, aesthetic concerns, and many others.''). Given the overwhelming evidence that the primary purpose of section 2, as amended by the Mexico Treaty Act, was to control over-hunting, the references to the later agreements do not bear the weight of the conclusion reached by the prior Opinion (M–37041).

Thus, the only legislative enactment concerning incidental activity under the MBTA is the 2003 appropriations bill that explicitly exempted military-readiness activities from liability under the MBTA for incidental takings. *See* Bob Stump National Defense Authorization Act for Fiscal Year 2003, Public Law 107–314, Div. A, Title III, Sec. 315, 116 Stat. 2509 (2002), *reprinted in* 16 U.S.C.A. 703, Historical and Statutory Notes. There is nothing in this legislation that authorizes the government to pursue incidental takings charges in other contexts. Rather, some have ''argue[d] that Congress expanded the definition of 'take' by negative implication'' since ''[t]he exemption did not extend to the 'operation of industrial facilities,' even though the government had previously prosecuted activities that indirectly affect birds.'' *CITGO,* 801 F.3d at 490–91.

This argument is contrary to the Supreme Court's admonition that ''Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'' *Whitman* v. *Am. Trucking Ass'ns,* 531 U.S. 457, 468 (2001). As the Fifth Circuit explained, ''[a] single carve-out from the law cannot mean that the entire coverage of the MBTA was implicitly and hugely expanded.'' *CITGO,* 801 F.3d at 491. Rather, it appears Congress acted in a limited fashion to preempt a specific and immediate impediment to military-readiness activities. ''Whether Congress deliberately avoided more broadly changing the MBTA or simply chose to

address a discrete problem, the most that can be said is that Congress did no more than the plain text of the amendment means.'' *Id.* It did not hide the elephant of incidental takings in the mouse hole of a narrow appropriations provision.

Constitutional Issues

The Supreme Court has recognized that ''[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.'' *FCC* v. *Fox Television Stations, Inc.,* 567 U.S. 239, 253 (2012). ''No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.'' *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453 (1939). Accordingly, a ''statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'' *Fox Television,* 567 U.S. at 253 (quoting *Connally* v. *General Constr. Co.,* 269 U.S. 385, 391 (1926)). Thus, ''[a] conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.' '' *Id.* (quoting *United States* v. *Williams,* 553 U.S. 285, 304 (2008)).

Assuming, *arguendo,* that the MBTA is ambiguous, the interpretation that limits its application to conduct specifically directed at birds is necessary to avoid potential constitutional concerns. As the Court has advised, ''where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'' *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988); cf. *Natural Res. Defense Council* v. *U.S. Dep't of the Interior,* 2020 WL 4605235 (S.D.N.Y. Aug. 11, 2020) (dismissing constitutional concerns, but on the basis that the relevant language is unambiguous). Here, an attempt to impose liability for acts that are not directed at migratory birds raises just such constitutional concerns.

The ''scope of liability'' under an interpretation of the MBTA that extends criminal liability to all persons who kill or take migratory birds incidental to another activity is ''hard to overstate,'' *CITGO,* 801 F.3d at 493, and ''offers unlimited potential for criminal prosecutions.'' *Brigham Oil,* 840 F. Supp. 2d at 1213. ''The list of birds now protected as 'migratory birds' under the MBTA is a long one, including many of the most numerous and least endangered species one can imagine.'' *Mahler,* 927 F. Supp. at 1576. Currently, over 1,000 species of birds—including ''all species native to the United States or its territories''—are protected by the MBTA. 78 FR 65,844, 65,845 (Nov. 1, 2013); *see also* 50 CFR 10.13 (list of protected migratory birds); Migratory Bird Permits; Programmatic Environmental Impact Statement, 80 FR 30032, 30033 (May 26, 2015) (''Of the 1,027 currently protected species, approximately 8% are either listed (in whole or in part) as threatened or endangered under the Endangered Species Act (ESA) (16 U.S.C. 1531 *et seq.*) and 25% are designated (in whole or in part) as Birds of Conservation Concern (BCC).''). Service analysis indicates that the top threats to birds are:

- Cats, which kill an estimated 2.4 billion birds per year;
- Collisions with building glass, which kill an estimated 599 million birds per year;
- Collisions with vehicles, which kill an estimated 214.5 million birds per year;
- Chemical poisoning (*e.g.,* pesticides and other toxins), which kill an estimated 72 million birds per year;
- Collisions with electrical lines, which kill an estimated 25.5 million birds per year;
- Collisions with communications towers, which kill an estimated 6.6 million birds per year;
- Electrocutions, which kill an estimated 5.6 million birds per year;
- Oil pits, which kill an estimated 750 thousand birds per year; and
- Collisions with wind turbines, which kill an estimated 234 thousand birds per year.

U.S. Fish and Wildlife Service, Threats to Birds: Migratory Birds Mortality—Questions and Answers, available at *https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php* (last updated September 14, 2018).

Interpreting the MBTA to apply strict criminal liability to any instance where a migratory bird is killed as a result of these threats would certainly be a clear and understandable rule. *See United States* v. *Apollo Energies, Inc.,* 611 F.3d 679, 689 (10th Cir. 2010) (concluding that under an incidental take interpretation, ''[t]he actions criminalized by the MBTA may be legion, but they are not vague''). However, it would also turn many Americans into potential criminals. *See Mahler,* 927 F. Supp. 1577–78 (listing a litany of scenarios where normal everyday actions could potentially and incidentally lead to the death of a single bird or breaking of an egg in a nest)). Such an interpretation could lead to absurd results, which are to be avoided. *See Griffin* v. *Oceanic Contractors,* 458 U.S. 564, 575 (1982) (''interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available''); *see also K Mart Corp.* v. *Cartier,* 486 U.S. 281, 324 n.2 (1988) (Scalia, J. concurring in part and dissenting in part) (''it is a venerable principle that a law will not be interpreted to produce absurd results.'').

These potentially absurd results are not ameliorated by limiting the definition of ''incidental take'' to ''direct and foreseeable'' harm as some courts have suggested. *See* U.S. Fish and Wildlife Service Manual, part 720, ch. 3, *Incidental Take Prohibited Under the Migratory Bird Treaty Act* (Jan. 11, 2017). The court in *Moon Lake* identified an ''important and inherent limiting feature of the MBTA's misdemeanor provision: To obtain a guilty verdict . . . , the government must prove proximate causation.'' *Moon Lake,* 45 F. Supp. 2d at 1085. Quoting Black's Law Dictionary, the court defines proximate cause as ''that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the accident could not have happened, if the injury be one which might be *reasonably anticipated or foreseen as a natural consequence of the wrongful act.*'' *Id.* (quoting Black's Law Dictionary 1225 (6th ed. 1990)) (emphasis in original). The Tenth Circuit in *Apollo Energies* took a similar approach, holding ''the MBTA requires a defendant to proximately cause the statute's violation for the statute to pass constitutional muster'' and quoting from Black's Law Dictionary to define ''proximate cause.'' *Apollo Energies,* 611 F.3d at 690.

Contrary to the suggestion of the courts in *Moon Lake* and *Apollo Energies* that principles of proximate causation can be read into the statute to define and limit the scope of incidental take, the death of birds as a result of activities such as driving, flying, or maintaining buildings with large windows is a ''direct,'' ''reasonably anticipated,'' and ''probable'' consequence of those actions. As discussed above, collisions with buildings and cars are the second and

third most common human-caused threat to birds, killing an estimated 599 million and 214.5 million birds per year, respectively. It is eminently foreseeable and probable that cars and windows will kill birds. Thus, limiting incidental take to direct and foreseeable results does little to prevent absurd outcomes.

To avoid these absurd results, the government has historically relied on prosecutorial discretion. *See* Ogden at 29 (''Historically, the limiting mechanism on the prosecution of incidental taking under the MBTA by non-federal persons has been the exercise of prosecutorial discretion by the FWS.''); *see generally FMC,* 572 F.2d at 905 (situations ''such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings . . . properly can be left to the sound discretion of prosecutors and the courts''). Yet, the Supreme Court has declared ''[i]t will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful . . . prosecution for some of the activities seemingly embraced within the sweeping statutory definitions.'' *Baggett* v. *Bullitt,* 377 U.S. 360, 373 (1964); *see also Mahler,* 927 F. Supp. 1582 (''Such trust in prosecutorial discretion is not really an answer to the issue of statutory construction'' in interpreting the MBTA.). For broad statutes that may be applied to seemingly minor or absurd situations, ''[i]t is no answer to say that the statute would not be applied in such a case.'' *Keyishian* v. *Bd. of Regents,* 385 U.S. 589, 599 (1967).

Recognizing the challenge posed by relying upon prosecutorial discretion, the *FMC* court sought to avoid absurd results by limiting its holding to ''extrahazardous activities.'' *FMC,* 572 F.2d at 907. The term ''extrahazardous activities'' is not found anywhere in the statute and is not defined by either the court or the Service. *See Mahler,* 927 F. Supp. at 1583 n.9 (noting that the *FMC* court's ''limiting principle . . . of strict liability for hazardous commercial activity . . . ha[s] no apparent basis in the statute itself or in the prior history of the MBTA's application since its enactment''); *cf. United States* v. *Rollins,* 706 F. Supp. 742, 744–45 (D. Idaho 1989) (''The statute itself does not state that poisoning of migratory birds by pesticide constitutes a criminal violation. Such specificity would not have been difficult to draft into the statute''). Thus, it is unclear what activities are ''extrahazardous.'' In *FMC,* the concept was applied to the manufacture of ''toxic chemicals,'' *i.e.,* pesticides. But the court was silent as to how far this rule extends, even in the relatively narrow context of pesticides.

This type of uncertainty is problematic under the Supreme Court's due process jurisprudence. *See Rollins,* 706 F. Supp. at 745 (dismissing charges against a farmer who applied pesticides to his fields that killed a flock of geese, reasoning ''[f]armers have a right to know what conduct of theirs is criminal, especially where that conduct consists of common farming practices carried on for many years in the community. While statutes do not have to be drafted with 'mathematical certainty,' they must be drafted with a 'reasonable degree of certainty.' The MBTA fails this test. . . . Under the facts of this case, the MBTA does not give 'fair notice as to what constitutes illegal conduct' so that [the farmer] could 'conform his conduct to the requirements of the law.' '' (internal citations omitted)).

While the MBTA does contemplate the issuance of permits authorizing the taking of wildlife, it requires such permits to be issued by ''regulation.'' *See* 16 U.S.C. 703(a) (''Unless and except as permitted *by regulations* made as hereinafter provided . . . .'' (emphasis added)). No regulations have been issued to create a permit scheme to authorize incidental take, so most potential violators have no formal mechanism to ensure that their actions comply with the law. There are voluntary Service guidelines issued for different industries that recommend best practices to avoid incidental take of protected birds; however, these guidelines provide only limited protection to potential violators and do not constitute a regulatory authorization or result in the issuance of permits.

In the absence of a permit issued pursuant to Departmental regulation, it is not clear that the Service has any authority under the MBTA to require minimizing or mitigating actions that balance the environmental harm from the taking of migratory birds with other societal goals, such as the production of wind or solar energy. Accordingly, the guidelines do not provide enforceable legal protections for people and businesses who abide by their terms. To wit, the guidelines themselves state, ''it is not possible to absolve individuals or companies'' from liability under the MBTA. Rather, the guidelines are explicit that the Service may only consider full compliance in exercising its discretion whether to refer an individual or company to the Department of Justice for prosecution. *See, e.g.,* U.S. Fish and Wildlife Service, Land-Based Wind Energy Guidelines 6 (Mar. 23, 2012).

Under this approach, it is literally impossible for individuals and companies to know exactly what is required of them under the law when otherwise-lawful activities necessarily result in accidental bird deaths. Even if they comply with everything requested of them by the Service, they may still be prosecuted, and still found guilty of criminal conduct. *See generally United States* v. *FMC Corp.,* 572 F.2d 902, 904 (2d Cir. 1978) (the court instructed the jury not to consider the company's remediation efforts as a defense: ''Therefore, under the law, good will and good intention and measures taken to prevent the killing of the birds are not a defense.''). In sum, due process ''requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.' '' *Smith* v. *Goguen,* 415 U.S. 566, 572–73 (1974).

Reading the MBTA to capture incidental takings could potentially transform average Americans into criminals. The text, history, and purpose of the MBTA demonstrate instead that it is a law limited in relevant part to actions, such as hunting and poaching, that reduce migratory birds and their nests and eggs to human control by killing or capturing. Even assuming that the text could be subject to multiple interpretations, courts and agencies are to avoid interpreting ambiguous laws in ways that raise constitutional doubts if alternative interpretations are available. Interpreting the MBTA to criminalize incidental takings raises potential due process concerns. Based upon the text, history, and purpose of the MBTA, and consistent with decisions in the Courts of Appeals for the Fifth, Eighth, and Ninth circuits, there is an alternative interpretation that avoids these concerns. Therefore, the Service concludes that the scope of the MBTA does not include incidental take.

Policy Analysis of Incidental Take Under the MBTA

As detailed above, the Service has determined that the MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to actions directed at migratory birds, their nests, or their eggs is compelled as a matter of law. In addition, even if such a conclusion is not legally compelled, the Service proposes to adopt it as a matter of policy.

The Service's approach to incidental take prior to 2017 was implemented without public input and has resulted in regulatory uncertainty and

inconsistency. Prosecutions for incidental take occurred in the 1970s without any accompanying change in either the underlying statute or Service regulations. Accordingly, an interpretation with broad implications for the American public was implicitly adopted without public debate. Subsequently, the Service has sought to limit the potential reach of MBTA liability by pursuing enforcement proceedings only against persons who fail to take what the Service considers ''reasonable'' precautions against foreseeable risks.

Based upon the Service's analysis of manmade threats to migratory birds and the Service's own enforcement history, common activities such as owning and operating a power line, wind farm, or drilling operation pose an inherent risk of incidental take. An expansive reading of the MBTA that includes an incidental-take prohibition would subject those who engage in these common, and necessary, activities to criminal liability.

This approach effectively leaves otherwise lawful and often necessary businesses to take their chances and hope they avoid prosecution, not because their conduct is or even can be in strict compliance with the law, but because the government has chosen to forgo prosecution. Otherwise-lawful economic activity should not be functionally dependent upon the *ad hoc* exercise of enforcement discretion.

Further, as a practical matter, inconsistency and uncertainty are built into the MBTA enforcement regime by virtue of a split between Federal Circuit Courts of Appeals. Courts have adopted different views on whether section 2 of the MBTA prohibits incidental take, and, if so, to what extent. Courts of Appeals in the Second and Tenth Circuits, as well as district courts in at least the Ninth and District of Columbia Circuits, have held that the MBTA criminalizes some instances of incidental take, generally with some form of limiting construction. *See United States* v. *FMC Corporation,* 572 F.2d 902 (2d Cir. 1978); *United States* v. *Apollo Energies, Inc.,* 611 F.3d 679 (10th Cir. 2010); *United States* v. *Corbin Farm Serv.,* 444 F. Supp. 510 (E.D. Cal. 1978); *Ctr. for Biological Diversity* v. *Pirie,* 191 F. Supp. 2d 161 (D.D.C. 2002), *vacated on other grounds sub nom. Ctr. for Biological Diversity* v. *England,* 2003 App. LEXIS 1110 (D.C. Cir. 2003). By contrast, Courts of Appeals in the Fifth, Eighth, and Ninth Circuits, as well as district courts in the Third and Seventh Circuits, have indicated that it does not. *See United States* v. *CITGO Petroleum Corp.,* 801 F.3d 477 (5th Cir. 2015); *Newton County Wildlife Ass'n* v. *U.S. Forest Serv.,* 113 F.3d 110 (8th Cir. 1997); *Seattle Audubon Soc'y* v. *Evans,* 952 F.2d 297 (9th Cir. 1991); *Mahler* v. *U.S. Forest Serv.,* 927 F. Supp. 1559 (S.D. Ind. 1996); *Curry* v. *U.S. Forest Serv.,* 988 F. Supp. 541, 549 (W.D. Pa. 1997).

As a result of these cases, the Federal Government is clearly prohibited from enforcing an incidental take prohibition in the Fifth Circuit. In the Eighth Circuit, the Federal Government has previously sought to distinguish court of appeals rulings limiting the scope of the MBTA to the habitat-destruction context. *See generally Apollo Energies,* 611 F.3d at 686 (distinguishing the Eighth Circuit decision in *Newton County* on the grounds that it involved logging that modified a bird's habitat in some way). However, that argument was rejected by a subsequent district court. *See United States* v. *Brigham Oil & Gas, L.P.,* 840 F. Supp. 2d 1202 (D.N.D. 2012). Likewise, the Federal Government has sought to distinguish holdings in the habitat-destruction context in the Ninth Circuit. *See United States* v. *Moon Lake Electrical Ass'n,* 45 F. Supp. 2d 1070, 1075–76 (D. Colo. 1999) (suggesting that the Ninth Circuit's ruling in *Seattle Audubon* may be limited to habitat modification or destruction). In the Second and Tenth Circuits, the Federal Government can apply the MBTA to incidental take, albeit with differing judicial limitations.

These cases demonstrate the potential for a convoluted patchwork of legal standards; all purporting to apply the same underlying law. The MBTA is a national law. Many of the companies and projects that face potential liability under the MBTA operate across boundary lines for judicial circuits. Yet what is legal in the Fifth and Eighth Circuits may become illegal as soon as an operator crosses State lines into the bordering Tenth Circuit or become a matter of uncertainty in the Ninth Circuit. The Service concludes that it is in its own interest, as well as that of the public, to have and apply a national standard that sets a clear, articulable rule for when an operator crosses the line into criminality. The most effective way to reduce uncertainty and have a truly national standard is for the Service to codify and apply a uniform interpretation of the MBTA that its prohibitions do not apply to incidental take, based upon the Fifth Circuit's ruling in *CITGO Petroleum Corporation.*

Therefore, as a matter of both law and policy, the Service adopts a regulation limiting the scope of the MBTA to actions that are directed at migratory birds, their nests, or their eggs, and clarifying that injury to or mortality of migratory birds that results from, but is not the purpose of, an action (*i.e.,* incidental taking or killing) is not prohibited by the Migratory Bird Treaty Act.

Public Comments

On February 3, 2020, the Service published in the **Federal Register** (85 FR 5915) a proposed rule to define the scope of the MBTA as it applies to conduct resulting in the injury or death of migratory birds protected by the Act. We solicited public comments on the proposed rule for 45 days, ending on March 19, 2020. We received 8,398 comments. Many comments included additional attachments (*e.g.,* scanned letters, photographs, and supporting documents). These comments represented the views of multiple State and local government agencies, private industries, non-governmental organizations (NGOs), and private citizens. In addition to the individual comments received, 10 organizations submitted attachments representing individuals' comments, form letters, and signatories to petition-like letters representing almost 180,000 signers. The following text presents the substantive comments we received and responses to them.

Comment: Multiple commenters noted that Congress has amended the MBTA in multiple instances (*i.e.,* narrowing scope of strict liability, adding knowledge requirement to felony violation, narrowly exempting certain activities from incidental take, etc.). The commenters noted that Congress could have clarified any objection to the enforcement of incidental take but did not. The commenters suggested that these later congressional interpretations should be given great weight and that failure to include incidental take within the scope of the statute would virtually nullify these amendments. Congress specifically demonstrated its familiarity with the development of take liability in 1998 when it tackled the ''unfairness'' of strict liability in baiting cases. Rather than strict liability, the MBTA would apply a negligence standard to hunters who used fields with loose grain. In making this change, the Senate Report noted that the amendment was ''not intended in any way to reflect upon the general application of strict liability under the MBTA.''

Response: The operative language originally enacted in section 2 of the MBTA has not substantively changed since 1936. The 1936 amendment modified the language to clarify its meaning and application, but there is no indication those changes were intended

to broaden the scope of the statute beyond actions directed at migratory birds. The subsequent amendments have instead fine-tuned the *mens rea* required for violations directed at migratory birds, including commercial use, hunting, and baiting. Interpreting the statute to reach only actions directed at migratory birds would not nullify these amendments. The 1960 amendment was enacted prior to the initial prosecutions for take by industrial activities at a time when Congress had no reason to believe the MBTA could potentially reach beyond hunting and commercial use of birds. The 1988 amendment was, as noted, simply a reaction to a court decision that added a negligence standard for baiting violations. As noted in the M-Opinion, nothing in the referenced amendments disturbs Congress's original intent that section 2 apply only to actions directed at migratory birds. Moreover, the views of one Congress regarding the construction of a statute adopted many years before by another Congress are typically given little to no weight, particularly where, as here, the amendments did not disturb the operative language governing the scope of that statute.

Comment: Several commenters concluded that the Department of Defense Authorization Act for Fiscal Year 2003 demonstrates that Congress intended the MBTA to prohibit incidental take of migratory birds because it directed FWS and the Department of Defense to develop a regulation authorizing incidental take of migratory birds during military readiness activities. Congress enacted the relevant provision in the wake of a case in which the court enjoined specific U.S. Navy live-fire training exercises that incidentally killed migratory birds. The commenters reasoned that Congress could have directed the Service to issue MBTA regulations that achieved the same result as this rulemaking action by limiting the MBTA to direct actions against migratory birds. Alternatively, Congress could have amended the MBTA itself to clarify that it did not apply to incidental takes and kills. However, Congress did not do either of those things; instead, it temporarily exempted incidental taking caused by military-readiness activities from the MBTA prohibition and directed the Service to issue MBTA regulations to create a permanent authorization for military-readiness activities. Thus, Congress spoke clearly to the matter of whether the MBTA scope includes incidental takes and kills.

Response: As explained by the Fifth Circuit in the *CITGO* case, the 2003 Authorization Act does not require the conclusion that Congress interpreted the MBTA to apply broadly to incidental take. Congress was simply acting to preempt application of a judicial decision that specifically and immediately restricted military-readiness activities. Imputing Congressional intent beyond the plain text of a narrow appropriation provision is not warranted. We do not interpret that action as Congress clearly speaking to the broad issue of the overall scope of the statute as it applies to incidental take. Congress may simply have chosen to address a discrete problem without any intent to interpret more broadly the MBTA outside of that particular context. In any event, the views of the 2003 Congress in a rider to an appropriation act that did not even explicitly amend any of the MBTA's language have little if any significance to interpreting the MBTA.

Comment: The proposed rule contained no information on the consequences of the action on migratory birds and the environment as a whole (through decreased ecosystem services). The commenter went on to note that there is no evidence presented as to the economic burden for implementing voluntary best management practices.

Response: Per the National Environmental Policy Act (NEPA), the Service analyzed the impacts mentioned by the commenter within the draft Environmental Impact Statement (EIS) published June 5, 2020. Within the EIS, the Service analyzed impacts of the no action alternative and two additional alternatives on (1) The overall effect of each alternative on migratory bird populations, (2) the effect of any decrease in migratory bird populations on ecosystem services, (3) the potential effects of climate change in combination of each alternative, and (4) the impacts to industry and small business that may profit from migratory birds. The Service also asked for and provided discussion on what extent industry would continue to implement best practices when there is no incentive to do so. This EIS was open for public comments, and comments focused on these analyses are addressed within the final EIS. We have added additional discussion in the final EIS and Regulatory Impact Analysis regarding the types of practices and types of costs associated with best practices.

Comment: Multiple commenters noted that the process being used for this rulemaking is unconventional. The commenters noted that the proposed rule was published with a notice of intent to prepare an EIS but without any concurrent environmental analysis of alternatives. This approach compromised the ability of commenters reviewing the proposed rule to understand fully the effects of the rule. Further, the subsequent publication and comment period on the draft EIS was after-the-fact, indicating a decision was already made regardless of the environmental consequences determined in the EIS. In addition, commenters noted that the 45-day comment period was inadequate for a rule that proposes to substantially change decades of conservation policy and hinder bird conservation in the United States, given the current National State of Emergency in response to the novel Covid–19 coronavirus. Many of these commenters requested an extended comment period.

Response: The procedures followed in this rulemaking process were appropriate and lawful. A draft EIS, issued subsequent to the proposed rule, analyzed various alternatives, some of which were discussed in the public webinars conducted as part of the NEPA scoping process. One alternative in the draft EIS covers the expected effects of reverting to the Department's prior interpretation of the statute. There is no requirement under the Administrative Procedure Act (APA) to consider alternatives in the proposed rule itself (Executive Order 12866 requires consideration of alternatives that would have less economic impact on regulated entities for economically significant rulemakings, as set forth in the regulatory impact analysis made available for review with the proposed rule). The NEPA process provides a broad analysis of the environmental and socioeconomic impacts of reasonable alternatives to the agency's proposal. The 45-day period for commenting on the proposed rule and NEPA scoping process, along with the subsequent 45-day comment period for the draft EIS, provided sufficient time for the public to address this rulemaking. Moreover, the M-Opinion, which provided the original basis for this rulemaking, has been publicly available for more than 2 years.

Comment: Members of the U.S. Senate commented that the Department closed the comment period on the proposed rule in mid-March during the height of a pandemic, ignoring requests from some in Congress to extend the comment deadline, and without even responding to Congress until after the deadline ended. Since then, some of the Nation's governors, State legislatures, and mayors jointly requested a suspension of public comment periods

during this national emergency. The Department should not be putting additional burdens on the public to respond at a time when the public is dealing with a global pandemic. The Department appears to be rushing through this entire process to meet an arbitrary timeline. At the very least, the Department should not be providing the minimum comment period. Rather, it should extend that comment period by 45 days or more.

Response: The procedures followed in this rulemaking process were appropriate and lawful. The Department provided 45-day comment periods on both the NEPA scoping process and the draft EIS and a separate 45-day comment period on the proposed rule. These three separate 45-day periods provided sufficient time for the public to address this rulemaking. Moreover, the M-Opinion, which provided the original basis for this rulemaking, has been publicly available for more than 2 years.

Comment: Multiple commenters noted that NEPA requires that decisions be analyzed in a public process before an agency irretrievably commits its resources. Specifically, an agency ''shall commence preparation of an [EIS] as close as possible to the time the agency is developing or is presented with a proposal.'' The DOI should suspend M-Opinion 37050 while the Service considers the environmental impacts as required by NEPA.

Response: The Service began the NEPA process at the appropriate time—when it first considered rulemaking regarding the interpretation of the MBTA originally set forth in M–37050. The Service drafted the proposed rule with sufficient flexibility to incorporate the alternatives analyzed in the draft EIS. The NEPA process informed our decision-making process culminating in this final rule.

Comment: The Flyway Councils noted that the proposed rule was brought forth without the proper procedures as outlined by NEPA and the APA. The Flyways noted that there was no advance notice of rulemaking to assess the implications of the proposed rule. In addition, the Flyways noted that no alternatives were put forth and there was no opportunity to propose other alternatives.

Response: The Service announced the scoping process in a notice of intent (NOI) to complete an EIS in the **Federal Register** on February 3, 2020 (85 FR 5913). An advanced notice of proposed rulemaking is not required. The Service has provided three opportunities to submit comments through the scoping notice, the proposed rulemaking, and the publication of the draft EIS.

Comment: One State expressed concern with the Service's attempt to alter its previous interpretation of the MBTA (M–37041) in the absence of review pursuant to NEPA. Therefore, the State requested that the short- and long-term impacts of the proposed rule change be fully and accurately evaluated in the EIS, and that there be at least a 60-day comment period after the draft EIS is published in order to facilitate a thorough public review. In the Service's evaluation of those impacts, it is critical to compare the proposed rule's impacts with the prior interpretation of the MBTA represented in M–37041, which concluded that the MBTA prohibits incidental take.

Response: The Service has fulfilled the commenter's request through the publication of a draft EIS, which analyzed a no action alternative and two action alternatives. One of the alternatives reverts to the prior interpretation of the MBTA described in Solicitor's Opinion M–37041. In the draft EIS, we compared the impacts of codifying M–37050 with returning to the prior Opinion's interpretation. We established 45 days as an appropriate period for public comment on the draft EIS. We concluded a 45-day comment period was reasonable given the prior opportunity to comment on the scoping notice published on February 3, 2020 (85 FR 5913), and during the associated public hearings, which invited input on the environmental effects of the proposed action and the potential alternatives we should consider.

Comment: Multiple commenters were concerned about the unorthodox approach of simultaneously publishing a draft rule and a NEPA scoping announcement and seeking comments on both at the same time. The commenters felt this approach strongly suggests that the Service had already reached a conclusion about the outcome of this process and that the NEPA process is nothing more than a formality. Under the normal NEPA EIS process, Federal agencies would conduct scoping of an issue, develop multiple action alternatives, put those alternatives out for public notice and comment, and ultimately select an alternative to advance. In this case, the Service appears at the scoping phase to have already selected the outcome it intended to reach.

Response: The Service began the NEPA process at the appropriate time—when it first considered rulemaking regarding the interpretation of the MBTA originally set forth in M–37050. The Service drafted the proposed rule with sufficient flexibility to incorporate the alternatives analyzed in the draft EIS. The NEPA process informed our decision-making process culminating in this final rule.

Comment: The Service cannot conduct a credible NEPA process based on the timeline and chronology it has presented at this point. Completing the entire NEPA process and reaching a final record of decision (ROD) and final rule by fall of 2020 is an extraordinarily short timeline of less than 10 months to proceed from initial scoping to final rule. It is difficult to imagine any scenario under which the Federal agencies could review and give serious consideration to the comments it will receive on this proposed rule, let alone incorporate them into a final EIS, ROD, and final rule.

Response: The Service has complied with the procedural requirements of NEPA for developing an EIS by publishing a scoping notice and a draft EIS inviting public comment before developing a final EIS and record of decision. The Service provided alternatives to the proposed action and has not predetermined any outcome of the NEPA process. The Service will take a reasonable amount of time to address and incorporate comments as necessary, deliberate on a final determination, and select an alternative presented in the final EIS. We will explain that selection in a record of decision at the appropriate time.

Comment: Multiple commenters felt the manner in which this proposed rulemaking was announced on January 30, 2020, by the Service's Office of Public Affairs was improper and a violation of the APA (Pub. L. 79–404, 60 Stat. 237). They asserted that the inclusion of 28 statements of support for this proposed rule within the rulemaking announcement establishes a record of pre-decisional collusion with certain interest groups by a regulatory agency that has tainted the entire rulemaking process and clouded the ultimate decision the Service will be called upon to make, once the comment period closes and all public testimony is fairly and impartially evaluated.

Response: The Service did not collude with any stakeholders, industry or otherwise, on the contents of the proposed rule before it was published in the **Federal Register**. No organizations or persons outside of the Federal Government were given an advance copy of the proposed rule to read before it was published in the **Federal Register**. Interagency review limited to Federal agencies occurred prior to issuance of the proposed rule under procedures required by Executive Order

12866 and implemented by the Office of Management and Budget. The announcement of the proposed rule was primarily a notification to the public and the media summarizing the contents of the proposed rule and its availability for public comment, with the viewpoints of several stakeholders included. It is not part of the official APA rulemaking process or docket and plays no part in the agency's ultimate decision. The announcement was not considered in developing this final rule.

Comment: If the press release accepted quotes from industry and government entities, it should also have included quotes and perspectives from environmental NGOs or ornithologists to comply with APA fairness rules.

Response: The referenced section was contained in a press release issued with the publication of the proposed rule. It is not part of the rulemaking record, and we did not consider the statements included in the press release as official public comments. The Service received many responses during the public comment period for the proposed rule from migratory bird experts and interested non-governmental organizations. We analyzed those comments, responded to any substantive issues presented, and amended the proposed rule where appropriate based on those comments.

Comment: Multiple commenters noted that the codification of the Solicitor's M-Opinion 37050 is premature as it has not been fully vetted or withstood legal challenges. These commenters recommended that the Service postpone any rulemaking regarding MBTA prohibitions of incidental take until the legal challenges to the M-Opinion currently pending in the United States District Court for the Southern District of New York are resolved. Given the uncertain future of M-Opinion 37050 and accompanying legal vulnerability of the proposed rule, it would be prudent for the Service to put the proposed rulemaking on hold until the courts have determined whether the M-Opinion on which it is based withstands legal scrutiny.

Response: There is no statutory or other legal requirement to wait for a Departmental legal opinion or any other agency opinion to be vetted in Federal court before it can be codified as a regulation. In fact, agencies may codify interpretations struck down by courts and have subsequent courts defer to and uphold the later rulemaking. *See Natl. Cable & Telecommunications Ass'n* v. *Brand X internet Svcs.,* 545 U.S. 967 (2005). We note that on August 11, 2020, a district court vacated M–37050 and held that the plain language of the MBTA prohibits incidental take. *See Natural Res. Defense Council* v. *U.S. Dep't of the Interior,* 2020 WL 4605235 (S.D.N.Y.). We respectfully disagree with that court's opinion and have finalized this rulemaking consistent with the Supreme Court's holding in *Brand X.*

Comment: The proposed rule incorrectly concludes that the terms ''kill'' and ''take'' are ambiguous. Even if the terms were ambiguous, the proposed rule's attempt to meld all the prohibited conduct into a singular meaning is unsupported by any canon of statutory interpretation. The Service proposes that ''kill'' and ''take'' exclude unintentional actions as they are listed among directed actions such as ''hunt'' or ''pursue.'' Yet this construction renders the list meaningless, working contrary to established norms of interpretation—if ''kill'' were limited to ''hunt'' and ''pursue,'' then there would be no need to include ''hunt'' and ''pursue'' on the list. The statutory context of the MBTA would make little sense if it merely prohibited directed action such as hunting because its purpose extends beyond conserving game birds. Its provisions protect non-game and insectivorous birds that are not—and have never been—intentionally pursued for game, poaching, or trafficking.

Response: We disagree with the commenter's interpretation of the MBTA. The preamble to the proposed rule and this final rule provides a detailed analysis of the language of the statute and why the scope of the MBTA does not include incidental take, including the best reading of the ambiguous terms ''take'' and ''kill.'' We refer the commenter to that analysis, which provides the basis for issuing this regulation.

Comment: The plain language of this statute pertains to conduct directed at species, and nowhere in the operative language does the law suggest an intent on the part of Congress to impose criminal liability for the incidental effects of otherwise lawful activities. The scope of prohibited conduct covers actions, which require intent—''pursue,'' ''hunt,'' and ''capture'' are all actions directed at wildlife and cannot be performed by accident. The terms ''take'' and ''kill'' are informed by the context of the rest of the statute in which they must be read, and by the legislative and historical record of the MBTA and other environmental laws.

Response: We agree with the comment that the language of section 2 of the MBTA pertains to conduct directed at migratory birds and not conduct that incidentally results in the death of migratory birds.

Comment: The original legislative intent of the MBTA was the protection and sustainability of migratory bird populations. The word ''protection'' occurs in its first sentence. There has been no express delegation of law-making duties or authority to amend the MBTA. The MBTA's legislative intent is to prevent needless losses, establish closed seasons for hunting, prohibit the taking of nests or eggs of migratory game or insectivorous nongame birds except for scientific or propagating purposes, further establish longer closures for certain species, and provide for the issuance of permits to address the killing of specified birds. Despite the phrase ''incidental take'' not appearing in either the MBTA or implementing regulations, its protective statutory intent remains clear, as shown by its common and long-time use in Congressional hearings and correspondence, and in inter- and intra-agency communications. Since its intent has not been amended by an act of Congress, the agency charged by Congress with its administration does not have the authority to restrict its meaning and intent.

Response: This rulemaking is based on the Department's interpretation of ambiguous language in a statute the Secretary is charged with implementing and does not amend the language of the MBTA. It does not require any delegation from Congress other than the delegations to the Secretary already included in the terms of the statute. The Service disagrees that this rulemaking restricts the meaning and intent of the MBTA. The preamble to this rule explains our interpretation of the MBTA's statutory language and legislative history and why the interpretation set forth by this rule is consistent with and the best reading of that language and history. Thus, we disagree with the commenter's assertion that this rule restricts or alters the meaning or intent of the MBTA.

Comment: Although the MBTA was written in large part to address the then-largest threat to migratory birds—hunters and poachers—the proposed rule offers no evidence to show its passage was intended to regulate only the activities that threatened birds in 1918. With ''effective protection,'' the drafters wanted to be able to revive and sustain completely decimated populations on behalf of the Americans who recognized aesthetic, economic, and recreational value in sustaining migratory bird populations. To impose a limit on the activities it could regulate under the MBTA would be to ossify this

broadly written protection into only applying to activities that existed during the decade immediately following its passage. An intention found nowhere in its text, legislative history, or subsequent interpretation and implementation.

Response: Congress's primary concern when enacting the MBTA in 1918 was hunting, poaching, and commercial overexploitation of migratory birds. It is clear from the legislative history leading up to the statute's passage that Congress drafted language to address those threats. To be sure, Congress may draft statutory language to include potential future concerns not readily predicted at the time of enactment, but there is no indication that Congress intended the language of section 2 to encompass accidental or incidental deaths of migratory birds. Instead, the balance of the legislative history favors the opposite interpretation as explained in the preamble.

Comment: A letter from some members of the U.S. Senate stated that the stakes of the proposed rule are considerable, and like the legal opinion, it will have a significant detrimental impact on migratory birds. This letter explained that birds provide tremendous value to our communities. Congress and the executive branch understood this fact a century ago when it signed the 1916 treaty and passed the MBTA, even in the midst of World War I. Congress also recognized that birds benefit American agriculture and forestry through the consumption of vast numbers of insect pests. This fact remains true today and takes on new importance with the spread of invasive species and outbreaks. The proposed rule contravenes the text and purpose of the MBTA and fails to align with the purpose of our migratory bird treaties and our international obligations. The rule also presents a false choice between regulatory certainty and implementing the MBTA.

Response: This rulemaking does not present a false choice between regulatory certainty and implementing the MBTA. M–37050 concluded that the MBTA does not prohibit incidental take. This rulemaking codifies that interpretation; thus, the Service has ultimately determined that developing a framework to authorize incidental take is not an action that is consistent with the statute. The Service notes that a Federal regulation applies across all agencies of the Federal Government and provides a more permanent standard that the public and regulated entities can rely on for the foreseeable future, in contrast to continued implementation of the MBTA under a legal opinion. This difference is underscored by the recent Federal district court decision vacating the M-Opinion. The final EIS and Regulatory Impact Analysis analyze the ecosystem services, such as insect consumption, provided by migratory birds.

Comment: Multiple commenters presented arguments that the Service has misquoted the provisions of the MBTA and that the proposal does not address the statutory authority in section 3 to authorize take of migratory birds that would otherwise violate the statute, which the commenters contend is the source of the Secretary's authority to implement the statute.

Response: This proposal does not authorize the taking of migratory birds; it defines the scope for when authorizations under section 2 are necessary and proper. Thus, it does not rely on the statutory language presented by the commenter. The authority to implement a statute necessarily comes with it the authority either to interpret ambiguous language in that statute or to correct a prior improper interpretation of that statute. The authority in section 3 is also contingent on an understanding of what actions violate the statute in the first place.

Comment: Several commenters suggested that the proposed rule paints a broad brush over incidental takes, treating all equally and absolving even grossly negligent behavior that can result in the large-scale death of birds. The commenters suggested that the Service modify the proposed rule to include a provision where incidental take resulting from reckless negligent behavior is considered a violation (*i.e.,* gross negligence). This approach would include creating a definition of ''extra-hazardous activities'' and enforcing incidental take when it results from gross negligence. The commenters conclude that the Service should focus enforcement of incidental take on large-scale, high-mortality, and predictable situations where unintentional loss of migratory birds is likely to occur, based on the best scientific information. The language of the act needs to be changed to protect those who injure birds on a purely accidental basis. However, there needs to be language that allows for the prosecution of individuals who are grossly negligent.

Response: During scoping for the associated EIS, we considered an alternative where the Service would promulgate a regulation defining what constitutes incidental take of migratory birds and develop an enforcement policy requiring gross negligence to establish a misdemeanor violation of the MBTA. The Service eliminated this alternative from further review because the vast majority of Federal courts have concluded the MBTA's misdemeanor provision is a strict liability crime—in other words, it has no minimum *mens rea* requirement. Because the proposed alternative would have established a minimum *mens rea* of gross negligence before the Service could enforce the statute's misdemeanor provision, it would not be legally defensible. Thus, codifying the Service's interpretation of the scope of the MBTA under a gross negligence standard would only serve to reduce legal certainty.

Comment: One commenter recommended that the Service prohibit incidental take that results from an extra-hazardous activity. The commenter felt that providing such a take threshold would allow the Service to address incidental take that occurs because of an entity's negligence.

Response: The proposed rule did not provide a threshold for prohibiting incidental take because it proposed to codify the interpretation set forth in M–37050 that the Act does not prohibit incidental take in the first place. The commenter is essentially proposing adopting an extra-hazardous activity requirement as a proxy for negligence or gross negligence. We decline to adopt that proposal for the same reasons we rejected application of a gross-negligence standard.

Comment: One commenter recommended following a Safe Harbor approach for industry that participates in avoidance, minimization, and mitigation measures.

Response: This approach would be very similar to establishing a policy to decline enforcement except in cases of gross negligence. We decline to adopt this proposal for the same reasons we rejected application of a gross-negligence standard.

Comment: Multiple commenters felt that the MBTA needed to be amended by Congress to make the changes being proposed in this regulation.

Response: The commenters are correct that only Congress can amend the language of the MBTA. The Service is charged with implementing the statute as written. The Department's Principal Deputy Solicitor, exercising the authority of the Solicitor pursuant to Secretary's Order 3345, determined in M–37050 that the statute as written does not prohibit incidental take. We are codifying that interpretation in this rulemaking. Thus, we are simply interpreting the existing language and not amending the statute or altering statutory language in this regulation.

Comment: One commenter suggested amending the proposed regulatory

language by adding: ''provided that the person, association, partnership, or corporation takes reasonably practicable precautionary measures to prevent the taking or killing of migratory birds. Owing to the diversity in operations of the various industries affected by this rule, USFW shall develop industry specific guidelines for developing precautionary measures to prevent the taking or killing of migratory birds.''

Response: The language proposed by the commenter is not consistent with our interpretation of the MBTA. The proposal would essentially be adding language to the MBTA given our interpretation that it does not prohibit incidental take. We have no authority to amend the statutory language or add provisions that simply are not there. Thus, we respectfully decline to adopt the commenter's proposed language.

Comment: Multiple commenters opposed the proposed action because recent studies have demonstrated that North American bird populations are facing significant population declines. Birds have economic and ecosystem services value, and, if birds continue to decline, the economy and ecosystems will be compromised. The commenters called for more protections and see the proposed rule as weakening actions for the conservation of migratory birds.

Response: The Service is aware of the recent science that demonstrates that North America has lost nearly 3 billion birds over the last 50 years. However, the proposed action is based on a legal interpretation of the MBTA. It is also noteworthy that those losses occurred despite the Department's prior interpretation of the MBTA as prohibiting incidental take. The Service is a conservation organization and will continue to address bird-conservation priorities in a manner that provides for the most effective conservation of protected species, such as working with domestic and international partners to conserve habitat and habitat connectivity, addressing threats both anthropogenic and natural, developing partnerships with Federal, State, and Tribal agencies, industry and NGOs that address the greatest conservation needs, and effectively implementing the array of Federal statutes that provide protections for migratory birds. For example, the Service will continue to work with any partner that is interested in reducing their impacts on birds by developing voluntary practices to reduce mortality and providing technical assistance for effectively implementing those practices.

Comment: Multiple commenters opposed the proposed rule because it removes the MBTA as the only mechanism that the Service can apply to require actions that avoid or minimize incidental take that is otherwise preventable.

Response: The Service does not agree that the MBTA is the only mechanism to achieve bird conservation. The Service is committed to working with those that voluntarily seek to reduce their project-related impacts to migratory birds. In addition to the MBTA, other Federal and State laws protect birds and require specific actions to reduce project-related impacts.

Comment: Multiple commenters opposed the proposed rule because, as written, the rule does not hold entities accountable for causing the incidental take of migratory birds.

Response: Our interpretation set forth in the proposed rule is that take incidental to the purpose of the action is not prohibited under the MBTA. We will not hold entities accountable for take that does not violate the MBTA. The Service will continue to manage and enforce the provisions of the MBTA as they relate to activities directed at migratory birds, including ensuring those holding take permits are accountable for complying with these permits.

Comment: Some commenters suggested that the interpretation of the MBTA set forth in the proposed rule is flawed and does not account for the mission of the Department and the Service.

Response: The enforcement of the MBTA is just one part of how the Service works with others to conserve migratory birds. We have found that building partnerships domestically and internationally to build strategies for implementing measures that protect, manage, and conserve migratory birds is a more effective conservation tool than enforcing incidental take under the MBTA on a piecemeal basis with our limited law enforcement resources. A few examples of our partnership work include: (1) Managing and implementing grant programs under the Neotropical Migratory Bird Conservation Act and North American Wetlands Conservation Act, (2) using Joint Ventures to build regional partnerships for habitat and species conservation, and (3) working with other Federal, State, and industry partners to develop voluntary solutions for reducing impacts to migratory birds and their habitat.

Comment: Multiple commenters supported the proposed action because a clarification of the scope of the MBTA was needed to avoid unnecessary regulation of industry projects.

Response: The Service appreciates the perspective of the entities that support this rulemaking.

Comment: Multiple commenters supported the proposal because, in their view, criminalizing incidental take does not advance conservation and other mechanisms could be used to protect birds.

Response: The Service agrees with this comment. We will continue to work with any entity that seeks to reduce their impacts to migratory birds to achieve conservation outcomes.

Comment: One commenter asked who would be financially responsible to mitigate and/or reverse the effects of an environmental disaster on a large or small scale, to prevent any further incidental takes of birds or their eggs once the disaster is under way. The commenter noted that under the prior interpretation of the MBTA, the party causing the disaster was clearly held liable and financially responsible. Under the new interpretation, this is no longer the case. The commenter asked whether the Service will be establishing a fund to step in for cleanup and incidental take mitigation when environmental mishaps occur. If not, where does the Service anticipate such needed funds will originate?

Response: The proposed rule does not directly affect Natural Resource Damage assessments for accidents that have environmental impacts because statutory authorities that provide the basis for that program do not rely on the MBTA. Pursuant to the Comprehensive Environmental Response Compensation and Liability Act, the Oil Pollution Act, and the Clean Water Act, the Department is authorized to assess injury to natural resources caused by releases of hazardous substances and discharges of oil to compensate the public for lost natural resources and their services. The Department's assessment of natural resource injuries under the Natural Resource Damage Assessment Program includes any injury to migratory birds, which in many cases could otherwise be classified as incidental take.

Comment: One commenter asked whether any best management practices would be required under any circumstances and how the proposed rule affected both Executive Order 13186: Responsibilities of Federal Agencies to Protect Migratory Birds and the implementation of the Land-based Wind Energy Guidelines.

Response: Best management practices (BMPs) have never been required under the MBTA, other than as part of our occasional application of the special purpose permit provision to authorize

incidental take under certain circumstances, as there has never been a specific permit provision for authorizing incidental take that would require their implementation. The Service has worked with project proponents to encourage the voluntary use of BMPs and used enforcement discretion to determine when an enforcement action was appropriate. Under the proposed rule, the Service will continue to work with and encourage the voluntary implementation of BMPs when the entity seeks to reduce their project-related impacts. E.O. 13186 remains in place and is a valuable tool for Federal agencies to work cooperatively to implement bird conservation strategies within their agency missions. The Land-based Wind Energy Guidelines are a voluntary approach to siting wind-energy facilities. This rule may reduce the incentive for affected parties to implement these guidelines.

Comment: Several commenters stated that some estimates of bird mortality used in the rule are more than a decade old and out of date. In one of the comments, they referenced that the proposed rule cites 500,000 to 1,000,000 deaths per year at oil pits as old and high, suggesting that new technological innovation and State regulations have caused a decrease in oil pit mortality.

Response: The summary of mortality from anthropogenic sources was based on the best scientific information currently available. Often, monitoring of industrial projects is not conducted, and when it is, the Service rarely gets reports of the findings. The Service recognizes that these estimates may represent both over- and under-estimates depending on the mortality source. Within our environmental analysis of this rulemaking conducted under NEPA, we acknowledge that other Federal or State regulations may require measures that reduce incidental take of birds. In the proposed rule and the NEPA notice of intent, and during the public scoping webinars, the Service requested that new information and data be provided to update our current information on sources and associated magnitude of incidental take. The Service did not receive any industry-related information for further consideration. If an industry sector has new or different information, we encourage them to submit those data to the Service for review and consideration.

Comment: A few commenters stated that the Department of the Interior's reinterpretation of the MBTA removed a broad layer of protection to birds against industrial harms and requested that the Service explain in the preamble how such action compounds or alleviates the findings of certain reports and other available science and biological data—including but not limited to data from Partners in Flight, the State of the Birds report, Christmas Bird Counts, Breeding Bird Surveys, and project-level nesting and demographic information that the Service has on file.

Response: The Service acknowledges that birds are currently in decline. Numerous technical reports including the 2019 Science paper have highlighted the declines in many habitat groups due to numerous anthropogenic sources (see page 26). However, this rulemaking is not expected to affect significantly those continuing declines. The Service will continue to work with partners to address migratory bird declines outside of a regulatory context.

Comment: One commenter in support of the proposed rule noted that there are other statutes that protect birds, including NEPA; industry would still have to comply with some of these laws and thus birds would benefit. There are also State and local laws that would prevent the unnecessary killing of birds.

Response: The Service recognizes that there are numerous reasons why an entity would continue to implement best practices, including other Federal or State laws, industry standard practices, public perception, etc. These mechanisms could reduce impacts to birds in some circumstances. We note, however, that NEPA does not provide substantive environmental protections by itself.

Comment: Multiple commenters recommended the Service clarify how the Service will continue to collect project-level data on industrial impacts to birds. There is concern from the commenters that the impact of this proposed rule will be a long-term loss of data and oversight of industrial impacts to avian species.

Response: Project-level information is still recorded when a project proponent engages the Service for technical assistance. It is not required for projects to submit data on incidental take; however, we encourage proponents voluntarily to submit these data so that we are able to track bird mortality. We note that even under the prior interpretation of the MBTA, there was no general mechanism to provide for the collection of project-level data on impacts to avian species. When an intentional take permit is issued, conditions of that permit request any information on incidental mortalities that are discovered. The Service will continue to work to develop partnerships with industry sectors to monitor incidental mortality and the stressors causing this mortality, as well as to develop voluntary best practices that industry sectors can implement when they seek to reduce their project-level impacts on the environment.

Comment: One commenter focused on impacts of wind energy and suggested that the final rule should provide language that terminates wind-energy projects where the migratory bird mortality levels are not remediable. The commenter suggested that, without such thresholds, the MBTA will be rendered meaningless.

Response: Our interpretation of the MBTA concludes that the statute does not prohibit incidental take, including any resulting from wind-energy facilities. However, the Service will continue to work with any industry or entity that is interested in voluntarily reducing their impacts on migratory birds to identify best practices that could reduce impacts. With respect to the wind industry, the Service will continue to encourage developers to follow our Land-based Wind Energy Guidance developed through the collaboration of many different stakeholders, including industrial and environmental interests.

Comment: Multiple commenters recommended that the Service abandon the current proposed action and revert to the previous M-Opinion and the 2015 MBTA proposal for developing and implementing a general permit program that works with industry to identify best practices to avoid or minimize avian mortality. The commenters noted that a well-designed general permit system will also create efficiencies for industry by removing regulatory uncertainty for developers and investors. Permit holders would have no risk of prosecution provided they comply with the terms of the permit. Further, it will discourage actors who fail to avoid, minimize, or mitigate for the impacts of their activities from gaming the system and taking advantage of the Service's limited prosecutorial resources.

Response: In the draft EIS, we considered an alternative under which the Service would promulgate a regulation defining what constitutes incidental take of migratory birds and subsequently establish a regulatory general-permit framework. The Service eliminated that alternative from further consideration because developing a general-permit system would be a complex process and better suited to analysis in a separate, subsequent proposal. Thus, we did not consider developing a general permit program as suggested by the commenters.

Comment: One commenter recommended imposing stricter regulations along main migratory routes where high concentrations of MBTA species are biologically vulnerable (including stopover areas along migration routes, and core breeding/wintering areas), especially for threatened or endangered species or Species of Conservation Concern.

Response: Given our interpretation of the MBTA, the commenter's proposal is not a viable option. This final rule defines the scope of the MBTA to exclude incidental take, thus incidental take that occurs anywhere within the United States and its territories is not an enforceable violation. This rule does not affect the prohibitions under the ESA, and thus species listed under that statute would continue to be covered by all the protections accorded listed species under the ESA. The status of migratory bird populations in the areas described by the commenter may be relevant in our decision to permit take under the Service's current permit system.

Comment: Multiple commenters noted that M-Opinion 37050 and the proposed action will likely result in increased mortality of migratory birds. Thus, in combination with the already significant population declines of many species, the proposed rule will almost certainly result in the need to increase the number of bird species listed under the Endangered Species Act (ESA) and increase the risk of extinction. The commenters noted that such deleterious effects are a more than sufficient basis to withdraw the proposed rule (and the underlying Opinion). Given the Service's recent elimination in the ESA regulations of automatic take protection for threatened species (subject to the adoption of species-specific 4(d) regulations), the proposed rule will have extremely deleterious impacts going forward as the Service increasingly lists species as threatened without affording them any protections for incidental take under the ESA. These entirely foreseeable effects of the action proposed by the Service must be analyzed in formal section 7 consultation under the ESA.

Response: While it is possible that this rule could potentially be a contributing factor in the future ESA listing of a migratory bird species, there is no requirement under section 7 to address the potential effects of an action on a species that may hypothetically be listed at some undetermined point in the future. Instead, section 7 requires an agency to analyze the effects of an action on currently listed or proposed-to-be-listed species. This rulemaking will have no effect on those species. We also note that several Service programs exist that are designed to conserve species that are candidates for ESA listing, such as Candidate Conservation Agreements and the Prelisting Conservation Policy.

Regarding the future listing of migratory birds as threatened species, as stated in the final rule rescinding the ''blanket rules'' for threatened species (84 FR 44753, August 27, 2019) and restated here, our intention is to finalize species-specific section 4(d) rules concurrently with final listing or reclassification determinations. Finalizing a species-specific 4(d) rule concurrent with a listing or reclassification determination ensures that the species receives appropriate protections at the time it is added to the list as a threatened species.

Comment: Multiple commenters noted that the effects of this rule on ESA-listed species must be seriously scrutinized in an EIS as well as in section 7 consultation under the ESA. The proposed rule will harm species that have already been listed as threatened and subject to broad ESA section 4(d) regulations.

Response: The effects of this rule have been analyzed in the EIS accompanying this rulemaking. Under the ESA, we have determined that this rule regarding the take of migratory birds will have no effect on ESA-listed species. This rule does not alter consultation requirements under the ESA for migratory bird species also listed as endangered or threatened species. Any likely impacts of a Federal action on migratory bird species also listed under the ESA would require consultation whether or not incidental take of that species is prohibited under the MBTA. Thus, this proposed action would not have any effect on those species.

Comment: Commenters claimed that the Service must examine the effect the proposed rule would have on certain ESA-listing decisions, such as a not-warranted determination or 4(d) rule, which may have been determined with the understanding that the MBTA incidental take protections would still apply.

Response: The Service has not issued any 4(d) rules or not-warranted determinations with the understanding that MBTA protections stemming from an interpretation that it prohibits incidental take would still apply.

Comment: Multiple States commented that the proposed rule would lead to further declines in migratory bird populations. The States voiced concerns that this rule would increase their species-management burden substantially as further declines in migratory bird populations could result in additional management requirements and protections for declining species, including additional listings under State endangered species protection laws implemented by State fish and wildlife agencies. This series of events would lead to further restrictions and require substantial resources to manage and ensure conservation and recovery. This rulemaking may violate federalism rules, as States will be required to use their budgets to implement migratory bird protection actions, including regulation development and permit systems. The limitation of State protections to projects within State borders, coupled with the absence of the Service providing necessary leadership and coordination would severely hinder migratory bird management and recovery efforts nationwide.

Response: This rule would not violate any laws or executive branch policy regarding unfunded mandates. Unfunded mandates occur when Congress enacts Federal law that includes directives that must be carried out by States and does not also provide funding for the States to fulfill those Federal requirements. This rule would alter the Service's interpretation of the MBTA to exclude incidental take from its scope. Thus, it removes what had been a Federal requirement for States to avoid engaging in or authorizing activities that incidentally take migratory birds. This rule effectively removes that directive. State partners are critical to the conservation of migratory birds, and we encourage States to continue to conserve and manage migratory bird species consistent with the MBTA and would be happy to engage with and assist our State partners in their management and conservation of MBTA species. The Service acknowledged in the EIS that this rule may result in incremental declines in bird populations as companies learn they are not required to implement best management practices to decrease incidental take. Enforcement actions have been few since the 2017 M-Opinion, so it would be speculative to assert that this change in policy will result in further significant population declines. However, States may decide to expend resources for conservation and recovery of these species due to this rulemaking.

Comment: How is the Service going to monitor bird populations to ensure that this proposal does not lead to increased population declines? If significant declines are noted, how will the Service respond if declines are attributed to incidental take? The commenter

recommended including a clause to stop the implementation of this proposed rule if populations are negatively impacted by incidental take from anthropogenic sources.

Response: Monitoring bird populations is outside the scope of this action. However, the Service continues to work with the bird conservation community to identify, support, and implement bird-monitoring programs. The Service is partner to multiple efforts to track migratory bird populations (*e.g.,* Partners in Flight Landbird Plan, Avian Conservation Assessment Database, etc.). These efforts and partnerships are not impacted by this rulemaking, and data will continue to drive the actions of the Service to protect migratory birds. The clause proposed by the commenter would be inconsistent with our interpretation of the Act and would essentially add a requirement to the MBTA. Only Congress can amend statutory language.

Comment: Multiple commenters suggested that compliance with the MBTA was not a burden to State and local governments and has straightforward and minimal impacts on capital-improvement projects. The commenters noted there is a successful history of the Federal, State, and local governments along with industry working in coordination to implement measures to reduce impacts to migratory birds and that the proposed rule would dismantle the extraordinary and successful history of this cooperation. Given the success of the MBTA to date, the commenter felt the proposed action was unnecessary.

Response: This rulemaking codifies our interpretation of the MBTA as prohibiting only conduct directed at migratory birds. It should not be viewed as standing in the way of the successful actions the commenter notes. The Service will continue to work with State and local governments as well as industry to implement voluntary measures to reduce impacts to migratory birds. This rulemaking should increase that cooperation and coordination by removing the specter of a potential criminal prosecution, which has often acted as a deterrent for private parties to share information with the Service on their impact on migratory birds and work with the Service on conserving migratory bird species. Economic effects on government entities are examined for each alternative in the RIA.

Comment: Multiple commenters noted that the proposed action removes all incentives for industry to work with the Service. The commenters noted that through judicious enforcement and by working directly with industries to develop and implement best management practices, the MBTA has provided a key incentive for adopting common-sense practices that protect birds. The commenters suggested that, without any legal obligations, industries no longer need to consider how their activities may harm migratory birds or take action to prevent any harm. Thus, it is unlikely that the Service's implementation of voluntary measures will result in benefits to birds.

Response: There are many other factors that influence an entity's decision to implement measures that may protect migratory birds from incidental take. In some cases, there are other Federal, State, Tribal, or local laws and regulations that directly or indirectly require actions to benefit or otherwise reduce impacts on migratory birds. Federal statutes such as the Endangered Species Act and the Bald and Golden Eagle Protection Act require entities to take steps to reduce incidental take and protect habitat, which may in turn benefit migratory birds and other wildlife. Many other Federal statutes include provisions that require implementing agencies to assess and mitigate potential environmental impacts, including impacts to migratory birds and their habitat. In addition, Federal agencies are required to evaluate their impacts to the environment under NEPA. NEPA compliance requires Federal entities to identify impacts to the environment affected by a proposal, including impacts to migratory birds and socioeconomic impacts if they are likely to occur. NEPA also requires Federal entities to assess potential mitigation of unavoidable adverse environmental impacts, which may include analysis of project design or mitigation measures that reduce potential impacts to migratory birds.

Some States have statutes with procedural requirements similar to those found in NEPA (*e.g.,* California Environmental Quality Act) and a variety of provisions regulating some form of incidental, indirect, or accidental take, or potentially allowing commissions or agencies to make applicable rules. In 2019, in response to M-Opinion 37050, California passed the Migratory Bird Protection Act, which makes it unlawful to take or possess any migratory nongame bird protected under the MBTA. Additional States may create new regulations to clarify that they have jurisdiction to regulate or otherwise oversee incidental take of migratory birds. Other factors entities consider include public perception, status as a green company, size of company, cost of implementation, perceived risk of killing migratory birds, or availability of standard industry practices. Some entities may continue to implement practices that reduce take for any of these reasons or simply to reduce their perceived legal risk due to short- or long-term uncertainty concerning future application of laws and regulations governing take of migratory birds.

Comment: One commenter stated that the removal of Federal authority to regulate incidental take of migratory birds could strongly affect offshore-wind siting and management decisions. One of the most important ways to minimize avian impacts from wind-energy development and make it ''bird-friendly'' is to site projects properly and implement measures to avoid impacts. The commenter noted that many stakeholders are engaged in identifying common-sense mitigation measures to minimize remaining impacts from the construction and operation of wind-energy facilities. Without a Federal mechanism for incorporating consideration of incidental take of migratory birds into decision-making, it will be much more difficult to make informed decisions that benefit bird populations.

Response: The Service works with offshore-wind-energy companies and Federal and State agencies responsible for regulating this industry. The Service will continue to work to provide recommendations for voluntary measures and siting locations based on sound science.

Comment: One commenter noted that the MBTA has not been used against many businesses in court because it has encouraged businesses to self-regulate, to the benefit of people and birds alike, as well as those businesses. This approach has long-term financial benefit as it focuses on prevention rather than reparations in the future.

Response: The Service has provided in the past and will continue to provide in the future technical assistance to interested parties to implement measures to reduce negative effects on migratory birds.

Comment: One commenter suggested that in some cases incidental take by industry should be considered purposeful since some of this mortality is well studied, predictable, and there are easy low-cost mitigation options available to reduce these takes. The commenter contended that entities that choose not to implement known measures are purposefully taking migratory birds.

Response: Incidental take refers to mortality that occurs in the course of an activity that is not directed at birds and often does not relate to birds in any

way—for example, the intent of building a wind turbine is generating energy not killing birds. Though knowledge of the likely results of a suspect's conduct may be relevant to determine whether a suspect has the requisite intent to violate a criminal statute, it is not relevant under the MBTA for two reasons: First, because criminal misdemeanor violations under the MBTA are a strict-liability crime, they do not require proof of intent. Second, the MBTA only prohibits actions that are directed at migratory birds. An activity that causes incidental take will never be directed at migratory birds regardless of the actor's knowledge of the potential consequences.

Comment: The analysis under the Regulatory Flexibility Act shows likely minimal economic benefit to all of the affected businesses. If anything, this finding argues that the proposed rule is a solution in search of a problem. In the commenters' experience the expenses of taking measures to minimize incidental take are minor and even the fines are minor to small businesses. This analysis really shows that the benefits of the proposed rule are overblown and targeted to a few companies that just do not want to be regulated.

Response: The purpose of this action is to provide an official regulatory definition of the scope of the statute as it relates to incidental take of migratory birds. This action is necessary to improve consistency in enforcement of the MBTA's prohibitions across the country and inform the public, businesses, government agencies, and other entities what is and is not prohibited under the MBTA.

Comment: Multiple commenters noted that the purpose and need of the rule is to create legal certainty and that this rulemaking removes a patchwork of court decisions that create uncertainty for MBTA compliance. The commenters noted that there is currently a patchwork of legal standards that protect migratory birds in each of the States. In the absence of national protection against incidental take, each State may seek to enforce or embolden existing State rules, thereby creating additional regulatory uncertainty for industry. The inconsistency among States in State code may complicate industry understanding of expectations across the many States in which they operate, potentially requiring multiple State permits to conduct business.

Response: It is appropriate for individual States to determine whether and how to regulate incidental take of migratory birds, given that the MBTA does not prohibit incidental take. Although we conclude on balance that this correct interpretation of the MBTA will reduce regulatory uncertainty created by the prior agency practice of reliance on enforcement discretion, we acknowledged in our draft EIS that different State laws may create difficulties for national companies that must navigate those differences. We also note that this problem already exists in large part and do not expect this rulemaking to significantly contribute to inconsistencies in State laws. We will continue to cooperate with States that request our assistance in developing best management practices for various industries that minimize incidental take of migratory birds. In fact, such partnerships will likely become increasingly important to promote conservation of migratory birds and lead to greater consistency in both conservation and regulation nationwide.

Comment: One commenter stated that in an international forum the United States agreed that the MBTA is a strict-liability statute covering incidental take. The commenter noted that in 1999, several environmental groups from Mexico, Canada, and the United States filed a submission under the North American Agreement on Environmental Cooperation asserting that the United States was failing to enforce environmental laws, including the MBTA. The United States disputed the allegations, but acknowledged that the MBTA is a strict-liability statute covering incidental take, writing: ''Under the MBTA, it is unlawful by any means or manner, to pursue, hunt, take, capture [or] kill any migratory birds except as permitted by regulation 16 U.S.C. 703–704. Except for the baiting of game birds, the MBTA is a strict liability statute that allows for the imposition of criminal penalties.'' This is clear evidence of the longstanding U.S. position under international law, and in agreement with its treaty partners, that the MBTA is a strict-liability statute covering incidental take. The United States must honor its obligations under international law or change them through an act of Congress.

Response: The language cited by the commenter simply refers to the language of the MBTA and asserts that it is a strict-liability statute. As described in the preamble to this rulemaking, the Service continues to view the misdemeanor provision as a strict-liability crime consistent with the majority of Federal courts that have ruled on the issue. Any statements made by the United States in prior international meetings regarding whether the MBTA prohibits incidental take would have been consistent with the Department's interpretation of the MBTA at that time, but we have since changed our position as reflected by this rulemaking.

Comment: Multiple commenters stated that the rule sends a message to industry that companies do not need to implement even modest measures to prevent entirely foreseeable bird mortality. The commenters claimed that the rule communicates that for even the most egregious and demonstrably deliberate violations, violators' real-world liability will still be limited by Service funding, investigatory resources and expertise, and political will with respect to enforcement. In all three categories, the Service is presently ill suited to fulfill the role envisioned by the proposed rule. To pretend otherwise ignores the agency's own established practices and guidance and constitutes another failure of the Federal Government's trust responsibilities.

Response: We disagree with the commenters' assertion that this rule signals that industry should not implement best management practices. The Service continues to be willing and able to work with any entity that is interested in developing and implementing voluntary measures that will avoid or minimize impacts to migratory birds. For example, the Service is working proactively with both the communication tower industry and with Federal agencies, cities, and other municipalities to address tower and glass collisions. The Service will continue to investigate instances of unauthorized taking or killing directed at migratory birds. This rulemaking will not affect those investigations.

Comment: A commenter noted that deaths of birds that are preventable and foreseeable are, in the context of the MBTA, negligent. Deliberate implies an intentional act, where foreseeable means consequences that may be reasonably anticipated. Nevertheless, the proposed rule attempts to parse the difference between definitions of the terms ''deliberate'' and ''foreseeable.'' Regardless of the scale and scope of destruction, the rule proposes to make deliberateness in the form of passive negligence consequence-free. By specifying that entities should be held liable only if they can be proven to have set out to purposefully kill birds, the proposed rule flips the burden from regulated entities to the government. If promulgated, the rule would force Service employees to act as private detectives with the nearly (and from all appearances, deliberately) impossible task of proving what was in the hearts and minds of violators.

Response: The rule does not attempt to parse the difference between

''deliberate'' and ''foreseeable.'' Those terms are not relevant to our interpretation of the MBTA. We currently authorize, and will continue to authorize, various activities that directly take migratory birds through our permit regulations at 50 CFR part 21. The Service's Office of Law Enforcement will continue to investigate unauthorized taking and killing of migratory birds resulting from actions directed at migratory birds. The rulemaking will not change those investigations in any way or require our officers to prove anything in addition to what they already would have to prove. In some sense, actions directed at migratory birds are deliberate in nature, but the concept of foreseeability is not relevant. Regarding the commenter's statements on enforcing a negligence standard, the misdemeanor provision of the MBTA contains no mental state requirement and is a strict-liability crime. For this reason, we cannot introduce a mental-state requirement such as negligence to the MBTA's misdemeanor provision.

Comment: Multiple commenters noted issues with how the proposed rule and associated NEPA document define a ''Federal action.'' The commenters noted that fundamental to this rulemaking effort is to identify properly the major Federal action. Major Federal actions include policy changes like M-Opinion 37050. The commenters stated that the rule ignores the real major Federal action and agency decision of greatest consequence: The Service's reliance on Interior's M-Opinion 37050 to reverse course on decades of protections for migratory birds against incidental take. The environmental consequences of the underlying sweeping policy change, which occurred in M-Opinion 37050, have yet to be held up to the mandates of NEPA. The commenters stated that, to proceed in any defensible fashion, the agency must reckon with the consequence of adopting M-Opinion 37050 in the first place.

Response: The EIS associated with this rulemaking analyzes the difference between adopting an interpretation of the MBTA that excludes incidental take and the prior interpretation that the MBTA prohibits incidental take. Thus, in our view, the M-Opinion was neither final agency action nor major Federal action. It was simply the initial stage of a process to alter agency practice to conform to the correct reading of the MBTA regarding incidental take. We conducted the NEPA analysis at the appropriate time to analyze the environmental effects of this rulemaking to codify that interpretation. That analysis includes comparing the effects of both interpretations.

Comment: A comment stated that an agency charged with administering a statute cannot restrict, amend, repeal or expand it without congressional approval. An agency has no authority to remove statutory protections without congressional approval. A rulemaking cannot violate a statute or make it inoperable and must be consistent with the legislative intent of the law. The proposed rule impermissibly excludes requirements of foreseeability and negligence by arguing that the statute only prohibits actions directed at birds to exempt industries whose projects kill birds incidentally. The proposed rule would largely make the statute inoperable, thus violating its congressional intent by removing its purpose.

Response: The preamble to this rulemaking explains in detail our interpretation of the language of the MBTA, including applicable legislative history and why our interpretation is consistent with that history. Nothing in this rulemaking changes the language or purpose of the MBTA. Only Congress can enact or amend statutory language. The proposed rule uses the commonly understood definition of ''incidental'' and does not purport to redefine that term in any way. As stated on numerous occasions throughout this rule, the MBTA's criminal misdemeanor provision is a strict-liability crime and we have no authority to insert a mental state such as negligence into that provision. That approach would require congressional action. The MBTA will continue to operate as Congress intended it to operate. The Service will continue to implement the full suite of regulations authorizing conduct directed at migratory birds.

Comment: Multiple commenters suggest that the Service's choice to release a proposed rule based on a policy change it is already implementing, and conduct a NEPA analysis after-the-fact, turns NEPA on its head. This confused order of events also hampers a fair public understanding of the agency's proposed action, alternatives, and likely impacts. The agency in essence has already been implementing the underlying policy change that is reflected in the rulemaking without the benefit of public review and comment at the time it made that policy change.

Response: The procedures followed in this rulemaking process were appropriate and lawful. The Service engaged the NEPA process at the time it began to consider rulemaking to codify the M-Opinion (the reasonable alternatives include potential outcomes of the proposed rulemaking), and that process will be complete before any final formal agency decision is made. A draft EIS, issued subsequent to the proposed rule on June 5, 2020, analyzed various alternatives, some of which were discussed in the public webinars conducted as part of the NEPA scoping process. Those alternatives analyze the environmental effects of both prohibiting incidental take under the MBTA and excluding incidental take under the MBTA and gave the public opportunity to comment on those effects.

Comment: Multiple Tribes stated that this proposed action violates multiple Tribal-specific treaties, dating back to the mid-1800s. These treaties established the Federal Government's trust responsibility to Federally Recognized Tribes. The Federal Indian trust responsibility is a continuing fiduciary duty and legal obligation owed by the Federal Government to Tribes as beneficiaries. Under the trust responsibility, the United States is legally responsible for the protection of Tribal lands, assets, resources, and treaty rights for the benefit of Tribes. Government-to-government consultation is one facet of effectuation of the trust responsibility. Several Tribes stated that they have no record of receiving any communication or outreach from the Service or DOI regarding the proposed regulation revisions or associated draft EIS, much less an invitation to consult on either. The Tribes recommended that the rulemaking process be paused so that intelligent and respectful consultation with any Tribe that expresses interest in response to the invitation to consult can proceed.

Response: The Service takes its Tribal trust responsibilities seriously and completed government-to-government consultation when requested. Prior to the publication of the proposed rule, the Service held six public scoping webinars in March 2019, which were open to any members of the public, including members of Federal and State agencies, Tribes, non-governmental organizations, private industries, and American citizens. On March 16, 2020, the Service held a webinar that was restricted in attendance to allow only Tribal members to attend, with the sole purpose of informing Tribes of the proposed action. Tribal representatives were allowed to ask questions and seek clarifications. In addition, a letter was sent through our regional offices to invite Tribes to engage in this proposed action via the government-to-government consultation process. Nine Tribes requested government-to-

government consultation. The Service completed these consultations prior to publication of this final rule.

Comment: Contrary to the Service's position, the proposed definition of incidental take would not improve the implementation of the MBTA. This definition still requires law enforcement to prove intent, which can be just as difficult to prove, just as legally uncertain, and equally burdensome to law enforcement.

Response: This rulemaking has no effect on investigations into conduct directed at migratory birds or the MBTA's criminal felony and baiting provisions that require a specific mental state. We will continue to interpret the misdemeanor provision of the MBTA as a strict-liability provision with no mental-state requirement, including intent.

Comment: One commenter noted that the recent Supreme Court ruling in *Bostock* v. *Clayton County, Georgia,* 140 S. Ct. 1731 (2020), does not support this rulemaking. In *Bostock* v. *Clayton County,* the Supreme Court relied on the ''ordinary'' meaning of title VII of the Civil Rights Act of 1964, to hold that it is unlawful to discriminate in employment decisions based on individuals' sexual orientation. *Id.* at 1754. In reaching this result, the Court squarely rejected the argument that the Court's reading of the statute's expansive terms ''ignore[d] the legislature's purpose in enacting Title VII'' and that ''few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons.'' *Id.* at 1745. The Court reaffirmed the longstanding principle that '' 'the fact that [a statute] has been applied in situations not expressly anticipated by Congress' does not demonstrate ambiguity, instead, it simply 'demonstrates [the] breadth' of a legislative command.'' *Id.* at 1749 (citation omitted). The Supreme Court's result and reasoning are impossible to square with a central justification for the proposed rule and M-Opinion 37050 on which it is based. According to the proposed rule, Congress's purpose in enacting the MBTA was to ''regulate the hunting of migratory birds,'' and thus the broad prohibitions on any taking or killing of migratory birds without authorization from the Service should be construed so as not to encompass any taking or killing other than that specifically directed at migratory birds. 85 FR at 5918, February 3, 2020. This, however, is exactly the mode of statutory construction rebuffed by the Supreme Court in *Bostock.*

Response: The Supreme Court's decision in *Bostock* is not applicable to our interpretation of the MBTA. Justice Gorsuch in *Bostock* was quite clear that legislative intent is only irrelevant if the language of the statute is plain, as he found the applicable language of the Civil Rights Act to be. He noted that a statute's application may reach '' 'beyond the principle evil' legislators may have intended or expected to address,'' *Bostock,* 140 S. Ct. 1731, 1749, but only where no ambiguity exists in the broadness of that statutory language. We do not rely on an argument that section 2's application to incidental take would demonstrate ambiguity simply because Congress could not have foreseen that application in 1918. Instead, the language of MBTA's section 2 is inherently ambiguous in nature as it relates to incidental take for the reasons stated in the preamble to this rulemaking and as evidenced by the split in Federal appellate courts that have addressed the issue. Therefore, the Supreme Court's holding in *Bostock* does not apply here.

Comment: The same commenter also noted that the recent Supreme Court ruling in *Dep't of Homeland Security* v. *Regents of the University of California,* 207 L. Ed. 2d 353 (2020), similarly does not support moving forward with this rulemaking. In *Homeland Security,* the Supreme Court rejected the Trump Administration's effort to rescind the Deferred Action for Childhood Arrivals (''DACA'') program, partly because the Department of Homeland Security (''DHS'') had sought to justify its rescission of the entire program on the basis that certain affirmative benefits should not be extended to DACA recipients while failing to consider the policy alternative of decoupling the extension of benefits from the deferral of deportation action. *Id.* at 375. The Court held that ''when an agency rescinds a prior policy its reasoned analysis must consider the 'alternative[s]' that are 'within the ambit of the existing [policy].' '' *Id.* at 374, 375 (citation omitted). The Court held that this ''omission alone renders [the agency's] decision arbitrary and capricious.'' *Id.* at 375.

The commenter stated that this ruling and analysis further undermine the Service's justification for reversing course on many decades of prior policy and practice in implementing the MBTA. The Service has sought to justify the reversal on the grounds that, ''[w]hile the MBTA does contemplate the issuance of permits authorizing the taking of wildlife . . . [n]o regulations have been issued to create a permit scheme to authorize incidental take, so most potential violators have no formal mechanism to ensure that their actions comply with the law.'' 85 FR at 5922. According to the Service, this absence of regulations designed to address incidental take, and the reliance instead on discretionary enforcement, ''has resulted in regulatory uncertainty and inconsistency,'' thus necessitating a ''truly national standard'' and a ''uniform'' approach to implementation of the MBTA. *Id.* at 5922–23; see also draft EIS at 3 (stating that the ''purpose and need'' for the action is to ''improve consistency in enforcement of the MBTA's prohibitions''). This refusal to scrutinize an otherwise viable alternative that would further the agency's own purported objective—*i.e.,* increasing certainty and consistency in enforcement—while also promoting the conservation of migratory birds, constitutes precisely the kind of arbitrary and capricious conduct that the Supreme Court denounced in its ruling on the DACA rescission.

Response: The Court's holding in *Homeland Security* does not apply to this rulemaking because the Service has considered the prior Departmental interpretation and agency practice in developing this rulemaking. Both the underlying M-Opinion and the preamble to this rule analyzed the prior interpretation and explained both why it is incorrect and why it does not provide the same level of certainty or consistency in enforcement. The EIS examined the impacts of this rulemaking and specifically compared the environmental impacts of adopting each interpretation of the MBTA to inform the decisionmaker of the consequences of adopting either alternative. Thus, the Service scrutinized alternatives to the preferred action of codifying our interpretation that the MBTA does not prohibit incidental take.

Comment: A commenter stated that the prosecution of incidental take under the MBTA does not violate due process. The Solicitor's M-Opinion and the proposed rule cite due process concerns as one justification for rolling back critical protections for migratory birds under the MBTA. The commenter noted that as the Courts have advised, ''where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'' The commenter claimed the Service appears concerned that strict liability for incidental takes of migratory birds does not provide adequate notice of what constitutes a violation and would lead to absurd results. However, the interpretation of the MBTA applying

strict liability to the law's criminal misdemeanor provision covering incidental take raises no constitutional problems, nor is it contrary to the intent of Congress. Rather, it is the only possible reading of the MBTA that accomplishes its intended purpose.

Response: The commenter misconstrues our interpretation of the MBTA's criminal misdemeanor provision in section 6. We agree that strict liability applies to misdemeanor violations of the MBTA. The due process concerns we raise in the preamble to this regulation apply to the Department's prior interpretation of section 2 of the MBTA, rather than the criminal provisions of section 6. The Service determines the relevant language in section 2 to be ambiguous, which is consistent with the views of most Federal courts. Potential due process concerns are relevant when the language of a statute is ambiguous and assist in divining its proper meaning. We do not base our current interpretation solely on those due process concerns; instead, they reinforce our current interpretation as the correct construction of section 2's ambiguous language.

Comment: Multiple commenters claimed that because the new Solicitor's Opinion rests on but does not resolve the Circuit court split indicates that courts are not obligated to adhere to its interpretation. The fact that no permit program has ever existed for incidental take demonstrates established precedent. The Department and the Service cannot ethically, legally, or morally make enforcement of Federal law a moving target for the convenience of the regulated industry.

Response: The commenters are correct that whether the Service interprets the MBTA to prohibit or exclude incidental take, that interpretation will not by itself resolve the current split in the circuit courts. However, Federal courts are obliged to defer to an agency's reasonable interpretation of ambiguous statutory language if that interpretation is codified in a regulation that undergoes public notice and comment under the Administrative Procedure Act. *See Chevron, U.S.A.* v. *Natural Resources Defense Council,* 467 U.S. 837 (1984). Application of judicial *Chevron* deference to this rulemaking would provide more certainty than any prior position of the Department by increasing the likelihood that Federal courts will defer to the Service's interpretation. We do not understand the point of the commenter's statement that the absence of a prior permit program established precedent on whether or not the MBTA prohibits incidental take. The opposite would seem to be true. Regarding enforcement of Federal law, the Department and the Service are obligated to interpret and follow the law established by Congress. This rulemaking will establish a firm position on enforcement of the MBTA as it applies to incidental take and will not provide a moving target. The commenter's assertion would be better applied to the Service's prior exercise of enforcement discretion under the former interpretation, which left many regulated entities uncertain whether their conduct violated the MBTA and would be investigated by the Service. A primary reason for engaging in this rulemaking is to remove any uncertainty in application of the statute to alleviate precisely the concern voiced by this comment.

Comment: Multiple Tribes stated that the United Nations ''Declaration on the Rights of Indigenous Peoples'' (2007) (''UNDRIP''), endorsed by the United States in 2010, recognizes that indigenous people must give Free, Prior and Informed Consent for projects affecting their interests, prior to approval of any project affecting their land or territories. Multiple federally recognized Tribes expect DOI to honor this policy in order to ensure no unilateral actions are taken that affect Tribal land, territories or people without Tribal consent.

Response: The UNDRIP—while not legally binding or a statement of current international law—has both moral and political force. The United States Government announced its support of the UNDRIP in 2010. In its announcement, the United States explained that it recognizes the significance of the Declaration's provisions on free, prior-and-informed consent, which the United States understands to call for a process of meaningful consultation with Tribal leaders—but not necessarily the agreement of those leaders—before the actions addressed in those consultations are taken.

To this end, the United States supports these aspirations of the UNDRIP through the government-to-government consultation process when agency actions may affect the interests of federally recognized Tribes. The Service has sought to involve and consult with Tribes regarding this rulemaking. Prior to the publication of the proposed rule, the Service held a NEPA scoping webinar on March 16, 2020, that we allowed only Tribal members to attend, with the sole purpose of informing Tribes of the proposed action. The Service sought feedback from Tribal representatives to inform the rulemaking process and address Tribal concerns. We also sent a letter through our regional offices inviting Tribes to engage in this proposed action via the government-to-government consultation process. Nine Tribes and two Tribal councils requested government-to-government consultation. The Service has completed these consultations with all interested parties.

Comment: One commenter suggested that the proposed rule should be abandoned because the meanings of ''take'' and ''kill'' need to be given broad interpretations to achieve the remedial purpose of protecting wildlife and remain consistent with the common law definitions of these terms. The commenter stated that the Department and the Service misinterprets the Fifth Circuit's narrow decision in *CITGO,* 801 F.3d 477 (5th Cir. 2015), which only holds that the MBTA does not impose strict liability for nonculpable omissions. Further, the commenter noted that the notice of the proposed rule acknowledges that Congress intended to adopt the common law definition of statutory terms such as ''take.''

Response: The preamble to this rulemaking exhaustively explains our interpretation of the terms ''kill'' and ''take'' in MBTA section 2. We disagree with the commenter's conclusions and refer readers to our analysis in the preamble.

Comment: One commenter stated that the proposed rule does not address the Service's statutory authority to change the interpretation of the MBTA. The commenter stated that the proposed rule does not facilitate the Service's only authorized action under the statute, which is the authority ''to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow'' hunting, etc., of such birds, or any part, nest, or egg thereof. The Service's proposal does not even address its actual statutory authority.

Response: This proposal does not authorize the taking of migratory birds; it defines the scope for when authorizations under section 703 are necessary and appropriate. Thus, it does not rely on the statutory language quoted by the commenter. The authority to implement a statute necessarily comes with it the authority both to interpret ambiguous language in that statute and to correct a prior improper interpretation of that language.

Comment: Multiple commenters stated that Solicitor's M-Opinion 37050 stands in direct conflict with Executive Order 13186 executed by President

Clinton in 2001. The commenters noted that the Executive Order defines ''take'' consistent with the Service's general definition applicable to all wildlife statutes in 50 CFR 10.12. The Executive Order further states without any uncertainty that the MBTA and its implementing regulations apply to both intentional and unintentional takings of migratory birds. Because E.O. 13186 has not to date been revoked, M-Opinion 37050 and this rulemaking directly conflict with that standing presidential directive. The Service must explain how the proposed rule meets and affects its own responsibilities and those of other Federal agencies under this Executive Order.

Response: We do not agree with the commenters that this rulemaking conflicts with Executive Order 13186. This rulemaking does not directly affect how Federal agencies manage incidental take as set forth in memoranda of understanding (MOUs) developed under the Executive Order. E.O. 13186 was not designed to implement the MBTA per se, but rather was intended to govern Federal efforts to conserve migratory birds more broadly. In any case, each Federal agency should continue to comply with the Executive Order, and each agency with an MOU should continue to carry out that MOU, including any conservation measures that reduce incidental take, even though that take does not violate the MBTA.

Comment: The Service must complete a full analysis of the impacts of the Solicitor's M-Opinion itself, not just the incremental impacts of codifying the M-Opinion.

Response: The EIS analyzes the incremental impact of codifying M–37050 and the alternative of returning to the interpretation of the MBTA espoused by the prior Opinion, M–37041, which concluded the MBTA does prohibit incidental take. The EIS compares the environmental effects of both alternatives. Thus, the Service has analyzed the environmental impacts of adopting either opposing interpretation of the MBTA.

Comment: The Service must reconcile how this action aligns with other legal statutes that protect birds and demonstrate how the rule aligns with other statutory obligations such as the Fish and Wildlife Conservation Act, which obligates monitoring for bird populations.

Response: The Service's implementation of the Fish and Wildlife Conservation Act is not directly relevant to this rulemaking. The Service will continue to monitor migratory bird species, particularly species of concern and candidates for listing under the ESA. This rulemaking will not significantly affect the Service's obligations under other legal statutes that protect migratory birds.

Comment: Only a few years ago, the United States exchanged formal diplomatic notes with Canada reaffirming our countries' common interpretation that the treaty prohibited the incidental killing of birds. The Service must consider how its proposed interpretation is consistent with that diplomatic exchange and seek Canada's views on the Service's new interpretation in light of that exchange.

Response: The exchange of diplomatic notes the commenter references occurred in 2008 and did not amount to an agreement that prohibiting incidental take was required by the Convention. Therefore, we do not regard our current approach to be inconsistent with the 2008 diplomatic exchange.

Comment: Numerous commenters requested that the Service return to the previous interpretation of the MBTA and publish a proposed rule that codifies the former interpretation that the MBTA prohibits incidental take.

Response: We have chosen to codify the interpretation set forth in Solicitor's Opinion M–37050 and interpret the scope of the MBTA to exclude incidental take. Thus, we decline the commenter's request to codify the prior interpretation as set forth in M–37041, which would achieve the opposite effect.

Comment: One commenter stated that it is notable that no additional alternatives were in the proposed rule. The commenter further noted that the Service failed to disclose the thought process followed in the selection of the proposed course of action in the proposed rule. Therefore, the commenter requested that the proposed rule be revised to include the three alternatives described in NEPA scoping and detailed information about the implementation of each, ensuring all affected parties are aware of the alternatives, through proper notice of rulemaking, as well as how the Service made its choice. The rule should be reissued in proposed form, allowing the public to weigh in on the alternatives and on the Service's choice.

Response: An analysis of reasonable alternatives to a proposed action is a requirement of the NEPA process. There is no requirement under the APA to consider alternatives in a proposed rule. The Service proposed to codify the interpretation set forth in Solicitor's Opinion M–37050 and presented reasonable alternatives to that proposal in the associated draft EIS. The public comment period for the scoping notice and the draft EIS provided opportunities to weigh in on the alternatives to the proposed action. Both the M-Opinion and the preamble to the proposed rule provide detailed background and analysis that explain why the Solicitor concluded the MBTA does not prohibit incidental take and why the Service adopted that analysis and conclusion. The Service has provided a Regulatory Impact Analysis with the proposed rule, which provides a cost-benefit analysis of the rule along with reasonable alternatives, to comply with Executive Order 12866 and certifies that the rule will not have a significant economic impact on a substantial number of small entities to comply with the Regulatory Flexibility Act.

Comment: A commenter stated that the proposed rule will result in a dangerous slippery slope, making intent difficult to prove because if there is no regulation for ''unintentional'' take, then anything could be classified as ''incidental take.'' The proposed rule change puts the burden of proof on the Service of determining ''intent,'' which can be difficult or impossible to truly establish. Without retaining the legal responsibility by individuals and/or companies under the existing MBTA, there would be far less money available for mitigation of preventable environmental damage.

Response: The proposed rule does not alter the burden of proof for intentional take under the MBTA. Over 100 years of case law and amendments to the statute have provided extensive guidance on the requirements to prove intent under the criminal provisions of the MBTA. This rulemaking will not disturb that case law or change our enforcement of the statute in that context. An analysis of the amount of funding available for mitigation of environmental damage, including incidental take of migratory birds, would be largely speculative at this point and not directly relevant to this rulemaking. To the extent there are economic impacts associated with this rulemaking or the alternatives considered in the associated NEPA analysis, those are described in the EIS and the regulatory impact analysis conducted to comply with Executive Orders 12866, 13563, and 13771.

Comment: Some commenters noted that the application of the MBTA as restricting anything other than intentional take of covered species offends canons of American criminal law and is perhaps most absurd when viewed in this light. The U.S. Supreme Court has held: ''Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be

interpreted in favor of the defendants subjected to them. . . . This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.'' *United States* v. *Santos,* 553 U.S. 507, 514 (2008) (internal citations omitted).

Response: We agree with this comment.

Comment: Some commenters noted that the prosecution of individual citizens or companies for the incidental take of migratory birds does not benefit conservation efforts. A few commenters noted that their industry sectors will continue to work with Federal and State agencies and help them fulfill their mission to conserve, protect, and enhance wildlife and their habitat for the continuing benefit of all people. The commenters noted that despite efforts to prevent incidental take, such take is not one-hundred-percent preventable and criminalizing incidental take does not advance conservation efforts. Removing the threat of unwarranted legal attacks under the MBTA will allow businesses to continue operating under good faith efforts to limit impacts to migratory birds.

Response: We appreciate that the commenters have engaged with the Service to advance conservation efforts that protect and enhance wildlife, including migratory birds, and that commenters advocate continued use of good faith efforts to limit impacts to migratory birds.

Comment: One commenter noted that the proposed codification differentiates between wanton acts of destruction and criminal negligence, on the one hand, and the accidental or incidental take of a protected bird, however regrettable, on the other. U.S. law has long differentiated between harm caused by intent and harm caused by accident. The proposed rulemaking extends that practice to the MBTA.

Response: We agree with the commenter that this rulemaking will continue to authorize criminal enforcement of intentional take while codifying that the MBTA does not prohibit incidental take.

Comment: One industry commenter claimed that an extreme application of the MBTA imposes criminal liability any time a migratory bird is killed incidental to another activity and would create an absurd and likely disastrous scenario in which the majority of Americans could be considered potential criminals. The commenter notes that enforcement of the MBTA under such an extreme interpretation would have devastating consequences for American businesses and communities, particularly in rural communities in close proximity to migratory bird habitat. As described in the proposed rule, millions of birds are killed every year from accidents such as collisions with glass windows, power lines, and vehicles. These are unfortunately realities of modern life and beyond the scope of the MBTA. The U.S. Supreme Court has ruled that the interpretation of a statute that would lead to absurd results must be avoided in favor of other interpretations ''consistent with the legislative purpose.''

Response: We agree with the commenter that interpreting the MBTA to prohibit incidental take could potentially lead to some of the cited absurd results. We refer the commenter to the analysis of the economic impacts of interpreting the scope of the statute to prohibit incidental take in the EIS and regulatory impact analysis conducted to comply with Executive Orders 12866, 13563, and 13771.

Comment: One commenter stated that as a result of the Federal Circuit Court split and dueling Solicitor's opinions, and without MBTA regulations addressing what activities are prohibited under the MBTA, the same activities that are entirely lawful in some parts of the country could give rise to strict criminal liability in parts of the country in which Federal Circuit Courts have held that unintentional take is prohibited under the MBTA. The commenter noted that the MBTA should be given a uniform interpretation across all regions of the country and is appreciative that the Service is engaging in a rulemaking process to achieve this result.

Response: We agree with this comment.

Comment: One commenter questioned the evidence suggesting that this rule change is warranted. The commenter questions what economic progress has been halted due to the protections of the MBTA and how this action is in the best interest of the American people.

Response: We refer the commenter to the EIS and the regulatory impact analysis for our conclusions regarding the environmental and economic impacts of this rulemaking and its reasonable alternatives on migratory birds and regulated entities.

Comment: A commenter stated that the Service has done little to demonstrate how this proposed rule actually benefits birds, instead focusing almost exclusively on economic interests of previously regulated industries. The commenter notes there is little mention in either notice of biological impacts or assessment of bird species protected by the Act. Interior and the Service fail to recognize that the MBTA's singular statutory purpose is to protect and conserve migratory birds. The U.S. Supreme Court described this purpose as ''a national interest of very nearly the first magnitude,'' and the origin of the statute to implement the international treaties signed for migratory bird conservation must not be overlooked. This environmental review should focus on the biological impacts and benefits to birds of the proposed rule and any authorization program that the Service is considering. It is misleading and simply false to suggest, as Interior does, that any regulation of incidental take under the MBTA is unduly burdensome.

Response: We constructed the purpose and need in the draft EIS to reflect our proposal to codify the correct interpretation of the MBTA as it relates to incidental take. Developing an authorization program was not within the scope of our proposal. We disagree with the commenter's interpretation of the MBTA and our nondiscretionary and discretionary duties to implement the MBTA. We refer the commenter to the EIS for analysis and discussion of the environmental impacts of the proposal and reasonable alternatives. The Service will continue to ensure that migratory birds are protected from direct take. We will also continue to work with other Federal agencies and stakeholders to promote conservation measures that reduce incidental take and protect migratory bird habitat, consistent with the Federal statutes we implement to manage, conserve, and protect migratory birds and other wildlife.

Comment: As a policy matter, the Service has not justified its departure from its prior interpretation of the Act, which was effective in protecting migratory birds without undue regulatory burden.

Response: We respectfully disagree that the Service has not justified its current interpretation of the MBTA. M–37050 and the preamble to the proposed rule explained the basis for the interpretation of the MBTA we are codifying in this rulemaking in great detail referencing the language of the statute itself, the international Conventions underlying the MBTA, its legislative history, and subsequent case law. As part of our duty as the agency

responsible for implementing the MBTA, we are obliged to present to the public our interpretation of any ambiguous language that affects public rights or obligations.

Comment: One commenter noted that the Service should not rely on other statutes or regulations to absolve itself from addressing incidental take. The commenter noted that the current administration is relaxing a number of regulations such as the Clean Water Act and the Endangered Species Act. Collectively, the change in interpretation of these foundational laws and rules will undoubtedly remove any motivation for regulated entities to mitigate the harm caused by their actions on birds and their eggs and will increase incidental take.

Response: A wide array of statutory mandates provide protections to wildlife, including migratory birds. In this rulemaking, the Service describes these various protections, but does not rely on them to address incidental take of migratory birds in the absence of MBTA protection. Our interpretation of the MBTA is primarily governed by the language of the statute, its legislative history, and subsequent case law. Whether other statutes provide protection to migratory birds is not directly relevant to codifying our current interpretation. The Service also notes that the motivation to implement conservation measures to mitigate harm to migratory birds is not simply driven by the threat of enforcement. Many other factors are often at play for companies engaged in actions that may affect migratory birds, including public perception, green business credentials, economic factors, State law, and pressure from investors and lenders.

Comment: One commenter requested that the Service remember their treaty obligation to protect birds that are shared with other countries that as independent nations could not ensure the protection of species that migrate across borders.

Response: We acknowledge this comment and submit that we will continue to implement relevant domestic laws and regulations and provide technical advice and assistance to our treaty partners and encourage continued conservation and protection of migratory birds to the extent authorized by their domestic laws.

Comment: Multiple commenters stated that the proposed rule is likely to facilitate a substantial increase in the number of migratory birds killed, in direct conflict with the amended treaty with Canada. The commenters noted that the proposed rule change is extremely limited in scope as it fails to address the evolution of threats to migratory birds or to ensure the sustainability of healthy bird populations. While unregulated harvesting is no longer a primary threat to migratory birds, declines in bird populations continue to remain a serious international issue. The commenters noted that international partners would suffer the loss of the many benefits of migratory birds as the United States rolls back its protective policies.

Response: We disagree that this rulemaking will result in a substantial increase in the number of migratory birds killed. The EIS notes that it may result in a measurable increase, but we do not expect it to be substantial. In other words, there may be a measurable difference but we do not expect it to substantially affect the existing trajectory of the number of migratory birds killed. It is important to note that the MBTA should not be relied upon by itself to reduce large-scale impacts on migratory bird populations, whether or not it is interpreted to prohibit incidental take. It is simply one tool in what must be a multifaceted approach. Voluntary efforts and development of industry best practices are an indispensable part of this approach, particularly given that the substantial decreases in migratory bird populations over the last 50 years have occurred despite the prior agency practice of enforcing the MBTA with respect to incidental take. We will continue to work with our domestic and international partners, the regulated community, and the public at large to uphold our commitment to ensure the long-term conservation of migratory birds under the migratory bird Conventions.

Comment: The proposed rule ignores article IV of the amended Canada treaty that the United States is to ''seek means to prevent damage to such birds and their environments, including damage resulting from pollution.'' Under the new interpretation of the MBTA, pollution is no longer a considered factor as pollution is almost never a direct, purposeful act. This failure to address threats beyond harvesting undermines the United States' commitment under the amended Canada treaty to ensure the long-term conservation of shared migratory bird species.

Response: Our commitment to our treaty partners to prevent and mitigate damage to migratory birds from pollution is implemented by several domestic laws. For example, pursuant to the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), the Oil Pollution Act, and the Clean Water Act, the Department is authorized to assess injury to natural resources caused by releases of hazardous substances and discharges of oil to compensate the public for lost natural resources and their services. The Department's assessment of natural resource injuries under the Natural Resource Damage Assessment Program includes any injury to migratory birds, which in many cases could otherwise be classified as incidental take. We will continue to implement these programs consistent with our treaty obligations.

Comment: One commenter stated that the proposed rule is not consistent with section 2(a) of the Migratory Bird Treaty Act, which states that ''it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill . . . any migratory bird.'' The key words regarding the prohibition of incidental take are ''at any time, by any means or in any manner.'' The words ''in any manner'' means regardless of whether it is purposeful or not.

Response: We disagree with the commenter on the import and context of the language ''at any time, by any means or in any manner'' in section 2 of the MBTA. The preamble to this regulation explains the correct context for that language and its relevance to whether the MBTA prohibits incidental take.

Comment: Multiple commenters suggested that reinterpretation of the MBTA will cause tension with Canada, whose migratory bird populations will also be affected by rules that are more lenient.

Response: The Service has met with its counterparts in Canada regarding the proposed rule. The Government of Canada submitted comments on the draft EIS associated with this rulemaking. We summarized and addressed substantive comments received from the Government of Canada in Appendix C of the final EIS. Any impacts to migratory birds that we share with Canada are also discussed in the EIS.

Additionally, after publication of the final EIS, the Government of Canada submitted a further comment expressing concern regarding this rule. Regarding the comments from the Government of Canada, the Service identified the impacts to migratory birds to the extent it was able in the final EIS, based on the information available.

Comment: Multiple comments stated that this proposed major shift in policy and regulation in the MBTA will have international implications. The commenters note that migratory birds

are a shared hemispheric resource, for which we are only custodians and stewards while they are within the borders of the United States. Any attempt to permanently weaken the MBTA, which will perpetuate, and almost certainly increase, the level of injury and death of migratory birds, needs concurrence by Canada, Mexico, Japan, and Russia if our treaty obligations are to have any true meaning. The Service has not addressed this international aspect in its planning and has not worked with the State Department on the issue. With this proposed change, the Service is making a unilateral change that will later be deemed an abrogation of our international agreements with these other sovereign nations.

Response: The MBTA, along with several other statutes, implements the migratory bird Conventions. The parties to those Conventions may meet to amend and update the provisions of the Conventions, but enactment, amendment, and implementation of domestic laws that implement those Conventions do not require concurrence by the other parties. We have undergone interagency review of this rulemaking at the proposed and final stages facilitated by the Office of Management and Budget, which included input from the State Department. We will not speculate on the views of our Convention partners beyond the public comments reflected here.

Comment: One commenter stated that this rule represents a fundamental abdication of the Service's mission to protect native wild birds. There is simply no question that the Service's history of interpretation (until 2017) of the MBTA as applying to incidental take has been the bulwark protecting tens of millions of birds from unnecessary deaths.

Response: We do not agree with the commenter's assessment of this rulemaking or that available data supports the commenter's analysis of the Service's prior interpretation.

Comment: One commenter recommended that the Service consider to what extent the proposed rule may increase regulatory uncertainty for industrial entities and other stakeholders. This administration's sudden policy change has thrown decades of practice and policy into upheaval for all entities, including industry, Federal, State, local, and international agencies, conservation groups, and more. Legal observers have also suggested that this policy may not be permanent, and one analysis noted that entities ''would be wise to keep a long-term perspective of MBTA-related risk.'' The commenters noted that rather than providing certainty into the enforcement of the law, the M-Opinion and this rulemaking may have increased uncertainty about what will be expected for industries, especially as many development decisions need to be made considering many years and decades into the future. Additionally, the M-Opinion and the proposed rule may inject more uncertainty about what is considered ''take'' compared to the previous decades of enforcement. For example, the removal of active nests when the purpose of the underlying activity is not to harm birds but related to another activity, such as construction or cleaning, has created confusion and a major loophole. Documents released under the Freedom of Information Act reveal numerous questions from entities since publication of the M-Opinion about what constitutes prohibited take. This legal uncertainty also leads to scientific uncertainty about future impacts on birds. This additional uncertainty should be considered by the Service going forward.

Response: We note that a primary purpose of codifying the interpretation presented in M–37050 is to provide more certainty and permanence regarding the Department's position on the scope of the MBTA as it relates to incidental take. Adopting the prior interpretation through regulation would not provide any more long-term certainty in this regard. Codification in the Code of Federal Regulations provides the maximum certainty and permanence possible absent new legislation, over which we have no control. To a certain extent, some degree of short-term uncertainty is to be expected when a change in agency practice occurs. We continue to provide technical advice when requested regarding application of the MBTA in specific situations. The example provided by the commenter regarding active nest removal is a clear case of incidental take that is not prohibited by the MBTA, although it may violate other Federal, State, Tribal, or local laws and regulations. If the purpose of the referenced activity were specifically to remove active bird nests, then that activity would still be a violation of the MBTA and a permit would be required before any removal could lawfully proceed. We will also continue to monitor bird populations in partnership with State wildlife agencies and other stakeholders.

Comment: The proposed rule would harm States by depriving them of the MBTA's protections for migratory birds that nest in, winter in, or pass through their territories. The States own and hold migratory birds in trust for their citizenry. Moreover, the States and their citizens benefit from the role that migratory birds play in maintaining ecological balance and the valuable ecological services that they provide. The critically important ecological services these species provide include insect and rodent control, pollination, and seed dispersal. As the U.S. Supreme Court recognized 100 years ago, State-level protections are insufficient to protect transient species that travel outside of a State's territorial bounds. In a landmark decision upholding the constitutionality of the MBTA, Justice Holmes wrote that migratory birds, which ''yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away'' can be ''protected only by national action.'' *Missouri* v. *Holland,* 252 U.S. 416, 434–35 (1920). If left to the States, the result would be a patchwork of legal approaches, reducing consistency nationwide. Individual States therefore rely on Federal law (and the international treaties implemented by Federal law) to protect their own bird populations when individual birds migrate beyond their boundaries. Interior's elimination of longstanding Federal protection harms State interests.

Response: The intent of this rulemaking is not to harm States, but to interpret the MBTA in the manner Congress intended when it drafted and enacted the statute. States remain free to prohibit, manage, or regulate incidental take of migratory birds as they see fit under State law, and nothing in this regulation or the MBTA prevents them from doing so. The EIS associated with this rulemaking analyzes the broader effects of codifying our interpretation. Though we conclude that this rule will have some negative effects on populations of some species, we do not find that those effects will be substantial.

Comment: A commenter noted that the proposed rule fails to provide adequate justification under Executive Orders 12866 and 13563 with regard to providing flexible approaches consistent with scientific integrity and protecting the environment. Simply stating that the Service has used the best available science is not sufficient. The commenter recommends the Service review its own web pages and the scientific literature to show that incidental take of birds is a significant problem. Adopting this regulation ignores that science and fails to protect the environment. It also fails the intent of the treaties. Providing a regulatory approach such as a permitting program or a program based upon a gross negligence approach

would fulfill the Treaty obligations while also satisfying the intent of E.O.s 12866 and 13563. The commenter called for the Office of Information and Regulatory Affairs to review the justification for consistency with these Executive Orders.

Response: The regulatory impact analysis developed for the proposed rule documents compliance with Executive Orders 12866 and 13563 and was reviewed and approved by OMB's Office of Information and Regulatory Affairs. We acknowledge that incidental take of migratory birds has a negative impact on many migratory bird populations and have assessed any incremental impact caused by this rulemaking and its reasonable alternatives in the EIS. We disagree that this rulemaking will have a substantial impact on migratory bird populations when compared to prior agency practice.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) 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.

Codifying our interpretation that the MBTA does not prohibit incidental take into Federal regulations would provide the public, businesses, government agencies, and other entities legal clarity and certainty regarding what is and is not prohibited under the MBTA. It is anticipated that some entities that currently employ mitigation measures to reduce or eliminate incidental migratory bird take would reduce or curtail these activities given the legal certainty provided by this regulation. Others may continue to employ these measures voluntarily for various reasons or to comply with other Federal, State, and local laws and regulations. The Service has conducted a cost-benefit analysis which can be viewed online at *https://beta.regulations.gov/docket/FWS-HQ-MB-2018-0090/document* and *https://www.fws.gov/regulations/mbta/.*

Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (Pub. L. 104–121)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small businesses, small organizations, and small government jurisdictions. However, in lieu of an initial or final regulatory flexibility analysis (IRFA or FRFA) the head of an agency may certify on a factual basis that the rule would 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 would not have a significant economic impact on a substantial number of small entities. Thus, for an initial/final regulatory flexibility analysis to be required, impacts must exceed a threshold for ''significant impact'' and a threshold for a ''substantial number of small entities.'' *See* 5 U.S.C. 605(b). This analysis first estimates the number of businesses impacted and then estimates the economic impact of the rule.

Table 1 lists the industry sectors likely impacted by the rule. These are the industries that typically incidentally take substantial numbers of birds and that the Service has worked with to reduce those effects. In some cases, these industries have been subject to enforcement actions and prosecutions under the MBTA prior to the issuance of M–37050. The vast majority of entities in these sectors are small entities, based on the U.S. Small Business Administration (SBA) small business size standards. Not all small businesses will be impacted by this rule. Only those businesses choosing to reduce best management practices will accrue benefits.

TABLE 1—DISTRIBUTION OF BUSINESSES WITHIN AFFECTED INDUSTRIES

NAICS industry description	NAICS code	Number of businesses	Small business size standard (employees)	Number of small businesses
Finfish Fishing	114111	1,210	20 [a]	1,185
Crude Petroleum and Natural Gas Extraction	211111	6,878	1,250	6,868
Drilling Oil and Gas Wells	213111	2,097	1,000	2,092
Solar Electric Power Generation	221114	153	250	153
Wind Electric Power Generation	221115	264	250	263
Electric Bulk Power Transmission	221121	261	500	214
Electric Power Distribution	221122	7,557	1,000	7,520
Wireless Telecommunications Carriers (except Satellite)	517312	15,845	1,500	15,831

Source: U.S. Census Bureau, 2012 County Business Patterns.

[a] **Note:** The Small Business Administration size standard for finfish fishing is $22 million. Neither Economic Census, Agriculture Census, nor the National Marine Fisheries Service collect business data by revenue size for the finfish industry. Therefore, we employ other data to approximate the number of small businesses. Source: U.S. Census Bureau, 2017 Economic Annual Survey.

Since the Service does not have a permitting system authorizing incidental take of migratory birds, the Service does not have specific information regarding how many businesses in each sector implement

measures to reduce incidental take of birds. Not all businesses in each sector incidentally take birds. In addition, a variety of factors would influence whether, under the previous interpretation of the MBTA, businesses would implement such measures. It is also unknown how many businesses continued or reduced practices to reduce the incidental take of birds since publication of the Solicitor's M-Opinion. We did not receive any information on that issue during the public comment period for this rule.

This rule is deregulatory in nature and is thus likely to have a positive economic impact on all regulated entities, and many of these entities likely qualify as small businesses under the Small Business Administration's threshold standards (see Table 1). By codifying the Service's interpretation, first outlined in Solicitor's Opinion, M–37050, this rulemaking would remove legal uncertainty for any individual, government entity, or business entity that undertakes any activity that may kill or take migratory birds incidental to otherwise lawful activity. Such small entities would benefit from this rule because it would remove uncertainty about the potential impacts of proposed projects. Therefore, these entities will have better information for planning projects and achieving goals.

However, the economic impact of the rule on small entities is likely not significant. As shown in Table 6, the costs of actions businesses typically implement to reduce effects on birds are small compared to the economic output of business, including small businesses, in these sectors. In addition, many businesses will continue to take actions to reduce effects on birds because these actions are best management practices for their industry or are required by other Federal or State regulations, there is a public desire to continue them, or the businesses simply desire to reduce their effects on migratory birds. For example, 13 States have oil pit covering requirements.

This analysis examines the potential effect of the rule on small businesses in selected industries. Following this discussion is a summary of mitigation measures and costs (Table 6) and a summary of the economic effects of the rule on the business sectors identified in Table 1 (Table 7).

Finfish (NAICS 114111)

Although longline fishing is regulated under the Magnuson–Stevens Act, seabirds are not afforded protection as they do not fall under that statute's definition of bycatch. *See* 16 U.S.C. 1802. Therefore, it is probable these finfish businesses may reduce bird mitigation measures such as changes in design of longline fishing hooks, change in offal management practices, and flagging or streamers on fishing lines. Table 6 shows example costs of some of the mitigation measures.

Data are unavailable regarding fleet size and how many measures are employed on each vessel. Because data are unavailable about the distribution of possible range of measures and costs, we do not extrapolate cost data to small businesses. Table 2 shows the distribution of businesses by employment size and average annual payroll.

TABLE 2—FINFISH NAICS 14111: EMPLOYMENT SIZES AND PAYROLL [1]

Employment size	Number of businesses	Average annual payroll per business [2]
Less than 5 employees	1,134	$62,000
5 to 9 employees	45	372,000
10 to 19 employees	23	639,000
20 to 49 employees	20	2,837,000
50 to 99 employees	5	4,333,000
100 to 249 employees	4	13,941,000

[1] 2017 Economic Census.
[2] Sales data are not available by employment size.

Crude Petroleum and Natural Gas Extraction (NAICS 211111)

The degree to which these small businesses may be impacted by the rule is variable and is dependent on location and choice. Thirteen States (Illinois, Arkansas, Oklahoma, Texas, North Dakota, South Dakota, Nebraska, Montana, Wyoming, Colorado, Utah, New Mexico, and California) have regulations governing the treatment of oil pits such as netting or screening of reserve pits, including measures beneficial to birds. The remaining States represent approximately 24 percent of businesses in the crude petroleum and natural gas extraction industry. Since the Small Business Size Standard is less than 1,250 employees, we assume all businesses are small. Table 3 shows the distribution of businesses by employment size and sales.

Businesses located in the States that do not have existing regulations would have the option to reduce or eliminate best management practices without potential litigation. As Table 6 shows, oil pit nets range in cost from about $131,000 to $174,000 per acre, where most netted pits are about ¼ to ½ acre. The distribution and number of oil pits across the United States or across the remaining States is unknown. Furthermore, the average number of oil pits per business is unknown. An estimate for the number of pits is unknown because some are ephemeral, present only while a well is being drilled, and others last for the life of the well. The replacement timeline for netting is also variable because hurricanes, strong winds, and strong sun all have deleterious impacts on nets. Because data are unavailable about the distribution or possible range of oil pits per business, we do not extrapolate netting cost data to small businesses.

TABLE 3—CRUDE PETROLEUM AND NATURAL GAS EXTRACTION NAICS 21111: EMPLOYMENT SIZES AND SALES [1]

Employment size	Number of businesses	Number of impacted businesses (37 states)	Average sales per business
Less than 5 employees	3,957	966	$1,473,000

TABLE 3—CRUDE PETROLEUM AND NATURAL GAS EXTRACTION NAICS 21111: EMPLOYMENT SIZES AND SALES [1]—Continued

Employment size	Number of businesses	Number of impacted businesses (37 states)	Average sales per business
5 to 9 employees	723	177	9,291,000
10 to 19 employees	632	154	22,386,000
20 to 49 employees	552	135	72,510,000
50 to 99 employees	203	50	180,065,000
100 to 249 employees	156	38	344,694,000
250 employees or more	84	21	839,456,000

[1] 2017 Economic Census.

Drilling Oil and Gas Wells (NAICS 213111)

The degree to which these small business in NAICS 213111 may be impacted by the rule is variable and is dependent on location and choice. Thirteen States (Illinois, Arkansas, Oklahoma, Texas, North Dakota, South Dakota, Nebraska, Montana, Wyoming, Colorado, Utah, New Mexico, and California) have regulations governing the treatment of oil pits such as netting or screening of reserve pits, including measures beneficial to birds. The remaining States represent approximately 32 percent of businesses in the crude petroleum and natural gas extraction industry. Since the Small Business Size Standard is less than 1,000 employees, we assume all businesses are small. Table 4 shows the distribution of businesses by employment size and sales.

Businesses located in the States that do not have existing regulations would have the option to reduce or eliminate best management practices without potential litigation. As Table 6 shows, oil pit nets range in cost from about $131,000 to $174,000 per acre, where most netted pits are about ¼ to ½ acre. The distribution and number of oil pits across the United States or across the remaining States is unknown. Furthermore, the average number of oil pits per business is unknown. An estimate for the number of pits is unknown because some are ephemeral, present only while a well is being drilled, and others last for the life of the well. The replacement timeline for netting is also variable because hurricanes, strong winds, and strong sun all have deleterious impacts on nets. Because data are unavailable about the distribution or possible range of oil pits per business, we do not extrapolate netting cost data to small businesses.

TABLE 4—DRILLING OIL AND GAS WELLS NAICS 213111: EMPLOYMENT SIZES AND SALES [1]

Employment size	Number of businesses	Number of impacted businesses (37 states)	Average sales per business
Less than 5 employees	1,217	393	$312,000
5 to 9 employees	289	93	1,674,000
10 to 19 employees	299	97	3,300,000
20 to 49 employees	330	107	11,791,000
50 to 99 employees	150	48	17,454,000
100 to 249 employees	85	27	38,874,000
250 employees or more	52	17	140,769,000

[1] Economic Census 2017.

Solar Electric Power Generation (NAICS 221114)

The degree to which these small businesses may be impacted by the rule is variable and is dependent on location and choice. Some States may have regulations that require monitoring bird use and mortality at facilities; however, the number of States with regulations is unknown. Table 5 shows the distribution of businesses by employment size and sales.

Businesses located in States that do not have existing regulations would have the option to reduce or eliminate best management practices without potential litigation. As Table 6 shows, the cost of pre- and post-construction bird surveys is unknown because data are not publicly available and public comments were not received to estimate costs. Due to these unknowns, we do not extrapolate cost data to small businesses.

TABLE 5—SOLAR ELECTRIC POWER GENERATION NAICS 221114: EMPLOYMENT SIZES AND SALES [1]

Employment size	Number of businesses	Average sales per business
Less than 5 employees	91	$6,792,000
5 to 9 employees	28	4,518,000
10 to 19 employees	21	5,806,000
20 to 49 employees	14	19,754,000
50 to 99 employees	6	64,296,000

TABLE 5—SOLAR ELECTRIC POWER GENERATION NAICS 221114: EMPLOYMENT SIZES AND SALES [1]—Continued

Employment size	Number of businesses	Average sales per business
100 to 249 employees	5	51,170,000

[1] 2017 Economic Census.

Other Industries (NAICS 221115, 221121, 221122, and 517312)

For the selected industries, we do not provide further analysis because minimal effects are expected on small businesses relative to an environmental baseline based on current regulations and voluntary conservation measures, due to the fact that mitigation costs are small relative to the cost of projects (see Table 7). Because there is not now, nor has there previously been a large-scale permit program for incidental take, the baseline does not include the potential costs of complying with such a program, including the regulatory uncertainty associated with permit approval, compliance with other statutes (*e.g.,* the National Environmental Policy Act), and potential litigation.

Summary

Table 6 identifies examples of bird mitigation measures and their associated cost. Table 7 summarizes likely economic effects of the rule on the business sectors identified in Table 1.

TABLE 6—BEST MANAGEMENT PRACTICES COSTS BY INDUSTRY [1]

NAICS industry	Example of bird mitigation measure	Estimated cost	Why data are not extrapolated to entire industry or small businesses
Finfish Fishing (NAICS 11411).	Changes in design of longline fishing hooks, change in offal management practices, flagging or streamers on fishing lines.	• Costs are per vessel per year. • $1,400 for thawed blue-dyed bait. • $150 for strategic offal discards. • $4,600 for Tori line ..... • $4,000 one-time cost for underwater setting chute. • $4,000 initial and $50 annual for side setting.	• No data available on fleet size. • No data available on how many measures are employed on each vessel.
Crude Petroleum and Natural Gas Extraction NAICS (211111).	• Netting of oil pits and ponds ..... • Closed wastewater systems	• $130,680 to $174,240 per acre to net ponds. • Most netted pits are ¼ to ½ acre. • Cost not available for wastewater systems.	• Infeasible to net pits larger than 1 acre due to sagging. • Size distribution of oil pits is unknown. • Average number of pits per business is unknown. • Closed wastewater systems typically used for reasons other than bird mitigation.
Drilling Oil and Gas Wells (NAICS 213111).	• Netting of oil pits and ponds ..... • Closed loop drilling fluid systems	• $130,680 to $174,240 per acre to net ponds. • Cost not available for closed loop drilling fluid systems, but may be a net cost savings in arid areas with water conservation requirements.	• Infeasible to net pits larger than 1 acre due to sagging. • Size distribution of oil pits is unknown. • Average number of pits per business is unknown. • Closed loop drilling fluid systems typically used for reasons other than bird mitigation. • High variability in number of wells drilled per year (21,200 in 2019).
Solar Electric Power Generation (NAICS 221114).	Pre- and post-construction bird surveys ...	No public comments received to estimate costs.	New projects can vary from 100 to 5,000 acres in size, and mortality surveys may not scale linearly.
Wind Electric Power Generation (NAICS 221115).	• Pre-construction adjustment of turbine locations to minimize bird mortality during operations. • Pre- and post-construction bird surveys • Retrofit power poles to minimize eagle mortality.	• Cost not available for adjustment of turbine construction locations. • $100,000 to $500,000 per facility per year for pre-construction site use and post-construction bird mortality surveys. • $7,500 per power pole with high variability of cost. • Annual nationwide labor cost to implement wind energy guidelines: $17.6M. • Annual nationwide non-labor cost to implement wind energy guidelines: $36.9M.	• Data not available for adjustment of turbine construction locations. • High variability in survey costs and high variability in need to conduct surveys. • High variability in cost and need to retrofit power poles.

TABLE 6—BEST MANAGEMENT PRACTICES COSTS BY INDUSTRY [1]—Continued

NAICS industry	Example of bird mitigation measure	Estimated cost	Why data are not extrapolated to entire industry or small businesses
Electric Bulk Power Transmission (NAICS 221121).	Retrofit power poles to minimize eagle mortality.	$7,500 per power pole with high variability of cost.	High variability in cost and need to retrofit power poles.
Electric Power Distribution (NAICS 221122).	Retrofit power poles to minimize eagle mortality.	$7,500 per power pole with high variability of cost.	High variability in cost and need to retrofit power poles.
Wireless Telecommunications Carriers (except Satellite) (NAICS 517312).	• Extinguish non-flashing lights on towers taller than 350′. • Retrofit towers shorter than 350′ with LED flashing lights.	• Industry saves hundreds of dollars per year in electricity costs by extinguishing lights. • Retrofitting with LED lights requires initial cost outlay, which is recouped over time due to lower energy costs and reduced maintenance.	Data not available for number of operators who have implemented these practices.

[1] Sources: FWS personnel, National Oceanic and Atmospheric Administration Revised Seabird Regulations Amendment, *eccnetting.com*, *statista.com*, *aerion.com*, FWS Wind Energy Guidelines, FWS Public Records Act data, FWS Eagle Conservation Plan Guidance.

TABLE 7—SUMMARY OF ECONOMIC EFFECTS ON SMALL BUSINESSES

NAICS industry description	NAICS code	Bird mitigation measures with no action	Economic effects on small businesses	Rationale
Finfish Fishing	11411	Changes in design of longline fishing hooks, change in offal management practices, and flagging/streamers on fishing lines.	Likely minimal effects	Seabirds are specifically excluded from the definition of bycatch under the Magnuson-Stevens Fishery Conservation and Management Act, and therefore seabirds not listed under the Endangered Species Act may not be covered by any mitigation measures. The impact of this on small entities is unknown.
Crude Petroleum and Natural Gas Extraction.	211111	Using closed wastewater systems or netting of oil pits and ponds.	Likely minimal effects	Thirteen States have regulations governing the treatment of oil pits such as netting or screening of reserve pits, including measures beneficial to birds. In addition, much of the industry is increasingly using closed systems, which do not pose a risk to birds. For these reasons, this rule is unlikely to affect a significant number of small entities.
Drilling Oil and Gas Wells.	213111	Using closed wastewater systems or netting of oil pits and ponds.	Likely minimal effects	Thirteen States have regulations governing the treatment of oil pits, such as netting or screening of reserve pits, including measures beneficial to birds. In addition, much of the industry is increasingly using closed systems, which do not pose a risk to birds. For these reasons, this rule is unlikely to affect a significant number of small entities.
Solar Electric Power Generation.	221114	Monitoring bird use and mortality at facilities, limited use of deterrent systems such as streamers and reflectors.	Likely minimal effects	Bird monitoring in some States may continue to be required under State policies. The number of States and the policy details are unknown.
Wind Electric Power Generation.	221115	Following Wind Energy Guidelines, which involve conducting risk assessments for siting facilities.	Likely minimal effects	Following the Wind Energy Guidelines has become industry best practice and would likely continue. In addition, the industry uses these guidelines to aid in reducing effects on other regulated species like eagles and threatened and endangered bats.
Electric Bulk Power Transmission.	221121	Following Avian Power Line Interaction Committee (APLIC) guidelines.	Likely minimal effects	Industry would likely continue to use APLIC guidelines to reduce outages caused by birds and to reduce the take of eagles, regulated under the Bald and Golden Eagle Protection Act.
Electric Power Distribution.	221122	Following Avian Power Line Interaction Committee (APLIC) guidelines.	Likely minimal effects	Industry would likely continue to use APLIC guidelines to reduce outages caused by birds and to reduce the take of eagles, regulated under the Bald and Golden Eagle Protection Act.

TABLE 7—SUMMARY OF ECONOMIC EFFECTS ON SMALL BUSINESSES—Continued

NAICS industry description	NAICS code	Bird mitigation measures with no action	Economic effects on small businesses	Rationale
Wireless Telecommunications Carriers (except Satellite).	517312	Installation of flashing obstruction lighting.	Likely minimal effects	Industry will likely continue to install flashing obstruction lighting to save energy costs and to comply with recent Federal Aviation Administration Lighting Circular and Federal Communication Commission regulations.

As explained above and in the rationale set forth in *Regulatory Planning and Review,* the economic effects on most or all regulated entities will be positive and this rule is not a major rule under SBREFA (5 U.S.C. 804(2)). The head of the agency therefore certifies that the rule would not have a significant economic impact on a substantial number of small entities.

Executive Order 13771—Reducing Regulation and Controlling Regulatory Costs

This rule is an E.O. 13771 (82 FR 9339, February 3, 2017) deregulatory action.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we have determined the following:

a. This rule would not ''significantly or uniquely'' affect small government activities. A small government agency plan is not required.

b. This rule would not produce a Federal mandate on local or State government or private entities. Therefore, this action is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act.

Takings

In accordance with E.O. 12630, this rule does not contain a provision for taking of private property, and would not have significant takings implications. A takings implication assessment is not required.

Federalism

This rule will not create substantial direct effects or compliance costs on State and local governments or preempt State law. Some States may choose to enact changes in their management efforts and regulatory processes and staffing to develop and or implement State laws governing birds, likely increasing costs for States. These efforts would require increased expenditure of funds, but would not constitute direct compliance costs. Therefore, this rule would not have sufficient federalism effects to warrant preparation of a federalism summary impact statement under E.O. 13132.

Civil Justice Reform

In accordance with E.O. 12988, we determined that this rule will not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is not required. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We evaluated this regulation 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), and the Department of the Interior Manual (516 DM 8). We completed an environmental impact statement (EIS) analyzing the potential impacts of a reasonable range of alternatives for this action. Based on the analysis contained within the final EIS, the Service selected Alternative A—*Promulgate regulations that define the scope of the MBTA to exclude incidental take.* Under Alternative A, the Service hereby promulgates a regulation that defines the scope of the MBTA take prohibitions to include only actions directed at migratory birds. This regulatory change is not expected to change current implementation or enforcement of the MBTA. The Service selected this alternative because it clarifies our interpretation of the MBTA and reduces the regulatory burden on the public without significantly affecting the conservation of migratory bird species protected by the MBTA. The Service's selection of this alternative and the basis for that selection are provided in the Record of Decision signed by the Director of the U.S. Fish and Wildlife Service.

Compliance with Endangered Species Act Requirements

Section 7 of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531–44), requires that ''The Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act.'' 16 U.S.C. 1536(a)(1). It further states ''[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat.'' 16 U.S.C. 1536(a)(2). We have determined that this rule regarding the take of migratory birds will have no effect on species listed under the provisions of the ESA. This rule does not lessen the requirements under the ESA and thus, species listed under the ESA continue to be afforded the full protection of the ESA. Therefore, this action will not have any effect on these species.

Government-to-Government Relationship With Tribes

In accordance with Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments,'' and the Department of the Interior's manual at 512 DM 2, we considered the possible effects of this rule on federally recognized Indian Tribes. The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under the criteria in Executive Order 13175 and under the Department's Tribal consultation policy and have determined that this rule may have a substantial direct effect on federally recognized Indian Tribes. We received

requests from nine federally recognized Tribes and two Tribal councils for government-to-government consultation. Accordingly, the Service initiated government-to-government consultation via letters signed by Regional Directors and completed the consultations before issuing this final rule. The results of these consultations are summarized in the NEPA Record of Decision associated with this rulemaking, published at *http://www.regulations.gov* in Docket No. FWS–HQ–MB–2018–0090.

Energy Supply, Distribution, or Use (E.O. 13211)

E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. As noted above, this rule is a significant regulatory action under E.O. 12866, but the rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The action has not been otherwise designated by the Administrator of OIRA as a significant energy action. No Statement of Energy Effects is required.

List of Subjects in 50 CFR Part 10

Exports, Fish, Imports, Law enforcement, Plants, Transportation, Wildlife.

Regulation Promulgation

For the reasons described in the preamble, we amend subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 10—GENERAL PROVISIONS

■ 1. The authority citation for part 10 continues to read as follows:

Authority: 16 U.S.C. 668a–d, 703–712, 742a–j–l, 1361–1384, 1401–1407, 1531–1543, 3371–3378; 18 U.S.C. 42; 19 U.S.C. 1202.

■ 2. Add § 10.14 to subpart B to read as follows:

§ 10.14 Scope of the Migratory Bird Treaty Act.

The prohibitions of the Migratory Bird Treaty Act (16 U.S.C. 703) that make it unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, or kill migratory birds, or attempt to engage in any of those actions, apply only to actions directed at migratory birds, their nests, or their eggs. Injury to or mortality of migratory birds that results from, but is not the purpose of, an action (*i.e.,* incidental taking or killing) is not prohibited by the Migratory Bird Treaty Act.

George Wallace,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2021–00054 Filed 1–5–21; 11:15 am]

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Part III

Department of Labor

Wage and Hour Division

29 CFR Parts 780, 788 and 795
Independent Contractor Status Under the Fair Labor Standards Act; Final Rule

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Parts 780, 788 and 795

RIN 1235–AA34

Independent Contractor Status Under the Fair Labor Standards Act

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Final rule.

SUMMARY: The U.S. Department of Labor (the Department) is revising its interpretation of independent contractor status under the Fair Labor Standards Act (FLSA or the Act) to promote certainty for stakeholders, reduce litigation, and encourage innovation in the economy.

DATES: This final rule is effective on March 8, 2021.

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division (WHD), U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Copies of this final rule may be obtained in alternative formats (Large Print, Braille, Audio Tape, or Disc), upon request, by calling (202) 693–0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1–877–889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest WHD district office. Locate the nearest office by calling WHD's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or logging onto WHD's website for a nationwide listing of WHD district and area offices at *http://www.dol.gov/whd/america2.htm.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

The FLSA requires covered employers to pay their nonexempt employees at least the Federal minimum wage for every hour worked and overtime pay for every hour worked over 40 in a workweek, and it mandates that employers keep certain records regarding their employees. A worker who performs services for an individual or entity (''person'' as defined in the Act) as an independent contractor, however, is not that person's employee under the Act. Thus, the FLSA does not require such person to pay an independent contractor either the minimum wage or overtime pay, nor does it require that person to keep records regarding that independent contractor. The Act does not define the term ''independent contractor,'' but it defines ''employer'' as ''any person acting directly or indirectly in the interest of an employer in relation to an employee,'' 29 U.S.C. 203(d), ''employee'' as ''any individual employed by an employer,'' *id.* at 203(e) (subject to certain exceptions), and ''employ'' as ''includ[ing] to suffer or permit to work,'' *id.* at 203(g). Courts and the Department have long interpreted the ''suffer or permit'' standard to require an evaluation of the extent of the worker's economic dependence on the potential employer—*i.e.,* the putative employer or alleged employer—and have developed a multifactor test to analyze whether a worker is an employee or an independent contractor under the FLSA. The ultimate inquiry is whether, as a matter of economic reality, the worker is dependent on a particular individual, business, or organization for work (and is thus an employee) or is in business for him- or herself (and is thus an independent contractor).

This economic realities test and its component factors have not always been sufficiently explained or consistently articulated by courts or the Department, resulting in uncertainty among the regulated community. The Department believes that a clear articulation will lead to increased precision and predictability in the economic reality test's application, which will in turn benefit workers and businesses and encourage innovation and flexibility in the economy. Accordingly, earlier this year the Department proposed to introduce a new part to Title 29 of the Code of Federal Regulations setting forth its interpretation of whether workers are ''employees'' or independent contractors under the Act.

Having received and reviewed the comments to its proposal, the Department now adopts as a final rule the interpretive guidance set forth in the Notice of Proposed Rulemaking (NPRM) (85 FR 60600) largely as proposed. This regulatory guidance adopts general interpretations to which courts and the Department have long adhered. For example, the final rule explains that independent contractors are workers who, as a matter of economic reality, are in business for themselves as opposed to being economically dependent on the potential employer for work. The final rule also explains that the inquiry into economic dependence is conducted by applying several factors, with no one factor being dispositive, and that actual practices are entitled to greater weight than what may be contractually or theoretically possible. The final rule sharpens this inquiry into five distinct factors, instead of the five or more overlapping factors used by most courts and previously the Department. Moreover, consistent with the FLSA's text, its purpose, and the Department's experience administering and enforcing the Act, the final rule explains that two of those factors—(1) the nature and degree of the worker's control over the work and (2) the worker's opportunity for profit or loss—are more probative of the question of economic dependence or lack thereof than other factors, and thus typically carry greater weight in the analysis than any others.

The regulatory guidance promulgated in this final rule regarding independent contractor status under the FLSA is generally applicable across all industries. As such, it replaces the Department's previous interpretations of independent contractor status under the FLSA which applied only in certain contexts, found at 29 CFR 780.330(b) (interpreting independent contractor status under the FLSA for tenants and sharecroppers) and 29 CFR 788.16(a) (interpreting independent contractor status under the FLSA for certain forestry and logging workers). The Department believes this final rule will significantly clarify to stakeholders how to distinguish between employees and independent contractors under the Act.

This final rule is considered to be an Executive Order 13771 deregulatory action. Details on the estimated increased efficiency and cost savings of this rule can be found in the regulatory impact analysis (RIA) in section VI.

II. Background

A. Relevant FLSA Definitions

Enacted in 1938, the FLSA requires that, among other things, covered employers pay their nonexempt employees at least the Federal minimum wage for every hour worked and overtime pay for every hour worked over 40 in a workweek, and it mandates that employers keep certain records regarding their employees. *See* 29 U.S.C. 206(a), 207(a) (minimum wage and overtime pay requirements); 29 U.S.C. 211(c) (recordkeeping requirements). The FLSA does not define the term ''independent contractor.'' The Act defines ''employer'' in section 3(d) to ''include[ ] any person acting directly or indirectly in the interest of an employer in relation to an employee,'' ''employee'' in section 3(e)(1) to mean, subject to certain exceptions, ''any

individual employed by an employer,'' and ''employ'' in section 3(g) to include ''to suffer or permit to work.'' [1] The Supreme Court has recognized that ''there is in the [FLSA] no definition that solves problems as to the limits of the employer-employee relationship under the Act.'' *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722, 728 (1947).

The Supreme Court has interpreted the ''suffer or permit'' language to define FLSA employment to be broad and more inclusive than the common law standard. *See Nationwide Mut. Ins. Co.* v. *Darden,* 503 U.S. 318, 326 (1992). However, the Court also recognized that the Act's ''statutory definition[s] . . . have [their] limits.'' *Tony & Susan Alamo Found.* v. *Sec'y of Labor,* 471 U.S. 290, 295 (1985) (internal citation omitted); *see also Walling* v. *Portland Terminal Co.,* 330 U.S. 148, 152 (1947) (''The definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees.''). The Supreme Court specifically recognized that ''[t]here may be independent contractors who take part in production or distribution who would alone be responsible for the wages and hours of their own employees.'' *Rutherford Food,* 331 U.S. at 729. Accordingly, Federal courts of appeals have uniformly held, and the Department has consistently maintained, that independent contractors are not ''employees'' for purposes of the FLSA. *See, e.g., Saleem* v. *Corporate Transp. Group, Ltd.,* 854 F.3d 131, 139–40 (2d Cir. 2017); *Karlson* v. *Action Process Serv. & Private Investigation, LLC,* 860 F.3d 1089, 1092 (8th Cir. 2017).

B. Economic Dependence and the Economic Reality Test

1. Supreme Court Development of the Economic Reality Test

As the NPRM explained, the U.S. Supreme Court explored the limits of the employer-employee relationship in a series of cases from 1944 to 1947 under three different Federal statutes: The FLSA, the National Labor Relations Act (NLRA), and the Social Security Act (SSA). 85 FR 60601 (summarizing *NLRB* v. *Hearst Publications, Inc.,* 322 U.S. 111 (1944); *United States* v. *Silk,* 331 U.S. 704 (1947); *Bartels* v. *Birmingham,* 332 U.S. 126 (1947); and *Rutherford Food,* 331 U.S. 722)).

In *Hearst,* the Supreme Court held that the NLRA's definition of employment was broader than that of the common law. 322 U.S. 123–25. Congress responded by amending the definition of employment under the NLRA on June 23, 1947, ''with the obvious purpose of hav[ing] the [National Labor Relations] Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the [NLRA].'' *NLRB* v. *United Ins. Co. of Am.,* 390 U.S. 254, 256 (1968).

On June 16, 1947, one week before Congress amended the NLRA in response to *Hearst,* the Supreme Court decided *Silk,* which addressed the distinction between employees and independent contractors under the SSA. In that case, the Court relied on *Hearst* to hold that ''economic reality,'' as opposed to ''technical concepts'' of the common law standard alone, determines workers' classification. 331 U.S. at 712–14. Although the Court found it to be ''quite impossible to extract from the [SSA] a rule of thumb to define the limits of the employer-employe[e] relationship,'' it identified five factors as ''important for decision'': ''degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation[,] and skill required in the claimed independent operation.'' *Id.* at 716. The Court added that ''[n]o one [factor] is controlling nor is the list complete.'' *Id.* One week after *Silk* and on the same day Congress amended the NLRA, the Court reiterated these five factors in *Bartels,* another case involving employee or independent contractor status under the SSA. In *Bartels,* the Court explained that under the SSA, employee status ''was not to be determined solely by the idea of control which an alleged employer may or could exercise over the details of the service rendered to his business by the worker.'' *Id.* Although ''control is characteristically associated with the employer-employee relationship,'' employees under ''social legislation'' such as the SSA are ''those who as a matter of economic reality are dependent upon the business to which they render service.'' *Id.*

The same day as it decided *Silk,* the Court ruled in *Rutherford Food* that certain workers at a slaughterhouse were employees under the FLSA, and not independent contractors, by examining facts pertaining to the five factors identified in *Silk*.[2] The Court also considered whether the work was ''a part of the integrated unit of production'' (meaning whether the putative independent contractors were integrated into the assembly line alongside the company's employees) to assess whether they were employees or independent contractors under the FLSA. *Id.* at 729–730.

In November 1947, five months after *Silk* and *Rutherford Food,* the Department of the Treasury (Treasury) proposed regulations r defining when an individual was an independent contractor or employee under the SSA, which used a test that balanced the following factors:

1. Degree of control of the individual;
2. Permanency of relation;
3. Integration of the individual's work in the business to which he renders service;
4. Skill required by the individual;
5. Investment by the individual in facilities for work; and
6. Opportunity of the individual for profit or loss.

12 FR 7966. Factors one, two, and four through six corresponded directly with the five factors identified as being ''important for decision'' in *Silk,* 331 U.S. at 716, and the third factor corresponded with *Rutherford Food*'s consideration of the fact that the workers were ''part of an integrated unit of production.'' 331 U.S. at 729. The Treasury proposal further relied on *Bartels,* 332 U.S. at 130, to apply these factors to determine whether a worker was ''dependent as a matter of economic reality upon the business to which he renders services.'' 12 FR 7966.[3]

Congress replaced the interpretations of the definitions of ''employee'' adopted in *Hearst* for the NLRA and in *Silk* and *Bartels* for the SSA ''to demonstrate that the usual common-law principles were the keys to meaning.'' *Darden,* 503 U.S. at 324–25. However, Congress did not similarly amend the FLSA. Thus, the Supreme Court stated in *Darden* that the scope of employment under the FLSA remains broader than that under common law and is determined not by the common law but instead by the economic reality of the relationship at issue. *See id.* Since implicitly doing so in *Rutherford Food,*

[1] 29 U.S.C. 203(d), (e), (g). The Act defines a ''person'' as ''an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.'' 29 U.S.C. 203(a).

[2] For example, the Court noted that the slaughterhouse workers performed unskilled work ''on the production line.'' 331 U.S. at 730. ''The premises and equipment of [the employer] were used for the work,'' indicating little investment by the workers. *Id.* ''The group had no business organization that could or did shift as a unit from one slaughter-house to another,'' indicating a permanent work arrangement. *Id.* ''The managing official of the plant kept close touch on the operation,'' indicating control by the alleged employer. *Id.* And ''[w]hile profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor.'' *Id.*

[3] The Treasury proposal was never finalized because Congress amended the SSA to foreclose the proposal.

the Court has not again applied (or rejected the application of) the *Silk* factors to an FLSA classification question.

2. Application of the Economic Reality Test by Federal Courts of Appeals

As the NPRM explained, in the 1970s and 1980s Federal courts of appeals began to adopt versions of a multifactor ''economic reality'' test based on *Silk, Rutherford Food,* and *Bartels* and similar to Treasury's 1947 proposed SSA regulation to analyze whether a worker was an employee or an independent contractor under the FLSA. *See* 85 FR 60603.[4] Drawing on the Supreme Court precedent discussed above, courts have recognized that the heart of the inquiry is whether ''as a matter of economic reality'' the workers are ''dependent upon the business to which they render service.'' *Usery* v. *Pilgrim Equip. Co.,* 527 F.2d 1308, 1311 (5th Cir. 1976) (quoting *Bartels,* 332 U.S. at 130). Some courts have clarified that this question of economic dependence may be boiled down to asking ''whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves.'' *Saleem,* 854 F.3d at 139 (internal quotation marks and citations omitted). Courts have also explained that a non-exhaustive set of factors—derived from *Silk* and *Rutherford Food*—shape and guide this inquiry. *See, e.g., Usery,* 527 F.2d at 1311 (identifying ''[f]ive considerations [which] have been set out as aids to making the determination of dependence, vel non''); *Real* v. *Driscoll Strawberry Assocs., Inc.,* 603 F.2d 748, 754 (9th Cir. 1979) (articulating a six-factor test).

In *Driscoll,* the Ninth Circuit Court of Appeals described its six-factor test as follows:

1. The degree of the alleged employer's right to control the manner in which the work is to be performed;

2. the alleged employee's opportunity for profit or loss depending on his managerial skill;

3. the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;

4. whether the service rendered requires a special skill;

5. the degree of permanency of the working relationship; and

6. whether the service rendered is an integral part of the alleged employer's business. *Id.* at 754.

Most courts of appeals articulate a similar test, but application between courts may vary significantly. *Compare, e.g., Sec'y of Labor* v. *Lauritzen,* 835 F.2d 1529, 1534–35 (7th Cir. 1987) (applying six-factor economic reality test to hold that pickle pickers were employees under the FLSA), *with Donovan* v. *Brandel,* 736 F.2d 1114, 1117 (6th Cir. 1984) (applying the same six-factor economic reality test to hold that pickle pickers were not employees under the FLSA). For example, the Second Circuit has analyzed opportunity for profit or loss and investment (the second and third factors listed above) together as one factor. *See, e.g., Brock* v. *Superior Care, Inc.,* 840 F.2d 1054, 1058 (2d Cir. 1988). The Fifth Circuit has not adopted the sixth factor listed above, which analyzes the integrality of the work, as part of its standard, *see, e.g., Usery,* 527 F.2d at 1311, but has at times assessed integrality as an additional factor, *see, e.g. Hobbs* v. *Petroplex Pipe & Constr., Inc.,* 946 F.3d 824, 836 (5th Cir. 2020).

The NPRM highlighted noteworthy modifications some courts of appeals have made to the economic reality factors as originally articulated in 1947 by the Supreme Court. *See* 85 FR 60603–04. First, the ''skill required'' factor identified in *Silk,* 331 U.S. at 716, is now articulated more expansively by some courts to include ''initiative.'' *See, e.g., Parrish,* 917 F.3d at 379 (''the skill and initiative required in performing the job''); *Karlson,* 860 F.3d at 1093 (same); *Superior Care,* 840 F.2d at 1058–59 (''the degree of skill and independent initiative required to perform the work'').

Second, *Silk* analyzed workers' investments, 331 U.S. at 717–19. However, the Fifth Circuit has revised the ''investment'' factor to instead consider ''the extent of the relative investments of the worker and the alleged employer.'' *Hopkins,* 545 F.3d at 343. Some other circuits have adopted this ''relative investment'' approach but continue to use the phrase ''worker's investment'' to describe the factor. *See, e.g., Keller* v. *Miri Microsystems LLC,* 781 F.3d 799, 810 (6th Cir. 2015); *Dole* v. *Snell,* 875 F.2d 802, 805 (10th Cir. 1989).

Third, although the permanence factor under *Silk* was understood to mean the continuity and duration of working relationships, *see* 12 FR 7967, some courts of appeals have expanded this factor to also consider the exclusivity of such relationships. *See, e.g., Scantland,* 721 F.3d at 1319; *Keller,* 781 F.3d at 807.

Finally, *Rutherford Food*'s consideration of whether work is ''part of an integrated unit of production,'' 331 U.S. at 729, has now been replaced by many courts of appeals by consideration of whether the service rendered is ''integral,'' which those courts have applied as meaning important or central to the potential employer's business. *See, e.g., Verma* v. *3001 Castor, Inc.,* 937 F.3d 221, 229 (3rd Cir. 2019) (concluding that workers' services were integral because they were the providers of the business's ''primary offering''); *Acosta* v. *Off Duty Police Servs., Inc.,* 915 F.3d 1050, 1055 (6th Cir. 2019) (concluding that services provided by workers were ''integral'' because the putative employer ''built its business around'' those services); *McFeeley* v. *Jackson Street Entertainment, LLC,* 825 F.3d 235, 244 (4th Cir. 2016) (considering ''the importance of the services rendered to the company's business'').

Courts of appeals have cautioned against the ''mechanical application'' of the economic reality factors. *See, e.g., Saleem,* 854 F.3d at 139. ''Rather, each factor is a tool used to gauge the economic dependence of the alleged employee, and each must be applied with this ultimate concept in mind.'' *Hopkins,* 545 F.3d at 343. Further, courts of appeals make clear that the analysis should draw from the totality of circumstances, with no single factor being determinative by itself. *See, e.g., Keller,* 781 F.3d at 807 (''No one factor is determinative.''); *Baker,* 137 F.3d at 1440 (''None of the factors alone is dispositive; instead, the court must employ a totality-of-the-circumstances approach.'').

3. Application of the Economic Reality Test by WHD

Since at least 1954, WHD has applied variations of this multifactor analysis when considering whether a worker is an employee under the FLSA or an independent contractor. *See* WHD Opinion Letter (Aug. 13, 1954) (applying six factors very similar to the six economic reality factors currently used by courts of appeals). In 1964, WHD stated, ''The Supreme Court has made it clear that an employee, as distinguished from a person who is engaged in a business of his own, is one who as a matter of economic reality follows the usual path of an employee and is dependent on the business which he serves.'' WHD Opinion Letter FLSA–795 (Sept. 30, 1964).

Over the years since, WHD has issued numerous opinion letters applying a multifactor analysis very similar to the multifactor economic reality test courts use (with some variation) to determine whether workers are employees or

[4] As explained below, versions of this multifactor economic realty test have also been enforced and articulated by the Department in subregulatory guidance since the 1950s.

independent contractors.[5] WHD has also promulgated regulations applying a multifactor analysis for independent contractor status under the FLSA in certain specific industries. *See, e.g.,* 29 CFR 780.330(b) (applying a six factor economic reality test to determine whether a sharecropper or tenant is an independent contractor or employee under the Act); 29 CFR 788.16(a) (applying a six factor economic reality test in forestry and logging operations with no more than eight employees). Further, WHD has promulgated a regulation applying a multifactor economic reality analysis for determining independent contractor status under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). 29 CFR 500.20(h)(4).

The Department's sub-regulatory guidance, WHD Fact Sheet #13, ''Employment Relationship under the Fair Labor Standards Act (FLSA)'' (Jul. 2008), similarly stated that, when determining whether an employment relationship exists under the FLSA, common law control is not the exclusive consideration. Instead, ''it is the total activity or situation which controls''; and ''an employee, as distinguished from a person who is engaged in a business of his or her own, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves.'' [6] The fact sheet identified seven economic reality factors; in addition to factors that are similar to the six factors identified above, it also considered the worker's ''degree of independent business organization and operation.'' On July 15, 2015, WHD issued Administrator's Interpretation No. 2015–1, ''The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors'' (AI 2015–1). AI 2015–1 provided guidance regarding the employment relationship under the FLSA and the application of the six economic realities factors. AI 2015–1 was withdrawn on June 7, 2017 and is no longer in effect.

WHD's most recent opinion letter addressing this issue, from 2019, generally applied the principles and factors similar to those described in the prior opinion letters and Fact Sheet #13, but not the ''independent business organization'' factor because it did not add to the analysis as a separate factor and was ''[e]ncompassed within'' the other factors. It also stated that the investment factor should focus on the ''amount of the worker's investment in facilities, equipment, or helpers.'' The opinion letter addressed the FLSA classification of service providers who used a virtual marketplace company to be referred to end-market consumers to whom the services were actually provided. WHD concluded that the service providers appeared to be independent contractors and not employees of the virtual marketplace company. *See* WHD Opinion Letter FLSA2019–6 at 7. WHD found that it was ''inherently difficult to conceptualize the service providers' 'working relationship' with [the virtual marketplace company], because as a matter of economic reality, they are working for the consumer, not [the company].'' *Id.* Because ''[t]he facts . . . demonstrate economic independence, rather than economic dependence, in the working relationship between [the virtual marketplace company] and its service providers,'' WHD opined that they were not employees of the company under the FLSA but rather were independent contractors. *Id.* at 9.

As explained below, the Department's prior interpretations of independent contractor status, which themselves have evolved over time, are subject to similar limitations as that of court opinions, and the Department believes that stakeholders would benefit from clarification. For these reasons, the Department proposed promulgating a clearer and more consistent standard for evaluating whether a worker is an employee or independent contractor under the FLSA and is now finalizing that proposal, with some modifications based on comments received.

C. The Department's Proposal

On September 25, 2020, the Department published the NPRM in the **Federal Register**. The Department proposed to adopt an ''economic reality'' test to determine a worker's status as an FLSA employee or an independent contractor. The test considers whether a worker is in business for himself or herself (independent contractor) or is instead economically dependent on an employer for work (employee). The Department further identified two ''core factors'': The nature and degree of the worker's control over the work; and the worker's opportunity for profit or loss based on initiative, investment, or both. The Department explained it was proposing to emphasize these factors because they are the most probative of whether workers are economically dependent on someone else's business or are in business for themselves. The proposal identified three other factors to also be considered, though they are less probative than the core factors: The amount of skill required for the work, the degree of permanence of the working relationship between the individual and the potential employer, and whether the work is part of an integrated unit of production. The Department further proposed to advise that the actual practice is more probative than what may be contractually or theoretically possible in determining whether a worker is an employee or an independent contractor.

D. Comments

The Department solicited comments on all aspects of the proposed rule. More than 1800 individuals and organizations timely commented on the Department's NPRM during the thirty-day comment period that ended on October 26, 2020. The Department received comments from employers, workers, industry associations, worker advocacy groups, and unions, among others. All timely comments may be viewed at the website *www.regulations.gov,* docket ID WHD–2020–0007.

Of the comments received, the Department received approximately 230 comments from workers who identified themselves as independent contractors (not including the over 900 comments received from Uber drivers discussed below). Of those, the overwhelming majority expressed support for the NPRM. These individuals identified themselves as freelancers or independent contractors in jobs including translator, journalist, consultant, musician, and many others. Among this group of commenters, over 200 expressed support for the proposed rule, while only 8 opposed it. The remaining individuals in this group did not express a specific position. Uber drivers submitted over 900 comments. While many expressed views on Uber corporate policies and not on the NPRM itself, the majority of these drivers who addressed the NRPM supported the Department's proposal. The Department also received a number of other

[5] *See, e.g.,* WHD Opinion Letter FLSA2019–6 at 4 (Apr. 29, 2019); WHD Opinion Letter, 2002 WL 32406602, at *2 (Sept. 5, 2002); WHD Opinion Letter, 2000 WL 34444342, at *3 (Dec. 7, 2000); WHD Opinion Letter, 2000 WL 34444352, at *1 (Jul. 5, 2000); WHD Opinion Letter, 1999 WL 1788137, at *1 (Jul. 12, 1999); WHD Opinion Letter, 1995 WL 1032489, at *1 (June 5, 1995); WHD Opinion Letter, 1995 WL 1032469, at *1 (Mar. 2, 1995); WHD Opinion Letter, 1986 WL 740454, at *1 (June 23, 1986); WHD Opinion Letter, 1986 WL 1171083, at *1 (Jan. 14, 1986); WHD Opinion Letter WH–476, 1978 WL 51437, at *2 (Oct. 19, 1978); WHD Opinion Letter WH–361, 1975 WL 40984, at *1 (Oct. 1, 1975); WHD Opinion Letter (Sept. 12, 1969); WHD Opinion Letter (Oct. 12, 1965).

[6] Fact Sheet #13 is available at *https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs13.pdf.*

comments that are beyond the scope of this rulemaking. For example, several commenters expressed opinions related to the issues addressed in the Department's proposal but that were specific to state legislation or employer policies. Significant issues raised in the timely comments received are discussed below, along with the Department's response to those comments.

III. Need for Rulemaking

The NPRM explained that the Department has never promulgated a generally-applicable regulation addressing who is an independent contractor and thus not an employee under the FLSA. Instead, as described above, the Department has issued and revised guidance since at least 1954, using different variations of a multifactor economic reality test that analyzes economic dependence to distinguish independent contractors from employees. Such guidance reflects, in large part, application of the general principles of the economic reality test by Federal courts of appeals. Such guidance, however, did not reflect any public input. Indeed, the NPRM kicked off the Department's first ever notice-and-comment rulemaking to provide a generally applicable interpretation of independent contractor status under the FLSA. As recounted just above, the Department received many comments from stakeholders who are actually impacted by FLSA classification decisions, which are valuable information and insight that the Department has not previously gathered and many of which reinforced the Department's view that more clarity is needed in this area.

The Department explained in the NPRM preamble that prior articulations of the test have proven to be unclear and unwieldy for the four following reasons. First, the test's overarching concept of ''economic dependence'' is under-developed and sometimes inconsistently applied, rendering it a source of confusion. Second, the test is indefinite in that it makes all facts potentially relevant without guidance on how to prioritize or balance different and sometimes competing considerations. Third, inefficiency and lack of structure in the test further stem from blurred boundaries between the factors. Fourth, these shortcomings have become more apparent over time as technology, economic conditions, and work relationships have evolved.

The Department thus proposed to promulgate a regulation that would clarify and sharpen the contours of the economic reality test used to determine independent contractor classification under the FLSA. The NPRM explained that such a regulation would provide much needed clarity and encourage (or at least stop deterring) flexible work arrangements that benefit both businesses and workers.

Commenters in the business community and freelance workers generally agreed with the Department that the multifactor balancing test is confusing and needs clarification. The National Retail Federation (NRF) complained that ''existing tests for independent contractor status tend to have a large number of factors which can be nebulous, overlapping, and even irrelevant to the ultimate inquiry.'' The Workplace Policy Institute of Littler Mendelson, P.C. (WPI) stated that ''[b]oth the Department and the courts have struggled to define 'dependence' '' in the modern economy—resulting in confusion, unpredictability and inconsistent results.'' The Society for Human Resource Management (SHRM) echoed this sentiment, writing ''the business community and workers are left applying numerous factors in a variety of ways that is mired in uncertainty and, therefore, unnecessary risk.'' The U.S. Chamber of Commerce stated that ''[t]he confusion regarding whether a worker is properly classified as an employee or an independent contractor has long been a vexing problem for the business community, across many different industries and work settings.'' *See also, e.g.,* World Floor Covering Association (WFCA) (''The current test has resulted in inconsistent decisions, much confusion, and unnecessary costs.''). Numerous individual freelancers and organizations that represent freelance workers also stated they would welcome ''greater clarity and predictability in the application of the 'economic realities' test.'' Coalition to Promote Independent Entrepreneurs (CPIE); *see also* Coalition of Practicing Translators & Interpreters of California (CoPTIC) (requesting ''greater clarity in Federal law''). Individual freelancers generally welcomed greater legal clarity. For example, one individual commenter wrote ''to express [her] support for this proposed rule. As someone who has enjoyed freedom and flexibility as a freelancer for 20 years, this would be a welcome clarification.'' Another individual freelancer stated that ''[t]he clarity and updating of [the FLSA] through this NPRM is long overdue and the DOL should issue ruling on independent contracting. . . .''

These supportive commenters generally agreed with the Department that additional clarity would encourage flexible work arrangements that benefit businesses and workers alike. For example, the Coalition for Workforce Innovation (CWI) asserted that additional clarity of the economic reality test would ''allow workers and businesses to pursue [ ] mutually beneficial opportunities as the United States economy evolves with technology.'' Fight for Freelancers explained that its members value flexibility that comes with working as independent contractors and supported the Department's ''efforts to protect [its members'] classification.''

Some commenters who opposed this rulemaking questioned the need for a regulation on this topic. The Southwest Regional Council of Carpenters (SWRCC) stated that the ''[t]he first of the Rule's shortcomings is its assumption that a new rule is necessary in the first place,'' and the American Federation of Labor & Congress of Industrial Organization (AFL–CIO) asserted that the Department's ''quest for certainty . . . is quixotic.'' Mr. Edward Tuddenham, an attorney, contended that the current test is ''generally consistent and predictable'' and thus does not need further clarification. He and others repeatedly questioned the Department's reasons for rulemaking by asserting that the Department did not identify cases where courts reached incorrect outcomes. Rather than focus on the outcomes in particular cases, the NPRM highlighted inconsistent or confusing reasoning in many decisions to explain why the regulated community would benefit from regulatory clarity. *See* 85 FR 60605. Mr. Tuddenham and others also provided thoughtful and detailed comments criticizing specific aspects of the reasons presented in the NPRM's need for rulemaking discussion. The following discussion retraces those reasons and responds to these criticisms.

A. Confusion Regarding the Meaning of Economic Dependence

The NPRM explained that undeveloped analysis and inconsistency cloud the application of ''economic dependence,'' the touchstone of the economic reality test. 85 FR 60605. The Department and some courts have attempted to furnish a measure of clarity by explaining, for example, that the proper inquiry is '' 'whether the workers are dependent on a particular business or organization *for their continued employment'* in that line of business,'' *Brock* v. *Mr. W Fireworks, Inc.,* 814 F.2d 1042, 1054 (5th Cir. 1987) (quoting *DialAmerica,* 757 F.2d at 1385), or instead ''are in business for themselves,'' *Saleem,* 854 F.3d at 139.

But the Department and many courts have often applied the test without helpful clarification of the meaning of the economic dependency that they are seeking.

The NPRM explained that the lack of explanation of economic dependence has sometimes led to inconsistent approaches and results and highlighted as an example the apparently inconsistent results in *Cromwell* v. *Driftwood Elec. Contractor, Inc.,* 348 F. App'x 57 (5th Cir. 2009) (holding that cable splicers hired by Bellsouth to perform post-Katrina repairs were employees), and *Thibault* v. *BellSouth Telecommunication,* 612 F.3d 843 (5th Cir. 2010) (holding that cable splicer hired by same company under a very similar arrangement was an independent contractor). *See* 85 FR 60605. The *Thibault* court distinguished its result from *Cromwell* in part by highlighting Mr. Thibault's significant income from (1) his own sales company that had profits of approximately $500,000, (2) ''eight drag-race cars [that] generated $1,478 in income from racing professionally[,]'' and (3) ''commercial rental property that generated some income.'' *Thibault,* 612 F.3d at 849. While these facts indicate that Mr. Thibault may have been in business for himself as a manager of a sales business, drag-race cars, and commercial properties, they are irrelevant as to whether he was in business for himself as a cable splicer.[7] The *Thibault* court nonetheless assigned these facts substantial weight because it understood economic dependence to mean dependence for income or wealth, which is incompatible with the dependence-for-work approach that other courts and the Department apply.[8] *See, e.g., Off Duty Police,* 915 F.3d at 1058 (''[W]hether a worker has more than one source of income says little about that worker's employment status.''); *Halferty,* 821 F.2d at 268 (''[I]t is not dependence in the sense that one could not survive without the income from the job that we examine, but dependence for continued employment''); *DialAmerica,* 757 F.2d at 1385 (''The economic-dependence aspect of the [economic reality] test does not concern whether the workers at issue depend on the money they earn for obtaining the necessities of life.''). As the *DialAmerica* court explained, the dependence-for-income approach ''would lead to a senseless result'' because a wealthy individual who had an independent source of income would be an independent contractor even though a poorer individual who worked for the same company under the same work arrangement is an employee. 757 F.2d at 1385 n.11. Mr. Tuddenham initially defended the reasoning in *Thibault,* but later listed that case as an example of ''the occasional erroneous application of the [economic reality] test.''

The NPRM also highlighted the decision in *Parrish* v. *Premier Directional Drilling,* 917 F.3d 369, as an example of inconsistent articulation of economic dependence. In that case, the court first applied a dependence-for-work concept to analyze the control factor and then explicitly departed from that framework in favor of a dependence-for-income analysis of the opportunity factor. *See* 85 FR 60606. The *Parrish* court impliedly took a third concept of dependence to analyze the investment factor through a ''side-by-side comparison'' of each worker's individual investment to that of the alleged employer.'' 917 F.3d at 383. AI 2015–1 took the same approach and explained that ''it is the relative investments that matter'' because ''[i]f the worker's investment is relatively minor, that suggests that the worker and the employer are not on similar footing and that the worker may be economically dependent on the employer.'' The comparative analysis of investments thus appears to rely on a concept of economic dependence that means ''not on a similar footing,'' which is different from the ''dependence for work'' concept that the Department believes to be correct.

In summary, courts and the Department typically economic dependence as ''dependence for work,'' but have sometimes applied other concepts of dependence to analyze certain factors, such as ''dependence for income'' and ''not on similar footing.'' Because economic dependence is the ultimate inquiry of FLSA employment, these different conceptions result in essentially different tests that confuse the regulated community. Accordingly, the economic reality test needs a more developed and dependable touchstone at its heart.

B. Lack of Focus in the Multifactor Balancing Test

The NPRM explained that the versions of the multifactor economic reality test used by courts since at least the 1980s and the Department since the 1950s lack clear, generally applicable guidance about how to balance the multiple factors and the countless facts encompassed therein. *See* 85 FR 60606.The test's lack of guidance leads to uncertainty regarding ''which aspects of 'economic reality' matter, and why.'' *Lauritzen,* 835 F.2d at 1539 (Easterbrook J., concurring).

As examples of such uncertainty, the NPRM highlighted court decisions analyzing economic reality factors to reach an overall decision about a worker's classification without meaningful explanation of how they balanced the factors to reach the final decision. 85 FR 60606 (citing, *e.g., Parrish,* 917 F.3d at 380; *Chao* v. *Mid-Atl. Installation Servs., Inc.,* 16 F. App'x 104, 108 (4th Cir. 2001); and *Snell,* 875 F.2d at 912). Even where many facts and factors support both sides of the classification inquiry, courts have not explained how they balanced the competing considerations. *See, e.g., Acosta* v. *Paragon Contractors Corp.,* 884 F.3d 1225, 1238 (10th Cir. 2018); *Iontchev* v. *AAA Cab. Services,* 685 F. App'x 548, 550 (9th Cir. 2017). The NPRM thus identified a need for guidance on which factors are most probative.

Even some commenters critical of the Department's approach in the NPRM conceded that the test as currently applied can create considerable ambiguity. Mr. Tuddenham asserted that the lack of general guidance regarding how to balance factors is ''an unavoidable function of determining something as nebulous as 'economic dependence.' '' *See also* Farmworker Justice (''[T]he test, as currently applied, creates necessary ambiguity.''). The Department disagrees that the concept of ''economic dependence'' is necessarily ''nebulous.'' FLSA employment itself depends on economic dependence, and nothing in the statute requires that this standard be nebulous and thus unmanageable. *See Usery,* 527 F.2d at 1311 (''It is dependence that indicates employee status.''). Instead, the Department believes the correct concept of economic dependence tangibly defines FLSA employment to include individuals who are dependent on others for work, and to exclude individuals who are, as a matter of economic reality, in business for themselves. *See Saleem,* 854 F.3d at 139. The Department thus believes it is

[7] The *Thibault* court also highlighted the fact that Mr. Thibault worked for only 3 months—although he intended to work for 7 or 8 months—before being fired. *See* 612 F.3d at 846, 849. In contrast, the splicers in *Cromwell* worked approximately 11 months. *See* 348 F. App'x at 58.

[8] The *Thibault* case recognized that ''[a]n individual's wealth is not a solely dispositive factor in the economic dependence question.'' 612 F.3d at 849 n.4. This confirms that wealth was in fact a meaningful consideration, which runs against other cases explaining that dependence on wealth is an inappropriate lens.

possible to provide generally applicable guidance regarding how to consider and balance the economic reality factors to assess this concept of economic dependence.

C. Confusion and Inefficiency Due to Overlapping Factors

The NPRM next explained that courts and the Department have articulated the economic reality factors such that they have overlapping coverage, which undermines the structural benefits of a multifactor test. *See* 85 FR 60607. The NPRM noted that most of these overlaps did not exist in the Supreme Court's original articulation of the economic reality factors in *Silk* and were instead introduced by subsequent court of appeals decisions. The NPRM then explained several ways in which extensive overlaps may lead to inefficiency and confusion for the regulated community.

First, the ''skill required'' factor articulated in *Silk,* 331 U.S. at 716, has been expanded by the Department and some courts to analyze ''skill and initiative.'' *See, e.g., Superior Care,* 840 F.2d at 1060; WHD Fact Sheet WHD #13. Because the capacity for on-the-job initiative is already part of the control factor, the NPRM explained that this approach essentially imports control analysis into the skill factor. Indeed, the presence of control appears to overrides the existence of skill,[9] effectively transforming the skill factor into an extension of the control factor in some circuits, but not others.[10] The ''skill and initiative'' factor also overlaps with the opportunity factor, which considers the impact of initiative on worker's earnings, resulting in initiative being analyzed under three different factors. As an illustration of confusion resulting from this overlap, the NPRM highlighted a case in which a court found that workers exercised enough on-the-job initiative for the control and opportunity factors to point towards independent contractor status, but nonetheless found the 'skill and initiative factor points towards employee status' due to 'the key missing ingredient . . . of initiative.' '' 85 FR 60607 (quoting *Express Sixty-Minutes Delivery,* 161 F.3d at 303).

Next, the permanence factor originally concerned the continuity and duration of a working relationship but has since been expanded by some courts and the Department to also consider the exclusivity of that relationship. *See* 85 FR 60608 (citing *Parrish* 917 F.3d at 386–87; *Keller,* 781 F.3d at 807–09; *Scantland,* 721 F.3d at 1319; WHD Opinion Letter FLSA 2019–6 at 8). But exclusivity—the ability or inability for a worker to offer services to different companies—is already a part of the control factor. This overlap results in exclusivity being analyzed twice and causes the actual consideration of permanence being potentially subsumed by control.

Third, the ''integral part'' factor is used by some courts to be merely a proxy of control. As one such court explained: ''It is presumed that, with respect to vital or integral parts of the business, the employer will prefer to engage an employee rather than an independent contractor. This is so because the employer retains control over the employee and can compel attendan[ce] at work on a consistent basis.'' *Baker* v. *Dataphase, Inc.,* 781 F. Supp. 724, 735 (D. Utah 1992). But the control factor already directly analyzes whether a business can compel attendance on a consistent basis. It is unclear what additional value can be gained by indirectly analyzing that same consideration a second time under the ''integral part'' factor.[11]

Finally, while *Silk* articulated the opportunity for profit and loss and investment as separate factors, it analyzed the two together in concluding that truck drivers in that case were independent contractors in part because they ''invested in their own trucks and had ''an opportunity for profit from sound management'' of that investment. 331 U.S. at 719. The Second Circuit recognized such clear overlap, noting that ''[e]conomic investment, by definition, creates the opportunity for loss, [and] investors take such a risk with an eye to profit.'' *Saleem,* 854 F.3d at 145 n.29. Nonetheless, most courts and Department have analyzed opportunity for profit and loss and investment as separate factors. When done right, separate analysis leads to redundancy. *See, e.g., Mid-Atlantic Installation Servs.,* 16 F. App'x at 106–07. When done wrong, it leads to analysis of investment without regard for the worker's profit or loss, such as by comparing the dollar value of a worker's personal investments against the total investment of a large company that, for example, ''maintain[s] corporate offices.'' *Hopkins* 545 F.3d at 344. The NPRM explained that such a comparison says nothing about whether the worker is in business for himself, as opposed to being economically dependent on that company for work, and is therefore not probative and potentially misleading. 85 FR 60608. The NRPM concluded that reducing the above-mentioned overlaps would make the economic reality test easier to understand and apply.

The SWRCC contended that ''overlapping factors [have] never been the source of—and the DOL cannot point to—any credible criticism,'' but did not question or even acknowledge the above criticism discussed at length in the NRPM. In contrast, commenters that are significantly impacted by the FLSA's obligations generally agreed with the Department that overlapping factors have created confusion. For example, the Association of General Contractors stated that ''[n]avigating and complying with the various overlapping and inconsistent standards are confusing and costly,'' and WPI ''agree[d] with the Department that such overlap and blurring of factors is confusing and inefficient.'' *See also, e.g.,* Center for Workplace Compliance (CWC); NRF; U.S. Chamber of Commerce.

A multifactor test is a useful framework for determining FLSA employment in part because it organizes the many facts that are part of economic reality into distinct categories, thus providing some structure to an otherwise roving inquiry. However, this benefit is lost if the lines between those factors blur. Under prior articulations of the test, considerations within the control factor—capacity for on-the-job initiative, exclusivity, and ability to compel attendance—have been imported into analysis of three other factors: Skill, permanence, and integral

[9] *See, e.g., Selker Bros.,* 949 F.2d at 1295 (concluding that the skill factor weighed towards employee classification due to ''the degree of control exercised by [the potential employer] over the day-to-day operation''); *Baker,* 137 F.3d at 1443 (finding that the skill factor weighed towards employee classification where skilled welders ''are told what to do and when to do it''); *Superior Care,* 840 F.2d at 1060 (finding that the skill factor weighed towards employee classification for skilled nurses because ''Superior Care in turn controlled the terms and conditions of the employment relationship'').

[10] Some courts of appeal continue to analyze skill rather than control as part of the skill factor. *See, e.g., Paragon,* 884 F3d at 1235 (considering ''the degree of skill required to perform the work''); *see also Iontchev,* 685 F. App'x at 550 (asking ''whether services rendered . . . require[d] a special skill''); *Keller,* 791 F.3d at 807 (analyzing ''the degree of skill required'').

[11] As the NPRM explained, this presumption that firms would control all important services on which they rely may rest on a mistaken premise because, for example, manufacturers routinely have critical parts and components produced and delivered by wholly separate companies. 85 FR 60608. And companies whose business is to connect independent service providers with customers would find those service providers to be important even though they are independent from the company's business. *See State Dep't of Employment, Training & Rehab., Employment Sec. Div.* v. *Reliable Health Care Servs. of S. Nevada, Inc.,* 983 P.2d 414, 419 (Nev. 1999) (''[W]e cannot ignore the simple fact that providing patient care and brokering workers are two distinct businesses.' '')

part. Indeed, those control-based considerations appear to be the most important aspect of the other factors, which obscures those factors' distinctive probative values. Moreover, considerations under the opportunity factor—the ability to affect profits through initiative—have been imported into the skill factor. And the ability to earn profits through investment overlaps completely with the investment factor. The Department continues to believe these overlapping coverages contribute to confusion and should be reduced where practicable.

D. The Shortcomings and Misconceptions That This Rulemaking Seeks To Remedy Are More Apparent in the Modern Economy

The NPRM explained that certain technological and social changes have made shortcomings of the economic reality test more apparent in the modern economy. It highlighted the effects of three types of change. First, falling transaction costs in many industries makes it more cost effective for firms to hire independent contractors rather than employees to perform core functions.[12] This in turn means analyzing the importance of the work through the ''integral part'' factor, which the Supreme Court never endorsed, is more likely to result in misleading signals regarding an individual's employment status. Second, the transition from a more industrial-based to a more knowledge-based economy reduces the probative value of the investment factor in certain industries because individuals can be in business for themselves in those industries with minimal physical capital. Third, shorter job tenures among employees dull the ability of the permanence factor to distinguish between employees and independence contractor. *See* 85 FR 60608–09.

Several commenters agreed with the Department's assessments of modern trends. *See, e.g.,* TechNet (''Given falling transaction costs, companies are more willing to allocate certain pieces of their production, even integrated parts, to independent contractors.''); Food Industry Association (''societal changes have resulted in innovative work arrangements and changes in job tenure expectation''). Former Deputy Under Secretary of Labor and retired law professor Henry H. Perritt, Jr. found the discussion of modern trends to be ''particularly insightful and should be retained and expanded in the preamble to any final rule.'' Other commenters disagreed. The AFL–CIO, for instance, theorized that lower transaction costs ''might just as easily result in employers not taking steps to retain employees who perform work central to their business, but instead tolerate frequent turnover in such positions'' and that the ''job tenure of independent contractors may have fallen more'' than for employees—though it did not provide evidence in support of its hypotheses.[13] The Department continues to believe that each of the above shortcomings of the previously applied economic reality test provides sufficient reason for this rulemaking and that technological and societal changes have made these shortcomings even more apparent.

E. Effects of Additional Regulatory Clarity on Innovation

The NPRM expressed concern that the legal uncertainty arising from the above-described shortcomings of the multifactor economic reality test may deter innovative, flexible work arrangements that benefit businesses and workers alike. Some commenters questioned this assumption. The Coalition of State Attorneys General, Cities, and Municipal Agencies (State AGs), for instance, contended that the Department ''provides no empirical evidence or data demonstrating that employers now hesitate to engage in innovative arrangements'' and further argued that because ''digital platforms have become part of the modern economy . . . they have not been stifled by the current test.'' But the mere existence of certain types of businesses is insufficient evidence that other such businesses are not being stifled, and it is unclear what empirical data could measure innovation that is not occurring due to legal uncertainty. Commenters who represent technology companies stated that legal uncertainty regarding worker classification in fact deters them from developing innovative and flexible work arrangements. *See, e.g.,* CWI; TechNet. In addition, economists who study the impact of labor regulation on entrepreneurship also commented that clear independent contractor regulations would assist startup companies. Dr. Liya Palagashvilli (''71 percent of startups relied on independent contractors and thought it was necessary to use contract labor during their early stages''); Dr. Michael Farren and Trace Mitchell (''[G]reater legal clarity to employers and workers will allow for more efficient production processes and will reduce the resources wasted on determining a worker's employment classification through the legal process.'').

For the reasons mentioned above, the Department continues to believe that, unless revised, the multifactor economic reality test suffers because the analytical lens through which all the factors are filtered remains inconsistent; there is no clear principle regarding how to balance the multiple factors; the lines between many of the factors are blurred; and these shortcomings have become more apparent in the modern economy. The resulting legal uncertainty obscures workers' and businesses' respective rights and obligations under the FLSA and deters innovative work arrangements, thus inhibiting the development of new job opportunities or eliminating existing jobs. The Department is therefore issuing this final rule to increase legal certainty.

IV. Final Regulatory Provisions

Having reviewed commenter feedback submitted in response to the proposed rule, the Department is finalizing the addition of a new part 795 to Title 29 of the Code of Federal Regulations, which will address whether particular workers are ''employees'' or independent contractors under the FLSA. In relevant part, and as discussed in greater detail below, the part includes:

- An introductory provision at § 795.100 explaining the purpose and legal authority for the new part;
- a provision at § 795.105(a) explaining that independent contractors are not employees under the FLSA;
- a provision at § 795.105(b) discussing the ''economic reality'' test for distinguishing FLSA employees from independent contractors and clarifying that the concept of economic

[12] Ronald Coase, *Nature of the Firm,* 4 Economica 386 (1937), *https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1468-0335.1937.tb00002.x. See also* Nobel Prizes and Laureates, Oct., 15, 1991, *https://www.nobelprize.org/prizes/economic-sciences/1991/press-release/* (explaining *The Nature of the Firm's* contribution to economics literature as a central reason for Coase's receipt of the 1991 Nobel Prize in Economics); Katz and A. Krueger, ''The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015,'' p. 25 (2018) (''Coase's (1937) classic explanation for the boundary of firms rested on the minimization of transaction costs within firm-employee relationships. Technological changes may be reducing the transaction costs associated with contracting out job tasks, however, and thus supporting the disintermediation of work.'').

[13] The Department notes that it is unlikely that job tenures of independent contractors have fallen by more than employees because average job tenure for employees have dropped by many years, which is greater than the total duration of a typical independent contractor relationship. *See* Julie Hotchkiss and Christopher Macpherson, *Falling Job Tenure: It's Not Just about Millennials,* Federal Reserve Bank of Atlanta, June 8, 2015, *https://www.frbatlanta.org/blogs/macroblog/2015/06/08/falling-job-tenure-its-not-just-about-millennials.aspx.* (showing that median job tenure for individuals born in 1933 was ten years or longer while median job tenure for individuals born after 1983 was three years or less).

dependence turns on whether a worker is in business for him- or herself (independent contractor) or is economically dependent on a potential employer for work (employee);

- provisions at § 795.105(c) and (d) describing factors examined as part of the economic reality test, including two ''core'' factors—the nature and degree of the worker's control over the work and the worker's opportunity for profit or loss—which typically carry greater weight in the analysis, as well as three other factors that may serve as additional guideposts in the analysis;
- a provision at § 795.110 advising that the parties' actual practice is more probative than what may be contractually or theoretically possible;
- fact-specific examples at § 795.115; and
- a severability provision at § 795.120.

The Department responds to commenter feedback on the proposed rule below.

A. The Purpose of Part 795

Proposed § 795.100 explained that the interpretations in part 795 will guide WHD's enforcement of the FLSA and are intended to be used by employers, businesses, the public sector, employees, workers, and courts to assess employment status classifications under the Act. *See* 85 FR 60638. Proposed § 795.100 further clarified that, if proposed part 795 is adopted, employers may safely rely upon the interpretations in part 795 under section 10 of the Portal-to-Portal Act, unless and until any such interpretation ''is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.'' *Id.* (quoting 29 U.S.C. 259).

Few commenters specifically addressed proposed § 795.100, but several discussed issues relevant to its content. For example, a few commenters questioned the Department's legal authority to promulgate any regulation addressing independent contractor status under the FLSA. *See* Northern California Carpenters Regional Council (''At no time since the FLSA was passed has Congress made substantive amendments to the definitions of employee, employer, or the 'suffer or permit to work' standard . . . nor has it directed any changes in the controlling regulations.''); Rep. Bobby Scott et al. (''Congress has not delegated rulemaking authority to the DOL with respect to the scope of the employment relationship under the FLSA.''). A few commenters requested that the Department explain its source of rulemaking authority and the level of deference it expects to receive from courts interpreting its proposed regulation. A diverse collection of commenters, including the American Trucking Association (ATA), the National Home Delivery Association (NHDA), the Northwest Workers Justice Project (NWJP), and Winebrake & Santillo, LLC, opined that the Department's proposed regulation would be entitled to *Skidmore* deference from courts, though these commenters diverged on the proposed rule's ''power to persuade.'' *Skidmore* v. *Swift & Co.,* 323 US 134, 140 (1944). Finally, the AFL–CIO asserted that ''[t]he proposed rule is based on considerations that did not motivate Congress when it adopted the FLSA, that the Department of Labor is not authorized to consider in construing the terms of the FLSA, and that the Department has no expertise regarding,'' thus placing the proposed rule ''outside the 'limits of the delegation' from Congress to the Department contained in the Act.'' (quoting *Chevron, U.S.A., Inc.* v. *NRDC, Inc.,* 467 U.S. 837, 865 (1984)).

The Department appreciates commenter interest in these issues. The Department without question has relevant expertise in the area of what constitutes an employment relationship under the FLSA, given its responsibility for administering and enforcing the Act[14] and its decades of experience doing so. The Department's authority to interpret the Act comes with its authority to administer and enforce the Act. *See Herman* v. *Fabri-Centers of Am., Inc.,* 308 F.3d 580, 592–93 (6th Cir. 2002) (noting that ''[t]he Wage and Hour Division of the Department of Labor was created to administer the Act'' while agreeing with the Department's interpretation of one of the Act's provisions); *Dufrene* v. *Browning-Ferris, Inc.,* 207 F.3d 264, 267 (5th Cir. 2000) (''By granting the Secretary of Labor the power to administer the FLSA, Congress implicitly granted him the power to interpret.''); *Condo* v. *Sysco Corp.,* 1 F.3d 599, 603 (7th Cir. 1993) (same). The Department believes a clear explanation of the test for whether a worker is an employee under the FLSA or an independent contractor not entitled to the protections of the Act in easily accessible regulatory text is valuable to potential employers, to workers, and to other stakeholders. It has a long history of offering interpretations in this area and believes this rulemaking has great value regardless of what deference courts ultimately give to it.

While proposed § 795.100 emphasized that part 795 would state the Department's interpretation of independent contractor status under the FLSA, some commenters expressed concern that it would affect the scope of employment under other Federal laws. The United Food and Commercial Workers International Union (UFCW) believed that the proposal may narrow the coverage of the ''Title VII of the Civil Rights Act of 1964, Americans with Disabilities Act, Age Discrimination in Employment Act (ADEA), and the Equal Pay Act.'' *See also* National Women's Law Center (NWLC); CLASP. The Department reaffirms that the rule concerns the distinction between employees and independent contractors solely for the purposes of the FLSA, and as such, would not affect the scope of employment under other Federal laws.[15]

Many commenters requested that the Department promulgate a standard more broadly applicable across other state and Federal employment laws. *See, e.g.,* American Society of Travel Advisors, Inc. (''[The NPRM . . . represents something of a missed opportunity insofar as it fails to address the longstanding difficulty associated with the continued use of multiple tests at the Federal level to determine worker status.''); Cambridge Investment Research, Inc. (''[W]ithout a more encompassing Department position or guidance addressing different state standards, some of the current uncertainty and unpredictability remain.''); Chun Fung Kevin Chiu (''[I]nconsistent Federal and state standards with regards to classification may render the DOL rules ineffective in practice for those independent contractors and businesses affected.''). While several commenters acknowledged the Department's lack of authority to interpret the scope of laws outside of its jurisdiction, the National Association of Manufacturers and the Mechanical Contractors Association of America (MCAA) urged the Department to collaborate with other Federal agencies to harmonize the varying employment definitions under Federal law. Finally, the Zobrist Law Group ''urge[d] the Department to prohibit states from using classification tests that

[14] *See* 29 U.S.C. 204, 211(a), 212(b), 216(c), 217; *see also Fernandez* v. *Zoni Language Centers, Inc.,* 858 F.3d 45, 48–49 (2d Cir. 2017) (noting that ''[t]he DOL . . . administers the FLSA'').

[15] Additionally and as explained in greater detail below, this rule does not narrow the longstanding standard for distinguishing between FLSA employees and independent contractors; employees are economically dependent on another for work, and independent contractors are in business for themselves as matter of economic reality.

conflict with the proposed rule,'' asserting that ''state law not preempted by the FLSA is narrow'' and that state laws ''shifting an independent contractor under the FLSA to an employee under state law . . . [impose] greater obligations upon those workers.'' *But see* Truckload Carriers Association (''TCA understands that, due to our nation's federalist system, individual states such as California can pursue misguided statues that are more stringent than the Federal standard the Department is seeking to clarify[.]'').

While the Department appreciates the desire to achieve uniformity across the various state and Federal laws which may govern work arrangements, requests to modify definitions and tests under different laws are outside the scope of this rulemaking.

Some commenters supportive of the proposed rule requested that the Department make conforming edits to its MSPA regulation at 29 CFR 500.20(h)(4), addressing whether or not a farm labor contractor engaged by an agricultural employer/association is an independent contractor or an employee under MSPA. *See* Americans for Prosperity Foundation (AFPF) (''To further the Department's goal of clarification, simplification, and consistency . . . the same criteria used in the NPRM to define independent contractors for purposes of the FLSA also should apply to the MSPA, and to any other provision that references the FLSA.''); Administrative Law Clinic at the Antonin Scalia Law School (''[T]he Department should simply use its proposed regulations in 29 CFR 795.100, *et seq.,* to determine employee status under MSPA, and repeal [29 CFR 500.20(h)] as duplicative.''). Relatedly, Texas RioGrande Legal Aid (TRLA), which expressed opposition to the proposed rule, asserted that ''the proposed rule will lead to considerable confusion among both employers and workers . . . because the proposed rule at odds with the Department's [MSPA] regulations,'' but opined that any effort to revise 29 CFR 500.20(h) ''would be in direct contravention of Congressional directives regarding the interpretation of the MSPA.''

As noted in the NPRM preamble, the Department acknowledges that MSPA adopts by reference the FLSA's definition of ''employ,'' *see* 18 U.S.C. 1802(5), and that 29 CFR 500.20(h)(4) considers ''whether or not an independent contractor or employment relationship exists under the Fair Labor Standards Act'' to interpret independent contractor status under MSPA. At this time, however, the Department does not see a compelling need to revise 29 CFR 500.20(h)(4), as we are unsure whether application of the six factor economic reality test described in that regulation has resulted in confusion and uncertainty in the more limited MSPA context similar to that described in the FLSA context. Importantly, the regulatory standard for determining an individual's classification status under MSPA is generally consistent with the FLSA guidance finalized in this rule: ''In determining if the farm labor contractor or worker is an employee or an independent contractor, the ultimate question is the economic reality of the relationship—whether there is economic dependence upon the agricultural employer/association or farm labor contractor, as appropriate.'' 29 CFR 500.20(h)(4). Therefore, as explained in the NPRM, the Department prefers to proceed incrementally at this time by leaving the MSPA regulation at 29 CFR 500.20(h)(4) unchanged.[16] [17]

The American Network of Community Options and Resources (ANCOR) expressed concern about the Department's statement in proposed § 795.100 that, if finalized, the proposed rule ''would contain the Department's sole and authoritative interpretation of independent contractor status under the FLSA,'' fearing that the statement could be interpreted to ''render obsolete the Department's specific guidance on the application of the FLSA to shared living in Fact Sheet #79G and Administrator's Interpretation No. 2014–1.'' The Department disagrees with this interpretation, noting that § 795.100 only rescinds earlier WHD guidance addressing independent contractor status under the FLSA ''[t]o the extent . . . [that such guidance is] inconsistent or in conflict with the interpretations stated in this part.'' As explained in the NPRM, the Department engaged in this rulemaking to ''clarify the existing standard, not radically transform it,'' 85 FR 60636, and none of the industry-specific guidance in Administrator's Interpretation No. 2014–1 is meaningfully affected by this final rule. For similar reasons, we believe that the assertion by the Nebraska Appleseed Center for Law in the Public Interest (Appleseed Center) that this rulemaking will ''rescind years of [Departmental] guidance'' is an overstatement. This rule is premised on familiar FLSA concepts that courts, employers, workers, and the Department have applied for years while providing updated and clearer explanations of what the concepts mean and how they are considered. Although this rule will change the Department's analysis for classifying workers as employees or independent contractors in some respect, those changes do not favor independent contractor classification (*i.e.,* the ultimate legal outcome) relative to the status quo, but rather offer greater clarity as to workers' proper classifications.

B. Clarification That Independent Contractors Are Not Employees Under the Act

Proposed § 795.105(a) explained that an independent contractor who renders services to a person is not an employee of that person under the FLSA, and that the Act's wage and hour requirements do not apply with respect to a person's independent contractors. *See* 85 FR 60638–39. Proposed 795.105(a) similarly explained that the recordkeeping obligations for employers under section 11 of the Act do not apply to a person with respect to services received from an independent contractor. *Id.*

The vast majority of substantive comments agreed with proposed § 795.105(a). One anonymous commenter suggested that the Department interpret the FLSA's minimum wage and overtime pay requirements to apply to independent contractors because the Act's ''declaration of policy'' at 29 U.S.C. 202 ''suggests the purpose of the FLSA is to protect workers.'' The Department does not adopt this interpretation because Federal courts of appeals have uniformly held, and the Department has consistently maintained, that ''FLSA wage and hour requirements do not apply to true independent contractors.'' *Karlson,* 860 F.3d at 1092; *see also, e.g., Parrish,* 917 F.3d at 384; *Saleem,* 854

[16] *See, e.g., Pharm. Research & Mfrs. of Am.* v. *FTC,* 790 F.3d 198, 203 (D.C. Cir. 2015) (affirming that agency had discretion to ''proceeding incrementally'' in promulgating rules that were directed to one industry but no others); *Inv. Co. Inst.* v. *Commodity Futures Trading Comm'n,* 720 F.3d 370, 378 (D.C. 2013) (observing that ''[n]othing prohibits Federal agencies from moving in an incremental manner'' (quoting *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 522 (2009)); *City of Las Vegas* v. *Lujan,* 891 F.2d 927,935 (D.C. Cir. 1989) (noting that ''agencies have great discretion to treat a problem partially'').

[17] Similar to the MSPA regulation at 29 CFR 500.20(h)(4), a regulation promulgated by the Department's Veterans' Employment & Training Service (VETS) at 20 CFR 1002.44 articulates a six-factor balancing test based on the tests used by courts under the FLSA for determining whether an individual is an employee or an independent contractor under the Uniformed Services Employment and Reemployment Rights Act (USERRA). *See* 70 FR 75254 (''The independent contractor provision in this rule is based on Congress's intent that USERRA's definition of 'employee' be interpreted in the same expansive manner as the term is defined under the [FSLA].'' (citing H.R. Rep. No. 103–65, Pt. I, at 29 (1993); S. Rep. No. 103–58, at 40 (1993))). Consistent with this rulemaking's incremental focus of the FLSA context, the Department declines to amend 20 CFR 1002.44 at this time.

F.3d at 139–40; *Express Sixty-Minutes Delivery,* 161 F.3d at 305; *see also Portland Terminal,* 330 U.S. at 152 (holding that the FLSA ''was obviously not intended to stamp all persons as employees'').

C. Adopting the Economic Reality Test To Determine a Worker's Employee or Independent Contractor Status Under the Act

Proposed § 795.105(b) would adopt the economic reality test to determine a worker's status as an employee or an independent contractor under the Act. As the proposal explained, the inquiry of whether an individual is an employee or independent contractor under the Act is whether, as a matter of economic reality, the individual is economically dependent on the potential employer for work. *See* 85 FR 60611; *see also Pilgrim Equip.,* 527 F.2d at 1311 (''It is dependence that indicates employee status.''). The proposal and this final rule provide further clarity as to the economic reality test's touchstone—economic dependence.

The NPRM preamble explained that clarifying the test requires putting the question of economic dependence in the proper context. ''Economic dependence is *not* conditioned reliance on an alleged employer for one's primary source of income, for the necessities of life.'' *Mr. W Fireworks,* 814 F.2d at 1054. Rather, courts have framed the question as '' 'whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves.' '' *Saleem,* 854 F.3d at 139 (quoting *Superior Care,* 840 F.2d at 1059). This conception of economic dependence comports with the FLSA's definition of employ as ''includ[ing] to suffer or permit to work.'' *See* 29 U.S.C. 203(g). An individual who depends on a potential employer for work is able to work only by the sufferance or permission of the potential employer. Such an individual is therefore an employee under the Act. In contrast, an independent contractor does not work at the sufferance or permission of others because, as a matter of economic reality, he or she is in business for him- or herself. In other words, an independent contractor is an entrepreneur who works for him- or herself, as opposed to for an employer.[18]

The Department did not receive any substantive comments disputing this distinction between employee and independent contractor classification under the Act.

The Department observed in the NPRM preamble that some courts have relied on a worker's entrepreneurship with respect to one type of work to conclude that the worker was also in business for him- or herself in a second, unrelated type of work. *See, e.g., Parrish,* 917 F.3d at 384 (considering ''plaintiff's enterprise, such as the goat farm, as part of the overall analysis of how dependent plaintiffs were on [defendant]'' for working as consultants); *Thibault,* 612 F.3d at 849 (concluding that plaintiff was an independent contractor as a cable splicer in part because he managed unrelated commercial operations and properties in a different state). This approach is inconsistent with the Supreme Court's instruction that the economic reality analysis be limited to ''the claimed independent operation.'' *Silk,* 331 U.S. at 716. Thus, the relevant question in this context is whether the worker providing certain service to a potential employer is an entrepreneur ''in that line of business.'' *Mr. W Fireworks,* 814 F.2d at 1054. Otherwise, businesses must make worker classification decisions based on facts outside the working relationship.[19]

At bottom, the phrase ''economic dependence'' may mean many different things. But in the context of the economic reality test, ''economic dependence'' is best understood in terms of what it is not. The phrase excludes individuals who, as a matter of economic reality, are in business for themselves. Such individuals work for themselves rather than at the sufferance or permission of a potential employer, *see* 29 U.S.C. 203(g), and thus are not dependent on that potential employer for work. Section 795.105(b) therefore recognizes the principle that, as a matter of economic reality, workers who are in business for themselves with respect to work being performed are independent contractors for that work.

Many commenters supported the Department's decision to implement the economic reality test applying the above-described approach to economic dependence. WPI applauded the ''decision to retain the long-standing economic reality test while sharpening the factors used to apply that test.'' The NRF stated that the economic reality test ''is the proper basis for distinguishing independent contractors from employees under the FLSA as articulated by the U.S. Supreme Court.'' ATA) found that the economic dependence framework ''comports with a thoughtful reading of decades of court precedent.'' *See also* Americans for Prosperity Foundation; Cetera Financial Group; Center for Workplace Compliance (''DOL is correct to propose using the economic dependence standard for determining whether an individual is an employee or independent contractor'').

The majority of commenters agreed with the Department's proposal to adopt the economic reality test using the above-mentioned definition of economic dependence, including commenters that were generally critical of the proposed rule. For example, the State AGs approvingly stated that ''[f]or nearly three-quarters of a century, the Supreme Court has held that whether a worker is a covered ''employee'' under the FLSA is governed by the economic reality test.'' *See also* National Employment Law Project (NELP); Signatory Wall and Ceiling Contractors Alliance (SWACCA) (recommending adopting an economic reality test with a different number of factors). While objecting commenters challenged various aspects of the proposed rule, they did not dispute the sharpened explanation of the economic dependence inquiry. Commenters, both supportive and objecting, made a number of thoughtful suggestions, which are addressed below.

The Administrative Law Clinic at the Antonin Scalia Law School suggested further clarifying the test by adding ''[a]n individual is not an 'employee' merely because he or she is economically dependent in some way on the potential employer.'' Such additional language may be redundant in § 795.105(b) because that section already articulates economic dependence as dependence on a potential employer for work, as opposed to being in business for oneself. As explained above, other forms of dependence, such as dependence on income or subsistence, do not count. However, given how important it is to apply the correct concept of economic dependence, the Department believes this point bears emphasis through a concrete, fact-specific example in the regulatory text. The Department is thus adding an example in § 795.115 to demonstrate that a different form of dependence, *i.e.,* dependence of income or subsistence, is not a relevant consideration in the economic reality test.

[18] The Department's prior guidance has stated that ''an employee, as distinguished from a person who is engaged in a business of his or her own, is one who, as a matter of economic reality, follows the usual path of an employee.'' Fact Sheet #13; *see also* WHD Opinion Letter FLSA–795 (Sept. 30, 1964). Upon consideration, however, the Department believes that describing an employee as someone who ''follows the usual path of an employee'' is circular and unhelpful.

[19] It is possible for a worker to be an employee in one line of business and an independent contractor in another.

A number of individual commenters who generally support this rule requested that the Department allow workers who voluntarily agree to be independent contractors to be classified as such, regardless of other facts. For example, Farren and Mitchell urged the Department to ''allow the parties themselves to explicitly define the nature of their labor relationship,'' asserting that such an approach would respect worker autonomy, maximize legal certainty, and promote greater flexibility in work arrangements. This requested approach would allow voluntary agreements to supersede the economic reality test in determining classification as an employee or independent contractor. The Supreme Court, however, held in *Tony & Susan Alamo,* 471 U.S. at 302, that the FLSA must be ''applied even to those who would decline its protections.'' In other words, an individual may not waive application of the Act through voluntary agreement. *See Barrentine* v. *Arkansas-Best Freight Sys., Inc.,* 450 U.S. 728, 740 (1981) (''FLSA rights cannot be abridged by contract or otherwise waived, because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate.'') (quoting *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697, 707 (1945)); *Lauritzen,* 835 F.2d at 1544–45 (''The FLSA is designed to defeat rather than implement contractual arrangements. If employees voluntarily contract to accept $2.00 per hour, the agreement is ineffectual.'') (Easterbrook J., concurring). Because this request would contradict this precedent by allowing the possibility of workers who are employees under the facts and law to waive the FLSA's protections by classifying themselves as independent contractors, the Department declines to implement it in the final rule.

Some commenters, including the Minnesota State Building & Construction Trades Council, PJC, and SWRCC, suggested that the rule include a presumption of employee status. The Supreme Court has said and the Department agrees that this is a totality of the circumstances analysis, based on the facts. The Department thus declines to create a presumption in favor of employee status.

NELA, Farmworker Justice (FJ), and several other commenters requested that the Department abandon the economic reality test in favor of the ABC test adopted by the California Supreme Court in *Dynamex Operations West* v. *Superior Court,* 416 P.3d 1 (2018). By contrast, other commenters, such as the American Society of Travel Advisors (ASTA) and National Federation of Independent Business (NFIB), urged the Department to adopt the common law standard used to distinguish between employees and independent contractors under the Internal Revenue Code and other Federal laws. These requests are addressed in the discussion of regulatory alternatives in Section VI, which explains why the Department is not adopting either the common law control test or the ABC test for employment under the FLSA.

For the reasons discussed above, the Department adopts § 795.105(b) as proposed to adopt the economic realty test to determine whether an individual is an employee or independent contractor under the FLSA. Under that test, an individual is an employee if he or she is dependent on an employer for work, and is an independent contractor if that he or she is, as a matter of economic reality, in business for him- or herself.

D. Applying the Economic Reality Factors To Determine a Worker's Independent Contractor or Employee Status

Proposed § 795.105(c) explained that certain nonexclusive economic reality factors guide the determination of whether an individual is, on one hand, economically dependent on a potential employer for work and therefore an employee or, on the other hand, in business for him- or herself and therefore an independent contractor. *See* 85 FR 60639. These factors were listed in proposed § 795.105(d), based on the factors currently used by the Department and most Federal courts of appeals, with certain proposed reformulations. *Id.*

First, the Department proposed to follow the Second Circuit's approach of analyzing the worker's investment as part of the opportunity factor. The combined factor asked whether the worker has an opportunity to earn profits or incur losses based on his or her exercise of initiative or management of investments. *See* 85 FR 60613–15, 60639. Second, the Department proposed to clarify that the ''skill required'' factor originally articulated by the Supreme Court should be used, as opposed to the ''skill and initiative'' factor currently used in some circuits, because considering initiative as part of the skill factor creates unnecessary and confusing overlaps with the control and opportunity factors. *See* 85 FR 60615, 60639. Third, the Department proposed to further reduce overlap by analyzing the exclusivity of the relationship as a part of the control factor only, as opposed to both the control and permanence factors. *See* 85 FR 60615–16, 60639. Lastly, the Department proposed to reframe the ''whether the service rendered is an integral part of the alleged employer's business'' factor in accordance with the Supreme Court's original inquiry in *Rutherford Food,* 331 U.S. at 729, of whether the work is ''part of an integrated unit of production.'' *See* 85 FR 60616–18, 60639.[20]

Proposed § 795.105(c) further aimed to improve the certainty and predictability of the test by focusing it on two core factors: (1) The nature and degree of the worker's control over the work; and (2) the worker's opportunity for profit or loss. The proposed rule explained that if both proposed core factors point towards the same classification—whether employee or independent contractor—there is a substantial likelihood that that classification is appropriate. *See* 85 FR 60618–20, 60639.

The following discussion addresses commenter feedback on the five proposed economic reality factors.

1. The ''Nature and Degree of the Individual's Control Over the Work'' Factor

The first core factor identified in the proposed regulatory text was the ''nature and degree of the individual's control over the work.'' 85 FR 60639. Proposed § 795.105(d)(1)(i) explained that this factor ''weighs towards the individual being an independent contractor to the extent the individual, as opposed to the potential employer, exercises substantial control over key aspects of the performance of the work, such as by setting his or her own schedule, by selecting his or her projects, and/or through the ability to work for others, which might include the potential employer's competitors.'' Proposed § 795.105(d)(1)(i) further explained that, in contrast, this factor ''weighs in favor of the individual being an employee under the Act to the extent the potential employer, as opposed to the individual, exercises substantial control over key aspects of the performance of the work, such as by controlling the individual's schedule or workload and/or by directly or indirectly requiring the individual to

[20] Consistent with WHD Opinion Letter FLSA2019–6, the Department's proposal did not include the ''independent business organization'' factor mentioned in Fact Sheet #13. The opinion letter explained that the ''independent business organization'' factor was ''[e]ncompassed within'' the other factors. Because the ultimate inquiry of the economic dependence test is whether workers are ''in business for themselves,'' *Saleem,* 854 F.3d at 139, analyzing the worker's degree of ''independent business organization'' restates the inquiry and adds little, if anything, to the analysis that is not already covered by the other factors.

work exclusively for the potential employer.'' In addition, the proposal stated that the following actions by the potential employer ''do[ ] not constitute control that makes the individual more or less likely to be an employee under the Act'': ''[r]equiring the individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships).'' Numerous commenters requested changes to the proposed control section regarding (1) the perspective from which control is framed; (2) the examples of control that are relevant to the economic dependence inquiry; and (3) examples of control that are not.

a. Responses to Requests Regarding the Framing of Control

Some commenters asserted that the control factor should focus on the potential employer's substantial control over the worker instead of the worker's substantial control over the work. For example, the State AGs said that the ''proposed control factor incorrectly focuses on the worker's control over the work'' and that ''[w]ell-established precedent makes clear that the proper focus is the employer's control over the worker.'' According to NELA, ''the control analysis has historically been, and should continue to be, on the control that the employer has over the employee, not that the employee has over their work.'' NELA added that the Department ''cannot deny that its proposal casts the control inquiry differently than the Supreme Court, courts of appeals, and the Department have in the past.'' And the United Brotherhood of Carpenters and Joiners of America stated that the proposal's ''focus on the individual's control over the work turns the 'suffer or permit' standard on its head'' because that standard ''references the purported employer's behavior—not the worker's.'' *See also* Northern California Carpenters Regional Council (noting that ''[b]ecause the 'nature and degree of the individual's control over the work' . . . focuses on the individual's control, as opposed to the employer's control, the factor skews towards most skilled tradespeople being classified as independent cont[r]actors''). Relatedly, attorney Richard Reibstein suggested that the title of the control subsection ''be re-drafted in a manner that does not suggest it favors independent contractor status because the remaining text regarding [the control factor] is neutral.'' Mr. Reibstein suggested that the title be changed from the ''nature and degree of the individual's control over the work'' to the ''nature and degree of each party's control over the work.'' Finally, WPI expected that some commenters would object to the Department's proposed articulation of the control factor, and it supported the Department's approach by saying that ''the economic reality test focuses on the individual—whether the individual is economically dependent on another business or in business for him or herself,'' and that, ''[t]hus, the focus of each factor should also be on the economic realities of the individual, not the businesses with which [he or she] contracts.'' *See also* CPIE (supporting ''the NPRM's articulation of this factor'').

Notwithstanding differing commenter preferences over the primary articulation of the control factor, the proposed (and final) regulatory text at § 795.105(d)(1)(i) discusses both the individual worker's control and the potential employer's control.[21] This approach is consistent with that of courts, which also generally consider both the individual's control and the potential employer's control. *See, e.g., Razak,* 951 F.3d at 142; *Hobbs,* 946 F.3d at 829; *Saleem,* 854 F.3d at 144–45; *Karlson,* 860 F.3d at 1096. The Department explained in the NPRM preamble that whether the control factor is articulated with reference to the individual worker's control or the potential employer's control is a ''distinction . . . of no consequence,'' and that both ''the nature and degree of control over the work by the worker and by the potential employer are considered to determine whether control indicates employee or independent contractor status.'' 85 FR 60612 n.34. The Department reaffirms that statement now and reiterates that both the worker's control and the potential employer's control should be considered. To remove any ambiguity on this point, the Department has modified the title of subsection 795.105(d)(1)(i) to ''[t]he nature and degree of control over the work,'' removing the proposed rule's reference to ''*the individual's* control over the work.'' This revised articulation is closer to the Supreme Court's description of the economic reality test's control factor in *Silk,* 331 U.S. at 716 (''degrees of control''), which does not indicate a focus on either the individual worker or the potential employer.

Mr. Reibstein also suggested that the control factor ''should be drafted in a manner that focuses attention on the key to control, which is control over the manner and means by which the work in question is performed.'' He asserted that, as proposed, the control section ''is ambiguous at best and may be misleading at worst,'' and suggested that ''control over the work'' should be changed to ''control over the performance of the work, particularly how the work is to be performed.'' The Department, however, prefers to retain the ''control over the work'' articulation. It is purposefully broad to encompass various different types of control that the individual worker and the potential employer may exercise over the working relationship. Moreover, the Department agrees that who controls the manner and means by which the work is performed is a key component of the control analysis, and the Department believes that both the proposed and final regulatory text reflect the importance of the manner and means by which the work is performed.

b. Responses to Comments Regarding Examples of Relevant Control

A number of comments addressed the proposed regulatory text's three non-exhaustive examples of control that may indicate employee or independent contractor status, which were setting schedules, selecting projects, and working exclusively for the employer or working for others.

Several commenters sought clarification that these examples may not always be probative of an employment or independent contracting relationship. For instance, NRF stated ''there may be limits on schedules that are consistent with business relationships that should not be treated as impacting the analysis,'' such as delivery workers who can deliver only during the restaurant's operating hours and a retailer that arranges for after-hours cleaning services. The Department agrees that there are examples of impacts on a workers schedule that are not probative of the type of control that indicates economic dependence and that NRF has identified two such examples by pointing to the fact that a delivery worker can deliver for a restaurant only when the restaurant is open and a cleaning worker can clean a retailer only when it is closed. But the Department does not think any change to the regulatory text is warranted to clarify this point, as the regulatory text merely provides a few examples of facets of control that may—

[21] As Mr. Reibstein acknowledged, the proposed regulatory text beyond the title of the control section was written in a ''neutral'' manner. The final regulatory text is written in a similarly neutral manner.

or may not—be probative in any given case depending on the facts. NHDA sought clarification of the working for others example because, in its view, ''it is not enough for the individual to claim he/she never turned down projects or never worked for others. Rather, the individual must demonstrate some action, implementation, or execution (in other words, act or conduct) by the potential employer that prevented the individual from turning down projects or working for others.'' In response, the Department notes its statement in the NPRM preamble that ''a potential employer may exercise substantial control, for example, where it explicitly requires an exclusive working relationship or where it imposes restrictions that effectively prevent an individual from working with others.'' 85 FR 60613 (citing cases where the employer's schedule made it ''impossible'' or ''practically impossible'' for the worker to work for others). Where a worker could work for others, meaning the potential employer is not explicitly or effectively preventing the worker from doing so, the worker retains control over this aspect of his or her work. That he or she exercises this control by choosing to work only for one potential employer does not necessarily shift the control to the potential employer. Further, the parties' actions, including whether the potential employer enforced an explicit bar on working for others or has imposed working conditions that make doing so impracticable, are stronger evidence of control than contractual or theoretical ability or inability to control this aspect of the working relationship.[22]

Some commenters interpreted the few examples of control in the proposal as an effort to limit the types of control that may be considered. For example, Farmworker Justice stated that the proposal ''improperly and erroneously tries to narrow the relevant considerations for the [control] factor.'' According to Edward Tuddenham, the proposal ''lists some 'key' elements of control that . . . may have little or no significance whatsoever'' and ''[s]uch a rigid approach to the question of control can only wreak havoc with the established common law of FLSA employer/employee relationships.'' However, the examples of types of control identified in the proposal were not an attempt to narrow or limit the control factor analysis. The Department cannot provide an exhaustive list of types of control and so instead focused on several key examples of types of control. Any type of control over the work by the individual worker or the potential employer may be considered. Such considerations should not be ''mechanical,'' *Saleem,* 854 F.3d at 140, and instead must focus on whether the control exercised by either the individual or the potential employer answers the ultimate inquiry of ''whether the individual is, as a matter of economic reality, in business for himself,'' as opposed to being economically dependent on the potential employer for work. In any event, as explained below, the Department is clarifying types of control that may be relevant to the analysis.

Numerous other commenters suggested the addition of dozens of examples of types of control that indicate employee or independent contractor status. For example, WPI suggested that the following types of control by the individual worker are indicative of independent contractor status: Controlling whether to work at all; controlling the location of where to perform the work; controlling how the work is performed; setting prices or choosing between work opportunities based on prices; and hiring employees or engaging subcontractors. It suggested, conversely, that the following types of control by the potential employer are indicative of employee status: Requiring the individual worker to comply with company specific procedures regarding how the work is performed; requiring a set schedule or minimum hours; controlling when the individual can take meal and rest breaks; and controlling when the individual can take time off. CWI recommended addition of the following as examples of the individual worker's control over the work that are indicative of independent contractor status: The worker's ability to make decisions with respect to the details of how the work is performed, including the staging and sequencing of aspects of the work; the worker's selection of supplies, tools, or equipment to be used (or not used) by the worker; the worker's control over when the work is conducted (*e.g.,* worker flexibility in start and end times) where flexibility exists in the result to be accomplished or the time periods available to a worker to offer their services; the worker's control over where certain aspects of the services can be performed where the subparts do not change the results provided by the worker; and the worker's discretion to use the services of others to perform the work in whole or in part, or to support the worker's performance of services (including performing some of the contracted work and/or performing supporting services such as accounting, legal, administrative, or financial services to support the worker or services to support equipment or tools used by the worker to perform services). UPS stated that the proposal ''fails to provide examples beyond controlling the worker's schedule or workload and restricting the worker's ability to work with other entities,'' and that ''courts have properly widened the lens when assessing control, looking at factors such as background checks, authority to hire and fire, training, advertising, licensing, uniforms, monitoring, supervision, evaluation, and discipline.'' Farmworker Justice commented that the proposal did ''not acknowledge other examples of employer control that unquestionably shape a worker's experience and performance of daily tasks'' and provided as examples ''[r]equirements about how a worker must dress, what language or tone she may use in a professional setting, or what prices she must charge customers.'' Likewise, Sen. Sherrod Brown and 22 other senators commented that the proposal ''ignore[s] other critical matters of control that an employer typically exercises or retains the right to, including setting the rate of pay and the manner in which the work must be performed and disciplining workers who do not meet their standards.'' And Human Rights Watch commented that the proposed control factor ''potentially omits other ways that gig companies control their workers, such as the ways in which they unilaterally change the formula for calculating base earnings, the setting of default tip options, and restrictions on the range of assignments that are offered to workers at a specific time or in a specific locale.'' Other commenters provided various industry-specific examples that they viewed as indicative of control by the individual worker or the potential employer.

The Department has considered the various comments regarding additional examples of types of control that can be indicative of employee or independent contractor status and declines to make changes to the proposed regulatory text in response. While this preamble and

[22] The Department received related feedback from commenters asking for proposed § 795.110 to discount the relevance of voluntary worker practices (*e.g.,* choosing to work exclusively for one business, declining to negotiate prices, etc.); as explained in greater detail in Section IV(F), coercive behavior by a potential employer (*e.g.,* vigilant enforcement of a non-compete clause, punishing workers for turning down available work, etc.) constitutes stronger evidence of employment status than such voluntary worker practices, but is not a prerequisite for such worker practices to have import under the FLSA's economic reality test.

the regulatory test cannot (and should not) address each and every potential scenario and example, they clarify and articulate principles related to the control factor that can be applied to an array of fact patterns as they arise.

As an initial matter, a number of commenters' examples fall within the general categories of control already identified in the regulatory text. For example, the worker's controlling whether to work at all, controlling when the work is conducted, and choosing between work opportunities based on prices are all examples of the worker's setting his or her schedule or selecting his or her projects, which the regulatory text identifies as examples of the worker's control over the work. Similarly, the potential employer's requiring a set schedule or minimum hours, controlling when the individual can take meal and rest breaks, controlling when the individual can take time off, and restricting the range of assignments that are offered to the worker are all examples of the potential employer's control over the worker's schedule, workload, or both, which the regulatory text identifies as examples of the potential employer's control over the work.

Moreover, as explained in the NPRM preamble, the Department is concerned that application of the economic reality factors has resulted in certain overlaps between the factors. *See* 85 FR 60607–08 (identifying ways in which the former skill/initiative, permanence, and ''integral'' factors considered control). Consistent with that discussion and in the interest of further clarification, the Department reiterates that the worker's ability to exercise significant initiative, whether the potential employer directly or indirectly requires the worker to work exclusively for it, and the potential employer's ability to compel the worker's attendance to work on a consistent basis or otherwise closely supervise and manage performance of the work are examples of relevant types of control and are part of the control analysis. And as stated above, the Department agrees that who controls the manner and means by which the work is performed is a key component of the control analysis. In addition, the Department approvingly cited in the NPRM preamble cases in which the workers' ability to accept or reject projects or deliveries without negative repercussions or retaliation,[23] the potential employer's lack of close supervision or specifications how the workers should do the work,[24] and the potential employer's allowing the workers broad discretion in the manner in which to complete their work [25] indicated substantial control over the work by the workers. Finally, the Department agrees that the various examples of types of control identified by the commenters above may, at least in some factual circumstances, be relevant to the control analysis.

Ultimately, however, it is not possible—and would be counterproductive—to identify in the regulatory text every type of control (especially industry-specific types of control) that can be relevant when determining under the FLSA whether a worker is an employee or independent contractor. As explained above, the Department purposefully articulated the control analysis in a general manner to encompass various different types of control that the individual worker and the potential employer may exercise over the working relationship, and to avoid any unintended inferences regarding omitted types of control. Accordingly, any type of control over the work by the individual worker or the potential employer may be considered, although some types of control are not probative of economic dependence as set forth in the final regulatory text (and discussed below).

The Owner-Operator Independent Drivers Association (OOIDA) objected that the proposal ''offers no guidance on how'' the examples of types of control ''should be weighed against each other'' and asked whether the Department intends ''that a worker must satisfy all of the criteria that it mentions in order to be an independent contractor,'' or if there is ''some other balance when evaluating this factor.'' OOIDA noted that although the proposal stated that no single factor of the economic reality test is dispositive, ''it does not offer the same clarification when considering the details within a single factor.'' As explained above, any type of control over the work by the individual worker or the potential employer may be considered to the extent it is probative as to whether the individual is, as a matter of economic reality, in business for himself, as opposed to being economically dependent on the potential employer for work. No single example of control, if present or not present, is necessarily dispositive as to whether the control factor indicates economic dependence. The examples are simply that: Examples.

c. Responses to Comments Regarding Examples of Requirements That Are Not Probative

Despite the final rule's broad articulation of the control factor, not every requirement or limitation on the means of doing business constitutes control for the purpose of analyzing whether a worker is an employee under the FLSA. The proposed regulatory text contained examples of requirements by a potential employer that do not constitute control and thus are not probative to the ultimate inquiry of whether the individual is, as a matter of economic reality, in business for himself. These are requirements to ''comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships).'' In other words, insisting on adherence to certain rules to which the worker is already legally bound would not make the worker more or less likely to be an employee.

NELA challenged the Department's ''claims that case law supports this approach'' and asserted that ''[t]he majority view among courts . . . is that evidence of a business compelling its workers to comply with certain legal obligations or customer requirements is probative of control over the work relationship'' (citing *Scantland* v. *Jeffry Knight, Inc.,* 721 F.3d 1308, 1316 (11th Cir. 2013), among other cases). NELA added that ''[c]ourts have routinely held that employer guidelines put in place to ensure that workers conform with the law or follow safety regulations constitute control over employees'' (citing *Narayan* v. *EGL, Inc.,* 616 F.3d 895, 902 (9th Cir. 2010), among other cases). The National Women's Law Center similarly stated that ''courts have regularly rejected arguments that external requirements imposed by the defendant company's customers are irrelevant to the right to control factor'' (citing cases). NELP asserted that the Department's ''attempts to take away consideration of certain employer controls based on the source of the control'' is ''nonsense'' because ''if legislators or regulators have placed an obligation on employers to comply with certain laws, that makes the worker less independent and more dependent on that employer, and this should be accorded weight.'' AFL–CIO commented that the ''categorical exclusion of evidence of control based solely on the reasons why the employer exercises the

[23] *See* 85 FR 60612 n.35 (citing *Parrish,* 917 F.3d at 382; *Express Sixty-Minutes Delivery,* 161 F.3d at 303).

[24] *See id.* (citing *Thibault,* 612 F.3d at 847).

[25] *See* 85 FR 60612–13 (citing *Mid-Atl. Installation,* 16 F. App'x at 106).

control is both irrational and contrary to Supreme Court precedent and Congress' intent.'' And the United Brotherhood of Carpenters and Joiners of America asserted that the Department's proposal would ''create[ ] a gaping hole that is fertile ground for exploitation by irresponsible employers like the ones we find in the construction industry.''

On the other hand, the Coalition to Promote Independent Entrepreneurs ''strongly agree[d]'' with this proposal and ''agree[d] that these types of requirements frequently apply to work performed by employees and independent contractors alike and thus are not probative of whether an individual is economically dependent on a company.'' In addition, NRF asserted that ''this clarification is important, as there is a difference between 'control' and 'quality control' and/or other performance standards.'' And the Independent Bakers Association ''strongly support[ed] the proposed clarification that requiring an individual to comply with specific legal obligations typical of business relationships would not constitute evidence of control or make an individual more or less likely to be an employee.'' *See also* SHRM (''support[ing] the [p]roposed . . . recognition that contracting parties should be able to build compliance with, for example, specific legal obligations, satisfy health and safety standards, and the carrying of insurance into the contractual relationship'').

The Department understands that some courts have found requirements that workers comply with specific legal obligations or meet quality control standards to be indicative of employee status. In particular, the Eleventh Circuit in *Scantland* stated that it examines ''the nature and degree of the alleged employer's control, not why the alleged employer exercised such control'' and that ''a company must hire employees, not independent contractors'' if ''the nature of [its] business requires [the] company to exert control over workers to the extent that [the defendant] has allegedly done.'' 721 F.3d at 1316. The *Scantland* court correctly recognized that the ultimate inquiry in the economic reality test is ''whether an individual is in business for himself or is dependent upon finding employment in the business of others.'' 721 F.3d at 1312 (quotation marks omitted). But to answer that question it is necessary to consider ''why'' the potential employer imposed a requirement. If the reason for a requirement applies equally to individuals who are in business for themselves and those who are employees, imposing the requirement is not probative. *See Parrish,* 917 F.3d at 379 (''although requiring safety training and drug testing is an exercise of control in the most basic sense of the word, . . . [r]equiring . . . safety training and drug testing, when working at an *oil-drilling site,* is not the type of control that counsels in favor of employee status.'').

The *Scantland* court's discussion of the control factor included the fact that ''[t]echnicians could also be . . . fired, for consistently misbilling, fraudulently billing, stealing, . . . [and] having consistently low quality control ratings'' as evidence that the control factor weighed in favored employee classification. 721 F.3d at 1314 (11th Cir. 2013).[26] However, employees and independent contractors alike are routinely terminated for fraud, theft, and substandard work. Such dismissal are therefore not probative as to whether and the dismissed workers were in business for themselves, as opposed to being economically dependent on the potential employer. In contrast, dismissals for failing to work mandatory hours or for disregarding close supervision would be probative because mandatory hours and close supervision are typically not imposed on individuals who are in business for themselves. At bottom, the question of ''why'' workers were dismissed matters a great deal.

In any event, *Scantland*'s reasoning appears to be in the minority among courts of appeals.[27] As explained in the NPRM preamble, other courts have concluded that requiring such types of compliance is not probative of an employment relationship. *See, e.g., Parrish* 917 F.3d at 379; *Iontchev* v. *AAA Cab Serv., Inc.,* 685 F. App'x 548, 550 (9th Cir. 2017) (noting that the potential employer's ''disciplinary policy primarily enforced the Airport's rules and [the city's] regulations governing the [drivers'] operations and conduct'' in finding that the potential employer ''had relatively little control over the manner in which the [d]rivers performed their work''); *Mid-Atl. Installation,* 16 F. App'x at 106 (rejecting an argument that backcharging the workers ''for failing to comply with various local regulations or with technical specifications demonstrates the type of control characteristic of an employment relationship,'' and noting that withholding money in such circumstances is common in contractual relationships); *cf. Mr. W Fireworks,* 814 F.2d at 1048 (finding that, because a scheduling requirement was imposed by the potential employer and not by state law, it suggested control over the workers). And courts have reached analogous conclusions in joint employer cases. *See, e.g., Zheng* v. *Liberty Apparel Co. Inc.,* 355 F.3d 61, 75 (2d Cir. 2003) (finding that control with respect to ''contractual warranties of quality and time of delivery has no bearing on the joint employment inquiry'' because such control is ''perfectly consistent with a typical, legitimate subcontracting relationship''); *Moreau* v. *Air France,* 356 F.3d 942, 950–51 (9th Cir. 2003) (noting that control exercised by potential joint employer over contractor's employees to ''ensure compliance with various safety and security regulations'' is ''qualitatively different'' from control that indicates employer status).

In addition to the supportive case law, the extent to which courts take differing approaches to the probative value of such requirements is yet another example of the need identified by the Department for a clear and uniform standard under the FLSA to distinguish between employees and independent contractors. Moreover, the Department believes that these types of requirements are generally imposed by employers on both employees and independent contractors (as some commenters indicated). Employers expect and often require all of their workers to, for example, comply with the law, satisfy health and safety standards, and meet deadlines and quality standards. Thus, the existence of the requirements themselves are not probative of whether the worker is an employee or independent contractor. Other indicia of control over the work, including the indicia of control identified in the final regulatory text, are more probative of the worker's economic dependence or independence. Accordingly, the Department retains in the final regulatory text's statement that requirements by the potential employer that the worker ''comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between

[26] The court also relied on the employers' close supervision, control over schedules, and ability to prevent technicians from hiring helpers or working for others to conclude that the control factors weighed in favor of employee classification. *Scantland,* 721 F.3d at 1314–15.

[27] In *Narayan,* the Ninth Circuit applied California law—not the FLSA—and merely recited requirements imposed by the potential employer to comply with certain legal obligations among a litany of examples of control that precluded summary judgment on the employee versus independent contractor issue in that case. *See* 616 F.3d at 900–02.

businesses (as opposed to employment relationships)'' are not ''control that makes the individual more or less likely to be an employee under the Act.''

Although the ATA ''strongly agrees'' with the Department's proposal that requirements by the potential employer that the worker ''comply with specific legal obligations'' would not be ''control that makes the individual more or less likely to be an employee under the Act,'' it suggested that ''specific'' be changed to ''any'' in the final regulatory text. ATA explained that referring to ''specific'' legal obligations ''may unfortunately result in a great deal of litigation over whether any particular aspect of a contract is 'specifically' mandated by law.'' It cited, as examples, laws that impose general safety standards with which employers determine the specifics of how to comply. *See also* NHDA (''The proposal carves out compliance with *specific* legal obligations. However, not all legal obligations are specific, making other language in the proposal unnecessarily problematic.'').

After careful consideration, the Department declines to adopt the suggested change. As an initial matter, the Department used the ''specific legal obligations'' language in its recent Joint Employer Status under the Fair Labor Standards Act final rule. *See* 85 FR 2859 (finalizing 29 CFR 791.2(d)(3)).[28] The Department noted there that the obligations include compliance with the FLSA or other similar laws, sexual harassment policies, background checks, or workplace safety practices and protocols. *See id.* The Department did not intend a high degree of specificity there and intends the same meaning here. Moreover, a potential employer's requirement that a worker comply with legal obligations without any further specificity as to the law or the actual obligations is unlikely to be probative of control in the first place. Accordingly, retaining the word ''specific'' is consistent with the Department's position that, although requiring workers to comply with legal obligations could be some manner of control, such requirements reflect the applicable legal regime more than the potential employer's control, and encouraging such requirements in contractual work relationships has obvious benefits for employers, workers, and society generally.

Other commenters expressed support for the Department's proposal to carve out from the control analysis the identified employer actions toward individual workers, but also requested that the Department expand its proposal by identifying many additional employer requirements as not types of control that make the individual more or less likely to be an employee under the Act. For example, SHRM asserted that ''the Final Rule must emphasize that all workers, regardless of their formal employment status, should be able to benefit from the training, resources, and positive workplace practices as those who are directly employed in the same workplace,'' and it gave examples of workplace trainings and audit measures. The U.S. Chamber of Commerce stated that the Department ''should expand this concept'' and ''explicitly state that workers and businesses should not be discouraged from incorporating terms (and audit and other certification processes) into their relationship that support sound, lawful, safe work practices.'' It suggested the following examples of such terms: ''Incorporation of an obligation that the work be performed pursuant to acceptable professional, industry and customer service standards, as well as commonly accepted safety, ethics, licensure and other standards and recommendations (such as compliance with limitations or control imposed or necessitated by law, regulation, order or ordinance).'' *See also* Seyfarth Shaw (requesting that the following employer actions toward workers be excluded from the control analysis: ''(1) compliance with professional obligations and ethics standards; (2) compliance with regulatory obligations, including over health and safety; (3) compliance with other published industry standards; (4) compliance with applicable local, state, and national licensure standards and rules; and (5) additional contractual term examples of agreed upon results and deadlines'');[29] WPI (asserting that the potential employer's practice or ability to do the following are not probative: Requiring the individual to comply with or pass down contractual and legal obligations to subcontractors and employees; requiring the individual to comply with customer requirements; tracking and monitoring data related to the individual; providing the individual with market data on pricing; establishing default pricing that the individual may change; providing the individual with information related to the establishment or running of a business; providing the individual with emergency assistance (*e.g.,* protective equipment during a public-health crisis); and complying with Federal, state or locals laws related to a contracting relationship). Likewise, the Financial Services Institute requested that the Department carve out from the control analysis requirements that ''Independent Broker-Dealers'' (IBDs) place on their ''financial advisors'' to ''comply with requirements imposed by FINRA, the SEC, and state securities regulators'' and exclusivity requirements that IBDs place on their financial advisors to comply with ''the extensive supervisory obligations imposed by the SEC and FINRA.'' OOIDA also expressed concerns about exclusivity requirements and sought clarification that a potential employer's compliance with ''Federal regulations requir[ing] that an owner-operator lease[ ] his or her equipment exclusively to a carrier for the duration of the lease'' not affect the control analysis. Finally, CPIE asked the Department to ''make clear that duties or requirements imposed by any third party, whether it be a government agency or a third-party customer, . . . be disregarded'' when applying the control factor. *See also* NHDA (''[C]ontrol weighing in favor of employee status should be control exercised by the potential employer that originates with the potential employer and does not originate from outside, independent forces or circumstances, such as customer requirements or governmental regulations.'').

The Department does not agree with CPIE that any requirement stemming from ''duties or requirements imposed by any third party'' be ''disregarded'' or with NHDA that only control ''that originates with the potential employer'' can indicate employee status. This is because a third party may explicitly or impliedly encourage businesses to

[28] The Department's Joint Employer final rule was mostly vacated by the U.S. District Court for the Southern District of New York for reasons unrelated to the ''specific legal obligations'' language. *See New York* v. *Scalia,* No. 1:20–cv–1689–GHW, 2020 WL 5370871 (S.D.N.Y. Sept. 8, 2020). The Department appealed the decision to the U.S. Court of Appeals for the Second Circuit on November 6, 2020.

[29] In a separate section of its comment, Seyfarth Shaw recommended that the Department state that the following are not evidence of a potential employer's control over the work of the worker: The business provides information regarding the final result to be accomplished by the worker; the business provides customer specifications/details and feedback relating to the work (including requesting confirmation that the customer feedback has been addressed); the business provides time frames within which services can be provided in light of the services contracted for, and/or the time sensitivity or perishable nature of the services/products; the business' right to enforce contractual obligations; the business provides the worker suggestions, recommendations, guidance, and/or tips that are not mandated but informational relating to the services; and the business pays the worker by the hour where it is customary in the particular business/trade to do so (*e.g.,* attorneys, physical trainers).

impose requirements on workers that signify employee classification. For example, clients of a home cleaning company may prefer that the company's workers wear uniforms, use the same equipment, and be closely supervised. Imposing such requirements, even to satisfy client preferences, makes the workers more likely to be classified as employees because those requirements are inconsistent with the workers being in business for themselves. A company may also require that workers it hires perform timely and high-quality work, as clients surely prefer. But contractually agreed-upon deadlines and quality standards do not signify employee classification because independent businesses routinely agree to meet deadlines and quality standards as part of their businesses.

In response to comments requesting that the Department identify many additional employer requirements as not types of control that make the individual more or less likely to be an employee under the Act, the Department declines to change its proposed regulatory text. As an initial matter, many of the requested additions are already covered by the proposed text. For example, the following requested additions are requirements to ''comply with specific legal obligations'' and thus already covered: Requirements to comply with limitations or control imposed or necessitated by law, regulation, order, or ordinance; regulatory obligations; Federal, state, or local laws related to a contracting relationship; requirements imposed by FINRA, the SEC, and state securities regulators; and Federal regulations requiring that an owner-operator lease his or her equipment exclusively to a carrier for the duration of the lease.[30] Other requested additions may fall into the ''satisfy health and safety standards'' category (for example: Requiring that the work be performed pursuant to commonly accepted safety standards; and providing the individual emergency assistance such as protective equipment during a public-health crisis) or the ''meet contractually agreed-upon deadlines or quality control standards'' category (for example: Agreements that the work be performed pursuant to acceptable professional, industry, or published industry standards; agreements to comply with applicable local, state, and national licensure standards and rules; and agreed upon results and deadlines). Other requested additions are narrow or industry-specific in nature, and the Department prefers general guidance that may be used by as many employers and workers as possible.

In any event, it is not possible to identify in the regulation every employer requirement that is not the type of control that makes the individual more or less likely to be an employee under the Act. The regulatory text accounts for this with a broader final category: Requiring the worker to ''satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships).'' This category recognizes that contractual work relationships currently vary and will evolve going forward, and provides that additional employer requirements that are not expressly identified in the regulatory text but which are similar to those identified and are typical of such relationships do ''not constitute control that makes the individual more or less likely to be an employee under the Act.''

SHRM requested that the Department exclude from the control analysis the offering of benefits such as ''health insurance, bonuses, or retirement savings.'' According to SHRM, ''the modern workplace would suffer if businesses were effectively barred from providing workplace enhancements that all workers should enjoy like healthcare or retirement savings.'' Other commenters made overlapping requests, although not necessarily in the context of applying the control factor. For example, TechNet requested that the Department add a ''safe harbor'' stating that ''a worker does not lose his or her independent status solely because a network platform provides the worker with emergency aid or benefits allowed or required under state law.'' Similarly, WPI requested a general ''safe harbor'' with respect to the provision of ''protections or benefits as allowed or required by Federal, state or local laws, including but not limited to minimum guaranteed earnings, health insurance, retirement benefits, health or retirement subsidies, life insurance, workers compensation or similar insurance, unemployment insurance, sick or other paid leave, training and expense reimbursement.''

The Department declines to change the regulatory text in response to these comments. The offering of health, retirement, and other benefits is not necessarily indicative of employment status. For example, payment of proceeds owed into a worker's own health plan or retirement account would not indicate an employment relationship. This is because it is reasonable for an independent contractor to have a personal health or retirement plan, and the precise method of compensation—whether cash, contributions to an account, or some other method—is not relevant to the question of economic dependence. However, providing a worker with the same employer-provided health or retirement plans on the terms that a business also gives its own employees may indicate the worker is not an independent contractor but rather an employee. Certain other benefits could also suggest employee status. For example, sick or other paid leave, especially the potential employer's administration and authorization of the leave, could be indicative of the potential employer's control over the worker's schedule. Finally, offering a bonus to a worker may or may not be indicative of employee status. For example, a worker's participation in a bonus or profit sharing plan in which he or she receives a bonus depending on the employer's, a division of the employer's, or his or her own performance over a period of time could limit the worker's ability to affect his or her profit or loss through initiative or investment—suggesting economic dependence and thus employee status. But a contractual agreement to provide a worker with a fixed bonus if the worker completes a job by a certain deadline or completes a certain number of tasks over a fixed period is typical of contractual relationships between businesses and itself does not make the worker more or less likely to be an employee under the Act. Even if, based on the circumstances of a particular case, the provision of certain health, retirement, or other benefits suggests classification as an employee, that fact is not determinative by itself because other facts and factors must also be considered.

2. The ''Opportunity for Profit or Loss'' Factor

The second core factor identified in the proposed regulatory text was the ''individual's opportunity for profit or loss.'' 85 FR 60639. This factor, included at proposed § 795.105(d)(1)(ii), ''weighs towards the individual being an independent contractor to the extent the individual has an opportunity to earn profits or incur losses based on his or her exercise of initiative (such as managerial skill or business acumen or judgment) or management of his or her

[30] Uber requested that the Department clarify that background checks are not an indicia of control: ''Where a business is required by law to engage in certain activities (such as screening potential workers for violent crime history), the Department should make clear that this required screening is not an indicia of control.'' However, requiring a worker to undergo and pass a background check when the law requires it falls in the ''comply with specific legal obligations'' category. No further clarification is necessary.

investment in or capital expenditure on, for example, helpers or equipment or material to further his or her work.'' Proposed § 795.105(d)(1)(ii) further explained that, ''[w]hile the effects of the individual's exercise of initiative and management of investment are both considered under this factor, the individual does not need to have an opportunity for profit or loss based on both for this factor to weigh towards the individual being an independent contractor.'' In addition, under the proposal, this factor ''weighs towards the individual being an employee to the extent the individual is unable to affect his or her earnings or is only able to do so by working more hours or more efficiently.'' Numerous comments were submitted regarding the proposals to analyze investment through the lens of opportunity for profit or loss and to focus that analysis on the worker's investment rather than comparing the worker's investment to the potential employer's investment. One commenter requested eliminating this factor altogether, and several commenters requested changes to the other aspects of the proposed opportunity factor section.

a. Whether To Analyze Investment Through the Lens of Opportunity for Profit or Loss

Some commenters opposed the proposal to consider the individual worker's ''management of his or her investment in or capital expenditure on, for example, helpers or equipment or material to further his or her work'' as part of the opportunity factor. For example, NELA stated that a worker's investment has ''been a critically important factor in the economic realities test analysis'' and that ''[d]iscounting this important piece of the economic reality test, as the Department has done here, plainly makes it easier for businesses to require workers to make significant financial investments without risking a finding of employee status.'' The State AGs similarly commented that the proposed approach of considering investment only in the context of opportunity for profit or loss ''inappropriately subordinates the investment factor to the opportunity for profit or loss'' factor. According to the State AGs, ''[c]ourts consider both factors, often together, but investment 'is, itself, indicative of independent contractor status' especially in smaller businesses'' (quoting *Saleem* v. *Corp. Transp. Group, Ltd.,* 854 F.3d 131, 144 n.29 (2d Cir. 2017)). UPS said that ''workers [who] make little or no monetary investment toward completion of the work . . . are more likely to be dependent on the company,'' but that the Department's proposal ''ignores that reality'' by suggesting that initiative and investment ''are on equal footing.'' NELP stated that, although opportunity for profit or loss and investment ''are linked, they are hardly duplicative and separately serve as useful indicia of an entity's status under the FLSA, as the Supreme Court's tests note.''

On the other hand, some commenters supported the proposal to consider investment in the opportunity factor. For example, according to WPI, ''[t]he Department's proposal to combine [opportunity for profit or loss] with an individual's investment in facilities and equipment, following Second Circuit precedent, is a welcome change that will bring clarity and reduce overlap.'' It added that ''[w]ise decisions about investments are perhaps the clearest path to increasing profits or suffering losses.'' CPIE supported the proposed ''adoption of the Second Circuit's approach of combining the factors 'opportunity for profit or loss' and 'investment,' and not treating them as separate factors.'' According to CPIE, the proposal ''better captures both the manufacturing-based independent contractor (who likely has a tangible capital business investment) and the new-economy independent contractor (who likely does not).''

Having carefully considered the comments on this issue, the Department adopts its proposal, consistent with Second Circuit case law, to consider investment as part of the opportunity factor. Some courts have acknowledged that the two concepts are related while still keeping the factors separate. *See McFeeley,* 825 F.3d at 243; *Lauritzen,* 835 F.2d at 1537. Other courts do not expressly acknowledge that they are related but consider investment when evaluating opportunity for profit or loss—resulting in unnecessary and duplicative analysis of the same facts under two factors. *See, e.g., Mid-Atl. Installation,* 16 F. App'x at 106–07 (finding that the worker's capital investments in tools, equipment, and a truck indicated independent contractor status under both the opportunity and the investment factors). And consideration of investment separately has caused other courts to discuss the worker's involvement in outside businesses in the context of opportunity for profit or loss. *See, e.g., Parrish,* 917 F.3d at 384 (considering consultant's management of a goat farm). After considering these varying approaches, the Department believes that adopting the Second Circuit's approach best furthers the Department's goal: A clear and non-duplicative analysis for determining employee versus independent contractor status. In sum, the individual worker's meaningful capital investments may evince opportunity for profit or loss: ''[e]conomic investment, by definition, creates the opportunity for loss, [and] investors take such a risk with an eye to profit.'' *Saleem,* 854 F.3d at 145 n.29; *see also Superior Care,* 840 F.2d at 1060 (identifying ''the workers' opportunity for profit or loss and their investment in the business'' as a single factor).

Moreover, considering investment as part of opportunity for profit or loss is consistent with the Supreme Court's opinion in *Silk* which articulated the two factors separately but analyzed them together. In particular, the Court found that coal unloaders were employees because they had ''no opportunity to gain or lose except from the work of their hands and [ ] simple tools,'' while truck drivers who invested in their own vehicles had ''opportunity for profit from sound management'' of that investment by, for instance, hauling for different customers. *Id.* at 719. Thus, it framed the analysis as whether workers are more like unloaders whose profits were based solely on ''the work of their hands and [ ] simple tools'' or the drivers whose profits depended on their initiative and investments. *See id.* As the Court explained decades ago and as the Second Circuit noted much more recently in *Saleem,* investment is a pathway to opportunity for profit or loss.

In response to NELA and likeminded commenters' concern that employers may require significant investments by their workers to avoid employee status, the Department reiterates that the investment must be capital in nature and consistent with the worker being in business for him/herself for the investment to indicate an opportunity for profit or loss. Senator Sherrod Brown and 22 other senators stated that ''[r]equiring [workers] to purchase a franchise or their own equipment, including a vehicle'' or otherwise ''take on financial risk as a condition of employment does not convert an employee into an independent contractor under the FLSA.'' While no single fact or factor may ''convert an employee into an independent contractor,'' the prospect of financial risk and reward plays an important role in distinguishing ''wage earners toiling for a living'' from ''independent entrepreneurs seeking a return on their risky capital investments.'' *Mr. W. Fireworks,* 814 F.2d at 1051. Moreover, it matters why certain investments are required. If certain capital investments

are necessary to perform the job for which the contractor is hired, then requiring a contractor to make such investments would be consistent with the contractor being in business for him- or herself. For example, a company that hires independent contractors to haul freight may obviously require that drivers bring their own vehicles. *Silk* 331 U.S at 719. In contrast, a requirement to ''invest'' in specific, company-provided equipment would not be consistent with the worker being in business for him- or herself, and may constitute a consideration under the control factor that points towards employee status. *See Scantland,* 721 F.3d at 1318 (concluding that technicians' ''expenditures [in equipment and materials] detract little from the[ir] economic dependence on Knight'' in part because ''many technicians purchased specialty tools from Knight directly via payroll withholdings''). As such, OOIDA's concern ''that any requirement that a worker must purchase services or equipment from the business for which they work [w]ould weigh in favor of employee status'' is misplaced. *See also* SWRCC (''[T]his standard would provide a perverse incentive for companies to require putative employees to maintain their own equipment in an effort to steer those employees to independent contractor status.''). Consistent with the economic dependence inquiry, an investment must indicate an independent business by the worker, as opposed to merely being required by the potential employer, for it to indicate an opportunity for profit or loss.

In response to the State AGs, the Department's approach does not subordinate investment; it can still separately indicate independent contractor status as they suggest. Finally, the Department's approach is not contrary to UPS' assertion that workers who make little or no investment ''are more likely to be dependent'' on the potential employer.[31] Workers who make little or no investment are more likely to be employees than workers who make significant investments, but of course, such a worker's ultimate status as an employee or independent contractor will also depend on other factors. As the Department explained in the NPRM preamble, workers who do not make significant investments may still be independent contractors: ''while the presence of significant capital investment is still probative, its absence may be less so in more knowledge-based occupations and industries. Indeed, technological advances enable, for example, freelance journalists, graphic designers, or consultants to be entrepreneurs with little more than a personal computer and smartphone.'' 85 FR 60609 (citing *Faludi* v. *U.S. Shale Sols., L.L.C.,* 950 F.3d 269, 276 (5th Cir. 2020)); *see also Meyer* v. *United States Tennis Ass'n,* 607 F. App'x 121, 123 (2d Cir. 2015) (concluding that workers who invested little were independent contractors primarily because of their control over the work and their initiative); *Lauritzen,* 835 F.2d at 1540–41 (Easterbrook, J. concurring) (''[P]ossess[ing] little or no physical capital . . . is true of many workers we would call independent contractors. Think of lawyers, many of whom do not even own books. The bar sells human capital rather than physical capital, but this does not imply that lawyers are 'employees' of their clients under the FLSA.'').[32]

b. Whether To Analyze the Worker's Investment or Compare the Worker's Investment With That of the Potential Employer

The Department noted in the NPRM preamble that, when considering investment, some courts use ''a side-by-side comparison method'' that directly compares the worker's individual investment to the investment by the potential employer. *See* 85 FR 60614 (citing cases). The Department explained that ''such a 'side-by-side comparison method' does not illuminate the ultimate question of economic dependence,'' but instead ''merely highlights the obvious and unhelpful fact that individual workers—whether employees or independent contractors—likely have fewer resources than businesses'' that, for example, maintain corporate offices. *Id.* (citing cases). The Department received a number of comments addressing its proposed rejection of the relative investment approach.

For example, UPS stated that the Department's proposal ''undervalues comparative analysis of investment'' and noted that courts ''have evaluated investment comparatively—correctly measuring the worker's investment against the company's'' (citing cases). NELA added that ''comparing workers' investments to the employer's investments'' has been ''a critically important factor in the economic realities test analysis'' and ''must be done in the context of the working relationship.'' TRLA objected that ''the proposed test does not include the Fifth Circuit's 'extent of the relative investments of the worker and alleged employer' factor'' and asserted that, while its usefulness may vary ''depending on the facts of individual cases,'' ''its wholesale exclusion from the test factors is not warranted, especially given the Supreme Court's caution against an exhaustive list'' (citing *Silk,* 331 U.S. at 716). The Southwest Regional Council of Carpenters described the relative investment approach as simple and efficient by ''lining up the expenses between worker and company'' and thus ''advanc[ing] the key interest of all parties concerned with the predictability of this part of the independent contractor test.'' According to the Pacific Northwest Regional Council of Carpenters, the Department acted ''arbitrarily'' in proposing to eliminate consideration of relative investments and asserted that, because ''virtually every craftsperson who works in the various carpentry trades owns his or her own tools,'' the proposal would make ''all of those individuals more susceptible to being classified as'' independent contractors regardless whether the investment is small or extensive.

Other commenters supported the Department's proposed position. For example, the ATA, the Arkansas Trucking Association, NHDA, and Scopelitis, Garvin, Light, Hanson & Feary (on behalf of various transportation companies) each agreed with the Department's proposal ''that the relative investment test fashioned by the Fifth Circuit 'does not illuminate the ultimate question of economic

[31] The American Society of Travel Advisors disagreed at least in part, commenting that ''workers in many service industries may make only a minimal investment in equipment or materials and in such situations this consideration, by itself, should not be taken to weigh in favor of employee status.''

[32] LocumTenens, an online company that specializes in the temporary placement of physicians and other health clinicians, requested that the Department eliminate from the economic reality test consideration of whether an individual has an opportunity for profit or loss. According to LocumTenens, its physicians and clinicians who provide temporary healthcare services ''do not have an obvious investment or opportunity for profit when they step in'' for another physician or clinician. However, as explained later, the Department believes that opportunity for profit or loss is very predictive of a worker's status as an employee or independent contractor. In addition, the rule requires a worker to exercise personal initiative or manage capital investments, but not necessarily both, for the opportunity factor to indicate independent contractor status. In other words, an absence of capital investment does not prevent an individual from having an opportunity for profit or loss, because such opportunity can be based on the individual's initiative. Nor does such absence necessarily prevent an individual from being properly classified an independent contractor, particularly in knowledge-based industries such as medicine where human capital matters more than physical capital.

dependence' '' (quoting 85 FR 60614). TechNet explained that ''the relative sizes of the parties' investments'' are not relevant to the analysis, asserting that ''[l]arge businesses may contract with small businesses,'' make investments that ''typically exceed their smaller partners' investments by orders of magnitude . . . because of their size,'' and ''not endanger [their] partners' independence merely because [they are] bigger than [their partners] are.'' CPIE stated that ''the determinative inquiry relative to investment should be whether the individual has a sufficient investment in his or her trade or business as to enable the individual to operate independently,'' asserting that ''[t]he investment of a potential client has no discernible relevance to this inquiry.'' *See also* WFCA (''The issue is whether a worker invested in his or her business, not how that investment compares to the employing company's investment.'').

Having carefully considered the comments, the Department reaffirms its position that comparing the individual worker's investment to the potential employer's investment should not be part of the analysis of investment. Comparing their respective investments does little more than compare their respective sizes and resources. In *Hopkins* v. *Cornerstone America,* 545 F.3d 338, 344 (5th Cir. 2008), it was of course ''clear that [the insurance company's] investment—including maintaining corporate offices, printing brochures and contracts, providing accounting services, and developing and underwriting insurance products—outweighs the personal investment of any one Sales Leader.'' The court, however, never explained how this fact indicated the Sales Leaders' economic dependence. *See id.* Tellingly, when summing up the entirety of the facts and analyzing whether the workers were economically dependent on the insurance company as a matter of economic reality, the court did not even mention the insurance company's larger investment. *See id.* at 346. And in *Karlson,* 860 F.3d at 1096, the court found that comparing the worker's investment with the potential employer's total operating expenses had little relevance because ''[l]arge corporations can hire independent contractors, and small businesses can hire employees.'' *Cf. Parrish,* 917 F.3d at 383 (comparing relative investments, but noting that ''[o]bviously, [the oil drilling company] invested more money at a drill site compared to each plaintiff's investments'' and according the factor little weight in light of the other evidence). In sum, comparing the relative investments does not illuminate the worker's economic dependence or independence. By contrast, as explained herein, analyzing the extent to which the individual worker has an opportunity for profit or loss because of his or her investment in, or capital expenditure on, helpers or equipment or material to further his or her work is probative of the worker's economic dependence or independence.

c. Other Comments Concerning the Opportunity Factor

WFCA agreed that ''an evaluation of a worker's investment and capital expenditures are relevant factors in determining whether he or she is an independent contractor'' and suggested including of ''a definition of what constitutes an investment or capital expense.'' WFCA suggested the following: ''Investments and capital expenditure shall include: The purchase or rental of tools, equipment, material, and office or work facilities; the payment for marketing and administrative expenses; the payment of costs incurred hiring or using other workers; and similar expenditures.'' However, the regulatory text already identifies investment in ''helpers or equipment or material'' as relevant, and the ''for example'' preceding them in the regulatory text makes clear that the list is non-exhaustive. The Department believes that general and non-exhaustive examples are more helpful than trying to precisely identify as many examples of relevant investments as possible.

NRF commented that ''it is important to emphasize that it is the 'opportunity' or 'ability' to earn profits or incur losses based on investment and/or initiative, as opposed to the actual level of investment or initiative shown by the individual.'' Relatedly, NRF expressed concern whether this factor squares with the discussion in proposed § 795.110 that the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible, asserting that ''the fact that someone might not engage in certain practices or take on certain risks that would further impact the level of profit or loss should not result in a finding that the individual is not an independent contractor, unless that person is prevented from doing so by the entity with whom the individual contracts.'' Here, the Department believes that NRF is conflating the ultimate outcome of independent entrepreneurship (profit or loss) with the actions indicative of entrepreneurship (initiative and/or investment) that largely determine that outcome. While profits are hardly guaranteed for anyone in business for him/herself, the text at § 795.105(d)(1)(ii) makes clear that independent contractors typically ''*exercise* . . . initiative'' and/or ''*manag[e]* . . . investment,'' (emphasis added). Thus, a lack of profit viewed in hindsight says little about a worker's economic independence; instead, the focus is the degree to which the worker actually exercised initiative or actually managed investments. A worker's theoretical ability to, for example, exercise initiative is weaker evidence than the worker's actual practices. *See e.g., Sureway Cleaners,* 656 F.2d at 1371 (''[T]he fact that Sureway's 'agents' possess, in theory, the power to set prices . . . and advertise to a limited extent on their own is overshadowed by the fact that in reality the 'agents' . . . charge the same prices, and rely in the main on Sureway for advertising.''). However, a worker's conscious decision to not make a particular investment (especially when choosing among a range of investments) or to not take a particular action (especially when choosing among a range of options) may constitute an affirmative exercise of initiative to consider among others when evaluating opportunity for profit or loss. In sum, in the context of the opportunity factor, the focus is the individual worker's opportunity for profit or loss, as shown by meaningful investments or the exercise of personal initiative; actual profits or losses are less relevant.

OOIDA expressed ''concern[ ] that the timeline for determining profit or loss is not clarified in the NPRM'' and explained that certain ''[m]otor carriers that take advantage of drivers through a lease-purchase agreement are likely to argue that a driver's opportunity for profit is merely a few years in the future, and that this full timeline must be considered.'' The Department agrees with OOIDA that ''[t]his is a fallacy''; the opportunity for profit or loss must be reasonably current to indicate independent contractor status.

Regarding the Department's proposal to include initiative as a consideration in the opportunity factor, NRF agreed that ''[t]he ability to impact profits or losses also may be dependent on business acumen and managerial skills, regardless of the 'skill level' of the work or the level of investment.'' NRF added that ''identifying 'business acumen' or 'management skill' as part of the profit or loss factor is appropriate and consistent with the FLSA.'' Senator Sherrod Brown and 22 other senators disagreed, commenting: ''Just because

employees can increase their wages by exercising skill or initiative does not mean they are running a separate, independent business, particularly if they cannot pass along costs to customers.'' They added that ''[t]he rule does not include additional, critical considerations of skill and initiative that are necessary to define an employment relationship.'' And Seyfarth Shaw requested that the Department state that ''a worker's business acumen is to be interpreted to cover acumen relevant to the wide range of business endeavors in the U.S. economy, including, for example: Sales, managerial, customer service, marketing, distribution, communications, and other professional, trade, technical, and other learned skills, as well as other unique business abilities and acumen, including acumen that impacts a worker's ability to profitably run their own independent business.''

Having carefully considered the comments, the Department continues to believe that a worker's initiative, such as managerial skill or business acumen or judgment, is an appropriate measure of a worker's opportunity to earn profits or incur losses. *See, e.g., Karlson,* 860 F.3d at 1094–95 (discussing how the worker's decisions and choices regarding assignments and customers affected his profits); *Saleem,* 854 F.3d at 145 (noting in support of independent contractor status that the degree to which the worker's relationship with the potential employer ''yielded returns was a function . . . of the business acumen of each [worker]''); *McFeeley,* 825 F.3d at 243 (''The more the worker's earnings depend on his own managerial capacity rather than the company's . . . the less the worker is economically dependent on the business and the more he is in business for himself and hence an independent contractor.'') (internal quotation marks omitted); *Express Sixty-Minutes Delivery,* 161 F.3d at 304 (agreeing with district court that ''driver's profit or loss is determined largely on his or her skill, initiative, ability to cut costs, and understanding of the courier business''); WHD Opinion Letter FLSA2019–6 at 6 (''These opportunities typically exist where the worker receives additional compensation based, not [merely] on greater efficiency, but on the exercise of initiative, judgment, or foresight.''). Commenters did not seriously dispute the relevance of initiative to a worker's opportunity for profit or loss. In response to the comment by Senator Sherrod Brown and 22 other senators, the Department agrees that a worker is not necessarily an independent contractor because he or she can use initiative to affect his or her opportunity for profit or loss but maintains that yet initiative is indicative of—or weighs towards—independent contractor status in the multifactor analysis. And the Department agrees that a worker's ability to cut costs, including by passing them along to customers, is relevant to determining initiative. *See Express Sixty-Minutes Delivery,* 161 F.3d at 304. Finally, the Department agrees with Seyfarth Shaw that a worker's business acumen can ''cover acumen relevant to the wide range of business endeavors in the U.S. economy''—initiative is not limited to or automatically present in any particular type of job.

Regarding the last sentence of the proposed opportunity factor regulatory text (''This factor weighs towards the individual being an employee to the extent the individual is unable to affect his or her earnings or is only able to do so by working more hours or more efficiently.''), WFCA expressed the concern that the sentence means that a worker who starts his or her own business and seeks to develop efficiencies in so doing will be an employee under the analysis. WFCA suggested that the sentence be deleted. WPI also asked that the last sentence be deleted because ''[a]n individual who uses initiative, skill or judgment to perform a job more efficiently can generate greater profits, even if compensated by the hour or piece rate.'' It asserted: ''The ability to use managerial skill, expertise, market experience, or business acumen to perform work more efficiently is indicative of independent contractor status.'' The Department agrees that such use of initiative can indicate independent contractor status when it affects opportunity for profit or loss. The word ''efficiently'' was used in proposed § 795.105(d)(2)(ii) to mean working faster to perform rote tasks more quickly. *See* 85 FR 60614 n.38 (identifying piece-rate workers as ''an example of workers who are able to affect their earnings only through working more hours or more efficiently.''). Higher earnings that result solely from this ''working faster'' concept of efficiency do not by themselves indicate independent contractor status. However, as WFCA and WPI note, efficiency may also mean effective management based on business acumen, which is indicative of being in business for oneself if it results in increased earnings. For instance, the Fifth Circuit found that the opportunity factor ''points towards independent contractor status'' where ''a driver's profit or loss is determined largely on his or her skill, initiative, ability to cut costs, and understanding of the courier business,'' observing that ''drivers who made the most money appeared to be the most experienced and most concerned with efficiency, while the less successful drivers tended to be inexperienced and less concerned with efficiency.'' *Express Sixty-Minutes Delivery Serv.* 161 F.3d at 304. To avoid confusion between multiple potential meanings of ''more efficiently,'' the Department is revising § 795.105(d)(2)(ii) to replace that term with ''faster.'' Relatedly, ATA and other transportation commenters objected to the Department's statements in the NPRM preamble that ''[w]orkers who are paid on a piece-rate basis are an example of workers who . . . lack meaningful opportunity for profit or loss.'' They asserted that the statements may result in some judges refraining from engaging in the actual analysis set forth in the rule as to opportunity for profit or loss. They further asserted that truck drivers paid on a piece-rate basis may be independent contractors based on their management decisions or ability to cut costs. The Department's statements in the NPRM preamble regarding workers paid on a piece-rate basis were general observations supported by case law [33] and not a categorical rule or the complete analysis. The fact that a worker is paid on a piece-rate basis set by the potential employer does not indicate an opportunity for profit or loss, but whether that worker has an opportunity for profit or loss indicative of independent contractor status is determined by a fuller analysis of the worker's circumstances.

Some commenters requested additional examples that are indicative

[33] *See Goldberg* v. *Whitaker House Co-op., Inc.,* 366 U.S. 28, 33 (1961) (plaintiffs who manufactured knitted goods at home were employees under the FLSA, in part, because ''[t]he management fixes the piece rates at which they work''); *Rutherford Food,* 331 U.S. at 730 (because workers' earnings ''depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor''); *Hodgson* v. *Cactus Craft of Arizona,* 481 F.2d 464, 467 (9th Cir. 1973) (persons who manufacture novelty and souvenir gift items at homes and were compensated at a piece rate were employees under the FLSA). And in *Donovan* v. *DialAmerica Marketing, Inc.,* the court held that homeworkers who were paid on a piece-rate basis to perform the simple service of researching telephone numbers were employees who lacked meaningful opportunity for profit or loss. *See* 757 F.2d 1376, 1385 (3rd Cir. 1985). In contrast, distributors who recruited and managed researchers and were paid based on the productivity of those they managed were independent contractors, in part, because distributors' earnings depended on ''business-like initiative.'' *Id.* at 1387.

of an opportunity for profit or loss (many of the suggested examples overlapped with each other). TechNet asked for ''concrete examples'' and suggested the following: ''[d]rivers who can set their own hours, choose which jobs to accept or reject, and use their judgment in how to best complete jobs,'' as well as ''[a]pp-based opportunities—including opportunities to provide personal transportation, parcel deliveries, shopping services, or food delivery, among other types of service.'' The U.S. Chamber of Commerce offered eleven ''additional examples of a worker's initiative or investment that may impact a worker's profit or loss.'' [34] The U.S. Chamber of Commerce also suggested ''examples of fact situations which are neutral in the analysis of whether the worker controls their profits and losses.'' [35] SHRM requested numerous ''additional examples of worker investment and initiative that impact profit and loss.'' [36] SHRM also requested that the final rule make ''the following explicit statements regarding facts that do not support a finding of dependency: [w]orkers may experience financial losses as a result of cancellations of their service or the provision of service that does not meet customer expectations when the worker has flexibility to choose between work opportunities; and [e]ven if the business sets the price of goods provided by the worker, that does not negate the worker's initiative when the worker controls the amount of time, when, and where they provide the services as well as the amount of the same service they chose to provide.'' Seyfarth Shaw asked the Department to ''expand upon the examples of ways that workers impact their own profitability as well as their losses (by impacting their profits and their costs)'' and to include numerous examples.[37] And Mr. Reibstein commented that ''[e]xamples of loss should be identified . . . so it is clear [that this factor] does not focus only on profit.'' He offered the following examples: ''He or she has to re-do work that is not consistent with industry standards or does not meet a customer's expectations; is potentially liable to the potential employer in the event his or her actions or inactions cause harm or legal expense to the potential employer; or fails to render services in a cost-efficient manner by not managing expenses or investing far too much time on activities that are unproductive.''

The Department has considered the various requests for additional examples of initiative and investment that can indicate a worker's opportunity for profit or loss, but declines to change to the proposed regulatory text. The regulatory text already broadly describes initiative as including managerial skill and business acumen or judgment, and explains that investment is the worker's management of his or her investment in or capital expenditure on, for example, helpers or equipment or material to further his or her work. Many of the suggested examples seem to fall into one of these categories, and some of them effectively repeat concepts already identified in the regulatory text—especially the ones involving helpers, tools, supplies, and equipment. The Department does not believe that (even after culling out all of the overlap) additional examples of initiative and investment would benefit employers or workers. It is not possible or productive to seek to identify in the regulatory text every example of initiative and investment that may be relevant to the opportunity for profit or loss analysis. The Department purposefully described both initiative and investment in a broad and general manner to provide helpful guidance to as many employers and workers as possible. The Department believes that this approach, along with the further clarification provided throughout this preamble section as well as the examples added in § 795.115, will be more helpful and functional for employers and workers as they apply the analysis.

3. The ''Skill Required'' Factor

In the NPRM, the Department identified three other factors that may serve as ''additional guideposts'' in the analysis to determine whether a worker is an employee or independent contractor. The first of these other factors, included at proposed § 795.105(d)(2)(i), is the amount of skill required for the work. 85 FR 60639. The Department's proposed regulatory text stated that this factor would weigh in favor of the individual being an independent contractor to the extent the work at issue requires specialized training or skill that the potential

[34] The U.S. Chamber of Commerce's suggested examples were: ''(1) The worker's own decision-making with respect to the details and means by which they make use of, secure, and pay helpers, substitutes, and related labor or specialties . . . (2) The worker's own decision-making with respect to the details and means by which they purchase, rent, or otherwise obtain and use tools . . . ; (3) The worker's own decision-making with respect to the details and means by which they purchase or otherwise obtain and use supplies . . . ; (4) The worker's own decision-making with respect to the details and means by which they purchase, rent, or otherwise obtain and use equipment . . . ; (5) The worker's initiative and decisions they implement in connection with their own performance of services through higher service fees, incentives, charges, and other ways; (6) The worker's initiative to invest in the development of skills, competencies, and trades . . . ; (7) The worker's expertise in delivery of services/products that result in enhanced profits, for example through tips and other incentives as a result of providing quality customer service; (8) The worker's losses incurred as a result of customer complaints or other charges where the worker's results were below customer or contractual expectations and obligations; (9) The worker's flexibility to choose amongst work opportunities offered that impact profits and losses; (10) The worker's contractual or other losses if they do not provide the accepted services or the worker provides substandard services, and are engaged to provide time-sensitive, often perishable services and products; and (11) The worker's avoidance of liquidated damages charges or indemnification obligations in the parties' agreement relating to various provisions, including material breaches of the parties' agreement.''

[35] These suggested examples were: ''(1) The business pays the worker by the hour where it is customary in the particular business/trade to do so (*e.g.,* attorneys, physical trainers); (2) The business sets the price of goods and services offered by a worker to customers where the worker controls the amount of time, date and place they provide the services as well as the amount of services they choose to provide and the price is set to facilitate the time sensitive transaction as a result of the time sensitive or perishable nature of the service the customer desires[;] and (3) The business's facilitation of payments from the customer to the worker.''

[36] SHRM's suggested examples were: ''[t]he worker's decisions in choosing amongst opportunities offered that impact profit and loss; [t]he worker's losses suffered from receipt of customer complaints where the worker's results were below customer or contractual expectations; [t]he worker's decisions in avoiding liquidated damages charges or indemnification obligations in the parties' agreement; [t]he worker's own decision-making on whether to use other workers or services as helpers or substitutes as well as the use of related labor or specialties to assist in either the services provided, the tools and equipment used, or the maintenance of the worker's business structure; [t]he worker's acumen regarding the delivery of services/products that result in enhanced profits through tips and other incentives; [t]he worker's decision-making regarding the details and means by which they obtain supplies, tools, and equipment for use in their business, including choices regarding from whom to purchase these goods, how much of the goods are obtained at any one time, the quality of the goods, and the negotiated prices regarding said goods; and [t]he worker's decision-making regarding investment in skills they deem necessary to achieve the desired results from their work, including education, certificates, or classes.''

[37] Seyfarth Shaw's suggested examples were ''[t]he worker's own decision-making regarding the use of helpers, substitutes, and related labor or specialties to assist in the services provided, the tools and equipment used, or the maintenance of the worker's business structure . . . to the extent those decisions impact the worker's costs and overall profitability; [t]he worker's initiative and the decisions they implement in connection with the performance of services and/or capital expenditures on equipment, supplies, and tools . . . ; [t]he worker's initiative to invest in the development of skills, competencies, and trades (including education, training, licenses, certifications, and classes) . . . ; [t]he worker's expertise in delivery of services/products that result in enhanced profits through tips and other incentives as a result of great customer service and exceptional skills, for example[; t]he worker's losses incurred as a result of customer complaint or other charges where the worker's results were below customer or contractual expectations and obligations; and [t]he worker's avoidance of liquidated damages charges or indemnification obligations in the parties' agreement relating to various provisions, including material breaches of the parties' agreement.''

employer does not provide; conversely, the factor would weigh in favor of the individual being an employee to the extent the work at issue requires no specialized training or skill and/or the individual is dependent upon the potential employer to equip him or her with any skills or training necessary to perform the job. As explained in the NPRM, the Department proposed to clarify that this factor should focus on the amount of skill required because importing aspects of the control factor into the skill factor has diluted the consideration of actual skill to the point of near irrelevance, and such dilution generates confusion regarding the relevance and weight of the worker's skill in evaluating economic dependence.

Employer representatives were generally supportive of the Department's clarification and relegation of this factor as an ''additional guidepost'' but provided additional commentary and requests for modification. Several commenters suggested that this factor be eliminated entirely. The National Restaurant Association commented that this factor ''does not add much clarity to the analysis'' and ''unnecessarily discriminates against individuals who operate businesses that do not require advanced degrees.'' WPI stated that ''[s]o narrowed, this factor has little probative value in determining economic dependence and should be eliminated as a separate factor.''

Other commenters suggested that the factor be included within the core, ''profit and loss'' factor or otherwise minimized. CWI suggested that the factor be incorporated into the profit and loss factor because ''[w]here specialized skills are required to perform work, workers unquestionably have taken the initiative to invest time and money into developing those skills.'' SHRM and U.S. Chamber of Commerce agreed that this factor should not be a stand-alone factor, but rather should be incorporated into the opportunity factor, to ensure that workers who desire the flexibility and freedom of independent contractor status—but who provide services that may not require specialized training—are not negatively impacted. *See also* WFCA (requesting that lack of skill should not weigh in favor of the worker being an employee). Commenters also stated that this additional factor should be minimized further in the analysis, commenting that the factor places too much emphasis on the importance of skill, and requested that ''the final rule should at least indicate that this may be a relevant factor in some but not all instances.'' Reibstein.

After considering these comments, the Department declines both the request to eliminate this factor from consideration entirely and the request to include it as part of the opportunity factor. The Department agrees with commenters that the concepts of initiative and judgment are sufficiently analyzed in multiple ways under the control and opportunity core factors, but believes that longstanding case law militates in favor of considering this additional factor—skill required—when relevant under the particular circumstances of each situation. As explained in the NPRM, the Supreme Court articulated the factor as ''skill required'' in *Silk,* 331 U.S. at 716, and multiple courts of appeals continue to consider as ''the degree of skill required to perform the work.'' *Paragon Contractors,* 884 F.3d at 1235; *see also Iontchev,* 685 F. App'x at 550; *Keller,* 781 F.3d at 807. The Department believes that sharpening this factor to focus solely on skill clarifies the analysis. Moreover, analyzing the worker's ability to exercise initiative under the control factor, a core factor that is given more weight than the skill factor, appropriately reflects that that the presence or absence of initiative is usually more important than the presence or absence of skill. Similarly, the effect of the worker's initiative is analyzed under the opportunity factor, another core factor that, for the reasons explained above, is usually more probative than the skill factor.

Commenters such as the National Restaurant Association and NRF suggested that the regulation should focus not on whether the skill required is specialized, but rather the extent to which a worker relies on the potential employer for training needed to perform the work. The Wood Flooring Covering Association, however, stated that the regulation as proposed may create unintended limits on training and employers should not be discouraged from funding needed training for workers, particularly in view of its industry's labor shortage. With respect to these requests, the Department declines to eliminate the modifier ''specialized'' from the regulation. This type of consideration is supported by discussions of this factor in case law. *See, e.g., Simpkins* v. *DuPage Hous. Auth.,* 893 F.3d 962, 966 (7th Cir. 2018) (''whether Simpkins had specialized skills, as well as the extent to which he employed them in performing his work, are [material] issues''); *Carrell* v. *Sunland Const., Inc.,* 998 F.2d 330, 333 (5th Cir. 1993) (finding it relevant that ''[p]ipe welding, unlike other types of welding, requires specialized skills''). The Department also declines to adjust the regulatory text to directly address who provides the training because such facts are not necessarily probative in every circumstance; the Department notes, however, that it can be suggests employee status if a worker receives all specialized skills from the employer. *See, e.g., Keller,* 781 F.3d at 809 (explaining that if ''the company provides all workers with the skills necessary to perform the job,'' that suggests employee status); *Scantland,* 721 F.3d at 1318; *Hughes* v. *Family Life Care Inc.,* 117 F. Supp. 3d 1365, 1372 (N.D. Fla. 2015) (''The relevant inquiry [for the skill factor] is whether [the worker] is dependent upon [the company] to equip her with the skills necessary to perform her job.''). This is because an individual who is in business for him- or herself typically brings his or her own skills to the job, rather than relying on the client to provide training.

While the WFCA generally supports this factor, it also requested that the Department include examples of specialized training or skill that focused on indicators such as certifications and licensing. Scopelitis, Garvin, Light, Hanson & Feary, a law firm commenting on behalf of several unnamed transportation providers, agreed that credentials such as testing to earn a Commercial Driver's License can demonstrate specialized skill, but also noted that skills needed to successfully operate a business should also be considered specialized skills to help distinguish independent contractors from employees. The Department notes that the opportunity factor already considers whether workers have an opportunity for profit or loss based on their business acumen or managerial expertise. It would be redundant to analyze ''skills needed to successfully operate a business'' as part of the skill factor. As to requests for examples or additional clarification as to what constitutes ''specialized'' skills, the Department agrees that credentials such as certifications and licenses can be helpful indicators of specialized skill, though they are by no means the only indicators of such skill. The Department does not believe any change to the regulatory text to clarify this point is warranted, however.

Employee representatives such as the AFL–CIO expressed concern that de-emphasizing the skill factor would ''place considerable competitive pressure on law-abiding employers employing employees at the bottom of the wage scale, thus undermining the

national minimum wage standard.'' The AFL–CIO further asserted that the proposed regulation would make it more likely that unskilled workers such as home care workers, delivery drivers, and janitors will be classified as independent contractors, and thus such workers will be unprotected by the FLSA's minimum wage and overtime pay standards. *See* AFL–CIO. The National Employment Lawyers Association (NELA) commented that the Department's proposed regulation ''seeks to constrict and demote'' the skill factor, and, relying on case law, noted that ''courts typically assess whether workers are required to use specialized skills, beyond those typically acquired through occupational or technical training, in an independent way to perform their job'' but that this factor, ''which often favors employee status, does not suit the Department's purposes.''

Regarding farmworkers specifically, TRLA stated that whether the services rendered by an employee require special skills has often been probative in the farm labor context, and that by largely eliminating consideration of this factor, the proposed rule makes the proper classification of farmworkers harder to determine. *See* Texas Rio Grande Legal Aid. This ''will lead to more farmworkers being classified as independent contractors, thereby denying the protections of the FLSA to one of the most vulnerable classes of workers''; moreover, ''[t]o the extent that the proposed rule purports to be descriptive of the current state of the law, it is flatly inaccurate.''

The Department has considered these comments but continues to believe that its proposal with respect to this factor is logical and helpful. Although many courts consider the skill factor, courts appear to find the core factors to be more dispositive than the skill factor when such factors conflict. *See* 85 FR 60621–22 (listing cases). Continuing to take it into account, but not as one of the core factors, adds clarity to the economic realities test. The Department's formulation of the test does not preclude the possibility that in some circumstances, such as with respect to farmworkers, that this factor could be particularly probative.

The Department adopts § 795.105(d)(2)(i) as proposed.

4. The ''Permanence of the Working Relationship'' Factor

The second additional guidepost factor, described in the regulatory text at § 795.105(d)(2)(ii), is the degree of permanence of the working relationship between the individual and the potential employer. The Department proposed that this factor would weigh in favor of the individual being an independent contractor to the extent the work relationship is by design definite in duration or sporadic, which may include regularly occurring fixed periods of work, although the seasonal nature of work by itself would not necessarily indicate independent contractor classification. In particular, the Department explained that the seasonal nature of work would not indicate independent contractor status where the worker's position is permanent for the duration of the relevant season and where the worker has done the same work for multiple seasons. *See Paragon Contractors,* 884 F.3d at 1236–37. The proposal also provided that this factor would weigh in favor of the individual being an employee to the extent the work relationship is instead by design indefinite in duration or continuous. As noted in the NPRM, courts and the Department routinely consider this factor when applying the economic reality analysis under the FLSA to determine employee or independent contractor status. *See, e.g.,* WHD Opinion Letter FLSA2019–6 at 4; *Razak,* 951 F.3d at 142; *Hobbs,* 946 F.3d at 829; *Karlson,* 860 F.3d at 1092–93; *McFeeley,* 825 F.3d at 241; *Keller,* 781 F.3d at 807; *Scantland,* 721 F.3d at 1312.

Multiple commenters urged the Department to focus this factor further on the indefiniteness of a working relationship. For example, the U.S. Chamber of Commerce commented that independent contractors often enter into multiple, long-term contracts with the same business. It suggested that the Department clarify that such contracts do not indicate employee status merely because of their length, but that only contracts of an indefinite length would be indicative of employee status. CWI similarly requested that this factor focus only on the length of the relationship as reflected in contractual agreements, regardless of how long the relationship is in reality.

The Department considered adding clarifying language to the regulation indicating that a relationship whose length is indefinite is more indicative of employee status than a relationship that is merely long. However, because the focus of the economic realities test is not on technical formalities, it may be that a long relationship could be evidence of permanence despite a contract with a definite end. For example, an employer may have a permanent relationship with an employee despite requiring the employee to enter into annual employment contracts. Or a potential employer may have a long-term relationship reflected in several short-term contracts. The Department has therefore retained the proposed regulatory text because, although indefiniteness is a stronger indicator of permanence, the length of a working relationship is still relevant to this factor.

One commenter urged the Department to consider the exclusivity of a relationship as part of the permanence factor, an approach taken by some courts. Specifically, CPIE commented that permanence does not indicate an employment relationship unless it is due to the potential employer's requirement of exclusivity rather than the worker's choice. The Department agrees that exclusivity most strongly indicates an employment relationship when the exclusivity is required by the potential employer. However, as the Department discussed in the NPRM, an exclusivity requirement more strongly relates to the control exercised over the worker than the permanence of the relationship. As explained in the discussion of the control factor, that factor already considers whether a worker has freedom to pursue external opportunities by working for others, including a potential employer's rivals. *See, e.g., Freund,* 185 F. App'x at 783 (affirming district court's finding that ''Hi–Tech exerted very little control over Mr. Freund,'' in part, because ''Freund was free to perform installations for other companies'').[38] The same concept of exclusivity is then re-analyzed as part of the permanence factor. *Compare id.* (''Freund's relationship with Hi–Tech was not one with a significant degree of permanence . . . [because] Freund was able to take jobs from other installation brokers.''), *with Scantland,* 721 F.3d at 1319 (finding installation technicians' relationships with the potential employer were permanent because they ''could not work for other companies''). Such duplicative analysis of exclusivity under the permanence factor, however, is not supported by the Supreme Court's original articulation of that factor in *Silk. See* 331 U.S. at 716 (analyzing the

[38] In addition, as also noted in the NPRM, the opportunity factor considers whether a worker's decisions to work for others affects profits or losses. *See, e.g., Freund,* 185 F. App'x at 783 (affirming the district court's finding that the ''looseness of the relationship between Hi–Tech and Freund permitted him great ability to profit,'' in part, because ''Freund could have accepted installation jobs from other companies.''). The Department does not believe this consideration overlaps with the control factor. While the control factor concerns the *ability* to work for others, the opportunity factor concerns the *effects* of doing so.

''regularity'' of unloaders' work); *id.* at 719 (analyzing truck drivers' ability to work ''for any customer'' as an aspect of ''the control exercised'' but not permanence); *see also* 12 FR 7967 (describing the permanence factor as pertaining to ''continuity of the relation'' but with no reference to exclusivity). Nor is the concept of exclusivity part of the common understanding of the word ''permanent.'' [39] In a similar vein to the Department's analysis of the concept of initiative, the Department believes analysis of exclusivity as part of the permanence factor dilutes the significance of actual permanence within that factor, blurs the lines between the economic reality factors, and creates confusion by incorporating a concept that is distinct from permanence.

Because the worker's ability to work for others is already analyzed as part of the control factor, proposed § 795.105(d)(2)(ii) articulated the permanence factor without referencing the exclusivity of the relationship between the worker and potential employer, and the Department retains the same language in the final rule.

Commenters also requested that the Department clarify that long-term relationships that are based on the workers' choice to continue working for the same business rather than the potential employer's requirements should not indicate employee status under this factor. NRF commented that an independent contractor may choose to focus on a particular client for reasons of the contractor's own rather than the client's requirements, suggesting that the worker's choice does not indicate employee status. The Department does not believe that further explanation in the regulatory text is necessary, though it agrees that a long-term relationship may not always indicate an employee relationship. This factor is not always probative to the analysis, and the scenarios described by the commenters may be situations where the length of the relationship is not a useful indicator. However, explicitly stating that a relationship is not permanent whenever the worker chooses for it to be long-term is not accurate. After all, every employee to some extent chooses whether to continue working for their employer, and the FLSA's definition of ''employ'' includes to passively ''suffer or permit to work.'' 29 U.S.C. 203(g). A long-term relationship is always the result of choices by both the potential employer and the worker, but it is sometimes a helpful indicator of employee status.

Edward Tuddenham urged the Department to give examples relationships that may or may not be viewed as permanent, such as a contract that is repeatedly renewed or an industry that is generally itinerant. Although the Department has added one example regarding this factor to new § 795.115 to help illustrate how the factor is to be considered, the Department does not believe it is possible to address all of the possible working relationships and contractual arrangements in a useful fashion. Certain general principles should inform any analysis of work relationships. The Department reiterates that it is not contractual formalities that are relevant to the inquiry, but economic reality. A potential employer's attempts to use contractual technicalities to label a relationship as temporary even though it is indefinite in reality should not affect whether this factor indicates employee or independent contractor status. Again, this factor will not always be probative, and, for example, in certain industries where employees are often employed for short periods, a short term of employment would not indicate independent contractor status.

SWCCA pointed out that a recent WHD opinion letter included language stating that ''the existence of a long-term working relationship may indirectly indicate permanence.'' WHD Opinion Letter FLSA 2019–06 (April 29, 2019). The Alliance requested that this language be added to § 795.105(d)(2)(ii). Though the quoted language and the case law from which it is drawn remain useful guidance for employers, the Department does not believe it is necessary to add this language to the regulation, which already indicates that a long-term relationship points toward an employment relationship.

Accordingly, the Department finalizes § 795.105(d)(2)(ii) as proposed.

5. The ''Integrated Unit'' Factor

The final additional guidepost factor, described in § 795.105(d)(2)(iii), is whether the work is part of an integrated unit of production. The Department proposed that this factor would weigh in favor of the individual being an employee to the extent his or her work is a component of the potential employer's integrated production process for a good or service. The proposed regulatory text further explained that this factor would weigh in favor of an individual being an independent contractor to the extent his or her work is segregable from the potential employer's production process. The Department proposed to clarify that this factor is different from the concept of the importance or centrality of the individual's work to the potential employer's business.

As noted in the NPRM, the Department and courts outside of the Fifth Circuit have typically articulated the sixth factor of the economic reality test as ''the extent to which services rendered are an integral part of the [potential employer's] business.'' WHD Fact Sheet #13. Under this articulation, the ''integral part'' factor considers ''the importance of the services rendered to the company's business.'' *McFeeley,* 825 F.3d at 244. In line with this thinking, courts generally state that this factor favors employee status if the work performed is so important that it is central to or at ''[t]he heart of [the potential employer's] business.'' *Werner* v. *Bell Family Med. Ctr., Inc.,* 529 F. App'x 541, 545 (6th Cir. 2013); *see also Baker,* 137 F.3d at 1443 (''[R]ig welders' work is an important, and indeed integral, component of oil and gas pipeline construction work.''); *Lauritzen,* 835 F.2d at 1537–38 (''[P]icking the pickles is a necessary and integral part of the pickle business[.]''); *DialAmerica,* 757 F.2d at 1385 (''[W]orkers are more likely to be 'employees' under the FLSA if they perform the primary work of the alleged employer.'').

The Department explained in the NPRM that it is concerned that this focus on importance or centrality departs from the Supreme Court's original articulation of the economic reality test, has limited probative value regarding the ultimate question of economic dependence, and may be misleading in some instances. As such, the Department proposed that § 795.105(d)(2)(iii) would clarify that the ''integral part'' factor should instead consider ''whether the work is part of an integrated unit of production,'' which aligns with the Supreme Court's analysis in *Rutherford Food,* 331 U.S. at 729.

Many commenters representing workers urged the Department to retain the ''integral part'' factor used by courts as part of the economic realities test, rather than replacing it with the ''integrated unit'' factor articulated in the proposed rule. This ''integral part'' factor would consider the importance or centrality of the work performed to the purported employer's business. In

[39] *See* Merriam-Webster Dictionary, *https://www.merriam-webster.com/dictionary/permanent* (defining permanent as ''continuing or enduring without fundamental or marked change''); *see also* Oxford American Dictionary 1980 (defining permanent as ''lasting or meant to last indefinitely''); Merriam-Webster Pocket Dictionary 1947 (defining permanent as ''Lasting; enduring'').

particular, several commenters, including United Food and Commercial Workers, Senator Patty Murray, and the State AGs contended that removing the ''integral'' factor would be contrary to established circuit court precedent. The UFCW asserted that ''[w]hether a worker's service is an integral part of the company's business may not be a relevant factor in all situations, but it may be in some and some courts have found value in analyzing this fact.'' It commented that if the Department stated that integrality is not relevant to the economic realities test, the Department's proposed rule would unduly limit the inquiry. One commenter, the Greenlining Institute, commented that eliminating an ''integral part'' factor disfavors workers ''performing physical tasks instead of stereotypically 'intellectual' pursuits,'' who are disproportionately racial or ethnic minorities.

Many commenters agreed with the Department's proposal to eliminate the ''integral part'' factor or any similar factor focused on the importance of the work. The U.S. Chamber of Commerce, for example, commented, ''In today's economy, independent workers provide services in all aspects of the economy and all aspects of individual businesses, including core and non-core functions, as well as in the same or different lines of business.'' The Society for Human Resource Management similarly commented that the ''analysis concerning the 'integrated unit' factor should not focus on the 'importance of services' provided.''

Though circuit courts have applied an ''integral part'' factor, it was not one of the factors analyzed by the Supreme Court in *Rutherford Food.* Rather, the Court considered whether the worker was part of an ''integrated unit of production,'' 331 U.S. at 729, as this final rule does. The Department believes that circuit courts—and even the Department itself—have deviated from the Supreme Court's guidance and, in doing so, have introduced an ''integral part'' factor that can be misleading. As explained in the NPRM, the ''integral part'' factor was not one of the distinct factors identified in *Silk* as being ''important for decision.'' 331 U.S. at 716. The ''integrated unit'' factor instead derives from *Rutherford Food,* where the Supreme Court observed that the work at issue was ''part of an integrated unit of production'' in the potential employer's business and concluded that workers were employees in part because they ''work[ed] alongside admitted employees of the plant operator at their tasks.'' 331 U.S. at 729. As the NPRM explained, the Department began using the ''integral part'' factor in subregulatory guidance in the 1950s. *See* WHD Opinion Letter (Aug. 13, 1954); WHD Opinion Letter (Feb. 8, 1956).[40] And circuit courts in the 1980s began referring to it as the ''integral part'' factor and analyzing it in terms of the ''importance'' of the work to the potential employer. *See, e.g., Lauritzen,* 835 F.2d 1529, 1534–35; *DialAmerica Mktg.,* 757 F.2d at 1386.

The NPRM explained the reasons that the Department now believes the Supreme Court's original ''integrated unit'' formulation is more probative than the ''integral part'' (meaning ''important'') approach. As Judge Easterbrook pointed out in his concurrence in *Lauritzen,* ''[e]verything the employer does is 'integral' to its business—why else do it?'' *Lauritzen,* 835 F.2d at 1541 (Easterbrook J., concurring); *see also Zheng,* 355 F.3d at 73 (cautioning in the joint employer context that interpreting the factor to focus on importance ''could be said to be implicated in *every* subcontracting relationship, because all subcontractors perform a function that a general contractor deems 'integral' to a product or a service'').

The Department's review of appellate cases since 1975 involving independent contractor disputes under the FLSA supports this criticism. The Department generally found that, in cases where the ''integral part'' factor was addressed, the factor aligned with the ultimate classification when the ultimate classification was employee.[41] However, courts' analyses of the ''integral part'' factor—again, if it was analyzed at all[42]—were misaligned more frequently than they were aligned with the ultimate classification when the ultimate classification was independent contractor status. *Compare Iontchev,* 685 F. App'x at 551; *Meyer,* 607 F. App'x at 123; *Freund,* 185 F. App'x at 784–85; *Mid-Atl. Installation,* 16 F. App'x at 107–08; *Brandel,* 736 F.2d at 1120, *with Werner,* 529 F. App'x at 545–46; *DialAmerica Mktg.,* 757 F.2d at 1387. This higher rate of misalignment is precisely what Judge Easterbrook's criticism would have predicted: If ''[e]verything the employer does is 'integral,' '' that factor would point towards employee status for workers who are employees, but also for workers who are independent contractors.

The NPRM further explained that ''the relative importance of the worker's task to the business of the potential employer says nothing about whether the worker economically depends on that business for work.'' 85 FR 60617. While some courts assumed that business may desire to exert more control over workers who provide important services, there is no need to use importance as an indirect proxy for control because control is already a separate factor. *Id.* (citing *Dataphase,* 781 F. Supp. at 735, and *Barnard Const.,* 860 F. Supp. at 777, *aff'd sub nom. Baker* v. *Flint Eng'g & Const. Co.,* 137 F.3d 1436 (10th Cir. 1998)). And this assumption may not always be valid. Modern manufacturers, for example, commonly assemble critical parts and components that are produced and delivered by wholly separate companies through contract rather than employment arrangements. And low transaction costs in many of today's industries make it cost-effective for firms to hire contractors to perform routine tasks.

The Department considered salvaging the ''integral part'' factor by deemphasizing ''integral'' and emphasizing ''part.'' Instead of focusing on whether the work is important ''to'' a potential employer's business, the factor would focus on whether the work is an important ''part'' of that business. This approach would more closely align with how ''integral part'' was used by the Supreme Court in *Silk,* which asked whether workers were ''an integral part of [defendants'] businesses,'' as opposed to operating their own businesses. 331 U.S. 716. But as the NPRM noted, the *Silk* Court framed that question as the ultimate inquiry, and not as a factor that is useful to guide the inquiry. *See* 85 FR 60616 n.41. Asking whether a worker is part of—integral or otherwise—a potential employer's business is not useful because it simply restates the ultimate inquiry: If a worker were part of the potential employer's business, then he or she could not be in business for him- or herself and therefore would be economically dependent. As an added complication, new technologies have led to the emergence of platform companies that connect consumers directly with service providers, and it is often difficult to determine whether those platform companies are in

[40] A 2002 opinion letter interpreted the factor to focus on the importance of the work, explaining that ''[w]hen workers play a crucial role in a company's operation, they are more likely to be employees than independent contractors.'' WHD Opinion Letter, 2002 WL 32406602, at *3 (Sept. 5, 2002). However, the Department's most recent opinion letter on this subject characterized the factor as ''the extent of the *integration* of the worker's services into the potential employer's business.'' WHD Opinion Letter FLSA2019–6 at 6 (emphasis added).

[41] The only appellate case the Department found of misalignment in this scenario is *Paragon Contractors,* 884 F.3d at 1237–38.

[42] As explained elsewhere, the Fifth Circuit does not usually consider the ''integral part'' factor in its analysis.

business of supporting service providers' own businesses or are in the business of hiring service providers to serve customers. *Compare Razak,* 951 F.3d at 147 n.12 (''We also believe [there] could be a disputed material fact'' whether Uber is ''a technology company that supports drivers' transportation businesses, and not a transportation company that employs drivers.''), *with O'Connor* v. *Uber Techs., Inc.,* 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015) (''it is clear that Uber is most certainly a transportation company''). For the reasons explained, the final rule retains the ''integrated unit'' approach.

The Department does not share the Greenlining Institute's concern that the final rule's ''integrated unit'' factor would result in workers who perform ''physical tasks'' being classified as independent contractors more than workers who perform white collar, ''intellectual'' work. Meat deboning is a physical task, but deboners were found to be part of an integrated unit of production in *Rutherford Food.* 331 U.S. at 729. On the other hand, freelance writers perform a white collar task, but they generally are not integrated into a publication's production process because they are not involved in, for instance, assigning, editing, or determining the layout of articles. Both white collar and physical labor jobs may be part of an integrated unit of production. The Department has added one example in new § 795.115 showing that a newspaper editor—who performs primarily white collar tasks—may be part of an integrated unit of production.

Another commenter, the Arkansas Trucking Association, agreed that the ''integrated unit'' factor was superior to ''integral part,'' but suggested an alternative formulation based on whether the business's activities would cease or be severely impacted by the absence of the worker. However, this approach has the same limitations as the approaches that emphasize ''importance.'' Almost every worker performs work that is in some sense important to the business that has hired the worker; otherwise, the business would not hire the worker. Moreover, as explained in the NPRM, easily-replaced workers are often more dependent on a particular business for work precisely because they are so easily replaced. Focusing on the impact of a worker's absence turns the economic dependence analysis on its head by essentially looking at the business's dependence on the worker. As a result, it sends misleading signals about employee status.

Another group of commenters suggested that the factor should include an explicit consideration of the location of the work performed. The U.S. Chamber of Commerce, for example, suggested that the factor should consider whether the worker is performing work ''the majority of which is performed off the physical premises of the business.''

Whether the work is performed on the business's physical premises may be a consideration under the ''integrated unit'' factor, as it may indicate the extent to which the worker is part of an integrated unit of production. However, the Department does not believe it is necessary to include this consideration as an explicit part of the ''integrated unit'' factor. Many businesses have no physical location but nevertheless employ employees. In other instances, an employee may be part of an integrated unit despite performing work at a different location than other employees. *See, e.g., Goldberg* v. *Whitaker House Cooperative, Inc.,* 366 US 28, 32 (1961) (holding that workers who produced copies of a sample product at home were employees). Some workers perform work on a business's physical premises but perform discrete, segregable services unrelated to any integrated process or unified purpose. Thus, although the location of the work may be a fact that is relevant to the ''integrated unit'' factor, it is not so probative that it would be useful to elevate it above other facts that may be more relevant in a particular case.

Several commenters asked that the Department clarify that the relevant inquiry is whether the worker is part of an integrated unit of production that is part of the potential employer's own processes rather than part of a broader supply chain. NRF suggested clarifying language that would ''expressly state that merely serving as a link in the chain of a company's provision of goods or services'' does not indicate employee status. It suggested that such language would make it clear that this factor does not indicate employee status where a worker is merely one, segregable step in the process of delivering a product to a consumer.

The Department does not believe such a clarification is needed, because the text of the final rule states that this factor points toward employee status only when the worker performs ''a component of the potential employer's integrated production process.'' The relevant process is the potential employer's process, not the broader supply chain. A worker who performs a segregable step in the process of delivering a product but who is not integrated into the employer's own production process is not part of an integrated unit of production. Multiple businesses, including independent contractors, may perform steps in the same supply chain.

Some commenters suggested that the description of this factor in the preamble should define the scope of the ''unified purpose'' toward which the potential employer's processes work. WPI requested that the Department clarify that the ''unified purpose'' cannot be broader than the potential employer's ''core or primary business purpose.'' On the other hand, Farmworker Justice urged a broad definition of ''unified purpose'' to prevent gamesmanship by which an employer may attempt to artificially separate its production process into separate units in order to claim that they are segregable rather than parts of a unified whole. It cited a hypothetical tomato farmer who could label its tomato harvesters as a separate unit rather than as part of the process of growing tomatoes.

The Department rejects these suggestions, because the final rule's rejection of the ''integral part'' factor and the question of ''importance'' or ''centrality'' makes clear that the relevant facts are the integration of the worker into the potential employer's production processes, rather than the nature of the work performed. As explained above, identifying the ''core or primary business purpose'' is not a useful inquiry in the modern economy. Falling transaction costs and other factors described above allow businesses to hire independent contractors to carry out tasks that are part of the businesses' core functions, while keeping those functions separate from its own production processes. At the same time, seemingly peripheral functions may be integrated into an employer's own processes, indicating employee status. What matters is the extent of such integration rather than the importance or centrality of the functions performed, which the Department does not find to be a useful indicator of employee or independent contractor status.

As noted in the NPRM, the Department recognizes that it may be difficult to determine the extent to which a worker is part of an integrated unit of production. For this reason, this factor is not always useful to the economic realities inquiry, and it is less likely than the core factors to be determinative. For example, this factor would not indicate independent contractor status for Farmworker Justice's hypothetical tomato harvesters

merely because the farmer artificially labeled them a separate unit. As has been the case since the concepts underlying the economic realities test was articulated, the test does not depend on labels assigned to workers. *Rutherford Food,* 331 U.S. at 729 (''Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act.''). The factor may indicate either employee or independent contractor status based on the extent to which the harvesters are integrated into the farmer's production process as a matter of fact, but most likely the ultimate determination would depend more on other factors, such as control and opportunity for profit or loss.

WPI also suggested that the Department clarify language in the preamble to the proposed rule stating that employee status would be indicated for a worker who performs work closely alongside conceded employees. WPI expressed concern that this language could wrongly imply that a worker performing different tasks than the conceded employees but in close proximity to them would indicate employee status. The Department does not believe such clarification is necessary, because the preamble stated that employee status is indicated where the worker ''performs identical or closely interrelated tasks as those employees.'' In other words, WPI is correct that if a worker works physically close to conceded employees but performs unrelated tasks, that fact alone would not indicate employee status.

Finally, many commenters requested that the Department add examples explaining how this factor would apply to specific industries, including trucking, construction, financial advising, and personal shopping. Others wanted examples to address certain types of contractual arrangements, such as multi-sided platforms, franchisees, and buy/sell agreements. In response to these requests, the Department notes that the facts that inform the ''integrated unit'' factor are too circumstance-specific to apply blanket statements to entire industries or broad types of employment arrangements. Any particular task that is common in a particular industry may be performed in one instance by a worker who is part of an integrated unit of production or by a segregable unit. In other words, this factor may point in a different direction for workers who perform similar duties in the same industry but who are more or less integrated into their potential employer's processes based on the potential employer's business model. Moreover, contractual formalities such as a buy/sell agreement or contracts formed using multi-sided platforms could memorialize either employment or independent contractor arrangements; the determination would not depend on the labels assigned but on the various economic realities factors, including the worker's integration into the potential employer's production process.

That said, as explained elsewhere in this preamble, although the Department cannot address all industries or all possible factual scenarios, it does appreciate that examples are helpful to understanding how each factor operates. The new regulatory provision added in this final rule to further illustrate several factors, § 795.115, includes two examples specifically meant to demonstrate how facts about whether a worker is part of an integrated unit of production should be considered as part of the employment relationship analysis.

For the reasons explained, the Department finalizes § 795.105(d)(2)(iii) as proposed.

6. Additional Unlisted Factors

The National Restaurant Association stated that facts and factors not listed in § 795.105(d) may be relevant to the question of economic dependence even though they would not be as probative as the two core factors. This commenter expressed concern that future courts may ignore these unlisted but potentially relevant considerations in response to this rulemaking and requested that the Department revise the regulatory text to explicitly recognize that unlisted factors may be relevant.

While proposed § 795.105(c) already states that the five factors listed in § 795.105(d) are ''not exhaustive,'' [43] the Department agrees that it may be helpful to make this point more explicit. The Department is thus adding § 795.105(d)(2)(iv), which states that additional factors not listed in § 795.105(d) may be relevant to determine whether an individual is an employee or an independent contractor under the FLSA. As with any fact or factor, such additional factors are relevant only to the extent that they help answer whether the individual is in business for him- or herself, as opposed to being economically dependent on an employer for work. Factors that do not bear on this question, such as whether an individual has alternate sources of wealth or income and the size of the hiring company, are not relevant. These unlisted factors are less probative than the core factors listed in § 795.105(d)(1), while their precise weight depends on the circumstances of each case and is unlikely to outweigh either of the core factors .

E. Focusing the Economic Reality Test on Two Core Factors

Proposed § 795.105(c) was intended to improve the certainty and predictability of the economic reality test by focusing the test on two core factors: (1) The nature and degree of the worker's control over the work; and (2) the worker's opportunity for profit or loss. This focus is an important corollary of the sharpened definition of economic dependence to include individuals who are dependent on a potential employer for work and to exclude individuals who are in business for themselves. The NPRM explained that these core factors, listed in proposed § 795.105(d)(1), drive at the heart of what is meant by being in business for oneself: Such a person typically controls the work performed in his or her business and enjoys a meaningful opportunity for profit or risk of loss through personal initiative or investment. The other economic reality factors—skill, permanence, and integration—are also relevant as to whether an individual is in business for him- or herself. But they are less probative to that determination. For instance, it is not uncommon for comparatively high skilled individuals—such as software engineers—to work as employees, and for comparatively low skill individuals—such as drivers—to be in business for themselves. *See, e.g., Saleem,* 854 F 3d at 140; *Express Sixty-Minutes Delivery,* 161 F.3d at 306. In contrast, ''[i]n ordinary circumstances, an individual 'who is in business for him- or herself' will have meaningful control over the work performed and a meaningful opportunity to profit (or risk loss).'' 85 FR 60618. As such, ''it is not possible to properly assess whether workers are in business for themselves or are instead dependent on another's business without analyzing their control over the work and profit or loss opportunities.'' *Id.*

The NPRM further explained that focusing on the two core factors is also supported by the Department's review of case law. The NPRM presented a remarkably consistent trend based on the Department's review of the results of appellate decisions since 1975 applying the economic reality test. Among those cases, the classification favored by the control factor aligned with the worker's

[43] *See Silk,* 331 U.S. at 716 (''No one [factor] is controlling nor is the list complete.'').

ultimate classification in all except a handful where the opportunity factor pointed in the opposite direction. And the classification favored by the opportunity factor aligned with the ultimate classification in every case.[44] These two findings imply that whenever the control and opportunity factors both pointed to the same classification—whether employee or independent contractor—that was the court's conclusion regarding the worker's ultimate classification.[45] *See* 85 FR 60619. In other words, the Department did not uncover a single court decision where the combined weight of the control and opportunity factors was outweighed by the other economic reality factors. In contrast, the classification supported by other economic reality factors was occasionally misaligned with the worker's ultimate classification, particularly when the control factor, the opportunity factor, or both, favored a different classification. *See id.* at 60621.

The NPRM thus provided that, given their greater probative value, if both proposed core factors point towards the same classification—whether employee or independent contractor—there is a substantial likelihood that is the individual's correct classification. This is because it is quite unlikely for the other, less probative factors to outweigh the combined weight of the core factors. In other words, where the two core factors align, the bulk of the analysis is complete, and anyone who is assessing the classification may approach the remaining factors and circumstances with skepticism, as only in unusual cases would such considerations outweigh the combination of the two core factors.

Numerous commenters welcomed proposed § 795.105(c)'s sharpening of the economic reality test by recognizing the two core factors' greater probative value on whether an individual is in business for him- or herself. For instance, the U.S. Chamber of Commerce stated that ''[t]he Department's straightforward focus on two core factors presents a concise interpretation of 'economic dependency' grounded in the Act's statutory definition of 'employ' and 'employer,' consistent with Supreme Court precedent, and well-reasoned courts of appeals' decisions.'' The American Bakers Association (ABA) likewise ''supports the Department's position that the two most probative 'core' factors for determining independent contractor status under the FLSA are the degree and nature of an individual's control over their work, and the opportunity for profit (or loss).'' *See also, e.g.,* ATA; CPIE; National Restaurant Association; SHRM. Even one commenter who did not generally support this rulemaking ''agreed with the Department that the two main factors, control and opportunity for profit or loss, should be given greater weight.'' Owner-Operator Independent Driver Association (OOIDA).

Many commenters objected to focusing on the two core factors. Broadly speaking, they raised three interrelated concerns. First, commenters contended that elevating the two core factors is inconsistent with the economic reality test, which they asserted requires that factors be either unweighted or weighted equally. *See, e.g.,* NELP (objecting to ''elevating two narrow 'core' factors''); SWACCA; Commissioner Slaughter of the Federal Trade Commission (FTC). Second, commenters contended that focusing on two core factors would narrow the scope of who is an employee (as opposed to an independent contractor) under the FLSA. *See, e.g.,* NELP (''The NPRM narrows the FLSA test for employee coverage[.]''); State AGs (''The Proposed Rule's interpretation of [employment under] the FLSA is unlawfully narrow.''); Appleseed Center (''The Department of Labor is trying to impermissibly narrow this definition''); NCFW (objecting to ''agency's proposed attempt to narrow the definition of employee''). Third, commenters asserted that focusing on two core factors would impermissibly restrict the set of circumstances that may be considered when assessing whether a worker is an employee or independent contractor under the FLSA. TRLA (''proposed reformulation would eliminate . . . any consideration of [the skill and permanence] factors''); NELA (objecting to ''a narrow, control-dominated inquiry''); State AGs (objecting to proposed rule because it ''narrows several areas of inquiry.'').[46] The Department responds to each of the above concerns below, and then addresses other requests relating to the focus on the two factors.

1. Focusing on Two Core Factors is Consistent With the Economic Reality Test

Many commenters contended that emphasizing core factors over others would violate a requirement that economic reality factors be unweighted or weighted equally. According to SWACCA, ''[t]he proposed weighted rule is a novel concept and a departure from existing caselaw.'' *See also, e.g.,* NELA (objecting to ''emphasizing certain factors over what should be the 'ultimate inquiry' ''). FTC Commissioner Slaughter likewise objected that ''[t]he Proposal takes the Supreme Court's five factor test, where all five factors are given equal weight, and narrows it down to focus on only two [core] factors.'' *See also* Appleseed Center (''[A]ll are given equal weight.''); Senator Patty Murray (suggesting that ''DOL afford [factors] equal weight''). NELP appeared to agree with the Department that the economic reality test may focus on certain factors over others, but asserted that ''the factor of integration into the business of another should be weighed heavily,'' rather than the proposed rule's two core factors. Several commenters further relied on an age discrimination case to contend that the economic reality test ''cannot be rigidly applied'' and that ''[i]t is impossible to assign to each of these factors a specific and invariably applied weight.'' NELP (quoting *Hickley* v. *Arkla Indus., Inc.,* 699 F.2d 748, 752 (5th Cir. 1983)); *see also* Michigan Regional Council of Carpenters (MRCC) (same).

The Department disagrees that the economic reality test requires factors to be unweighted or equally weighted. Each time the Department or a court applies the test, it must balance potentially competing factors based on their respective probative value to the ultimate inquiry of economic dependence. In the very case that announced the economic reality factors, the Supreme Court listed five factors that are ''important for decision'' but

[44] This is not to imply that the opportunity factor necessarily aligns with the ultimate classification, but rather that the Department is not aware of an appellate case in which misalignment occurred.

[45] The only cases in which an appellate court's ruling on a worker's classification was contrary to the court's conclusions as to the control factor were cases in which the opportunity factor pointed in the opposite direction. *See* 85 FR 60619 (citing *Paragon Contractors,* 884 F.3d at 1235–36, and *Cromwell,* 348 F. App'x at 61).

[46] There are two distinct concepts within the economic reality test—and any test for employment status—that can be broad or narrow. The first concept is the test's standard for employment, which is economic dependence. *See Bartels,* 332 U.S. at 130. The second concept is the set of circumstances that may be considered as part of the test, which is the ''circumstances of the whole activity.'' *See Rutherford Food,* 331 U.S at 730. The breadth of these two concepts are not always logically related. For instance, the ABC test states that a worker is an employee unless the hiring party can establish that three criteria are met, *see, e.g., Dynamex,* 416 P.3d at 35; thus, the ABC test considers a relatively narrow set of circumstances while imposing a broad standard for employment. While most commenters that objected to the narrowing of the economic reality test did not present the standard of employment and circumstance that may be considered as separate concepts, the Department addresses them separately.

did not treat them equally. *Silk,* 331 U.S. at 716. It instead emphasized the most probative factors, while de-emphasizing less probative ones in that case. The Court focused on the fact that coal unloaders ''had no opportunity to gain or lose'' to conclude they were employees under the SSA, while explaining the fact ''[t]hat the unloaders did not work regularly was not significant.'' *Id.* at 717–18. The Court further focused on ''the control exercised [and] the opportunity for profit from sound management'' to conclude that truck drivers were independent contractors, without discussing any of the other economic reality factors. *Id.* at 719. Similarly, the Court in *Whitaker House* concluded that workers at issue in that case were employees based primary on considerations relating to control (*e.g.,* the workers were ''regimented under one organization, manufacturing what the organization desires'') and opportunity for profit (*e.g.,* the workers were ''receiving the [piece rate] compensation the organization dictates'' rather than ''selling their products on the market for whatever price they can command''). 366 U.S. at 32–33.

As discussed in the NPRM, courts of appeals also emphasized facts and factors that are more probative of the economic dependence inquiry. *See* 85 FR 60620. In *Saleem,* the Second Circuit focused on facts relating to drivers' control over their work and their opportunity for profit or loss based on initiative or investment to conclude that they were independent contractors.[47] 854 F.3d at 138–39; *see also Agerbrink* v. *Model Service LLC,* 787 F. App'x 22, 25–27 (2d Cir. 2019) (denying summary judgement based solely on disputed facts regarding plaintiff's ''control over her work schedule, whether she had the ability to negotiate her pay rate, and, relatedly, her ability to accept or decline work''). The Third Circuit in *Razak* v. *Uber Technologies* took a similar approach by emphasizing disputed facts regarding ''whether Uber exercises control over drivers'' ' and had ''the opportunity for profit or loss depending on managerial skill'' to deny summary judgment. 951 F.3d at 145–47.[48] And the Eight Circuit recently emphasized a process server's ability to determine his own profits by controlling hours, which assignments to take, and for which company to work, to affirm a jury verdict that he was an independent contractor. *See Karlson,* 860 F.3d at 1095.

Courts have repeatedly warned against the ''mechanical application'' of the economic reality factors when determining whether an individual is an employee or independent contractor. *See, e.g., Saleem,* 854 F.3d at 139; *Superior Care,* 840 F.2d at 1059. Rather, the factors should be analyzed with the aim of answering the ultimate inquiry under the FLSA: ''Whether an individual is 'in business for himself' or is 'dependent upon finding employment in the business of others.' '' *Scantland,* 721 F.3d at 1312 (quoting *Mednick,* 508 F.2d at 301–02). Commenters who object to focusing on the two core factors do not dispute this principle, and some affirmatively support it. For instance, NELA and the State AGs both stated that economic reality ''factors 'are aids—tools to be used to gauge the degree of dependence of alleged employees on the business with which they are connected' '' (quoting *Pilgrim Equip.,* 527 F.2d at 1311). NELA nonetheless believed that it would be inappropriate to ''emphasiz[e] certain factors over what should be the 'ultimate inquiry': The worker's economic dependence on the putative employer.'' Emphasizing certain factors, however, would dilute the ultimate inquiry of economic dependence only if those factors were less probative of economic dependence than others. In contrast, emphasizing factors that are more probative would not dilute but rather focus the analysis on the ultimate inquiry under the FLSA. If NELA and the State AGs are correct that the economic reality factors must be ''used to gauge the degree of dependence,'' then focusing on factors that are more probative measures of economic dependence is not only permitted but preferred.

The Department's review of case law indicates that courts of appeals have effectively been affording the control and opportunity factors greater weight, even if they did not always explicitly acknowledge doing so.[49] *See* 85 FR 60619. Among the appellate decisions since 1975 that the Department reviewed, whenever the control factor and the opportunity factor both pointed towards the same classification—whether employee or independent contractor—that was the worker's ultimate classification. Put another way: In those cases where the control factor and opportunity factor aligned, had the courts hypothetically limited their analysis to just those two factors, it appears to the Department that the overall results would have been the same. One commenter attempted to dispute this finding. TRLA asserted that, in the following four cases, farmworkers who were found to be employees ''might be reclassified as independent contractors based on the NPRM's two core factors:'' *Driscoll,* 603 F.2d 748; *Lauritzen,* 835 F.2d 1529; *Perez* v. *Howes,* 7 F. Supp. 3d 715 (W.D. Mich. 2014); and *Cavazos* v. *Foster,* 822 F. Supp. 438 (W.D. Mich. 1993). However, the court in each of these cases actually concluded that the control and opportunity factors both favored employee classification,[50] and thus the farmworkers would have been found to be employees even if those courts had hypothetically based is decision solely on the core factors. These cases therefore reinforce the Department's conclusion that the control and opportunity factors have been consistently afforded significant weight in the economic dependence inquiry.

The consistent empirical trend indicating that the control and opportunity factors have been afforded

[47] In particular, the *Saleem* court focused on: drivers' ''considerable discretion in choosing the nature and parameters of their relationship with the defendant,'' ''significant control over essential determinants of profits in [the] business,'' how they ''invested heavily in their driving businesses,'' and the ''ability to choose how much work to perform.'' 854 F.3d at 137–49.

[48] The *Razak* decision also briefly addressed other factors, including a footnote on the ''integral'' factor and a discussion that was nominally about the permanence factor but actually concerned control: ''On one hand, Uber can take drivers offline, and on the other hand, Plaintiffs can drive whenever they choose to turn on the Driver App, with no minimum amount of driving time required.'' 951 F.3d at 147 n.12.

[49] Some courts have explicitly acknowledged that facts related to the control factor were more probative than facts related to other factors. For instance, the court in *Saleem* stated that ''whatever 'the permanence or duration' of Plaintiffs' affiliation with Defendants, both its length and the 'regularity' of work was entirely of Plaintiffs' choosing.'' 854 F. 3d at 147 (citation omitted). When discussing ''the use of special skills,'' the court in *Selker Brothers* similarly explained that, ''[g]iven the degree of control exercised by Selker over the day-to-day operations of the stations, this criterion cannot be said to support a conclusion of independent contractor status.'' 949 F.2d at 1295.

[50] *Driscoll,* 603 F.2d at 755 (''The appellants' affidavits, which must be taken as true for summary judgment purposes, plainly disclose that [defendant] possesses substantial control over important aspects of the appellants' work''); *id.* (''The appellants' opportunity for profit or loss appears to depend more upon the managerial skills of [defendant]''); *Lauritzen,* 835 F.2d at 1536 (''The defendants exercise pervasive control over the operation as a whole.''); *id.* (''The Sixth Circuit [in a prior case] found that the migrant workers had the opportunity to increase their profits through the management of their pickle fields. . . .We do not agree.''); *Howes* 7 F. Supp. 3d at 726, *aff'd sub nom. Perez* v. *D. Howes LLC,* 790 F.3d 681 (6th Cir. 2015); (''Accordingly, [the control] factor weighs in favor of a finding that the workers were employees.''); *id.* (''[W]orkers could simply increase their wages by working longer, harder, and smarter—this does not constitute an opportunity for profit.''); *Cavazos,* 822 F. Supp. at 442 (''Their lack of control supports plaintiffs' claim that they are employees.''); *id.* at 443 (noting that the work relationship ''does not afford plaintiffs an opportunity for profits'').

greater weight should be unsurprising given their greater probative value. As the NPRM explained, those two factors ''strike at the core'' of what it means to be in business for oneself, 85 FR 60612, and therefore they are more probative of the ultimate inquiry under the FLSA: ''whether an individual is 'in business for himself' or is 'dependent upon finding employment in the business of others.' '' *Scantland,* 721 F.3d at 1312 (quoting *Mednick,* 508 F.2d at 301–02). No commenters offered a persuasive counterargument to the commonsense logic that, when determining whether an individual is in business for him- or herself, the extent of the individual's control over his or her work is more useful information than, for example, the skill required for that work. Nor did any commenters effectively rebut that the extent of an individual's ability to earn profits (or suffers losses) through initiative or investment is more useful information than, for example, how long that individual has worked for a particular company.

NELP appeared to agree with the Department that emphasis should be given to factors that are most probative to the ultimate inquiry of whether an individual is in business for him- or herself, but disagrees as to what those factors should be. In particular, NELP asserted that ''the factor of integration into the business of another should be weighed heavily and in fact is ultimately the test. If the work is integrated this leads to the conclusion that the worker is not independently running a business.'' [51]

NELP correctly defines the economic dependence inquiry as ''whether a person is in business for themselves and therefore independent, or works instead in the business of another and dependent on that business for work.'' If a worker is economically dependent on an employer for work, the worker is not in business for him- or herself. NELP then defines the ''integration factor'' to mean the exact same thing: ''If the work is integrated this leads to the conclusion that the worker is not independently running a business.'' NELP is correct that, when defined as such, ''the factor of integration . . . in fact is the ultimate test,'' but that factor would not be helpful in ascertaining a worker's employment status because it simply restates the question. The Department, courts, and the regulated community would still have to determine which factors to analyze to determine whether an individual is in business for him- or herself. The Department therefore declines to create and give greater weight to NELP's concept of the ''integration factor'' and continues to believe that the control and opportunity factors are the most probative as to whether an individual is in business for him- or herself as a matter of economic reality.

NELP and MRCC quoted dicta from an age-discrimination case that ''[i]t is impossible to assign to each of [the economic reality] factors a specific and invariably applied weight.'' *Hickley,* 699 F.2d at 752.[52] This proposed rule, however, does not run afoul of *Hickley*'s dicta. As an initial matter, neither core factor individually has ''a specific and invariably applied weight'' because the proposed rule does not state that one necessarily outweighs the other. The Department nonetheless recognizes that proposed § 795.105(c)' statement that ''each [core factor] is afforded greater weight in the analysis than is any other factor'' may be overly rigid. For reasons explained above, certain types of facts—*i.e.,* those falling within the control and opportunity factors—are more probative than others regarding whether an individual is in business for him- or herself. But that does not necessarily mean the control or opportunity factors are entitle to greater weight in all cases. For example, it may be the case that, after all the circumstances have been considered, a core factor does not weigh very strongly towards a particular classification because considerations within that factor point in different directions. *See Cromwell,* 348 F. App'x at 61 (finding that ''defendants here did not control the details of how the plaintiffs performed their assign jobs'' but did have ''complete control over [their] schedule and pay''). A core factor could even be at equipoise, in which case it would not weigh at all in favor of a classification. *See Johnson,* 371 F. 3d at 730 (concluding that competing facts regarding plaintiffs' opportunity for profit or loss meant that the ''jury could have viewed this factor as not favoring either side''). In short, there is a subtle but important distinction that was not fully reflected in the NPRM's language between a factor's probative value as a general matter and its specific weight in a particular case. Probative value refers to the extent to which a factor encapsulates types of facts that illuminate the ultimate inquiry of whether workers are in business for themselves, as opposed to being dependent on an employer for work. The weight assigned to a factor in a particular case refers to how strongly specific facts within the factor, on balance, favors a particular classification. Considerations within a core factor may have significant probative value even though that factor, on balance, does not weigh heavily towards a classification in a specific case. The Department therefore revises § 795.105(c) to more clearly distinguish between a core factor's probative value as a general matter and its' weight in a specific case and to clarify that the core factors' greater probative value means that they typically (but not necessarily) carry greater weight . Thus it should be clear that the rule does not assign any factor a specific or invariable weight. In contrast, the approach favored by some commenters, including the Appleseed Center and Commission Slaughter, to give each factor ''equal weight'' would ''assign to each of the factors a specific and invariably applied weight.'' *Hickley,* 699 F.2d at 752.

At bottom, the final rule's focus on two core factors thus does not depart from the economic reality test—it merely elucidates the factors' respective probative values that have always existed but never been explained. *Cf. Lauritzen,* 835 F.2d at 1539 (''Why keep [employers] in the dark about the legal consequences of their deeds.'' (Easterbrook, J., concurring)). As explained in more detail below, providing such clarification for the regulated community would not narrow the scope of who is an FLSA employee as opposed to an independent contractor. Nor would it narrow the circumstances that may be considered under the economic reality test.

2. The Proposed Rule Would Not Narrow the Standard for FLSA Employment

A number of commenters argued that focusing the economic reality test on the control and opportunity factors would narrow the standard for employment under the FLSA. The FLSA defines ''employ'' as including ''to suffer or permit to work,'' 29 U.S.C. 203(g), and these commenters argued this definition should be interpreted to provide broad coverage in light of the Act's remedial

[51] According to NELP, this language is a quotation from AI 2015–1 that was withdrawn in 2017. But that withdrawn guidance does not contain the quoted language.

[52] The court in *Hickley* applied the economic reality test in the context of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621–34, without opining whether that was the correct test under the ADEA. 699 F.2d at 752 (''Finding . . . there was no evidence . . . that Hickey was an employee under the more liberal 'economic realities' test used in FLSA cases, [but] express[ing] no opinion on whether it or one of the tests used in Title VII cases should ultimately be used to determine employee status in ADEA cases.''). *Hickley*'s ''specific and invariably applied weight'' dicta appears in one FLSA case, *Parrish,* 719 F.3d at 380, as a *see also* parenthetical to support the proposition that economic reality factors should not be applied mechanically.

purpose. *See, e.g.,* AFL–CIO; NELA; NELP; Senator Patty Murray; State AGs. Most of these commenters argued that the proposed rule is incompatible with the Act's broad definition of employment because focusing on the control factor would effectively adopt the narrower scope of employment under the common law control test. One commenter, however, had a different view: UPS argued that the proposed rule would adopt a narrower standard for employment by giving the control factor *too little* weight.

Discussing the proposed rule's consistency with the FLSA's standard for employment first requires an understanding of the Act's definitions. Commenters point out that the Act defines ''employ'' as including ''to suffer or permit to work,'' 29 U.S.C. 203(g), but the Supreme Court has observed that, although broad, the Act's definitions are not clear regarding the scope of relationships that are included. *Rutherford Food,* 331 U.S. at 728 (''[T]here is in the [FLSA's text] no definition that solves problems as to the limits of the employer-employee relationship under the Act.''). Courts of appeals have likewise found the definitions not to clearly indicate the precise contours of FLSA employment. *See, e.g., Solis* v. *Laurelbrook Sanitarium & Sch., Inc.,* 642 F.3d 518, 522 (6th Cir. 2011); *Steelman* v. *Hirsch,* 473 F.3d 124, 128 (4th Cir. 2007).

As commenters also noted, the Supreme Court relied on the FLSA's purpose and legislative history to interpret the ''suffer and permit'' language to encompass a more inclusive definition of employment than that of the common law. *Rutherford Food,* 331 U.S. at 727 (affirming that FLSA employment is not limited to the ''common law test of control, as the act concerns itself with the correction of economic evils through remedies which were unknown at common law''); *see also Darden,* 503 U.S. at 326. The Supreme Court has ''consistently construed the Act liberally in recognition that broad coverage is essential to accomplish [its] goal,'' *Tony & Susan Alamo,* 471 U.S. at 296, but at the same time, the Court also recognized that the ''suffer or permit'' definition ''does have its limits.'' *Id.* at 295; *see also Portland Terminal,* 330 U.S. at 152 (''The definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees.''). No court has suggested that applying such limits (including the limit that bona fide independent contractors are not employees under the Act) cannot be reconciled with the Act's remedial purpose. *Cf. Encino Motorcars, LLC* v. *Navarro,* 138 S. Ct. 1134, 1142 (2018) (*Encino* II) (warning against relying on ''flawed premise that the FLSA 'pursues' its remedial purpose 'at all costs'' when interpreting the Act). Ultimately, ''[t]he test of employment under the Act is one of 'economic reality.''' *Tony & Susan Alamo,* 471 U.S. at 301 (quoting *Whitaker House,* 366 U.S. at 33)). This rule applies such a test and does so with sufficient breadth consistent with the Act's remedial purpose.

While the phrase ''economic reality'' is on its face no clearer than the ''suffer or permit'' language, *see Lauritzen,* 835 F.2d at 1539 (Easterbrook J., concurring), decades of case law has refined its meaning. The Court determined that employees include ''those who as a matter of economic reality are dependent upon the business to which they render service.'' *Bartels,* 332 U.S. at 130. Courts of appeals have subsequently used *Bartels'*s concept of economic dependence to determine employment under the FLSA. *See, e.g., Saleem,* 854 F.3d at 139; *Mr. W Fireworks,* 814 F.2d at 1054; *DialAmerica,* 757 F.2d at 1385. Thus, the courts have interpreted the scope of employment under the Act's definition to include any individual who is ''dependent upon finding employment in the business of others,'' and to exclude any individual who is ''in business for himself.'' *Scantland,* 721 F.3d at 1312.[53] However, as noted in the need for rulemaking discussion, this principle has not always been applied consistently.

The Department agrees with this interpretation and further believes that the economic dependence standard developed by courts comports with the ''suffer or permit'' statutory text. As the NPRM explained: ''An individual who depends on a potential employer for work is an employee whom the employer suffers or permits to work. In contrast, an independent contractor does not work at the sufferance or permission of an employer because, as a matter of economic reality, he or she is in business for him- or herself.'' 85 FR 60606 (citing *Saleem,* 854 F.3d at 139). Commenters generally agreed that employee versus independent contractor status under the FLSA is determined by the worker's economic dependence, and several of the above-mentioned commenters affirmatively supported this standard. For example, NELA stated that ''[i]t is dependence that indicates employee status'' (quoting *Usery,* 527 F.2d at 1311). And the State AGs explain that ''[t]he ultimate concern is whether, as a matter of economic reality, the workers depend on someone else's business . . . or are in business for themselves'' (quoting *Superior Care,* 840 F.2d at 1059).

Most commenters who objected to focusing the economic reality test on the two core factors were concerned that such an approach would narrow FLSA employment to the common law standard. For instance, NELA stated that ''[b]y affording the control factor greater weight in the economic reality analysis, the Department slides back toward the common law agency test.'' *See, e.g.,* AFL–CIO (''[T]he proposed rule effectively collapses the FLSA's definition into the common law definition by giving primacy and controlling weight to the two factors of control and opportunity for profit and loss.''). The implied logic behind this concern is that if one test gives greater weight to a factor that is also given greater weight by a second test, the two tests necessarily have an equal scope of employment. But that does not follow.

A comparison with the ABC test is illustrative. That test creates a presumption of employee status, which can be overridden only if all three factors are established. One of the ABC test's factors is ''whether the worker is free from the control and direction of the hiring entity.'' This factor is given dispositive weight under certain circumstances: If the worker is controlled by the hiring party, then he or she is automatically an employee, regardless of other considerations. The common law control test also gives control dispositive weight. While both tests afford control greater weight than the economic reality test, one test (ABC) has a broader scope of employment than the economic reality test and the other (common law) has a narrower scope. The relative weight attached to a particular factor does not, by itself, determine whether the ultimate scope of employment is broad or narrow. Accordingly, it is not possible to compare the breadth of the standards for employment used by two tests simply by comparing the weight attached to a shared factor. Rather, it is necessary to consider how each test's factors are actually applied.

Under the common law control test, control is the ultimate inquiry: If an individual controls the work, then he or she would be an independent contractor rather than an employee. However, such control by itself would be insufficient to establish the worker as an independent contractor under the Department's rule.

[53] Courts apply this economic dependence standard for employment in the employee-versus-independent contractor context, but use different approaches in other contexts. *See, e.g., Glatt* v. *Fox Searchlight Pictures,* 811 F.3d 528 (2d Cir. 2016).

Other considerations, including the second core factor of opportunity for profit or loss, can outweigh the control factor and result in a classification of employee status. That is precisely what happened in *Paragon Contractors,* wherein the control and integral part factors weighed in favor of independent contractor classification but the court nonetheless held that the worker was an employee because the remaining factors, including opportunity for profit or loss, favored classification as an employee. *See* 884 F.3d at 1238. And even if the individual both controls the work and has a meaningful opportunity for profit or loss, he or she still would not necessarily be classified as an independent contractor under the Department's rule because other factors may outweigh those two core factors in rare cases. In short, because the ultimate inquiry under the common law control test is the worker's right to control the manner and means by which the work is performed, such control by the worker disqualifies the worker from being an employee under that test, but more is needed under the rule's articulation of the economic reality test because economic dependence is the ultimate inquiry. Thus, the rule's standard for employment remains broader than the common law standard. Nor does the rule ''slide[ ] back toward the common law agency test,'' as NELA contends, or otherwise narrow the standard of employment under the FLSA. As explained above, the standard for determining whether an individual is an employee under the FLSA or an independent contractor has always been economic dependence. The two core factors are more probative than other factors regarding whether an individual is in business for him- or herself, as opposed to being dependent on an employer for work. Neither NELA nor likeminded commenters dispute this specific claim. NELA further recognized that economic reality factors must be ''used to gauge the degree of dependence.'' If so, the test should focus on core factors that are more probative measures of dependence. Doing otherwise would serve no purpose other than to make regulations more confusing, thereby reducing compliance and driving up the transaction cost of a lawful business practice.

UPS expressed the opposite concern as NELA and likeminded commenters, asserting that the proposed rule did not give enough weight to the control factor. According to UPS, treating control as a factor to be balanced rather than giving it dispositive weight ''leaves open the possibility that a worker could be classified as an 'independent contractor' even when the common-law control factor indicated employee status.'' The potential for such an outcome implies that FLSA employment may be narrower than the common law standard in certain circumstances.

As an initial matter, UPS's concern that the control factor may be outweighed by other considerations even when it indicates employee status also applies to every prior articulation of the economic reality test—indeed more so—because none of them gave the control factor greater weight, much less dispositive weight. The rule addresses UPS's concern because it explicitly identifies control as a core factor that is less likely to be outweighed by other factors. More importantly, UPS's concern could materialize only if the control factor were balanced against other factors without regard for the ultimate inquiry for FLSA employment. Courts have cautioned against such ''mechanical application'' of the economic reality factors and have instead instructed that all factors should guide the analysis of whether the individual is in business for him or herself or is dependent on others for work. *See, e.g., Saleem,* 854 F.3d at 140. For these reasons, the Department does not share UPS's concern that not giving dispositive weight to the control factor results in a standard for employment that is narrower than the common law.[54]

3. The Rulemaking Will Not Restrict the Range of Considerations Within Economic Reality Test

A number of commenters contend that the proposed rule's focus on the two core factors is inconsistent with case law requiring the ''circumstances of the whole activity'' to be considered as part of the inquiry into economic dependence. State AGs (quoting *Rutherford Food,* 331 U.S. at 730); *see also, e.g.,* NELA (''The economic reality inquiry therefore cannot be answered without 'employ[ing] a totality-of-the-circumstances approach.' '' (quoting *Baker,* 137 F.3d at 1441)); *see also* Senator Patty Murray (''No one test factor is controlling, nor is the list exhaustive.''); TRLA (same).

The Department agrees with commenters that the circumstances of the whole activity should be considered as part of the economic reality inquiry. *See* 85 FR 60621 (''Other factors may also be probative as part of the circumstances of the whole activity''). While all circumstances must be considered, it does not follow that all circumstances or categories of circumstance, *i.e.,* factors, must also be ''given equal weight.'' *See e.g.,* FTC Commissioner Slaughter; Appleseed Center. Assigning one factor less weight than another does not restrict the circumstances being considered because the very act of determining relative weight requires considering both factors.

As explained above, each factor should be analyzed in accordance with its probative value to the ultimate inquiry of whether an individual is in business for him or her-self. To be sure, the specific weight of the factors depends on specific circumstances. The control and opportunity factors are nonetheless more probative than other factors in determining whether an individual is in business for him- or herself. As such, it is appropriate to recognize, as the proposed rule does, that these two more probative factors should typically carry greater weight than other factors. Doing so would not, as TRLA contends, ''eliminate . . . any consideration of [other] factors that have often been regarded as probative in the farm labor context.'' The proposed rule explicitly permits other factors to outweigh the two core factors if the specific circumstances of the case—whether in the farm labor context or another contexts—warrants such a result. In order to determine whether the combined weight of the two core factors are outweighed or not by other factors, it is necessary to consider both sets of factors. Nor would it make any ''single factor determinative by itself.'' *Hopkins,* 545 F.3d at 343. Neither of the core factors can be ''determinative by itself'' because there is a second core factor against which each is balanced. Even when both core factors align, they are not ''controlling'' because their combined weight can still be outweighed by other considerations.

4. Other Comments Regarding the Focus on the Two Core Factors

PAM and Global Tranz requested that the Department create a ''bright-line test'' that ''would be limited to the two 'core factors' already identified in the Proposed Rule: (1) the nature and degree of the individual's control over the work, and (2) the individual's opportunity for profit or loss.'' *See also* Cetera Financial Group (CFG) (''we believe it would be appropriate for the Department to limit the criteria employed in the economic dependence analysis to the two Core factors and

[54] In any event, courts have foreclosed UPS's requested remedy of giving the control factor dispositive weight to determine employee status. *See, e.g., Silk,* 331 U.S. at 716 (''No one factor is controlling); *Keller,* 781 F.3d at 807 (''No one factor is determinative.''); *Baker,* 37 F.3d at 1440 (''None of the factors alone is dispositive.'').

eliminate the others''). According to these commenters, a two-factor test would be even clearer and simpler than the proposal to focus the test on the two core factors, while still considering other factors. Other commenters requested that the Department eliminate one or more of the non-core factors listed in § 795.105(d)(2) from the economic reality test because such factors have little to no probative value in some circumstance, and may sometimes send misleading signals regarding an individual's classification. CWI and the National Restaurant Association asked the Department to eliminate the skill required factor; SHRM and the U.S. Chamber of Commerce were among several commenters who suggested that the Department eliminate the permanence factor; and ATA, NDHA, and others requested eliminating the integrated unit factor.

The Department believes that the two core factors of control and opportunity are always probative as to whether an individual is in business for him- or herself. The Department further agrees with the above commenters that the other factors are less probative and may have little to no probative value in some circumstances. *See, e.g., Silk,* 331 U.S. at 718 (''That the unloaders did not work regularly is not significant.''). However, ''circumstances of the whole activity should be examined'' as part of the economic reality test, meaning that the other factors should be considered in all cases even if they are not always probative once considered. *DialAmerica Mktg., Inc.,* 757 F.2d at 1382. If a factor is probative in some situations but not in others, there is still a need to consider that factor to determine whether it is probative in a particular case. Eliminating the non-core factors from consideration would therefore be warranted only if those factors lacked probative value in all circumstances—that is, if there was never a need to even consider whether they had probative value.

Because non-core factors are probative in many circumstances, the Department believes it would be inappropriate to eliminate them. In response to commenters' concern that non-core factors may not always be probative, the Department is making non-substantive revisions to clarify that the two core factors are always probative as to whether an individual is in business for him- or herself, but there may be circumstances where one or more of the non-core factors, upon consideration, has little or no probative value.

Several commenters requested that the Department revise § 795.105(c) to state that if the two core factors point towards the same classification, there is no need to consider any other factors. *See e.g.,* NRF (''if both of the core factors point in the same direction, then a court may consider only those two factors and end the analysis without examining the three additional possible factors identified by DOL''); SHRM (requesting revision ''to ensure that if the Core Factors indicate the same status of the worker, no further analysis is necessary''). According to the SHRM, such an approach would ''create clear expectations and stable grounds to build working relationships.''

The Department believes that the economic reality test cannot be rigidly applied and concludes that its approach of giving certain factors greater weight and other factors lesser weight while retaining flexibility as to the degree of weight depending on the facts of the case best accounts for all of the circumstances that work relationships present. Commenters' requests would require the Department to state that the combined probative value of the two core factors—whatever that might be—always outweighs the combined probative value of other factors. The Department believes that will usually be the case, but does not rule out the possibility that, in some circumstances, the core factors could be outweighed by particularly probative facts related to other factors.

Several commenters effectively requested that the Department assign a specific relative weight to one core factor as compared to the other. CWI requested that the Department always weigh the two core factors equally, while the HR Policy Institute requested that the control factor always be given greater weight than the opportunity factor. The Department declines to implement both requests. The Department's review of U.S. Courts of Appeals cases since 1975 did not indicate that the control and opportunity factors should be weighed equally. Nor did that review indicate that the control factor should always outweigh the opportunity factor. Indeed, in the few cases reviewed by the Department where the control and opportunity factors pointed towards different classifications, the ultimate classification aligned with the opportunity for factor. *See* 85 FR 60619 (citing *Paragon Contractors,* 884 F.3d at 1235–36, and *Cromwell,* 348 F. App'x at 61). Ultimately, the Department is confident in its conclusion that the two core factors are more probative than all other factors and that framework is logical, as described above. But the Department declines to assign an invariable relative weight between the two core factors.

Several commenters requested that the Department revise § 795.105(c) to establish a rebuttable presumption of employee or independent contractor status if both core factors indicate the same classification. Such a presumption would be rebuttable only by ''substantial evidence to the contrary under all three [other factors].'' ATA. According to ATA, a rebuttable presumption ''[w]ould further reduce the possibility of courts unnecessarily and potentially selectively applying and weighing the three additional factors for preferred policy outcomes, which has been a concern with regard to the current test in some instances.'' As the NPRM explained, the Department considered but did not propose a rebuttable presumption based on alignment of the two core factors because it was concerned a formal presumption may be needlessly complex or burdensome. *See* 85 FR 60621. The Department further believes that emphasizing the importance of the two core factors provides sufficient clarity. As such, the Department declines to adopt a presumption-based framework.

CWI requested that the ''the Final Rule spell out specifically that each of the Core Factors should be analyzed independently of the other, without overlap.'' The Department agrees with CWI that overlaps between economic reality factors, core or otherwise, should be minimized. As discussed in the NPRM and in this preamble, reducing such overlap is one of the reasons for this rulemaking. That said, the Department believes specific regulatory instructions against overlapping analysis of the two core factors is not necessary and may be confusing. The Department believes proposed § 795.105(d)(1) articulates the two core factors without apparent overlap, and CWI does not identity any specific considerations that risk being analyzed under both factors. Language in the regulatory text warning against overlapping analysis may therefore confuse members of the regulated community by priming them to look for potential overlapping considerations when there are none. The Department therefore declines to add CWI's requested language.

In summary, the economic reality test examines the circumstances of the whole activity to determine whether an individual is in business for him- or herself, as opposed to being economically deponent on others for work. Not all facts or factors are equally probative (if they are probative at all) as

to whether, as a matter of economic reality, an individual is in business for him- or herself. Treating them all as equal would not focus the inquiry on economic dependence, but rather would distort that analysis. In contrast, highlighting factors that are more probative would sharpen the test's focus on economic dependence.

The NPRM presented reasoning and evidence based on the Department's review of case law indicating that control and opportunity factors are more probative to whether an individual is in business for him- or herself, as opposed to being economically dependent. While not all commenters agree with this approach, commenters who object to it have not convinced the Department to change its original assessment. The Department therefore believes that it is appropriate to focus the economic reality test on the two core factors that are more probative to the test's ultimate inquiry. Such focus appropriately guides how factors should be balanced, while retaining flexibility in the test.

F. Proposed Guidance Regarding the Primacy of Actual Practice

Proposed § 795.110 stated that the actual practice of the parties involved—both of the worker (or workers) at issue and of the potential employer—is more relevant than what may be contractually or theoretically possible. The proposed rule explained that this principle is derived from the Supreme Court's holding that '' 'economic reality' rather than 'technical concepts' is to be the test of employment'' under the FLSA. *Whitaker House,* 366 U.S. at 33; *see also Tony & Susan Alamo,* 471 U.S. at 301 (''The test of employment under the [FLSA] is one of 'economic reality' '' (citing *Whitaker House,* 366 U.S. at 33)).

Several commenters expressed support for proposed § 795.110. For example, ATA wrote that ''[t]he general principle also is almost black letter law—substance is always more important than form—under virtually every regulation WHD enforces.'' The Center for Workplace Compliance described the language as ''consistent with historical interpretation of the economic reality test by Federal courts and DOL.'' Other commenters complimented the proposal with little or no further explanation, *see* NHDA; New Jersey Civil Justice Institute; WPI, while HR Policy Association urged the final rule to go further by entirely disregarding the relevance of unexercised contractual or theoretical possibilities. WFCA supported proposed § 795.110, but asked the Department to elaborate in the final rule that ''best indicator of the actual practices is whether a significant segment of the industry has traditionally treated similar workers as independent contractors or employees.''

No worker advocacy organizations specifically commented in support of the provision, but several groups, including NELA, the Pacific Northwest Regional Council of Carpenters, and the Public Justice Center, quoted Judge Frank Easterbrook's observation from *Lauritzen,* 835 F.2d at 1545, that ''[t]he FLSA is designed to defeat rather than implement contractual arrangements.'' The International Brotherhood of Teamsters similarly asserted that Congress ''chose to define 'employment' in a manner that would allow the Act to be applied flexibly so that employers could not simply recalibrate their contractual arrangements with workers to evade coverage.'' Finally, NELP and 32 other organizations quoted Judge Learned Hand's observation from *Lehigh Valley Coal Co.* v. *Yensavage,* 218 F. 547 (2d Cir. 1914), *cert. denied,* 235 U.S. 705 (1915), that employment statutes from the early 20th century were intended to ''upset the freedom of contract'' between workers and businesses. *Id.* at 553.

Some business commenters expressed general support for proposed § 795.110, but requested edits to discount the relevance of voluntary choices on the part of an individual worker that implicate one or more of the economic reality factors described in proposed § 795.105(d), such as choosing to work exclusively for one business, accepting all available work assignments from the business, or declining to negotiate prices. *See, e.g.,* American Bakers Association; ATA; New Jersey Warehousemen & Movers Association (NJWMA); NRF; Private Care Association; Scopelitis, Garvin, Light, Hanson & Feary; U.S. Chamber of Commerce (''[T]he Chamber urges the Department clarify that so long as a business does not take actions to foreclose an individual from exercising certain rights, that the individual's choice to not exercise those rights does not diminish their indicia of independence in the relationship.''). Some of these commenters asserted that allowing voluntary worker practices to influence classification outcomes would lead to costly and inefficient business decisions. *See* Dart Transit Company (''[T]he practical effect of [proposed § 795.110] is to require independent contractors to arbitrarily switch routes and carriers . . . simply in order to preserve their independent status''); Minnesota Trucking Association (''In effect, the motor carrier would have to restrict offering to the independent owner operator a route both find beneficial in order to ensure that the independent owner operator performs services for other motor carriers.''). Others asserted that considering voluntary worker practices would lead to classification discrepancies between workers with similar contractual freedoms. *See* NRF; SHRM.

Some business commenters were flatly opposed to proposed § 795.110. SHRM wrote that ''[a] focus on 'practice' as opposed to the contractual 'rights,' of the parties . . . unnecessarily de-emphasizes voluntariness of the contract itself and places ambiguity over parties' negotiations.'' The Customized Logistics and Delivery Association objected that worker classifications could turn on voluntary worker practices that a business may not know about (*e.g.,* whether particular workers perform labor for other companies), asserting that proposed § 795.110 ''essentially shift[s] the burden of proof to the alleged employer to establish a worker's status as an IC'' and ''could force mass reclassifications of ICs for motor carriers, and many other industries.''

Finally, several commenters representing workers, as well as Senator Patty Murray and the State AGs, voiced opposition to proposed § 795.110 on the basis that emphasizing the primacy of an alleged employer's practices would establish an employee classification standard impermissibly narrower than the common law, which evaluates an alleged employer's ''right to control.'' [55] In this regard, the State AGs compared proposed § 795.110 to the Department's interpretation in its recent Joint Employer final rule that ''[a] potential joint employer must actually exercise—directly or indirectly—one or more . . . indicia of control to be jointly liable'' (85 FR 2859). Winebrake & Santillo, LLC asserted that proposed § 795.110 conflicts with a statement from a recent Third Circuit opinion that ''actual control of the manner of work is not essential; rather, it is the right to control which is determinative,'' *Razak,* 951 F.3d at 145, while Edward. Tuddenham commented that ''[a]ll of the cases [the Department cited in its NPRM] to support the primacy of 'actual practice' are referring to the actual practices of workers and are not discussing analysis of employer controls.'' In rejecting the proposed rule's distinction between a potential employer's contractual

[55] Restatement (Second) of Agency § 2(3); *see also Commun. for Non-Violence* v. *Reid,* 490 U.S. 730, 751 (1989) (describing ''the hiring party's right to control the manner and means by which the product is accomplished'' as the overarching focus of the common law standard).

authority to control workers and control that they actually exercise, Senator Murray asserted that contractual authority ''provides a potential employer an incredible amount of de facto control over a worker . . . induc[ing] a worker to perform the work in the manner the employer prefers, suggests, recommends, or hints at, even if the employer does not ever command it.'' *See also* State AGs (''[R]eserved authority in an agreement, like the looming sword of Damocles, will often influence what the parties do[.]'').

The Department has carefully considered the views and arguments expressed by commenters and decided to implement § 795.110 as proposed. As emphasized in the NPRM, and as the plain language of § 795.110 makes clear, unexercised powers, rights, and freedoms are not irrelevant in determining the employment status of workers under the economic reality test;[56] such possibilities are merely *less* relevant than powers, rights, and freedoms which are actually exercised under the economic reality test.[57] Affording equal relevance to reserved control and control that is actually exercised—by either party—would ignore the Supreme Court's command to focus on the ''reality'' of the work arrangement, *Silk,* 331 U.S. at 713, which places a greater importance on what actually happens than what a contract suggests *may* happen. Several Federal courts of appeals decisions have explicitly made this observation. *See, e.g., Saleem,* 854 F.3d at 142 (''[P]ursuant to the economic reality test, it is not what [Plaintiffs] could have done that counts, but as a matter of economic reality what they actually do that is dispositive.'') (citations omitted); *Parrish,* 917 F.3d at 387 (''The analysis is focused on economic reality, not economic hypotheticals.''); *Scantland,* 721 F.3d at 1311 (''It is not significant how one 'could have' acted under the contract terms. The controlling economic realities are reflected by the way one actually acts.'' (citations omitted)). Moreover, as some commenters pointed out, prioritizing substance over form is consistent with the Department's general interpretation and enforcement of the FLSA. *See, e.g.,* 29 CFR 541.2 (''A job title alone is insufficient to establish the exempt status of an employee.''); 29 CFR 541.603(a) (providing that employers violate the salary basis requirement for certain employees exempt under Sec. 13(a)(1) of the Act only when they demonstrate ''an actual practice of making improper deductions'');[58] 29 CFR 778.414 (''[W]hether a contract which purports to qualify an employee for exemption under section 7(f) meets the requirements . . . will in all cases depend not merely on the wording of the contract but upon the actual practice of the parties thereunder.'').

The Department disagrees with commenters who assert that prioritizing the actual practice of the parties involved makes the economic reality test impermissibly narrower than the common law control test. In many instances, the actual practices of the parties will establish the existence of an employment relationship despite what a ''skillfully devised'' contract might suggest on paper. *Silk,* 331 U.S. at 715; *see, e.g., Scantland,* 721 F.3d at 1313–14 (''Though plaintiffs' 'Independent Contractor Service Agreements' provided that they could 'decline any work assignments,' plaintiffs testified that they could not reject a route or a work order within their route without threat of termination or being refused work in the following days.''); *Hobbs,* 946 F.3d at 833 (dismissing the fact that welders determined to be employees ''could hypothetically negotiate their rate of pay''). In any event, because the ultimate inquiry of the economic reality test is ''economic dependence,'' the test ensures coverage over more workers in the aggregate than the common law control test, notwithstanding its more nuanced interpretation of the control factor itself. *See Silk,* 331 U.S. at 716 (listing ''*degrees* of control'' as one of several non-dispositive factors in the economic reality test) (emphasis added).

It is true that, under the economic reality test, some workers subject to a potential employer's ''right to control'' may nevertheless qualify as bona fide independent contractors for other reasons. To the extent that this excludes some workers who might qualify as ''employees'' under a traditional common law test,[59] this is the logical outcome of a multifactor test where ''no one [factor] is controlling.'' *Silk,* 331 U.S. at 716; *see also, e.g., Selker Bros.,* 949 F.2d at 1293 (''It is a well-established principle that . . . neither the presence nor the absence of any particular factor is dispositive.''). Moreover, the Supreme Court arrived at precisely this outcome in two of its seminal cases applying the economic reality test.

First, in *Silk,* the Court evaluated the employment status of owner-operator truck drivers who contracted to perform services exclusively for a motor carrier company, subject to a ''manual of instructions . . . purport[ing] to regulate in detail the conduct of the truckmen in the performance of their duties.'' 331 U.S. at 709–710. Before reaching its own conclusion, the Court excerpted an analysis from the appellate court below noting that, ''[w]hile many provisions of the manual, if strictly enforced, would go far to establish an employer-employee relationship between the Company and its truckmen . . . there was evidence to justify the [district] court's disregarding of it,'' including testimony that the manual was ''impractical and was not adhered to.'' *Id.* at 716 n.11 (quoting *Greyvan Lines* v. *Harrison,* 156 F.2d 412, 415 (7th Cir. 1946)). Although the Court acknowledged ''cases . . . where driver-owners of trucks or wagons have been held employees in accident suits at tort'' (under the common law), the Court said it ''agree[d] with the decisions below'' that the owner-operator truck drivers were independent contractors, as ''the total situation, including . . . the control *exercised* . . . marks these driver-owners as independent contractors.'' *Id.* at 718–19 (emphasis added).

The Court in *Bartels,* even more clearly illustrated of how the economic reality test's emphasis on actual practice may indicate independent contractor. There, the Court found that band members were not employees of a public dance hall that hired them for

[56] Entirely disregarding unexercised contractual rights and authorities would not be consistent with the Supreme Court's instruction in *Rutherford Food* to evaluate ''the circumstances of the whole activity.'' 331 U.S. at 730; *see also Mid-Atl. Installation,* 16 F. App'x at 107 (determining that cable installers were independent contractors in part because they had a ''right to employ [their own] workers''); *Keller,* 781 F.3d at 813 (citing as relevant ''the fact that Miri never explicitly prohibited Keller from performing installation services for other companies'' and finding ''a material dispute as to whether Keller could have increased his profitability had he improved his efficiency or requested more assignments'').

[57] In this respect, § 795.110's emphasis on actual practice differs from the treatment of control in the Department's partially invalidated Joint Employer rule, which provided that ''[a] potential joint employer *must* actually exercise—directly or indirectly—one or more . . . indicia of control to be jointly liable.'' 85 FR 2859 (emphasis added).

[58] In a 2004 final rule amending this language, the Department rejected commenter arguments that the mere existence of a policy permitting improper deductions should disqualify an employer from claiming the Section 13(a)(1) exemption for salaried employees whose earnings and job duties otherwise qualify for exemption. ''[Such an] approach . . . would provide a windfall to employees who have not even arguably been harmed by a 'policy' that a manager has never applied and may never intend to apply[.]'' 69 FR 22122, 22180.

[59] *See Commun. for Non-Violence* v. *Reid,* 490 U.S. 730, 751 (1989) (''In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's *right* to control the manner and means by which the product is accomplished.'') (emphasis added).

short-term gigs, despite a contract provision stipulating that the dance hall ''shall at all times have complete control of the services which the [band members] will render under the specifications of this contract.'' 332 U.S. at 128. Again applying the economic reality test, the Court noted that a worker's employment status ''was not to be determined solely by the idea of control which an alleged employer *may or could exercise* over the details of the service rendered to his business by the worker or workers.'' *Id.* at 130 (emphasis added). While the Court made clear that other economic reality factors (*e.g.,* skill, permanence, profit) indicated that the band members were independent contractors, *id.* at 132, the Court implicitly found that the control factor did as well, noting that it was the band leader (and not the dance hall) which ''organizes and trains the band . . . [and] selects [its] members.'' *Id.* at 132. In other words, notwithstanding the dance hall's contractual authority to ''complete[ly] control'' the band members, the actual practice of the parties made clear that the band members themselves controlled the work, as a matter of economic reality.

Contrary to the argument put forth by several worker advocacy commenters, the outcome and reasoning of the Supreme Court's decisions in *Silk* and *Bartels* show that the common law control test does not establish an irreducible baseline of worker coverage for the broader economic reality test applied under the FLSA. In other words, while the economic reality test is broad in the sense that it covers more workers as a general matter, it does not necessarily include every worker considered an employee under the common law.

At the same time, the Department disagrees with the interpretation suggested by various business commenters that only worker practices which are affirmatively coerced by a potential employer may indicate employee status. Such a reading conflicts with the definition of ''employ'' in section 3(g) of the Act, which makes clear that the FLSA was intended to cover employers who passively ''suffer or permit'' work from individuals.[60] Accordingly, courts applying the economic reality test have not hesitated to consider voluntary worker practices where such practices indicate economic dependence. *See Keller,* 781 F.3d at 814 (''[A] reasonable jury could find that the way that [the defendant] scheduled [the worker's] installation appointments made it impossible for [the worker] to provide installation services for other companies.''). To be sure, the Department agrees that coercive behavior by a potential employer (*e.g.,* vigilant enforcement of a non-compete clause, punishing workers for turning down available work, etc.) constitutes stronger evidence of employment status than voluntary worker practices (*e.g.,* the mere existence of an exclusive work arrangement, the fact that a worker rarely turn down available work, etc.), but coercive action on the part of the potential employer is not a prerequisite for such worker practices to have import.

The Department believes that commenters' concerns that proposed § 795.110 will cause workers with similar contractual freedoms to be classified differently are overstated. Consistent with evaluating the ''the circumstances of the whole activity'' in a work arrangement, *Rutherford Food,* 331 U.S. at 730, courts have often considered the rights and practices of similarly situated workers affiliated with a particular business, arriving at a single classification outcome for the group of workers at issue. *See, e.g., Freund,* 185 F. App'x. at 784 (finding independent contractor status in part because ''although Freund did not hire any workers, other of Hi-Tech's installers did''); *Express Sixty-Minutes Delivery,* 161 F.3d at 305 (finding independent contractor status in part because ''[t]he majority of drivers work for Express for a short period of time''); *cf. Mr. W Fireworks,* 814 F.2d at 1048–51 (finding employee status in part because ''the overwhelming majority of operators did not engage in independent advertising'' and ''the vast majority of operators made only minor investments in the business''). Even where meaningful factual differences exist between workers, courts may separate them into multiple groups for separate collective analyses instead of making individualized determinations. *See, e.g., Off Duty Police,* 915 F.3d at 1055–1062 (separate collective analyses of ''sworn officers'' and ''nonsworn officers'' who provide security and traffic control services); *DialAmerica,* 757 F.2d at 1383–88 (separate collective analyses of home researchers and distributors). Judicial application of the economic reality test to groups of workers has shown that classification outcomes cannot turn on one factor alone. *See, e.g., Silk,* 331 U.S. at 719 (''In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation . . . that marks these driver-owners as independent contractors.'').

In summary, finalized § 795.110's emphasis on the actual practices of the parties involved is not a one-way ratchet, applying selectively either for or against a finding of independent contractor status. Instead, as the examples in § 795.110 illustrate, the principle applies to every potentially relevant factor, and can weigh in favor of either an employee or independent contractor relationship. In some cases, the actual practice of the parties involved may suggest that the worker or workers are employees. *See, e.g., Sureway Cleaners,* 656 F.2d at 1371 (''[T]he fact that Sureway's 'agents' possess, in theory, the power to set prices, determine their own hours, and advertise to a limited extent on their own is overshadowed by the fact that in reality the 'agents' work the same hours, charge the same prices, and rely in the main on Sureway for advertising.''); *DialAmerica,* 757 F.2d at 1387 (concluding that evidence showing workers were not doing similar work for any other businesses ''although they were free to do so'' indicates employee status). In other cases, it may suggest that the worker or workers at issue are independent contractors. *See Saleem,* 854 F.3d at 143 (concluding that black-car drivers were independent contractors in part because ''many Plaintiffs . . . picked up passengers via street hail, despite TLC's (apparently under-enforced) prohibition of this practice''); *see also Silk,* 331 U.S. at 718–19; *Bartels,* 332 U.S. at 129. Section 795.110's focus on actual practice is a neutral interpretive principle, consistent with the way courts and the Department have long applied the FLSA's economic reality test. Accordingly, and contrary to the concerns expressed by some commenters, it should not disrupt specific industries or result in substantial worker reclassifications in either direction (*i.e.,* from employee to independent contractor status, or vice versa).

G. Other Comments

Many substantive comments were not directed towards a specific provision of the proposed rule but rather the rule as a whole. These comments addressed the following topics: (1) Whether the proposed rule would create confusion or clarity for the regulated community; (2) whether the proposed rule would exacerbate or ameliorate misclassification of employees; (3) whether the rule is consistent with the FLSA's purpose; (4) whether

[60] 29 U.S.C. 203(g). *See also* 83 C.J.S. Suffer (1953) (''[T]o suffer work requires no affirmative act by a putative employer.'').

Congressional inaction prohibits this rulemaking; and (5) whether the Department may depart from its prior practice.

1. Whether the Rulemaking Will Create Confusion or Clarity

Commenters from the business and freelance community generally expressed the view that the proposed rule would improve clarity regarding which workers are independent contractors versus employees under the FLSA. For example, the U.S. Chamber of Commerce stated that ''[t]he Proposed Rule would provide long-awaited and much needed structure and clarity to the evaluation of worker relationships under the Act.'' SHRM agreed that ''[t]he Proposed Rule is necessary to provide certainty and consistency to businesses and workers.'' *See also* CWI; WPI; ATA; NRF; National Restaurant Association. Freelancers and groups that represent them echoed this message, with the CPIE, for instance, stating that ''[w]e believe the proposed guidance would provide greater clarity and predictability in the application of the 'economic realities' test to independent entrepreneurs and their clients.'' *See also* Fight for Freelancers. Individual commenters who identified themselves as freelancers or small business owners overwhelmingly agreed that the rule would improve legal clarity. For example, one individual commenter who believed that ''independent contracting . . . kept [her] family afloat when [she] unexpectedly became a single mom'' stated that ''[t]his proposed rule is simple to understand and provides necessary clarity for both employers and individuals like myself that want to engage in freelancing.'' Another individual who identified himself as a small business owner believed that ''[t]he regulations proposed seem to provide clarity for determining an individual's status as an employee or independent contractor under the Fair Labor Standards Act.''

Some government and union commenters took the opposite view. The State AGs, for instance, asserted that ''this rule will create confusion, not clarity'' in part because they believe it ''departs from the statutory text and Supreme Court precedent and is contrary to established application of the economic reality test.'' FTC Commissioner Slaughter expressed concern that the proposed rule would ''create legal confusion around the labor exemption to the antitrust laws.'' The AFL–CIO argued that ''the proposal is likely to increase rather than decrease confusion because it does not clearly define 'an integrated unit of production.' ''

The Department continues to believe that the rule will improve clarity because it clarifies the meaning of economic dependence, which determines FLSA employment, and aligns the economic reality test to more accurately analyze that concept by, among other things, highlighting the two core factors that are most probative to the inquiry. The rule does not depart from the statutory text, which courts have interpreted to define FLSA employment based on the concept of economic dependence on which this rule focuses. Nor does the rule depart from any Supreme Court precedent because it continues to consider the circumstances of the activity as a whole to analyze whether workers, as a matter of economic reality, depend on another business for work, or are in business for themselves. The Department further disagrees with the State AGs that the rule departs from the ''established application of the economic reality test.'' The final rule takes into account facts and factors that have historically been part of the economic reality test, and decades of appellate decisions indicating that the two core factors frequently align with the ultimate determination of economic dependence or lack thereof. *See* 85 FR 60619–21. As one comment stated, the rulemaking ''synthesizes previous understandings of the independent contractor rule,'' as opposed to departing from them. *See* Farren and Mitchell.

The Department does not believe this final rule will cause confusion regarding the labor exemption to antitrust laws because, as explained by FTC Commissioner Slaughter, that exemption is governed ''[u]nder the Clayton Act and the Norris-La Guardia Act.'' In contrast, this rule's application is limited to the FLSA, and therefore, would not affect the labor exemption to antitrust laws established by other statutes. Finally, for reasons explained in the NPRM and this preamble, the Department believes this rule's articulation of the ''integrated unit'' is clearer than the prior ''integral part'' articulation. For added clarity, the Department added a pair of examples in § 795.115 to further illustrate application of the ''integrated unit'' factor.

For these reasons, the Department believes the final rule will result in greater clarity.

2. Whether the Rulemaking Exacerbates or Ameliorates Misclassification

Many commenters expressed concern that the proposed rule would exacerbate the misclassification of employees as independent contractors. *See, e.g.,* Equal Justice Center; Employee Rights Center; NELP; State AGs; TRLA. According to these commenters, the proposed rule would make it easier for an unscrupulous employer to classify its employees as independent contractors, and they cite statistics that purport to show high rates of misclassification in support of that contention. Several other commenters took the opposite position and asserted, for example, that ''[c]larifying the application of the test for independent contractor status will promote compliance with labor standards under the FLSA and, in turn, reduce worker misclassification.'' Opportunity Solutions Project (OSP); *see also, e.g.,* TCA (''[t]he increased clarity provided by the [proposed rule] would likely lead to reduced misclassification.''); IAW (''This rule will clear up misclassifications''); Financial Services Institute (''we agree that it will reduce worker misclassification and litigation''). These commenters also presented reports that dispute the widespread occurrence of misclassification. *See, e.g.* CWI; U.S. Chamber of Commerce; WPI.

FLSA employee versus independent contractor status is determined in terms of economic dependence. Misclassification occurs when an individual who is economically dependent on a business is classified by that business as an independent contractor and treated as such. This can occur inadvertently because the business misunderstands the concept of economic dependence or incorrectly analyzes factors to assess the concept. It can also occur intentionally. This final rule clearly defines economic dependence and explains how to assess facts and factors to evaluate whether that dependence exists. It discards misleading and confusing interpretations of that concept developed over the years and emphasizes the essential aspects. A clearer test means more businesses will better understand their obligations under the FLSA and thereby inadvertently misclassify fewer workers. As one commenter who identified himself as a small business owner explained: ''We want to comply [with the FLSA] but we need guidance that allows us to know how to comply.'' A clearer test also means more workers will understand their rights under the FLSA and thereby will be better positioned to combat intentional misclassification through, for example, private litigation or complaints to the Department. Unscrupulous employers

may also be deterred from intentional misclassification in the first place if workers better understand their legal rights. For these reasons, the Department believes the final rule is likely to reduce both inadvertent and intentional FLSA misclassification.

While several commenters asserted that the proposed rule will facilitate misclassification, the Department does not agree. The Department's final rule makes clear that a business may classify a worker as an independent contractor with greater confidence if the worker has control over key aspects of the work and a meaningful opportunity for profit or loss based on initiative or investment. Except in unusual cases, a worker who enjoys substantial control over the work and has opportunity for profit in abundant measures is, as a matter of economic reality, in business for him- or herself, and thus properly classified as an independent contractor. The rule thus makes it easier for a business and its workers to structure their work arrangements to create bona fide independent contractor relationships. But that effect of the final rule will help avoid misclassification, not encourage it.

As discussed in greater detail in the RIA at Section VI(D)(6), the Department has concerns regarding the reliability of statistics cited by commenters regarding the prevalence of misclassification. Even assuming commenters' statistics are accurate, however, they would merely estimate the current rate of misclassification rather than how that rate would change as a result of this rule. Insofar as the final rule will reduce misclassification, these statistics make this rulemaking even more urgent.

For the above reasons, the Department believes this rule will ameliorate rather than exacerbate misclassification of employees under the FLSA.

3. Whether the Rulemaking Is Consistent With the FLSA's Remedial Purpose

A number of commenters asserted that this rule ''conflicts with the FLSA's remedial purposes of protecting workers.'' State AGs; *see also, e.g.,* Pacific Northwest Council of Carpenters (''the Proposed Rule . . . is contrary to the statutory definitions and remedial purpose of the FLSA''). NELP, for instance, stated that ''DOL's proposed test would leave behind workers in high growth sectors with high rates of wage theft, contrary to the purposes of the FLSA.'' And NELA indicated that, because ''the FLSA is a remedial statute'' its coverage should be construed liberally to adopt a standard for employment that is even broader than economic dependence.[61] Commenters that supported the proposed rule pointed that the FLSA is not intended to cover all workers and that ''Congress intended to cut off [the FLSA's] coverage at a certain point to preserve the freedom of workers to operate as independent contractors.'' Scalia School; *see also* WPI (''Nothing in the text or legislative history of any Federal employment law indicates that Congress intended to supplant or displace independent work and require instead for all workers to be employees.'').

The Supreme Court has cautioned against the ''flawed premise that the FLSA 'pursues' its remedial purpose 'at all costs' '' when interpreting the Act. *Encino,* 138 S. Ct. at 1142. The *Encino* II Court rejected the principle that FLSA's remedial purpose required exemptions to be narrowly construed, *id,* and courts of appeal have followed that logic to reject the corollary principle, articulated above by NELA, that the Act's remedial purpose requires its coverage to be construed broadly. *See Sec'y United States Dep't of Labor* v. *Bristol Excavating, Inc.,* 935 F.3d 122, 135 (3d Cir. 2019) (rejecting broad reading of the FLSA based its remedial purpose); *Diaz* v. *Longcore,* 751 F. App'x 755, 758 (6th Cir. 2018) (same). Rather, '' 'a fair reading' of the FLSA, neither narrow nor broad, is what is called for.'' *Bristol,* 935 F.3d at 135 (quoting *Encino,* 138 S. Ct. at 1142); *Diaz,* 751 F. App'x at 758 (''We must instead give the FLSA a 'fair' interpretation.'').

''The principal congressional purpose in enacting the Fair Labor Standards Act of 1938 was to protect all *covered* workers from substandard wages and oppressive working hours.'' *Barrentine* v. *Arkansas-Best Freight Sys., Inc.,* 450 U.S. 728, 739 (1981) (emphasis added). The Supreme Court, however, has long recognized held that the FLSA ''was obviously not intended to stamp all persons as employees.'' *Portland Terminal Co.,* 330 U.S. at 152. As the State AGs stated, the ''the FLSA must be interpreted with its 'remedial and humanitarian purpose . . . purpose' in mind to protect 'those who sacrifices a full measure of their freedom and talents to the use and profit of others.' '' State AGs (quoting *Tenn. Coal, Iron. R. Co.* v. *Muscoda Local No. 123,* 321 U.S. 590, 598 (1944)). Workers who are economically dependent on an employer for work have sacrificed ''freedom and talents to the use of profits of others,'' and therefore are covered by the Act as employees. But independent contractors use their ''freedom and talents'' to operate their own businesses, and thus fall outside of the FLSA's coverage. *See Saleem,* 854 F.3d 131, 139–40 (2d Cir. 2017) (noting that independent contractors are separate from employees in the context of the FLSA); *Karlson,* 860 F.3d 1089, 1092 (8th Cir. 2017) (''FLSA wage and hour requirements do not apply to true independent contractors.''); *Scantland,* 721 F.3d at 1311 (''[The Act's] 'broad' definitions do not, however, bring 'independent contractors' within the FLSA's ambit.''); *Hopkins,* 545 F.3d at 342 (observing that the ''FLSA applies to employees but not to independent contractors'').

The Department believes the line between economically dependent workers who are covered by the FLSA and independent contractors who are not comports with the Act's purpose to ''protect all covered workers from substandard wages and oppressive working hours.'' *Barrentine,* 450 U.S. at 739. Independent contractors who are in business for themselves do not need protection against ''oppressive working hours'' because they are not economically dependent on any employer who could oppress them. Nor do they need protection from ''substandard wages'' because they are not economically dependent on an employer that sets wages. Forcing workers who are in business of themselves into the FLSA's coverage would not protect them, and would instead unduly restrict their ability to operate their own businesses. Indeed, numerous individuals who identified as freelancers or independent contractors commented that being classified as an employee would undermine their ability to operate their own business. For example, one freelance translator lamented that ''many of my clients became unwilling to work with me'' when a state law required her to be classified as clients' employee. Another commenter identified himself ''[a]s a self employed professional [who] do[es] NOT want to be forced into employment.'' As a final illustrative example, another commenter stated that ''I have no desire to be an employee . . . . If I was required to be an employee, I would no longer be able to make money for my family from my home on my own schedule.''

The Supreme Court has explained that the FLSA's ''exemptions are as much a part of the FLSA's purpose as

[61] NELA specifically urged the Department to adopt the ''ABC'' test to determine whether a worker is an independent contractor or an employee under the FLSA. The Regulatory Alternative discussion at Section VI(G) provide further explanation why the Department is not adopting that test.

the [Act's] requirement[s].'' *Encino,* 138 S. Ct. at 1134. By the same logic, respecting the independence of workers whom the FLSA does not cover is as much a part of the Act's purpose as extending the Act's coverage to workers who need its protection. Denying FLSA coverage to workers who are economically dependent on an employer for work would result in workers loosing needed protection ''from substandard wages and oppressive working hours.'' *Barrentine,* 450 U.S. at 739. But extending the Act's coverage to workers who, as a matter of economic reality, are in business for themselves would unduly restrict independent workers who neither need nor benefit from the Act's provisions. This rule sharpens the distinction between these two categories of worker and thereby furthers the Act's purpose to protect employee who need protection without burdening independent contractors who do not.

4. Whether Congressional Inaction Prohibits This Rulemaking

The American Federation of State, County, and Municipal Employees, AFL–CIO (AFSCME) asserted that, ''[b]ecause Congress has legislatively ratified the existing six-factor Economic Reality test, the Secretary and Administrator are powerless to alter the standard. This also means the Proposed Rule would fail the first step of the *Chevron* deference analysis and would be entitled to no deference by the courts.'' According to AFSCME, ''when Congress re-enacts a statute without change, it is presumed to be aware of administrative and judicial interpretation of that statute and to have adopted those interpretations.'' Based on this principle, AFSCME reasoned that, because Congress did not revise the definition of ''employ'' when it amended the FLSA in 1966, it must have adopted the ''integrated unit of production'' factor articulated in *Rutherford Food,* 331. U.S. 730. Additionally, AFSCME asserted that Congress's 1983 decision to adopt the FLSA's definition of ''employ'' without revision in MSPA indicates that Congress implicitly adopted the ''six-factor test [that] was well embedded as the interpretation of the FLSA's 'employ.' ''

AFSCME's ratification argument is based entirely on the fact that Congress has not amended the FLSA's definition of ''employ.'' The Supreme Court, however, has ''criticized . . . reliance on congressional inaction'' as a tool of statutory interpretation, cautioning that, ''[a]s a general matter . . . these arguments deserve little weight in the interpretive process.'' *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N. A.,* 511 U.S. 164, 187 (1994). ''And when . . . Congress has not comprehensively revised a statutory scheme but has made only isolated amendments, [the Court has] spoken more bluntly: 'It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation.' '' *Alexander* v. *Sandoval,* 532 U.S. 275, 292, (2001) (quoting *Patterson* v. *McLean Credit Union,* 491 U.S. 164, 175 n.1 (1989)). Congress has not ''comprehensively revised'' the Act's statutory scheme in a manner that would indicate Congressional approval of a judicially created six-factor test as the standard for FLSA employment.

Even if some insight could be gleaned from Congressional inaction, that insight would not support ratifying a specific and definitive six-factor test because there has never been a uniform test for Congress to ratify. The Supreme Court has never articulated a six-factor test, and courts of appeals articulate the test differently. As discussed earlier, the Second Circuit combines two of the factors. The Fifth Circuit omits one factor, while the remaining circuits use a sixth, ''integral part'' factor that departs from the Supreme Court's consideration of ''integrated unit of production.'' Some circuits analyze a ''skill and initiative'' factor, while others consider just ''skill required.'' Some circuits analyze the investment factor by comparing the dollar value of the worker's investment against that of the hiring entity, while others analyze whether the worker's investment creates opportunities for profit or loss. Simply put, there is no single test that Congress could have impliedly ratified, nor did AFSCME suggest one.

For these reasons, Congress's inaction does not demonstrate that it ratified a specific six-factor economic reality test.

5. Whether the Rulemaking Improperly Departs From Prior Practice

Several commenters, including NELA, contended that the proposed rule would be an improper departure from the Department's prior practice. The rule is consistent with the Department's prior position that the ultimate inquiry for determining employee versus independent contractor status under the FLSA is whether an individual is, as a matter of economic reality, economically dependent on another for work or is instead in business for him- or herself. The rule is further consistent with the Department's longstanding position that all economic reality factors should be analyzed when answering that ultimate inquiry.

The Department acknowledges that the rule's focus on two core factors that are most probative to that ultimate inquiry is different from how the Department articulated the economic reality test in the past. ''Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.'' *Encino Motorcars, LLC* v. *Navarro,* 136 S. Ct. 2117, 2125 (2016). The Department has explained its reasoning for focusing the economic reality test on two core factors throughout the NPRM and this preamble. The Department further acknowledges that the rule lists economic reality factors in § 795.105(d) that correspond with how the Department has articulated those factors in the past, with a few modifications. The Department explained its reasons for these modifications in the NPRM and in this preamble. This rule does not improperly depart from the Department's prior positions.

H. Examples

As discussed above, many commenters requested that the regulatory text contain examples of how the economic reality test would apply in the context of their specific industries or practices. The Department, however, prefers to adopt generally applicable principles as opposed to attempting to provide guidance for every potential scenario. The later approach would require the regulation be drafted as an exhaustive treatise that is neither accessible nor helpful for most members of the regulated community. It would also invariably omit many important types of circumstances and be more difficult to adapt to future industries and practices that neither the Department nor commenters could have conceived.

While the Department cannot provide examples for every conceivable scenario, it is adding § 795.115 to provide six illustrative examples that involve a variety of industries and specific facts. Due to the complexities of balancing multiple factors that encompass countless facts that are part of the totality of the circumstances, the Department does not believe it would be helpful to provide examples that make conclusions regarding workers' ultimate classifications. Rather, each illustrative example focuses on the classification favored by a specific economic reality factor within the context of the fact-specific scenario. The first example concerns the control factor in the context of the long-haul transportation industry. The second example concerns

the opportunity factor in the context of the gig economy. The third example concerns the opportunity factor in the context of the construction industry and clarifies the concept of economic dependence. The fourth example concerns the permanence factor within the context of a seasonal hospitality industry. The fifth example concerns the reframed ''integrated unit'' factor within the context of the journalism industry. The sixth example also concerns the new ''integrated unit'' factor within the context of the journalism industry and is designed to work with the fifth example to elucidate the distinction between when this factor favors classification as an employee versus independent contractor.

I. Severability

The Department proposed to include a severability provision in part 795 so that, if one or more of the provisions of part 795 is held invalid or stayed pending further agency action, the remaining provisions would remain effective and operative. The Department did not receive any comments on this provision, and finalizes it as proposed.

J. Amendments to Existing Regulatory Provisions at §§ 780.330(b) and 788.16(a)

Finally, in addition to the proposed addition of part 795, the Department proposed to amend existing regulatory provisions addressing independent contractor status under the FLSA in narrower contexts at 29 CFR 780.330(b) (tenants and sharecroppers) and 29 CFR 788.16(a) (certain forestry and logging workers). Specifically, the Department proposed to replace descriptions of the six economic reality factors WHD has historically used to evaluate independent contractor status under the FLSA with a cross-reference to the guidance provided in new part 795. While some commenters invoked the existing provisions at §§ 780.330(b) and 788.16(a) to justify opposition to proposed part 795, the Department did not receive any commenter feedback regarding the proposed amendment of these provisions. Accordingly, the Department finalizes amendments to these provisions as proposed.

V. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections, their practical utility, the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. In the NPRM, the Department invited public comment on its determination that the proposal did not contain a collection of information subject to OMB approval under the PRA. A few commenters, while not referencing the PRA directly, discussed records in their public comments. However, this was merely to note agreement that section 11 of the FLSA does not require the keeping of records regarding workers who are independent contractors. This final rule does not contain a collection of information subject to OMB approval under the PRA.

VI. Executive Order 12866, Regulatory Planning and Review; and Executive Order 13563, Improved Regulation and Regulatory Review

A. Introduction

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review.[62] Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as a regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more, or adversely affect in a material way 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) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Because the annual effect of this rule is estimated to be greater than $100 million, this rule will be economically significant under section 3(f) of Executive Order 12866.[63]

Executive Order 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society, consistent with obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Executive Order 13563 recognizes that some costs and benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

B. Overview of Analysis

The Department believes this rule is likely to improve the welfare of both workers and businesses on the whole. With respect to businesses, the Department believes that the improved clarity offered by the rule will increase the efficiency of the labor market, allowing businesses to be more productive and decreasing their litigation burden. With respect to workers, broadly speaking, this rule is likely to have four categories of potential effects.

First, this rulemaking makes it easier for the millions of individuals who currently work as independent contractors and those who hire them to comply with the law. *See* Farren and Mitchell (''The proposed rule will likely reduce the cost of complying with the relevant Federal regulations.''). Compliance cost savings will be shared between the independent contractors and businesses for which they work. *Id.* (''labor regulations are generally paid for by reductions in workers' total compensation'').

Second, as explained above, the legal clarity from this rule is likely to reduce occurrences of misclassification by enabling firms and workers to better understand their respective obligations and rights under the FLSA. The Department agrees with commenters that misclassification harms workers and believes this rule will reduce those harms by facilitating compliance.

Third, legal clarity may encourage firms to create independent contractor arrangements for roles that did not previously exist, which may attract workers who otherwise would not work in that field. Such job creation unambiguously benefits workers and firms alike. *See* Dr. Liya Palagashvili (''[W]e got the impression from our interviews that the primary concern for startups in terms of labor regulation or policy is mostly with regulation of independent contractors.''), and Fuller et al. (''[M]ore than two-thirds of [women with advanced degrees or high-

[62] *See* 58 FR 51735 (Sept. 30, 1993).

[63] The entirety of the estimated costs from this deregulatory action, which exceed the $100 million threshold and relate strictly to familiarization, fall in the first year alone. The Department's Regulatory Impact Analysis further explains that these one-year costs are more than offset by continuing annual cost-savings of $495.8 million per year, accruing to the same parties that face the familiarization costs.

honors BAs] who drop out of the workforce would not have done so if they'd had access to more-flexible job arrangements.'').[64]

Fourth, as a result of the improved clarity of the rule, businesses might convert existing positions from employee to independent contractor. This rule provides the most legal certainty to employers classifying a worker as an independent contractor if the worker substantially controls the work and has a meaningful opportunity for profit or loss based on initiative or investment. As such, a job conversion attributable to the legal clarity provided by this rule is likely to satisfy the control and opportunity criteria.[65] Businesses could reclassify existing employees as independent contractors by modifying their working relationship under the criteria of this rule, and would only be expected to do so upon determination that the clarity provided by this rule materially shifts the balance of tradeoffs. Business could also reclassify positions because the increased clarity of the rule confirms that their workers are actually already effectively independent contractors because their workers have substantial control over the work and have an opportunity for profit.[66] Any benefit to businesses of modified classifications would need to outweigh the costs, including any autonomy they cede to workers in such arrangements and any costs associated with implementation or modifying the classification itself, and such a relationship would need to be compatible with their business models. Further, generally speaking, workers have a choice of whether to agree to the new independent contractor arrangement. The overall effect of job conversion on workers is ambiguous and could vary from worker to worker, as discussed in more detail in section VI(D)(7) below. Impacts resulting from litigation avoidance due to increased clarity are discussed in section VI(F)(2).

The Department did not attempt to quantify all aspects of these four categories of potential impacts. In particular, the Department believes that significant uncertainty surrounds any attempt to quantify the number or nature of new independent contractor relationships that could arise as a result of this rule. Although the Department assumes that there will be an increase in the number of independent contracting relationships, the Department did not attempt to put a specific number on this figure and did not attempt to estimate how new independent contractors might differ from existing independent contractors. The Department is uncertain with respect to several key questions, including how many new workers will be added and what their characteristics will be, how many existing employee relationships may be converted to independent contractor status, and which industries, type or sizes of employers would be most impacted. Absent these data, the Department is not well positioned to generate a constructive estimate or model of impact on the change in independent contracting relationships due to the rule. Notwithstanding, the Department quantified certain other impacts associated with the final rule, including those to current independent contractors and businesses where sufficient data and theory afforded greater confidence in the resulting estimates.

Regarding the employees who may be negatively impacted by this rule, the Department has ascertained certain characteristics that it expects will be representative across this group. This rule provides a sharpening of the economic realities test, which is a marginal change that may impact firms' assessment of legal risk, leading to an increased chance that some employers will choose to reclassify certain positions from employee to independent contractor relationships. Because this analysis attempts to quantify the marginal impacts of this rule, if the only change is increased legal clarity, any resulting change in classification will most likely be limited to workers who already possess characteristics associated with independent contractor status, including control and opportunity for profit or loss.[67] Due to the customary negotiation between firms and workers, most workers whose positions are converted will be in a position to influence the tradeoffs between employee and independent contractor status. The one group of workers for whom these assumptions may not apply is those workers paid the minimum wage, and whose positions already resemble characteristics of independent contractors. Workers earning the minimum wage may lack the bargaining power to fully offset the adverse effects triggered by the job conversion; however, independent contractor status often carries flexibilities that may further offset some of these effects, albeit non-monetarily. Further, on one hand, these workers likely do not have extensive benefits coverage, but on the other hand, they may qualify for access to benefits from other means. There are approximately 370,000 workers over the age of 19 who earn the minimum wage, which represents 0.24 percent of the workforce. It is unclear how many of these jobs could be converted to independent contractor status without material modifications to the position or substantive negotiation on overall compensation, but it is not likely to be many. Further, many of these workers may have access to health insurance coverage via a spouse or partner, a parent, or a government program (Medicaid, Medicare, Tricare, etc.). For these reasons, the Department does not expect there to be many current employees whose positions are converted to independent contractor relationships without meaningful ability to influence the terms of the new position in a way that mitigates deleterious impacts of the resulting tradeoffs.

The Department estimates there were 10.6 million workers who worked at any given time as independent contractors as their primary jobs in the United States in 2017 (6.9 percent of all workers), the most recent year of data available. Including independent contracting on secondary jobs results in an estimate of 18.9 million independent contractors (12.3 percent of all workers). The Department discusses other studies estimating the total number of independent contractors, ranging from 6.1 percent to 14.1 percent of workers (see Table 2 in VI.C.2). Due to uncertainties regarding magnitude and other factors, the Department has not quantified the potential change to the aggregate number of independent contractors that may occur as a result of this rule. Furthermore, the Department's analysis relies on data collected prior to 2020, which reflects the state of the economy prior to the COVID–19 pandemic. The Department acknowledges that data on independent contractors could look different during the pandemic and following its

[64] Joseph B. Fuller, et al., Rethinking the On-Demand Workforce, Harvard Business Review (Oct. 20, 2020).

[65] Section 795.105(c) indicates that a worker who lacks both control and opportunity is most likely an employee. As such, the Department believes this rule would discourage employers from converting such workers from employee to independent contractor status. Section 795.105(c) would not give an employer sufficient confidence that it could change the classification of a worker who has only control but not opportunity, or vice versa.

[66] The Department notes that the final rule does not, by its operation, change the classification of any employee. Notwithstanding the assertions of several commentators, as explained throughout the analysis, the rule does not narrow the definition of who is an employee under the FLSA.

[67] For greater discussion on this and other points in this summary, please see Section XXXX on Job Conversion.

economic effects, but does not yet have information to determine how the number of independent contractors could change nor whether these changes would be lasting or a near term market distortion.[68]

The Department estimates regulatory familiarization costs to be $370.9 million in the first year. The Department estimates cost savings due to increased clarity to be $447.1 million per year, and cost savings due to reduced litigation to be $48.7 million per year. This results in a 10-year annualized net cost savings of $452.4 million using a 3 percent discount rate and $443.0 million using a 7 percent discount rate.[69] For purposes of Executive Order 13771, the Department calculated the difference between the total cost savings and the total costs in $2016, discounted over a perpetual time horizon using a 7 percent discount rate beginning in 2021 when the rule will take effect. This results in an annualized net cost savings over a perpetual time horizon of $315.5 million.[70] Other anticipated costs, benefits, and cost savings are discussed qualitatively.

TABLE 1—SUMMARY OF RULE IMPACTS

[$2019 Millions]

Impact	Year 1	Years 2–10	Annualized values[a]	
			7% Discount	3% Discount
Regulatory Familiarization Costs:				
Establishments	$152.3	$0.0	$21.7	$17.9
Independent Contractors	218.6	0.0	31.1	25.6
Total	370.9	0.0	52.8	43.5
Cost Savings from Increased Clarity:				
Employers	369.0	369.0	369.0	369.0
Independent Contractors	78.1	78.1	78.1	78.1
Total	447.1	447.1	447.1	447.1
Cost Savings from Reduced Litigation	48.7	48.7	48.7	48.7
Total Cost Savings	495.8	495.8	495.8	495.8
Net Cost Savings (Cost Savings—Costs)	125.0	495.8	443.0	452.4

[a] Annualized over 10-years.

C. Independent Contractors: Size and Demographics

The Department extrapolated from U.S. Census Bureau data to estimate that there are 15.6 to 22.1 million individuals who work as independent contractors as either a primary or secondary job. This estimated figure could be higher or lower depending on different data sources and methodologies discussed below. The Department used the median of the above range, 18.9 million, for its estimates to avoid overestimation by accounting for a number of criteria, which are presented in this section.

1. Current Number of Independent Contractors

The Department estimated the number of independent contractors. There are a variety of estimates of the number of independent contractors spanning a wide range depending on methodologies and how the population is defined. The Department believes that the Current Population Survey (CPS) Contingent Worker Supplement (CWS) offers an appropriate lower bound for the number of independent contractors; however, there are potential biases in these data that will be noted. Additionally, estimates from other sources will be presented to demonstrate the potential range.

The U.S. Census Bureau conducts the CPS and it is published monthly by the Bureau of Labor Statistics (BLS). The sample includes approximately 60,000 households and is nationally representative. Periodically since 1995, and most recently in 2017, the CPS has included a supplement to the May survey to collect data on contingent and alternative employment arrangements. Based on the CWS, there were 10.6 million independent contractors in 2017, amounting to 6.9 percent of workers.[71] The CWS measures those who say that their independent contractor job is their primary job and that they worked at the independent contractor job in the survey's reference week. However, while the Department refers to the CWS measure of independent contractors throughout this analysis, due to the survey's design it should be uniformly recognized as representing a constrained subsection of the entire independent contractor pool. Due to its clear methodological constraints, the CWS measure should be differentiated from other, more comprehensive measures.

The BLS's estimate of independent contractors includes ''[w]orkers who are identified as independent contractors, independent consultants, or freelance workers, regardless of whether they are self-employed or wage and salary workers.'' BLS asks two questions to identify independent contractors:[72]

- Workers reporting that they are self-employed are asked: ''Are you self-employed as an independent contractor, independent consultant, freelance worker, or something else (such as a shop or restaurant owner)?'' (9.0 million independent contractors.) We refer to these workers as ''self-employed

[68] Recent studies and news reports suggest that more individuals are working under freelance or independent contractor arrangements during the pandemic. *See, e.g.,* Press Release, New Upword Study Finds 36% of the U.S. Workforce Freelance Amid the COVID–19 Pandemic, Sep. 15, 2020, available at *https://www.upwork.com/press/releases/new-upwork-study-finds-36-of-the-us-workforce-freelance-amid-the-covid-19-pandemic;* Kim Mackrael, In the Covid Economy, Laid-Off Employees become New Entrepreneurs, Wall Street Journal, Nov. 18, 2020; Uri Berliner, Jobs in the Pandemic: More Are Freelance and may stay that way forever, NPR, Sep. 16, 2020; Jon Younger, A New Payoneer Report Shows Covid 19 is Accelerating Freelance Growth, Forbes, Sep. 1., 2020.

[69] Discount rates are directed by OMB. *See* Circular A–4, OMB (Sept. 17, 2003).

[70] $332.9 million − $17.4 million = $315.5 million. Per OMB guidelines, Executive Order 13771 data is represented in 2016 dollars, inflation-adjusted for when the rule will take effect.

[71] Bureau of Labor Statistics, ''Contingent and Alternative Employment Arrangements—May 2017,'' USDL–18–0942 (June 7, 2018), *https://www.bls.gov/news.release/pdf/conemp.pdf.*

[72] The variables used are PES8IC=1 for self-employed and PES7=1 for other workers.

independent contractors'' in the remainder of the analysis.

• Workers reporting that they are wage and salary workers are asked: ''Last week, were you working as an independent contractor, an independent consultant, or a freelance worker? That is, someone who obtains customers on their own to provide a product or service.'' (1.6 million independent contractors.) We refer to these workers as ''other independent contractors'' in the remainder of the analysis.

It is important to note that independent contractors are identified in the CWS in the context of the respondent's ''main'' job (*i.e.,* the job with the most hours).[73] Therefore, the estimate of independent contractors does not include those who may be defined as an employee for their primary job, but may work as an independent contractor for a secondary or tertiary job.[74] For example, Lim et al. (2019) estimate that independent contracting work is the primary source of income for 48 percent of independent contractors.[75] Applying this estimate to the 10.6 million independent contractors estimated from the CWS, results in 22.1 million independent contractors (10.6 million ÷ 0.48). Alternatively, a survey of independent contractors in Washington found that 68 percent of respondents reported that independent contract work was their primary source of income.[76] Applying that estimate to the 10.6 million independent contractors from the CWS results in an estimated 15.6 million independent contractors (10.6 million ÷ 0.68).

The Coalition for Workforce Innovation (CWI) submitted a survey they conducted of 600 self-identified independent contractors. The survey found that independent contracting is the primary source of income for 71 percent of respondents.[77] This is consistent with the prior estimate from Washington State. Applying this estimate to the 10.6 million primary independent contractors estimated from the CWS, results in 14.9 million independent contractors (10.6 million ÷ 0.71).

The CWS's large sample size results in small sampling error. However, the questionnaire's design may result in some non-sampling error. For example, one potential source of bias is that the CWS only considers independent contractors during a single point in time—the survey week (generally the week prior to the interview).

These numbers will thus underestimate the prevalence of independent contracting over a longer timeframe, which may better capture the size of the population.[78] For example, Farrell and Greig (2016) used a randomized sample of 1 million Chase customers to estimate prevalence of the Online Platform Economy.[79] They found that ''[a]lthough 1 percent of adults earned income from the Online Platform Economy in a given month, more than 4 percent participated over the three-year period.'' Additionally, Collins et al. (2019) examined tax data from 2000 through 2016 and found that the number of workers who filed a form 1099 grew substantially over that period, and that fewer than half of these workers earned more than $2,500 from 1099 work in 2016. The prevalence of lower annual earnings implies that most workers who received a 1099 did not work as an independent contractor every week.[80]

The CWS also uses proxy responses, which may underestimate the number of independent contractors. The RAND American Life Panel (ALP) survey conducted a supplement in 2015 to mimic the CWS questionnaire, but used self-responses only. The results of the survey were summarized by Katz and Krueger (2018).[81] This survey found that independent contractors comprise 7.2 percent of workers.[82] Katz and Krueger identified that the 0.5 percentage point difference in magnitude between the CWS and the ALP was due to both cyclical conditions, and the lack of proxy responses in the ALP.[83] Therefore, the Department believes a reasonable upper-bound on the potential bias due to the use of proxy responses in the CWS is 0.5 percentage points (7.2 versus 6.7).[84] [85]

Another potential source of bias in the CWS is that some respondents may not self-identify as independent contractors, and others who self-identify may themselves be improperly classified. There are reasons to believe that some workers, who are legally considered independent contractors, would not self-identify as such. For example, if the worker has only one employer/client, or did not actively pursue the employer/client, then they may not agree that they ''[obtain] customers on their own to provide a product or service.'' Additionally, individuals who do only

[73] While self-employed independent contractors are identified by the worker's main job, other independent contractors answered yes to the CWS question about working as an independent contractor last week. Although the survey question does not ask explicitly about the respondent's main job, it follows questions asked in reference to the respondent's main job.

[74] Even among independent contractors, failure to report multiple jobs in response to survey questions is common. For example, Katz and Krueger (2019) asked Amazon Mechanical Turk participants the CPS-style question ''Last week did you have more than one job or business, including part time, evening or weekend work?'' In total, 39 percent of respondents responded affirmatively. However, these participants were asked the follow-up question ''Did you work on any gigs, HITs or other small paid jobs last week that you did not include in your response to the previous question?'' After this question, which differs from the CPS, 61 percent of those who indicated that they did not hold multiple jobs on the CPS-style question acknowledged that they failed to report other work in the previous week. As Katz and Krueger write, ''If these workers are added to the multiple job holders, the percent of workers who are multiple job holders would almost double from 39 percent to 77 percent.'' *See* L. Katz and A. Krueger, ''Understanding Trends in Alternative Work Arrangements in the United States,'' RSF: The Russell Sage Foundation Journal of the Social Sciences 5(5), p. 132–46 (2019).

[75] K. Lim, A. Miller, M. Risch, and E. Wilking, ''Independent Contractors in the U.S.: New Trends from 15 years of Administrative Tax Data,'' Department of Treasury, p. 61 (Jul. 2019), *https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf.*

[76] Washington Department of Commerce, ''Independent Contractor Study,'' p. 21 (Jul. 2019), *https://deptofcommerce.app.box.com/v/independent-contractor-study.*

[77] Coalition for Workforce Innovation. ''National Survey of 600 Self-Identified Independent Contractors'' (January 2020), *https://rilastagemedia.blob.core.windows.net/rila-web/rila.web/media/media/pdfs/letters%20to%20hill/hr/cwi-report-final.pdf.*

[78] In any given week, the total number of independent contractors would have been roughly the same, but the identity of the individuals who do it for less than the full year would likely vary. Thus, the number of unique individuals who work at some point in a year as independent contractors would exceed the number of independent contractors who work within any one-week period as independent contractors.

[79] D. Farrell and F. Greig, ''Paychecks, Paydays, and the Online Platform,'' JPMorgan Chase Institute (2016), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2911293.*

[80] B. Collins, A. Garin, E. Jackson, D. Koustas, and M. Payne, ''Is Gig Work Replacing Traditional Employment? Evidence from Two Decades of Tax Returns,'' IRS SOI Joint Statistical Research Program (2019) (unpublished paper), *https://www.irs.gov/pub/irs-soi/19rpgigworkreplacingtraditionalemployment.pdf.*

[81] *See* Katz and Krueger (2018), *supra* note 12.

[82] *Id.* at 49. The estimate is 9.6 percent without correcting for overrepresentation of self-employed workers or multiple job holders. *Id.* at 31.

[83] *Id.* at Addendum (''Reconciling the 2017 BLS Contingent Worker Survey'').

[84] Note that they estimate 6.7 percent of employed workers are independent contractors using the CWS, as opposed to 6.9 percent as estimated by the BLS. This difference is attributable to changes to the sample to create consistency.

[85] In addition to the use of proxy responses, this difference is also due to cyclical conditions. The impacts of these two are not disaggregated for independent contractors, but if we applied the relative sizes reported for all alternative work arrangements, we would get 0.36 percentage point difference due to proxy responses. Additionally, it should be noted that this may not entirely be a bias. It stems from differences in independent contracting reported by proxy respondents and actual respondents. As Katz and Krueger explain, this difference may be due to a ''mode'' bias or proxy respondents may be less likely to be independent contractors. *Id.* at Addendum p. 4.

informal work may not view themselves as independent contractors.[86] This population could be substantial. Abraham and Houseman (2019) confirmed this in their examination of the Survey of Household Economics and Decision-making. They found that 28 percent of respondents reported doing informal work for money over the past month.[87] Conversely, some workers who are improperly classified by their employers as independent contractors may answer in the affirmative, despite not truly being independent contractors. The prevalence of misclassification is unknown, but it likely occurs across numerous sectors in the economy.[88] Because reliable data on the potential magnitude of these biases are unavailable, and so the net direction of the biases is unknown, the Department has not attempted to calculate how these biases may impact the estimated number of independent contractors.

Because the CWS estimate represents only the number of workers who worked as independent contractors on their primary job during the survey reference week, the Department applied the research literature and adjusted this measure to include workers who are independent contractors in a secondary job or who were excluded from the CWS estimate due to other factors. As noted above, integrating the estimated proportions of workers who are independent contractors on secondary or otherwise excluded jobs produces estimates of 15.6 million and 22.1 million. The Department uses the average of these two estimates, 18.9 million, as the estimated total number of workers working as independent contractors in any job at a given time. Given the prevalence of independent contractors who work sporadically and earn minimal income, adjusting the estimate according to these sources captures some of this population. It is likely that this figure is still an underestimate of the true independent contractor pool.

2. Range of Estimates in the Literature

To further consider the range of estimates available, the Department conducted a literature review, the findings of which are presented in Table 2. Other studies were also considered but are excluded from this table because the study populations were broader than just independent contractors or limited to one state.[89] The RAND ALP [90] and the General Social Survey's (GSS's) Quality of Worklife (QWL) [91] supplement are widely cited alternative estimates. However, the Department chose to use sources with significantly larger sample sizes and more recent data for the primary estimate.

Jackson et al. (2017) [92] and Lim et al. (2019) [93] use tax information to estimate the prevalence of independent contracting. In general, studies using tax data tend to show an increase in prevalence of independent contracting over time. The use of tax data has some advantages and disadvantages over survey data. Advantages include large sample sizes, the ability to link information reported on different records, the reduction in certain biases such as reporting bias, records of all activity throughout the calendar year (the CWS only references one week), and inclusion of both primary and secondary independent contractors. Disadvantages are that independent contractor status needs to be inferred; there is likely an underreporting bias (*i.e.,* some workers do not file taxes); researchers are generally trying to match the IRS definition of independent contractor, which does not mirror the scope of independent contractors under the FLSA; and the estimates include misclassified independent contractors.[94] A major disadvantage of using tax data for this analysis is that the detailed source data are not publicly available and thus the analyses cannot be directly verified or adjusted as necessary (*e.g.,* to describe characteristics of independent contractors, *etc.*).

TABLE 2—SUMMARY OF ESTIMATES OF INDEPENDENT CONTRACTING

Source	Method	Definition [a]	Percent of workers (%)	Sample size	Year
CPS CWS	Survey	Independent contractor, consultant or freelance worker (main only).	6.9	50,392	2017
ALP	Survey	Independent contractor, consultant or freelance worker (main only).	7.2	6,028	2015

[86] The Department believes that including data on informal work is useful when discussing the magnitude of independent contracting, although not all informal work is done by independent contractors. The Survey of Household Economics and Decision-making asked respondents whether they engaged in informal work sometime in the prior month. It categorized informal work into three broad categories: Personal services, on-line activities, and off-line sales and other activities, which is broader than the scope of independent contractors. These categories include activities like house sitting, selling goods online through sites like eBay or craigslist, or selling goods at a garage sale. The Department acknowledges that the data discussed in this study might not be a one-to-one match with independent contracting, but it nonetheless provides useful data for this purpose.

[87] K. Abraham, and S. Houseman. ''Making Ends Meet: The Role of Informal Work in Supplementing Americans' Income.'' RSF: The Russell Sage Foundation Journal of the Social Sciences 5(5): 110–31 (2019), *https://www.aeaweb.org/conference/2019/preliminary/paper/QreAaS2h.*

[88] *See, e.g.,* U.S. Gov't Accountability Off., GAO–09–717, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention* 10 (2008) (''Although the national extent of employee misclassification is unknown, earlier national studies and more recent, though not comprehensive, studies suggest that employee misclassification could be a significant problem with adverse consequences.'').

[89] Including, but not limited to: McKinsey Global Institute, ''Independent Work: Choice, Necessity, and the Gig Economy'' (2016), *https://www.mckinsey.com/featured-insights/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy;* Kelly Services, ''Agents of Change'' (2015), *https://www.kellyservices.com/global/siteassets/3-kelly-global-services/uploadedfiles/3-kelly_global_services/content/sectionless_pages/kocg1047720freeagent20whitepaper20210x21020final2.pdf;* Robles and McGee, ''Exploring Online and Offline Informal Work: Findings from the Enterprising and Informal Work Activities (EIWA) Survey'' (2016); Upwork, ''Freelancing in America'' (2019); Washington Department of Commerce, *supra* note 76; Farrell and Greig, *supra* note 79; MBO Partners, ''State of Independence in America'' (2016); Abraham et al., ''Measuring the Gig Economy: Current Knowledge and Open Issues'' (2018), *https://www.nber.org/papers/w24950;* Collins et al. (2019), *supra* note 80; Gitis et al., ''The Gig Economy: Research and Policy Implications of Regional, Economic, and Demographic Trends,'' American Action Forum (2017), *https://www.americanactionforum.org/research/gig-economy-research-policy-implications-regional-economic-demographic-trends/#ixzz5IpbJp79a;* Dourado and Koopman, ''Evaluating the Growth of the 1099 Workforce,'' Mercatus Center (2015), *https://www.mercatus.org/publication/evaluating-growth-1099-workforce.*

[90] *See* Katz and Krueger (2018), *supra* note 12.

[91] *See* Abraham et al. (2018), *supra* note 89, Table 4.

[92] E. Jackson, A. Looney, and S. Ramnath, ''The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage,'' OTA Working Paper 114 (2017), *https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-114.pdf.*

[93] Lim et al., *supra* note 75.

[94] In comparison to household survey data, tax data may reduce certain types of biases (such as recall bias) while increasing other types (such as underreporting bias). Because the Department is unable to quantify this tradeoff, it could not determine whether, on balance, survey or tax data are more reliable.

TABLE 2—SUMMARY OF ESTIMATES OF INDEPENDENT CONTRACTING—Continued

Source	Method	Definition [a]	Percent of workers (%)	Sample size	Year
GSS QWL	Survey	Independent contractor, consultant or freelancer (main only).	14.1	2,538	2014
Jackson et al	Tax data	Independent contractor, household worker.	[b] 6.1	~5.9 million [c]	2014
Lim et al	Tax data	Independent contractor	8.1	1% of 1099–MISC and 5% of 1099–K ...	2016

[a] The survey data only identify independent contractors on their main job. Jackson et al. include independent contractors as long as at least 15 percent of their earnings were from self-employment income; thus, this population is broader. If Jackson et al.'s estimate is adjusted to exclude those who are primary wage earners, the rate is 4.0 percent. Lim et al. include independent contractors on all jobs. If Lim et al.'s estimate is adjusted to only those who receive a majority of their labor income from independent contracting, the rate is 3.9 percent.

[b] Summation of (1) 2,132,800 filers with earnings from both wages and sole proprietorships and expenses less than $5,000, (2) 4,125,200 primarily sole proprietorships and with less than $5,000 in expenses, and (3) 3,416,300 primarily wage earners.

[c] Estimate based on a 10 percent sample of self-employed workers and a 1 percent sample of W–2 recipients.

3. Demographics of Independent Contractors

The Department reviewed demographic information on independent contractors using the CWS, which, as stated above, only measures those who say that their independent contractor job is their primary job and that they worked at the independent contractor job in the survey's reference week. According to the CWS, these primary independent contractors are most prevalent in the construction and professional and business services industries. These two industries employ 44 percent of primary independent contractors. Independent contractors tend to be older and predominately male (65 percent). Millennials have a significantly lower prevalence of primary independent contracting than older generations: 3.6 percent for Millennials compared to 6.0 percent for Generation X and 8.8 percent for Baby Boomers and Matures.[95] However, surveys suggest that this trend is reversed when secondary independent contractors, or those who did informal work as independent contractors, are included. These divergent data suggest that younger workers are more likely to use contractor work sporadically and/or for supplemental income.[96] White workers are somewhat overrepresented among primary independent contractors; they comprise 85 percent of this population but only 79 percent of the population of workers. Conversely, black workers are somewhat underrepresented (comprising 9 percent and 13 percent, respectively).[97] The opposite trends emerge when evaluating informal work, where racial minorities participate at a higher rate than white workers.[98] Primary independent contractors are spread across the educational spectrum, with no group especially overrepresented. The same trend in education attainment holds for workers who participate in informal work.[99]

D. Potential Transfers

Given the current universe of independent contractors and the possibility that more individuals may become independent contractors after the rule is finalized, the Department here identifies the possible transfers among workers and between workers and businesses, which may occur. These transfer effects are discussed qualitatively and include effects relating to employer provided benefits, tax liability, earnings, minimum wage and overtime pay, accurate classification of workers, and conversions of employee jobs to independent contractor jobs.

In evaluating potential transfers that could be occasioned by the rule, the Department notes at the outset that the substantive effect of the rule is not intended to favor independent contractor or employee classification relative to the status quo of the Department's existing guidance and precedent from courts. However, the Department assumes in this RIA that the increased legal certainty associated with this final rule could lead to an increase in the number of independent contractor arrangements by reducing the transaction and compliance costs inherent in structuring such an arrangement. The Department has not attempted to estimate the magnitude of this change, primarily because there are not objective tools for quantifying the clarity, simplification, and enhanced probative value of the Department's proposals for sharpening and focusing the economic reality test.[100] Several commenters assumed the increase in independent contractors would be 5 percent, although none provided substantive support to bolster the assumption. *See* EPI, Washington Center. Due to the lack of certainty and data to support a reliable estimate, the Department does not attempt to estimate the increase in independent contractor relationships that would result due to this rule. Therefore, potential transfers are discussed qualitatively with some numbers presented on a per worker basis. Potential transfers may result from differences in benefits, tax liabilities, and earnings between employees and independent contractors. Although employment benefits could decrease, and tax liabilities could increase, the Department believes the net impact on total compensation should be small in either direction. Furthermore, to attract qualified workers, companies must offer competitive compensation. Therefore,

[95] The Department used the generational breakdown used in the MBO Partner's 2017 report, ''The State of Independence in America.'' ''Millennials'' were defined as individuals born 1980–1996, ''Generation X'' were defined as individuals born 1965–1980, and ''Baby Boomers and Matures'' were defined as individuals born before 1965.

[96] Abraham and Houseman (2019), *supra* note 87, find that informal work decreases as a worker's age increases. Among 18 to 24 years olds, 41.3 percent did informal work over the past month. The rate fell to 25.7 percent for 45 to 54 year olds, and 13.4 percent for those 75 years and older. *See also* Upwork (2019), *supra* note 89.

[97] These numbers are based on the respondents who state that their race is ''white only'' or ''black only'' as opposed to identifying as multi-racial.

[98] Abraham and Houseman (2019), *supra* note 87.

[99] *Id.*

[100] Another uncertainty limiting the Department's ability to quantify the possible increase in independent contracting is the nature and effect of state wage and hour laws. Some states, such as California, have laws that place more stringent limitations on who may qualify as independent contractors than the FLSA. *See* Cal. Labor Code 2775 (establishing a demanding ''ABC'' test applicable to most workers when determining independent contractor status under California law). Because the FLSA does not preclude states and localities from establishing broader wage and hour protections than those that exist under the FLSA, *see* 29 U.S.C. 218(a), workers in some states may be unaffected by this final rule. However, because the Department is not well positioned to interpret the precise scope of each state's wage and hour laws, the Department is unable to definitively determine the degree to which workers in particular states would or would not be affected by this final rule.

for workers in a competitive labor market, any reduction in benefits and increase in taxes are expected to be offset by higher base earnings. This concept is discussed further below in the Earnings section.

Assuming that independent contractor arrangements increase following this final rule, it is unclear the extent to which this would occur as a result of current employees being subsequently classified as independent contractors or as a result of the hiring of new workers as independent contractors. This will have implications for transfers. If current employees change classifications, then there may be transfers. Employers could change the classification of current employees only if those workers could already have been classified as independent contractors or if the working conditions are modified such that the relationship becomes a true independent contractor relationship, assuming doing so is consistent with any applicable employment contracts, collective bargaining agreement, or other applicable laws.[101] Lim et al. (2019) found in the status quo that there was ''little evidence that firms are increasingly reclassifying existing employee relationships as [independent contractor] relationships,'' however, they found that ''firms are hiring more new workers as [independent contractors] rather than as employees.'' [102] The Department does not anticipate this phenomenon will cease occurring in the presence of the final rule. As discussed below, the limited number of businesses with employees whose roles would meet the requirements to be independent contractors likely face incentives to maintain the status quo for those workers, but there will likely be some degree of innovation in the labor market in response to the rule that compounds the current trend towards greater numbers of independent contractors. For more discussion on how employees may be affected by transfers, see the Job Conversion discussion in Section VI(D)(7).

By decreasing uncertainty and thus potentially opening new opportunities for firms, companies may hire independent contractors who they otherwise would not have hired. In this case, there may be a decrease in unemployment, an increase in the size of the labor force, or both. In a study of respondents from both Europe and the U.S., McKinsey Global Institute found that 15 percent of those not working are interested in becoming an independent contractor as their primary job.[103] Attracting these individuals to join the labor force would be classified as a societal benefit, rather than a transfer. These impacts are evaluated more fully below as part of the discussion on Cost Savings and Benefits.

The Department requested comments on its assumption that use of independent contractors will increase if the proposed rule is finalized. Most commenters took the view that, consistent with the Department's assumption, the final rule will lead to an increase in the number and proportion of workers who are independent contractors. Some commenters, such as the Signatory Wall and Ceiling Contractors Alliance (SWACCA) and other construction workers' unions commented that the rule could lead to increases in the percentage of independent contractors in the workforce by narrowing the standard for FLSA employment. But as explained above in Section IV(E)(2) and later in the discussion of regulatory alternatives in Section VI(G)(2), the final rule does not narrow or expand the standard for FLSA employment. Rather, the Department agrees with many commenters representing businesses and freelance workers that the final rule serves only to make that standard clearer, enabling businesses and individuals to structure their work relationships to comply with the law. *See* Section III (discussing commenter feedback). While this could lead to a greater incidence of independent contracting—as businesses and workers will be able to more freely adopt independent worker arrangements without fear of FLSA liability—the final rule does not narrow the standard for FLSA employment.[104]

Some commenters disagreed with the Department's decision not to specifically quantify a change in the number of independent contractors. Furthermore, most of the commenters who included assumptions of growing numbers of independent contractors also assumed that those workers were drawn from the existing pool of employees, not from the otherwise unemployed or those outside the labor market.[105] The Washington Center for Equitable Growth (Washington Center), for instance, simply assumed a 5 percent increase in the number of independent contractors (corresponding to an equivalent decline in employees); [106] however, it neither provided explanation why that percentage was reasonable nor justified its assumption that the percentage would entirely represent a shift of existing employment relationships to independent contractor relationships. Many commenters asserting and estimating a sizable shift from employment to independent contracting relationships seem to have based their estimates on the false impression that the final rule would narrow the FLSA scope of employment. As explained above, this is not the case—the final rule does not shift the definition of who is an employee under the FLSA. Any shift, the Department believes, would have to result from increased certainty, reduced overhead, and reduced misclassification. Conversely, the Americans for Prosperity Foundation (AFPF) agreed with the Department's decision to not quantify potential changes in the aggregate number of independent contractors and supported the Department's analysis.

The Department continues to believe that the necessary data and information are not available to quantify either any shift in independent contracting away from employee relationships or the number of new independent contractors who may enter the workforce in response to the rule and the impact of such a shift on workers and businesses. As explained in the NPRM, any attempt to produce a useful estimate for the impact of an increase in independent contractors requires ascertaining a

[101] Under the final rule, a worker may be classified only if the job meets the requirements of section 795.105.

[102] Lim et al., *supra* note 75 at 3.

[103] McKinsey Global Institute, *supra* note 89 at 71.

[104] The fact that the final rule is not an expansion or narrowing of the FLSA's scope of employment is not to say that courts have never in the past misapplied the economic reality test in particular cases. For example, some courts have expressly disagreed on the meaning of the ''integral/integrated'' factor in the test. The existence of seemingly contradictory and inconsistent case law is one of the reasons why the Department sees a need to issue this final rule. However, as discussed extensively above, the Department believes that the statement of the economic reality test in the final rule is consistent with precedent and the FLSA as a whole, even if it is in tension with particular cases.

[105] Some commenters and reports (*See e.g.,* Palagashvili; Fuller et al.,) cited data that indicate increased regulatory clarity would likely result in workers entering the workforce due to the greater flexibility and control provided by independent contracting relationships. This would expand the workforce rather than transfer workers between classifications.

[106] EPI, Washington Center, and other commenters who use this 5 percent estimate assume the entire increase to independent contractors consists of workers whose overall compensation will decline and whose jobs otherwise remain the same. *See* EPI (characterizing converted workers as having ''the same job for substantially less compensation''). The Department finds this highly unlikely. For more discussion on this topic, see the Job Conversion topic in Section II.D.6.

number of additional variables, including how this reduction in administrative overhead and misclassification would impact independent contracting. *See* 85 FR 60626. The approach taken by some commenters of simply choosing a number without support and applying it across the entire economy, given the extremely large number of employment relationships in the United States, the differences in how a worker may value certain ''benefits,'' [107] and the unique relationships between different types of independent contractors and different businesses, could create a misleading and uncertain estimate of the impact of the rule without lending any additional clarity because of the lack of the basis for such a figure and likely differences between the current independent contractor population and the population likely to arise as a result of this rule. Since commenters, including those in support and those in opposition, did not proffer sufficient data upon which to build more accurate assumptions, the Department has not attempted to quantify this impact.

1. Impact of COVID–19 on the Rule

The Department also requested data and comment on the possible impacts resulting from the COVID–19 pandemic as it relates to the composition of the labor market, the share and scope of independent contractors in the workforce, and any associated wage effects. Several commenters noted the importance of independent contracting in weathering the pandemic. For example, the Center for Growth and Opportunity at Utah State University (CGO) wrote that the benefits of independent contracting ''are likely to grow if the United States labor market adapts to the recession spurred by the COVID–19 pandemic similarly as it did to the financial crisis of 2008.'' They note that during an economic downturn, workers can turn to alternative work arrangements such as independent contracting to supplement their income. The view is supported by a recent Harvard Business Review article that describes how firms have increasingly relied on freelancing and platforms that allow access to the growing supply of on-demand workers to identify innovative solutions more flexibly and quickly than relying solely on their fulltime workforce, noting that ''Early signs suggest that Covid–19 will also speed up this shift.'' [108] It is also supported by a range of recent news reports indicating that freelance opportunities provide an important path for individuals to return to the workforce who lost their jobs due to the pandemic.[109] Women Employed claimed that this rule will degrade jobs, and that doing so in the midst of a pandemic would be harmful, basing this claim on assumptions that this rule would ''undermine the FLSA'' and increase misclassification of workers. But as explained above, this rule does not undermine the FLSA; it sharpens the focus of the economic reality test and clarifies the meaning of economic dependence that courts, the Department, and most commenters agree is the standard for employment under the Act. This clearer standard is likely to reduce rather than increase occurrences of misclassification.

2. Employer Provided Benefits

In the context of transfers, the Department attempted to evaluate how an increase in independent contracting relationships could affect employer provided benefits. Although this rule only addresses workers' independent contractor status under the FLSA, the Department assumes in this analysis that employers are likely to keep the status of most workers the same across all benefits and requirements.[110] To the extent that employers currently provide employees benefits such as health insurance, retirement contributions, and paid time off, these would likely decrease with an increase in the use of independent contractors because independent contractors generally do not receive these benefits directly (although independent contractors are able to purchase at least some of these benefits for themselves and, as explained in the preamble, the offering of health, retirement, and other benefits to workers is not necessarily indicative of employee status). Employer-provided benefits are often a significant share of workers' compensation. According to the BLS's Employer Costs for Employee Compensation (ECEC), the value of employer benefits that directly benefit employees average 21 percent of total compensation.[111] The Department notes that this 21 percent figure is an average for all employees and may not be representative of the subset of employees whose classification may be impacted by this rule. Since the 21 percent figure includes paid leave (7.2 percentage points) and retirement benefits (5.3 percentage points), and workers may value these benefits at very different levels, applying these elements does not seem reasonable in the context of this analysis.[112]

The Department used the CWS to compare prevalence of health insurance and retirement benefits across employees and independent contractors to produce a highly generalized picture. However, it should be noted that these two populations may differ in other ways than just their employment classification and the particular elements of their compensation packages discussed in the preceding paragraph which may impact benefit amounts. For instance, an employee shifting to independent contractor status who already receives health benefits through a partner's benefit plan would not be impacted by losing heath benefit eligibility. Additionally, lower benefits may be offset by increased base pay to attract workers because workers consider the full package of pay and benefits when accepting a job.

According to the CWS's relatively narrow definition of independent contractor:

[107] If, for example, a state mandates that employees receive paid parental leave, but the worker does not have and intends not to have children, this ''benefit'' is of no value to that worker. Estimating how an individual worker values a particular ''benefit'' or even a tax liability would require a worker-by-worker analysis for which the Department lacks necessary data.

[108] Fuller, et al., *supra* note 64 (''Many freelance platforms offer access to workers from around the world with a wide variety of skills, and payment is often per completed task. Covid-19 is accelerating the move toward these platforms. . ..''); *see also* Press Release, New Upwork Study Finds 36% of the U.S. Workforce Freelance Amid the COVID–19 Pandemic, Sep. 15, 2020, available at *https://www.upwork.com/press/releases/new-upwork-study-finds-36-of-the-us-workforce-freelance-amid-the-covid-19-pandemic.*

[109] *See, e.g.,* Kim Mackrael, In the Covid Economy, Laid-Off Employees become New Entrepreneurs, Wall Street Journal, Nov. 18, 2020; Uri Berliner, Jobs in the Pandemic: More Are Freelance and may stay that way forever, NPR, Sep. 16, 2020; Jon Younger, A New Payoneer Report Shows Covid 19 is Accelerating Freelance Growth, Forbes, Sep. 1. 2020.

[110] Courts have noted that the FLSA has the broadest conception of employment under Federal law. *See, e.g., Darden,* 503 U.S. at 326. To the extent that businesses making employment status determinations base their decisions on the most demanding Federal standard, a rulemaking addressing the FLSA's distinction between employees and independent contractors may affect the businesses' classification decisions for purposes of benefits and legal requirements under other Federal and state laws.

[111] BLS, ''Employer Costs for Employee Compensation News Release'' (Sept. 2019), *https://www.bls.gov/news.release/archives/ecec_12182019.htm. For* Civilian Workers, this includes paid leave ($2.68), insurance ($3.22), and retirement and savings benefits ($1.96). It does not include overtime and premium pay, shift differential pay, nonproduction bonuses, or legally required benefits. Calculated as ($2.68 + $3.22 + $1.96)/$37.03.

[112] The average economy-wide provision of insurance benefits, which represent 8.7 percentage points of the 21 percent figure, is also likely to be an overestimate for the average percentage of compensation offered to the workers most likely to be impacted by this rule.

• 79.4 percent of self-employed independent contractors have health insurance. Most of these workers either purchased insurance on their own (31.5 percent) or have access through their spouse (28.6 percent).

• 80.7 percent of other independent contractors have health insurance. There are three main ways these workers receive health insurance: Through their spouse (25.1 percent), through an employer (24.2), or on their own (20.1 percent).

• 88.3 percent of employees have health insurance. Most of these workers receive health insurance through their work (64.1 percent). Furthermore, according to the ECEC, employers pay on average 12 percent of an employee's base compensation in health insurance premiums.

Several commenters estimated the prevalence of health insurance among independent contractors. In early 2020, CWI commissioned a national survey of 600 self-identified independent contractors. Their survey found that 84 percent of independent contractors have healthcare coverage.[113] The Workplace Policy Institute of Littler Mendelson, P.C. (WPI) pointed to a study that found about 90 percent of gig workers have health insurance.[114] The study also found that less than one-third of 1099–MISC workers purchase their own health insurance, ''and most indicate that health insurance does not affect their decision to work as an independent contractor.'' It also notes that the businesses interviewed believe that workers may have ''made an economic decision with their spouse—where one spouse works without benefits for higher pay and the other receives lower pay with benefits—resulting in a higher total income and health benefits for the household.''

From these data, it is unclear exactly how health insurance coverage would change if the number of independent contractors increased, but the data suggest that independent contractors, on average, may be less likely to have health insurance coverage. That said, employment is not a guarantee of health insurance, nor do independent contractors generally lack health insurance. Additionally, simply comparing rates between independent contractors and employees may be misleading. As the U.S. Chamber of Commerce pointed out, many independent contractors would not be eligible for benefits even if they were employees due to the short-term and/or part-time nature of such an employment relationship.

Women Employed noted that the although the Department showed high rates of health insurance among independent contractors in general, the Department did not show that low-wage independent contractors have access to health insurance. In response, the Department compared health insurance rates for workers earning less than $15 per hour and found that 71.0 percent of such independent contractors have health insurance compared with 78.5 percent of such employees. Health insurance rates are lower for both independent contractors and employees when limited to low-wage workers. However, the gap in coverage between low-wage employees and independent contractors remains comparable to that for all workers: 7.5 percentage points for low-wage workers compared to 8.1 percentage points for all workers.

A major source of retirement savings is employer sponsored retirement accounts. According to the CWS, 55.5 percent of employees have a retirement account with their current employer; in addition, the ECEC found that employers pay 5.3 percent of employees' total compensation in retirement benefits on average ($1.96/$37.03). If a worker shifts from employee to independent contractor status, that worker may no longer receive employer-provided retirement benefits, but may choose alternate personal investment options. As with health insurance, it is not clear whether retirement savings for such a worker would increase or decrease, but such a worker would likely need to take a more active role in saving for retirement vis-à-vis an employee with an employer-sponsored retirement plan.[115]

Commenters pointed out that independent contractors generally have retirement accounts. CWIs survey of independent contractors found that 73 percent have a retirement savings plan. The WPI pointed to a study by T. Rowe Price that found that more than half of independent contractors are saving for retirement.[116] Conversely, commenters such as the Washington Center cited a study showing that independent contractors are ''less likely . . . to make contributions to a retirement account.'' [117] However, that study narrowly defines retirement accounts to include ''employer-sponsored plans'' while excluding other common long-term saving methods, which biases the comparison between independent contractors and employees. This hampers the ability to substantively compare this commenter's position with those of other commenters, such as CWI and WPI, listed above.

Some commenters asserted the Department should quantify the impact of the rule on benefits such as health insurance and retirement savings. This includes a letter from 107 U.S. Representatives and separate letters from Rep. Donald Norcross and Rep. Pramila Jayapal. The Texas RioGrande Legal Aid (TRLA) claimed that because the Department did not estimate the ''financial impact on the health and retirement accounts of workers'' it violated the Administrative Procedure Act. However, the Department does not believe that these impacts could be usefully quantified. First, quantifying these impacts necessarily requires estimating any increase in the prevalence of independent contracting relationships. As explained previously, the Department does not believe that this figure can be meaningfully estimated. Second, classification under the FLSA does not directly determine whether workers qualify for these benefit programs, and as such, it is difficult to assess how the specific workers who are converted from employee to independent contractor status under the FLSA could have their individual benefits affected. If an employer provides health and retirement benefits to employees, but does not provide them to the same workers upon conversion of the positions into independent contractor relationships, overall compensation will be negatively impacted unless offset by sufficiently higher earnings. However, this could happen only in non-competitive labor markets in which employers have the ability to set compensation without regard for worker preferences. While some employers may desire to save the costs of providing certain benefits to employees by engaging independent contractors, if the relevant labor markets are even somewhat competitive, they likely will need to increase monetary compensation, give up, for example,

[113] Coalition for Workforce Innovation (2020), *supra* note 77.

[114] A. Yildirmaz, M. Goldar, S. Klein, ''Illuminating the Shadow Workforce: Insights Into the Gig Workforce in Businesses,'' ADP Research Institute (February 2020), *https://www.adpri.org/research/illuminating-the-shadow-workforce/?release=illuminating-the-shadow-workforce-2020.*

[115] Access to such benefits might be similar for both employees and independent contractors, but it is unlikely that the business will contribute similar sums to benefits for an independent contractor and employee.

[116] T. Rowe Price, ''Press Release: The Majority of Independent Workers are Actively Saving for Retirement'' (March 25, 2019), *https://www.troweprice.com/corporate/en/press/t-rowe-price-the-majority-of-independent-workersare-actively-.html*

[117] Jackson, Looney, and Ramnath (2017), *supra* note 92.

certain elements of control (*i.e.,* non-pecuniary compensation), or both to recruit workers for providing the same work. The impacts of the rule would not be uniform across workers, especially with respect to those workers that may become independent contractors. Furthermore and as explained further in Section VI(D)(7), the Department believes the ability for firms to deny benefits by converting their workers into independent contractors is constrained.

3. Tax Liability

Another potentially important source of transfers affected by the prevalence of independent contracting is tax liability. Payroll tax liability is generally divided between the employer and the employee in the United States. Most economists believe that the ''incidence'' of the payroll tax, regardless of liability, falls on the employee.[118] As self-employed workers, independent contractors are legally obligated to pay both the employee and employer shares of the Federal Insurance Contributions Act (FICA) taxes. Thus, if workers' classifications change from employees to independent contractors, there may be a transfer in Federal tax liabilities from employers to workers (regardless of whether this affects the actual cost of these taxes to the worker). These payroll taxes include: [119]

- Social Security tax: The 6.2 percent employer component (half of the 12.4 percent total).[120]
- Medicare tax: The 1.45 percent employer component (half of the 2.9 percent total).[121]

In sum, vis-à-vis an employee, independent contractors are legally responsible for an additional 7.65 percent of their earnings in FICA taxes (less the applicable tax deduction for this additional payment). However, any tax-related transfers from employers to workers would likely be offset by higher wages employers pay independent contractors. Employers will not pay payroll taxes for work transferred to workers classified as independent contractors and market forces could compel them to pass the full wage (wage + payroll tax) to the independent contractors. That is not the only reason we expect independent contractors will earn higher hourly earnings, but is the focus here. For discussion on other expected wage effects, see Section VI(D)(4) below.

Companies also cover unemployment insurance and workers' compensation taxes for their employees. Independent contractors may choose to pay for comparable insurance protection offered in the private market, but are not obligated to. The resulting regulatory effect (experienced as savings, either by companies or employees, depending on who ultimately bears the cost of the tax) combines societal cost savings (the lessened administrative cost of incrementally lower participation in unemployment insurance and workers' compensation programs) and transfers (from individuals whose unemployment insurance or workers' compensation payments decline, to entities paying less in taxes). Independent contractors may recoup some or all of the employer portion of these taxes and insurance premiums in the form of increased wages. This rule could decrease employers' tax liabilities and increase independent contractors' take-home compensation. However, there are costs to independent contractors if they are out of work or injured or ill on the job because they no longer are protected, unless they purchase their own private insurance.[122] Many of these impacts will depend on the individual risk tolerances of the workers. It is likely that workers who are more comfortable taking risks will be attracted to the potentially higher take-home compensation of independent contractor status, while workers who are risk averse will likely prefer the predictability of traditional employee relationships. It is uncertain how the universe of workers is dispersed, beyond theoretical generalizations. It is further unclear how workers' risk preferences will be distributed across the market for insurance products. The Department was not able to identify economy-wide distributional data on worker preferences and projected purchasing dynamics. That is likely because worker preferences are difficult to accurately measure and capture in datasets due to their high variability worker to worker and ambiguity of sorting across economic sectors. Without access to such data, the Department did not attempt to quantify the cost of changes in coverage or whether the net effect is a benefit or cost.

4. Earnings

Potential transfers could also occur through changes to earnings as a result of an increase in independent contracting. These transfers could occur if workers who were employees experience a change in earnings by becoming independent contractors, or if workers who are out of the labor market enter in order to become independent contractors. Although the minimum wage and overtime pay requirements of the FLSA would no longer apply to workers who shift from employee status to independent contractor status, as discussed below, this does not sufficiently explain the potential transfers that could occur as a result of such a shift. Furthermore, the Department anticipates an increase in labor force activity, but for the reasons stated above, the Department does not attempt to quantify the magnitude of any increase or decrease in earnings as a result of increased labor force activity.

If currently unemployed workers or individuals who are out of the labor market become independent contractors due to this rule, their earnings will increase as they currently have no work-related earnings other than possibly unemployment benefits. The impact on earnings is more ambiguous if employees' classifications change to independent contractors. In theory, because independent contractors likely prefer to have at least similar levels of total compensation as they would earn if they were employees, companies would likely have to pay more per hour to independent contractors than to employees because independent contractors generally do not receive company-provided benefits and have higher tax liabilities. Data show an hourly wage premium for independent contractors when comparing unadjusted mean averages. But as the analysis below illustrates, when controlling for certain differences in worker characteristics, this expected wage premium may not always be observable at a statistically significant level. It should be noted, however, that these estimates do not attempt to incorporate the value of flexibility and satisfaction that many independent contractors cite as key factors in their preference of

[118] The share of payroll taxes borne by employees versus firms is unknown but economists generally believe that employer payroll taxes are partially-to-completely shifted to employees in the long run. For a detailed review of the literature see J. Deslauriers, B. Dostie, R. Gagné, and J. Paré, ''Estimating the Impacts of Payroll Taxes: Evidence from Canadian Employer-Employee Tax Data,'' IZA Institute of Labor Economics Discussion Paper Series IZA DP No. 11598 (June 2018), *http://ftp.iza.org/dp11598.pdf.* Further information is available by the Tax Foundation, *https://taxfoundation.org/what-are-payroll-taxes-and-who-pays-them/.*

[119] Internal Revenue Service, ''Publication 15, (Circular E), Employer's Tax Guide'' (Dec. 23, 2019), *https://www.irs.gov/pub/irs-pdf/p15.pdf.*

[120] The social security tax has a wage base limit of $137,700 in 2020.

[121] An additional Medicare Tax of 0.9 percent applies to wages paid in excess of $200,000 in a calendar year for individual filers.

[122] The Department did not undertake to comprehensively review state law on unemployment insurance in this area, but notes that some states do not use the economic reality test to determine which individuals are covered by state unemployment insurance.

independent contracting arrangements over traditional employment.

Comparing the average earnings, hourly wages, and hours of current employees and independent contractors may provide some indication of the impact on wages of a worker who transitions from an employee to independent contractor classification. A regression analysis that controls for observable differences between independent contractors and employees may help isolate the impact on earning, hourly wages, and usual hours of being an independent contractor. Katz and Krueger (2018) [123] regressed the natural log of hourly wages on independent contractor status,[124] occupation, sex, potential experience, potential experience squared, education, race, and ethnicity. They use the 2005 CWS and the 2015 RAND ALP (the 2017 CWS was not available at the time of their analysis). The Department conducted a similar regression using the 2017 CWS. In both Katz and Krueger's regression results and the Department's calculations, the following outlying values were removed: Workers reporting earning less than $50 per week, less than $1 per hour, or more than $1,000 per hour.[125]

The Department combined the CWS data on usual earnings per week and hours worked per week to estimate hourly wage rates to normalize the comparison between independent contractors and employees.[126] The Department found that independent contractors tend to earn more per hour: Employees earned an average of $24.07 per hour, self-employed independent contractors earned an average of $27.43 per hour, and other independent contractors earned an average of $26.71 per hour (the average hourly wage is $27.29 when combining the two types of independent contractors).[127] Katz and Krueger conducted similar hourly earnings estimates based on 2005 CWS and 2015 ALP data. Their analysis of the 2005 CWS data indicated that ''[b]efore conditioning on covariates, the 2005 and 2015 results are similar: freelancers and contract workers are paid more per hour than traditional employees.'' [128] When controlling for education, potential experience, potential experience squared, race, ethnicity, sex and occupation, independent contractors' higher hourly wages in the 2005 CWS data remained higher but were not statistically significant. But Katz and Krueger's analysis of the 2015 ALP data under the same specifications found that primary independent contractors earned more per hour than traditional employees, and the estimates were statistically significant.[129]

Conceptually, the Department expects that independent contractors would earn more per hour than traditional employees in base compensation as an offset to employer-provided benefits and increases in tax liabilities. Katz and Krueger's analysis of the 2015 RAND ALP data appears to support this prediction.[130] However, they recommend caution in interpreting the estimates from the ALP due to the relatively small sample size. Their analysis of the 2005 CWS data and the Department's similar analysis of 2017 CWS data did not show a statistically significant difference. But as previously noted, comparing current employees to current primary independent contractors may not be indicative of how earnings would change for current employees who became independent contractors. Nor do such wage-based comparisons reflect the non-pecuniary attributes of employees and independent contractors.[131]

One potential reason for the variance among the estimates for independent contractor wages could be error in the measurement of independent contractor status and earnings, a factor that is present throughout every analysis in this area. As a recent analysis concluded, ''different data sources provide quite different answers to the simple question of what is the level and trend of self-employment in the U.S. economy,'' which suggest substantial measurement error in at least some data sources.[132] As noted above, reporting errors by survey respondents may contribute to measurement error in CWS data.[133] Additionally, CWS questions ''were asked only about people who had already been identified as employed in response to the survey's standard employment questions and only about their main jobs,'' and therefore may miss important segments of the population. BLS has recently acknowledged limitations in the 2017 CWS survey in response to a GAO audit and is reevaluating how it would measure independent contractors in the future.[134]

Another potential bias in the Department's results could be due to the exclusion of relevant explanatory variables from the model specification, including the omission of observable variables that correlate with hourly earnings. For example, the Department's analysis of 2017 CWS data used 22

[123] *See* Katz and Krueger (2018), *supra* note 12.

[124] On-call workers, temporary help agency workers, and workers provided by contract firms are excluded from the base group of ''traditional'' employees.

[125] Choice of exclusionary criteria from Katz and Krueger (2018), *supra* note 12.

[126] The CWS data, based on its relatively narrow definition of independent contractors, indicated that employees worked more hours per week in comparison to primary independent contractors. The Department found that 81 percent of employees worked full-time, compared to 72 percent for self-employed independent contractors and 69 percent for other independent contractors. Katz and Krueger similarly found that independent contractors work fewer hours per week than employees (statistically significant at the 1 percent level of significance in all specifications with both datasets). Despite working fewer hours per week than employees, self-employed independent contractors earned more per week on average ($980 per week compared to $943 per week). Other independent contractors, on average, worked fewer hours per week and earned less per week than employees ($869 per week compared to $943 per week). Given the difference between hours worked by primary independent contractors and employees, and the appeal of flexibility cited by many independent contractors, average weekly earnings may be an inadequate measure. Accordingly, the Department's analysis focuses on hourly wages.

[127] The Department followed Katz and Krueger's methodology in excluding observations with weekly earnings less than $50, hourly wages less than $1, or with hourly wages above $1,000. Additionally, workers with weekly earnings above $2,885 are topcoded at $2,885. Weekly earnings are used to calculate imputed hourly wages.

[128] *Id.* at 19.

[129] *Id.* at 34.

[130] *See* Katz and Kreuger (2018), *supra* note 12 at 20 (''A positive hourly wage premium for independent contractors could reflect a compensating differential for lower benefits and the need to pay self-employment taxes.'').

[131] In particular, at least some research reveals significant non-pecuniary advantages to independent contracting, including through increased job satisfaction. *See* ''The State of Independence in America,'' MBO Partners (2019), *https://www.mbopartners.com/state-of-independence/;* Chen et al., ''The Value of Flexible Work: Evidence from Uber Drivers,'' Journal of Political Economy 127:6, 2735–794 (2019); He, H. et al., ''Do Workers Value Flexible Jobs? A Field Experiment,'' NBER Working Paper No. w25423, (2019), *https://ssrn.com/abstract=3311395;* McKinsey Global Institute, *supra* note 89; Upwork (2019), *supra* note 89.

[132] Abraham et al. (2018), *supra* note 89 at 15. Generally, ''[h]ousehold surveys consistently show lower levels of self-employment than tax data and a relatively flat or declining long-term trend in self-employment as contrasted with the upward trend that is evident in tax data.'' *Id.; see also id.* at 45.

[133] ''For example, a household survey respondent might fail to mention informal work that they do not think of as a job, something that further probing might uncover. To take another example, a household member who is doing work for a business may be reported as an employee of that business, even in cases where further probing might reveal that the person is in fact an independent contractor or freelancer.'' *Id.* at 15.

[134] Specifically, BLS recognized that: (1) The ''CWS measures only respondents' main jobs . . ., thus potentially missing workers with nontraditional second or supplementary income jobs''; (2) ''CWS only asks respondents about their work in the past week and may fail to capture seasonal workers or workers that supplement their income with occasional work''; and (3) ''added questions regarding electronically-mediated employment resulted in a large number of false positive answers.'' Government Accountability Office, Contingent Workforce: BLS is Reassessing Measurement of Nontraditional Workers, Jan. 29, 2019, *https://www.gao.gov/assets/700/696643.pdf.*

occupation dummy variables but did not control for a worker's job position within any of the occupations (although it did control for ''potential experience''). However, as the Department's guidance indicates, a statistical comparison of earnings between workers generally must control for ''job level or grade'' in addition to experience to ensure the comparison is for workers in similar jobs.[135] If, hypothetically, independent contractors on average have lower job levels (or equivalents) than traditional employees within each occupation,[136] the Department's analysis would not be comparing the hourly earnings of primary independent contractors and employees who have the same jobs. Instead, the Department would be comparing a population of relatively low-level independent contractors with a population that includes both low- and high-level employees.

The existence of unobservable differences between independent contractors and employees that are correlated with earnings, such as productivity, skill, and preference for flexibility also bias comparison of hourly earnings. For example, independent contractors may be on average more willing than employees to trade monetary compensation for increased workplace flexibility that may accompany independent contractor status, which would obscure the observability of an earnings premium for independent contractors.[137] Non-pecuniary benefits of independent contracting, often including workplace flexibility, may impact the occurrence of an earnings premium, measured strictly in monetary terms, but may contribute to workers' evaluation of the merits of in engaging as independent contractors.

Independent contractors' hourly earnings premium may be best observed at the margin, such as comparing a worker's behavior when deciding between two similar positions, one as an employee and one as an independent contractor. However, the Department could not find data on such situations to allow for an economy-wide estimate, nor did commenters provide such data.

Some commenters expressed concern that the Department did not sufficiently justify its claim that independent contractors earn an earnings premium. Other commenters cited evidence purporting to show that workers misclassified as independent contractors earn less than employees. Much of this evidence, however, relates only to total take-home pay, which may reflect mere variation in hours-worked, rather than indicate any relation to the existence of an earnings premium. Some other evidence on lower earnings relates to misclassified workers—but the final rule is expected to *reduce* misclassifications by increasing certainty, and as explained further below, the Department does not believe that evidence relating to misclassified workers is applicable to the independent contracting population as a whole. For example, the Coalition of State Attorneys General, Cities, and Municipal Agencies (State AGs) cited recent state data on awards to workers who were misclassified and evidence that the misclassified workers face higher rates of wage theft and wage suppression.[138] [139] They additionally cited evidence produced by another critical commenter of this rule, the National Employment Law Project (NELP), that the State AGs claimed shows that once controls are implemented to account for taxes, business expenses, and legal risks, workers who have been misclassified as independent contractors often earn significantly less than similar workers paid as employees.[140] The Department expects the rule to reduce misclassification, which based on these above commenters' analyses will result in significant cost savings.

A number of other commenters made similar claims that the Department did not adequately address the misclassification of workers, and posited this would impose costs. In each case, the commenter did not demonstrate how the rule would increase the frequency of misclassification. North America's Building Trades Unions made similar claims. Its comment cited a number of studies, including a GAO study finding contingent workers (workers who lack an explicit or implicit contract for long-term employment, but who can be employees or independent contractors under the FLSA) have lower earnings than those who are not contingent workers; a DC Office of Attorney General study that estimated misclassified construction workers in DC may earn 11.5 percent less in take-home pay than employees, based on implied findings that result from a series of selected assumptions; and a sampling of studies on construction workers that claimed significant losses in net pay for construction workers misclassified as independent contractors compared to employees.[141] The United Brotherhood of Carpenters and Joiners of America asserted that many construction companies misclassify workers as independent contractors in order to pay them less than employees and cited estimates of the magnitude of the difference, and claims that the Department's rule ''does nothing to stem the abuse.'' [142] Commenter Matt Brown cited a Washington Center report that claims low- and middle-wage gig workers make less than comparable employees.[143] The same commenter noted that, applied appropriately, ''Independent contracting is a critical part of the economy.'' NELP and the National Women's Law Center (NWLC) cited a study, notably from a report for New York's taxi and limousine industry, claiming that while independent contractors in New York in a subset of industries (construction, retail, personal care, and others)

[135] Department of Labor, Office of Federal Contracting Compliance Programs, Directive 2018–5, (Aug. 24, 2018), *https://www.dol.gov/agencies/ofccp/directives/2018-05#ftn.id10.*

[136] For example, because individuals working in that occupation as independent contractors are less likely to be in positions with managerial responsibilities over other workers than are employees.

[137] He, H. et al. (2019), *supra* note 131.

[138] California Labor Commissioner's Office, 2017–2018 Fiscal Year Report on the Effectiveness of the Bureau of Field Enforcement (2018), *https://www.dir.ca.gov/dlse/BOFE_LegReport2018.pdf.* Massachusetts Council on the Underground Economy, 2017 Annual Report, (2017), *https://www.mass.gov/doc/cue-annual-report-2017-0/download.* Written Testimony of Jennifer L. Berrier, Deputy Secretary, Department of Labor & Industry Before the House Labor & Industry Committee (April 29, 2019).

[139] C. Ruckelshaus and C. Gao, ''Who's the Boss: Restoring Accountability for Labor Standards in Outsourced Work,'' National Employment Law Project, 9–27, (2014), *https://www.nelp.org/wp-content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf.*

[140] S. Leberstein and C. Ruckelshaus, ''Independent Contractor vs. Employee: Why Independent Contractor Misclassification Matters and What We Can Do to Stop It,'' National Employment Law Project, (2016), *https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf.* Bureau of Labor Statistics, ''Contingent and Alternative Employment Arrangements—May 2017,'' (2018), *https://www.bls.gov/news.release/archives/conemp_06072018.htm.*

[141] U.S. Government Accountability Office, ''Contingent Workforce,'' GAO–15–168R. DC, (2018). Office of Attorney General, ''Illegal Worker Misclassification: Payroll Fraud in the District's Construction Industry,'' (2019). Ormiston, R., Belman, D., Brockman, J., and M. Hinkel, ''Rebuilding Residential Construction,'' in *Creating Good Jobs: An Industry-Based Strategy* 75, 80 (Paul Osterman ed., MIT Press 2020).

[142] R. Ormiston et al. (2020), *supra* note 141. Liu, Y.Y., Flaming, D. and P. Burns, ''Sinking Underground: The Growing Informal Economy in California Construction,'' Economic Roundtable, 2 (2014), *https://economicrt.org/publication/sinking-underground.*

[143] C. Husak, ''How U.S. Companies Harm Workers by Making them Independent Contractors,'' Washington Center for Equitable Growth, (2019), *https://equitablegrowth.org/how-u-s-companies-harm-workers-by-making-them-independent-contractors/.*

experienced positive wage growth, they had lower increases in their real annual earnings from 2013 to 2018 than the counterpart employees.[144] PA L&I claimed that the Department provided ''no evidence'' to support other claims about compensation premiums. However, the Department offered a significant data-backed rationale for those sections, and in fact notes that PA L&I's own comment refers to some of these sources in its critique, though it offers no data of its own. Some commenters asserted that companies make workers independent contractors specifically because they can pay them less due to a lack of bargaining power, but they do not offer substantive data to demonstrate that this is the case throughout the economy. Since the failure to pay misclassified workers the wages that are due them is already prohibited by law, the Department determined comments on the topic fall outside the scope of this rule and analysis. As stated elsewhere, the Department expects that misclassification will be reduced because of this rule. Further, because meeting the proper standards for legitimate independent contracting will generally entail a substantively different relationship between a worker and a business beyond a simple change in classification, and no commenters nor the Department's own review of past court cases yielded any examples of this phenomenon in practice, the Department has not attempted to quantify it. For most discussion, see the Job Conversion discussion at Section (VI)(D)(7).

The data employed in the comments and the reports commenters cite to support their claims on impacts to earnings are not strictly based on independent contractors. In fact, several of them focus explicitly on contingent workers, who are defined as ''persons who do not expect their jobs to last or who report that their jobs are temporary.'' [145] These persons can be employees or independent contractors, and may not include all independent contractors, depending on the nature of the contractor's work. Estimates based on these definitions are not useful for the purpose of evaluating the universe of independent contractors. The non-representative data sources preclude widespread applicability. Further, these commenters and their cited sources largely focused on misclassified workers, who are defined as workers unlawfully classified as independent contractors in order to limit employers' monetary and legal liabilities. Selection bias causes the estimates of the impacts on this group to be unreliable; the sample likely includes illicit actors. The Department recognizes that some illicit actors intentionally evade the law, but its analysis of this rule's impact naturally focuses on employers, employees, and independent contractors that would follow the rule to the best of their ability. While these comments and the sources upon which they rely highlight important worker issues, the non-representative data presented cannot be extrapolated to the universe of individuals classified as independent contractors, for whom the literature offers strong evidence of an earnings premium.

Some commenters provided specific concerns with the Department's numbers. SWACCA disputes the Department's justification of the assertion that independent contractors earn more than employees because the unconditional mean hourly rate of independent contractors is higher than the unconditional mean hourly rate of employees. They note that the 11 to 14 percent higher hourly wage ($26.71 and $27.43 per hour for independent contractors versus $24.07 per hour for employees) is insufficient to cover the average of 21 percent of total compensation that employees receive in employer-provided benefits. While SWACCA correctly identified that the hourly wage premium independent contractors enjoy economy-wide may be less than employer's total cost of providing benefits, such a comparison may not accurately reflect the *value* the employee places on the employer-provided benefits. If, for example, a worker already has access to health insurance as a military veteran, that worker will not value the employer's provision of health insurance. Further, even assuming the worker values these benefits at the same level as the employer's cost for the benefits, the analysis cited earnings premiums and benefits which are based on all employees and independent contractors in the economy and may not reflect the narrower universe of employees whose classification is most likely be affected by this rule.[146] Employing economy-wide averages to compare niche subsets of the economy is not a sound approach. As such, it is inappropriate to assume, as SWACCA did, that the average employee who is converted to independent contractor status as a result of the rule would gain the same earnings premium enjoyed by the average economy-wide independent contractor, or lose benefits equal to the benefits enjoyed by the average economy-wide employee. The Department believes that many workers who are most likely to be converted due to this rule likely do not presently receive benefits or, if they do receive fringe benefits, their value (both as measured by the worker and as an absolute cost to the employer) falls below the economy-wide average.[147] Due to the highly individualized impacts that vary across numerous undefined variables (risk tolerances; specifics regarding level of position, industry, location; access to other means of benefits provision; etc.), the Department did not attempt to quantify such an impact. Considered qualitatively, the Department notes that employees who make more than the minimum wage implicitly display a measure of bargaining power because their employer could lawfully reduce their wages but has not. If employees have bargaining power—meaning labor market conditions require employers to account for workers' preferences— they would be positioned to negotiate an earnings premium that could offset a reduction in benefits that may result from being converted to independent contractors, which may be higher or lower than the economy-wide average. Similarly, a worker without bargaining power would be unlikely to receive the 11 to 14 percent earnings premium if converted from employee to independent contractor status—but such no-bargaining-power employees are also much less likely to have any company-provided benefits to lose as a result of the conversion. Ultimately, there is no reason to believe employees whose classification may be affected by the rule are likely to have the same benefits as an average employee or, if converted to independent contractors, would receive the same earnings premium that the average independent contractor has over the average employee. As explained below further in Section

[144] J.A. Parrott and M. Reich, ''An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment,'' Report for the New York City Taxi and Limousine Commission, (2018), *https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5b3a3aaa0e2e72ca74079142/1530542764109/Parrott-Reich+NYC+App+Drivers+TLC+Jul+2018jul1.pdf.*

[145] BLS, *https://www.bls.gov/news.release/conemp.nr0.htm.*

[146] The 11 to 14 percent earnings premium for independent contractors is also an economy-wide finding.

[147] The Department expects that many new independent contractor jobs will be created due to this rule, but does not anticipate many existing employee positions to be converted to independent contractor relationships because of it.

VI(D)(7), the Department expects that most workers whose classification may be affected by this rule will have a measure of bargaining power that could allow them to offset reductions in benefits with higher earnings, better working conditions, or both.

The Washington Center asserted that the population of independent contractors is very diverse and that comparing mean wages is not appropriate, expounding that the independent contractor market includes both high-wage workers with adequate bargaining power and low-wage workers with little bargaining power. The commenter did not explain how this point meaningfully applies to the Department's analysis, which addressed the diversity of the labor market in its regression specifications, controlling for many more variables than simply income. Nonetheless, in response to this comment the Department conducted two additional regression analyses as a proxy for the labor market for low-wage workers. The results were largely consistent with the initial conclusions presented in the NPRM. The Department ran its regression model including only low-education workers (a high school diploma or less). In this case, independent contractors had an average wage about 9 percent higher, and the results were statistically significant. The Department also ran a regression including only workers in low-wage occupations (12 occupations with mean hourly rate less than the overall mean), for which the coefficient on independent contractor was positive, although small.[148]

The Economic Policy Institute (EPI) estimated annual transfers from workers to employers of $3.3 billion in supplemental pay, paid leave, insurance and retirement benefits, and the employer share of Social Security and Medicare taxes. Its estimate is based on the primary assumptions that (1) employees reclassified as independent contractors will be paid the same in nominal wages and (2) there will be an increase of 5 percent in the number of independent contractors. EPI states that the first assumption is based on sources demonstrating that perfect competition in labor markets is rare, a claim stated by several other commenters. However, Alan Manning, the author of the foundational source referenced to make this case (cited by EPI, sources cited by EPI in the same section, and other commenters), explicitly caveats that the wage-setting assumption should not be applied to the self-employed (under which category independent contractors fall).[149] Manning states, ''In this book it is assumed that firms set wages. This is a more appropriate assumption in some labour markets than others. For example, it would not seem to be appropriate [. . .] for the self-employed.'' [150] The sources that EPI cites thus do not support its ultimate conclusion. Rather, EPI's methodological assumptions appear to run counter to a widely-cited source that EPI itself relies on. Finally, the EPI analysis also relied on firms' wage-setting power to be absolute, that labor supply is perfectly inelastic. EPI's analysis proceeds from the premise that ''perfect competition is rare,'' but then jumps to the claim that ''most labor markets do not function competitively,'' and that worker are particularly ''likely to lack the power to bargain for higher wages to compensate for their loss of benefits and increase in taxes when they become independent contractors.'' However, each of the sources the EPI cites for this proposition, which are discussed above, clearly show that firms do not possess or exert such absolute wage-setting power. These flaws fundamentally undermine EPI's estimates and yet go unaddressed by EPI and other commenters that reference EPI's estimates. The Department, therefore, declined to integrate these unreliable estimates into its analysis due to such methodological concerns.

EPI's analysis states that ''it is difficult to imagine that there are a meaningful number of workers who would get more satisfaction from doing the same job for substantially less compensation as an independent contractor than for substantially more compensation as a payroll employee.'' But this statement exposes what appears to be a flawed assumption in EPI's analysis. Under the economic reality test, an employee typically cannot possess the ''same job'' as an independent contractor. Rather, for the worker to be classified as an independent contractor, the worker must, on the whole, possess the characteristics of an independent contractor, which often include meaningful control over the work or meaningful opportunity for profit. EPI's analysis assumes, however, that the employer can and will simply reclassify a worker as an independent contractor without regard for the features of the working relationship.

EPI's analysis considers only monetary compensation as part of the ''value of a job to a worker.'' In the May 2017 Contingent Worker Supplement (CWS) to the Current Population Survey (CPS) workers classified as independent contractors were asked about their preferences toward employment arrangement. Their responses are indicative of non-monetary value derived from independent contractor status. When asked, ''Would you prefer to work for someone else?'' independent contractors resoundingly stated ''No'' over ''Yes'' by a ratio of nearly 8 to 1. Furthermore, the two most noted responses to the question, ''What is the main reason you are self-employed/an independent contractor?'' were ''Flexibility of schedule'' and ''Enjoys being own boss/independent.'' It is evident that most independent contractors strongly value the non-pecuniary compensation they receive. EPI does not address how these non-pecuniary benefits factor into worker compensation.

Arguing against the Department's inclusion of flexibility and satisfaction as important non-pecuniary compensation factors in the NPRM, EPI states that ''employers are able to provide a huge amount of flexibility to payroll employees if they choose to; the 'inherent' tradeoff between flexibility and payroll employment is greatly exaggerated.'' [151]

[148] The result is statistically significant at the 90 percent confidence level but not at the 95 percent level.

[149] EPI cites three sources alongside its claim, Manning (2003), Dube et al. (2018), and a literature review by the Washington Center, which also submitted a comment opposing this rule. The Manning book is cited by both other commenters, with the Washington Center's analysis drawing on it in numerous sections of its review as fundamental support. The Dube et al study focused exclusively on users of a specific online task portal (Amazon Mechanical Turk), which is a niche market of independent contractors and is a marketplace accessible to 49 countries, which makes it difficult to apply the findings with confidence to the U.S. market and the whole independent contractor universe. The Washington Center citation was a literature review of work in the field of monopsony in labor markets; its findings did not offer direct applications to the independent contractor universe. Furthermore, its review concluded, ''our results provide evidence on the elasticity of labor supply to the firm and the implied degree of firms' wage-setting power, but not necessarily whether the firms are able to exercise this power,'' explaining that it appears other forces rein in firms' wage-setting power to some degree.

[150] A. Manning, *Monopsony in Motion: Imperfect Competition in Labor Markets,* Princeton, N.J.: Princeton University Press, (2003). A. Sokolova and T. Sorensen, ''Monopsony in Labor Markets: A Meta-Analysis,'' Washington Center for Equitable Growth, (February 2020). A. Dube, J. Jacobs, S. Naidu, and S. Suri, ''Monopsony in Online Labor Markets,'' *American Economic Review:* Insights 2(1): 33–46 (March 2020), *https://www.aeaweb.org/articles?id=10.1257/aeri.20180150.*

[151] Some sources have argued that businesses, in fact, use scheduling in a way that negatively affect worker flexibility. *See e.g.,* L. Golden, ''Irregular Work Scheduling and Its Consequences,'' Economic Policy Institute, (April 2015), *https://files.epi.org/pdf/82524.pdf* (''Facilitated by new software technology, many employers are adopting a human resource strategy of hiring a cadre of part-time

EPI's argument is less than persuasive for a number of reasons. First, economists have long recognized that workers value leisure as well as the remuneration of labor. As such, any worker selecting between jobs is likely to consider the flexibility of work schedules, the compensation package, fringe benefits, and a host of non-pecuniary compensation factors when deciding both whether to work at a particular company and how many hours to spend working at that company. Second, the fact that some employees have flexibility does not imply that those employees do not value the flexibility or that greater flexibility is not something employees would trade for lower compensation. Third, in many jobs, employee flexibility is necessarily limited because the business requires a certain number of employees working together to accomplish a task, and so granting significant flexibility to employees would result in less productivity for the business which would likely result in lower compensation for the workers. Fourth, some employers do offer employees flexibility, but often that flexibility comes at a cost to the workers (of note, payroll employees generally have less control over their own schedules than similarly-situated independent contractors).

EPI, however, fails to explain why an employer would, all things equal, allow its employees to work for direct competitors, let them choose assignments, or set their own hours. The point of hiring employees is to have workers that an employer can call upon and direct to perform desired tasks, as opposed to contractors who operate their own businesses. While some employers may provide a measure of flexibility they generally would not offer the same degree of flexibility enjoyed by individuals who are in business for themselves. The Department believes, based on data in the CWS survey and beyond, that independent contractors experience significantly more flexibility than employees and that such a feature is a core motivator.[152]

The Department notes several other key weaknesses in EPI's estimate that undermine its assertions. EPI's estimate of transfers from workers to employers is an estimate of the gross transfer without taking into account that the independent contractors also have the ability to deduct some of their additional expenses on their income taxes and thus is not a comprehensive comparison of the net earnings of employees and independent contractors. EPI's estimate is based on applying a net loss in income for every new independent contractor, yet the data resoundingly show that workers pursue independent contract work voluntarily and in vast numbers, suggesting that other factors, unmentioned by the commenter, are significant to worker decisions in this field. EPI nonetheless assumes a blanket negative impact will be felt economy-wide for all new independent contractors—an assumption the Department believes is unsupportable in the face of the existing evidence.

Ultimately, based on the assumption that the final rule will increase independent contracting arrangements, the Department acknowledges that there may be transfers between employers and employees, and some of those transfers may come about as a result of changes in earnings. However, for the reasons stated above, the Department does not believe that these transfers can be quantified with a reasonable degree of certainty for purposes of this rule. The Department also does not believe that independent contracting roles are usefully compared by focusing solely on earnings to employee roles—under the economic reality test embraced by the final rule, control and an opportunity for profit are core considerations for determining who is an independent contractor. The Department believes that these factors are often valued by workers in ways that are difficult to quantify. Furthermore, the Department believes that workers as a whole will benefit from this rule, both from increased labor force participation as a result of the enhanced certainty provided by the rule, and from the substantial other benefits detailed below.

5. Minimum Wage and Overtime Pay

As noted above, an additional consideration in the discussion of transfers is that minimum wage and overtime pay requirements would no longer apply if workers shift from employee status to independent contractor status. The 2017 CWS data indicate that, before conditioning on covariates, primary independent contractors are more likely than employees to report earning less than the FLSA minimum wage of $7.25 per hour (8 percent for self-employed independent contractors, 5 percent for other independent contractors, and 2 percent for employees).

Several commenters highlighted this possibility that independent contractors could earn below the minimum wage. The Washington Center cited a report by the Center of American Progress that estimated that almost 10 percent of independent contractors earn less than the Federal minimum wage.[153] Representative Mark Takano pointed to literature finding that in California and New York many gig drivers receive significantly less than the state minimum wage.[154] A letter from 107 U.S. Representatives referenced an instance where the Wage and Hour Division (WHD) recovered roughly $250,000 in unpaid overtime and minimum wages for 75 workers misclassified as independent contractors by a cleaning company.[155] EPI stated in its comment, ''The workers most likely to be affected by this rule are workers in lower-wage occupations in labor-intensive industries, such as delivery workers, transportation workers like taxi drivers and some truckers, logistics workers including warehouse workers, home care workers, housecleaners, construction laborers and carpenters, agricultural workers, janitors, call center workers, and staffing agency workers in lower-paid placements.'' However, EPI did not provide a source for this important assumption, and the Department was unable to verify EPI's assertion in the Department's own research. The nature of the work done by workers across the diverse fields EPI identified is uncertain, although many roles in the

employees whose work schedules are modified, often on short notice, to match the employer's staffing with customer demand at the moment.'').

[152] Bureau of Labor Statistics, ''Contingent and Alternative Employment Arrangements—May 2017,'' USDL–18–0942 (June 7, 2018), *https://www.bls.gov/news.release/pdf/conemp.pdf.* MBO Partners, *The State of Independence in America:* 2018: The New Normal, 2018, 7. James Manyika et al., *Independent Work: Choice, Necessity, and the Gig Economy* (New York: McKinsey Global Institute, October 2016).

[153] K. Walter and K. Bahn, ''Raising Pay and Providing Benefits for Workers in a Disruptive Economy.'' Washington: Center for American Progress (2017), *https://www.americanprogress.org/issues/economy/reports/2017/10/13/440483/raising-pay-providing-benefits-workers-disruptive-economy/.*

[154] M. Reich. ''Pay, Passengers and Profits: Effects of Employee Status for California TNC Drivers.'' University of California, Berkeley (October 5, 2020), *https://irle.berkeley.edu/files/2020/10/Pay-Passengers-and-Profits.pdf;* L. Moe, et al. ''The Magnitude of Low-Paid Gig and Independent Contract Work in New York State,'' The New School Center for New York City Affairs (February 2020), *https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5e424affd767af4f34c0d9a9/1581402883035/Feb112020_GigReport.pdf.*

[155] ''Skokie Cleaning Business Must Pay $500K In Unpaid Wages, Damages to Workers,'' CHICAGO.CBSLOCAL.COM (May 5, 2012), *https://chicago.cbslocal.com/2012/05/05/skokie-cleaning-business-must-pay-500k-in-unpaid-wages-damages-to-workers/.* The Department believes that misclassification is an important concern that the rule addresses, and that the rule will reduce the ability of employers to misclassify its workers by rendering the test more clear and understandable.

above fields could lack features that would facilitate a position conversion to independent contractor status.

With respect to overtime, CWS has further indicated that, before conditioning on covariates, primary independent contractors are more likely to work overtime or extra hours beyond what they usually work at their main job (30 percent for self-employed independent contractors and 19 percent for other independent contractors versus 18 percent for employees). The Department was unable to determine whether these differences were the result of differences in worker classification, as opposed to other factors. The Department has cited many sources throughout this analysis that point to a wide range of income for independent contractors, and does not believe that this rule will be especially applicable to any particular income segment of independent contractors. Accordingly, the Department believes it prudent to rely on the numerous sources it has drawn on in the development of this rule, rather than to focus on any particular slice of the income distribution. And while independent contractors are not, by definition, subject to the minimum wage requirements of the FLSA, none of the evidence cited by commenters suggests that the final rule is likely to significantly impact this issue, and if so, to what extent. Accordingly, the Department did not attempt to quantify these potential transfers.

6. Misclassification

Many commenters expressed concerns regarding misclassification of employees as independent contractors, which occurs when an individual who is economically dependent on an employer is classified by that employer as an independent contractor. FLSA misclassification may be inadvertent or intentional and its direct effects could include a transfer from the worker to the employer if the employer fails to pay minimum wage and overtime pay to which the worker is entitled. Conversely, reducing misclassification could result in a transfer from employers to workers.

Several commenters believe that ''[c]larifying the application of the test for independent contractor status will promote compliance with labor standards under the FLSA and, in turn, reduce worker misclassification.'' Opportunity Solutions Project (OSP); *see also, e.g.,* Truckload Carriers Association (''[t]he increased clarity provided by the [proposed rule] would likely lead to reduced misclassification.''); IAW (''This rule will clear up misclassifications''); Financial Services Institute (''we agree that it will reduce worker misclassification and litigation''). Other commenters believe this rule may make it easier for employers to misclassify employees as independent contractors. *See, e.g.,* Equal Justice Center; Employee Rights Center; NELP; State AGs; TRLA. These commenters cited reports purporting to show extremely high rates of misclassification. For example, a 2020 NELP report cited by many commenters reviewed state audits and concluded that ''these state reports show that 10 to 30 percent of employers (or more) misclassify their employees as independent contractors.'' [156] The Washington Center also cited a study conducted by the Department of Labor in 2000 to claim that ''between 10 percent and 30 percent of employers audited in 9 states misclassified workers as independent contractors.'' [157]

These estimates, however, appear to be unreliable for at least two reasons. First, they make generalized conclusions regarding rates of misclassification using non-representative audit data. For example, the Department's 2000 study cited by the Washington Center states that audits were ''selected on a targeted basis because of some prior evidence of possible non-compliance.'' [158] The 2020 NELP report likewise explained that ''[m]ost studies [on misclassification] rely on audit data from unemployment insurance and workers' compensation audits, targeted or random.'' [159] As a 2015 EPI report explained, ''[a]udit methods vary across states in the extent to which they target employers for audit: They can base the audits on specific criteria (*e.g.,* a record of prior violation), or use a random sample of employers *within* industries prone to misclassification, or a mix of both methods.'' [160] Thus, even ''random'' audits are not necessarily representative because they target industries with high rates of misclassification. Because audits focus on groups of businesses or industries in which misclassification rates are the highest, their results would not support generalized conclusions regarding the wider population. As such, the reports' generalized conclusion lack reliable and representative evidence, and are almost certainly significant overestimates.

Second, the audit data cited by NELP and others do not necessarily focus on misclassification of employees as independent contractors; some states' data are evaluated based on prevalence of employer violations, which is not representative of percentages of workers misclassified as independent contractors. For example, the 2020 NELP report appears to state that audits conducted by Ohio found a misclassification rate of 45 percent, but the cited Ohio report stated otherwise. The report explained that the audits searched for unemployment insurance violations, not just misclassifications, and that ''45% of the audits produce findings, in many cases for workers misclassification.'' [161] In other words, the Ohio audits found 45% of audited employers failed to comply with some unemployment insurance requirement, with an unspecified subset committing misclassification. This and other misunderstandings of state audit findings may result in a misleading estimate of the frequency with which employers misclassify employees as independent contractors. Furthermore, the reporting is based on misclassification (or other issues, as documented above) on a per employer basis. The employer rate of misclassification may not necessarily correspond to the rate of employee misclassification. For example, if an employer employs 100 employees and misclassifies only one of them, the employer is recorded as a misclassifying employer in the aggregated results.[162]

[156] NELP, Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries, Oct. 2020, available at *https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-Federal-state-treasuries-update-october-2020.*

[157] Lalith de Silva, Adrian Millett, Dominic Rotondi, and William F. Sullivan, ''Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs'' Report of Planmatics, Inc., for U.S. Department of Labor Employment and Training Administration (2000), available at *https://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.*

[158] *Id.* (emphasis added).

[159] NELP, Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries, Policy Brief Oct. 2020, available at *https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-Federal-state-treasuries-update-october-2020/.*

[160] Employment Policy Institute. Carre, Francoise, (In)dependent Contractor Misclassification. *https://www.epi.org/publication/independent-contractor-misclassification.*

[161] Report of the Ohio Attorney General on the Economic Impact of Misclassified Workers for State and Local Governments in Ohio 16–17 (Feb. 18, 2009), available at *https://iiiffc.org/images/pdf/employee_classification/OH%20AG%20Rpt%20on%20Misclass.Workers.2009.pdf.*

[162] If 11 percent of businesses misclassify only one worker as an independent contractor, there are 100 businesses, and each employer has 20 workers, then the total percentage of these misclassified workers is actually 0.5 percent. To find that 11 percent of workers are misclassified as independent contractors, all of the businesses who misclassified workers as independent contractors would need to

This binary approach to data collection on a per employer basis prevents a disambiguation to analyze the actual number of misclassified workers in the labor force. This phenomenon is present is another study conducted by the Wisconsin Department of Revenue cited by NELP, which claimed that ''In 2018, 44% of audited employers were found to be misclassifying workers.'' [163] However, that data seems to be misleading for multiple reasons. First, the quotation does not appear to match the cited source. Appendix 2 of the Wisconsin Workforce Report states that in *2019* the ''percentage of audited employers with misclassified workers'' was 33.3 percent (divergent from the ''44 percent'' that NELP stated). Second, the number of businesses found to be misclassifying workers does not address how many workers were misclassified. The percentage of workers misclassified was 10.6, across all of the audited employers, which is much smaller than either 33 or 44 percent. Finally, all of these estimates are compounded by the targeting bias described earlier, namely that the results only reflect businesses specifically targeted for audits, which presents only a partial picture of the incidence of such misclassification economy-wide.

Ultimately, and as explained above in Section VI(G)(2), commenters' estimates regarding current rates of misclassification—whether accurate or not—have little bearing on how misclassification rates are likely to change as a result of this rule. This rule establishes a clearer test for when a worker is an independent contractor rather than an employee under the FLSA. As such, it would reduce inadvertent misclassification by employers who are confused by the prior test, particularly small businesses that lack resources to hire expensive attorneys. For example, one small business owner commented to explain that ''the ability to understand and properly determine worker status under the FSLA is paramount for small businesses who cannot afford the cost of litigation . . . I believe that with the proper transparency within the regulations, the better the outcome not only for small businesses, but the worker, and ultimately the care recipient. We want to comply, and I have confidence that the proposed [rule] . . . will be highly effective in achieving the desired clarity and certainty.'' A clearer test also means more workers will better understand their rights under the FLSA and can defend those rights through private litigation or complaints to the Department, which should deter unscrupulous employers from intentionally misclassifying them.

In summary, the Department believes that the simplicity and clarity this rule provides will reduce both inadvertent and intentional misclassification, which could produce transfers from employers to employees who are more likely to be correctly classified and given minimum wage and overtime pay. The Department is unable to calculate the exact transfer amount because it lacks reliable metrics on, for example, the existing misclassification rates in the general economy, the precise extent to which this rule improves legal clarity, and how firms will respond to that clarity.

7. Job Conversion

Many commentators expressed concerns that the rule would cause businesses to reclassify their workers as independent contractors, causing those workers to lose the benefits of the FLSA with little gain in return. *See, e.g.,* Washington Center (asserting that ''independent contractors tend to be worse-off than their wage-and-salary counterparts''); National Women's Law Center (''if finalized, this rule will cost workers . . . in the form of reduced compensation''); EPI (estimating that converted ''workers would lose $6,963 per year''). Some of these issues are discussed above. For example, the Department discussed possible earnings effects of workers converting from employee to independent contractor extensively in this section VI(D) and concluded it could not definitively determine whether overall compensation—*i.e.,* earnings plus benefits—for a job that is converted from employee to independent contractor classification in response to this rule is likely to rise or fall on average. Regardless, the Department acknowledges that whether the overall effect of job conversion is likely to be, on balance, positive depends on the individual, reclassified worker, the unique circumstances of the business, and whether or not the working conditions were changed in order to reclassify the worker.

If the converted position is an entirely new position, it is more likely to be filled by one of the many individuals who desire to work as an independent contractor, for example because they value the ''flexibility to choose when and where to work'' that the position may provide more than ''access to a steady income and benefits.'' [164] Such an individual may, for example, discount the value of certain types of compensation associated with employee classification, such as health insurance, that he or she might already enjoy from a different source. The individual may also simply prefer to trade overall compensation for the greater flexibility that often accompanies independent contractor roles. Thus, the lower paid converted new jobs do not necessarily reduce such workers' welfare because they could offer tradeoffs that may be preferable to the workers who are most likely to sort themselves into those positions. On balance, the Department believes conversion of new jobs will have an overall positive impact on workers.

The second category of job conversion discussed above occurs when employers modify their working relationship with existing employees such that they are rendered independent contractors under this rule. As explained above, to act on the legal certainty provided by this rule, the converted position likely would have to provide the worker with substantial control over the work and a meaningful opportunity for profit or loss. The Department believes such conversions will be less common than conversion of future positions because the marginal cost of restructuring an existing work arrangement is greater than altering the arrangement of an unfilled position. And such restructuring would disrupt the preexisting working relationships, which risks negatively impacting worker morale, productivity, and retention. Nonetheless, some conversion of existing positions may occur, and some converted workers may prefer the additional flexibility and earn more by taking advantage of the opportunity for profit or loss that may accompany the conversion. The effect of the rule would be positive for these workers. Other converted workers may prefer the security, stability, and other features of an employment relationship or earn less due to, for example, reduction of employer-provided benefits, employment taxes, and loss of the FLSA's minimum wage and overtime pay. The effect of the rule would be negative for these converted workers, but, as explained above, the Department believes this type of conversion will be rare.

Finally, an employer may reclassify an existing employee position to an independent contractor position

have misclassified 100 percent of their workforce as independent contractors.

[163] Wisconsin Department of Workforce Development, Payroll Fraud and Worker Misclassification Report 16 (2020), available at: *https://dwd.wisconsin.gov/misclassification/pdf/2019-2020-misclassification-task-force-report.pdf.*

[164] *See* Coalition for Workforce Innovation (2020), *supra* note 77.

without meaningfully changing the nature of the job in response to the added legal clarity provided by this rule. Employers could be most confident of such reclassification under this rule if the preexisting job already provided the worker with substantial control over the work and a meaningful opportunity for profit or loss. The Department believes this phenomenon is likely to be rare because the current position would have to be held by an individual who is in business for him- or herself as an economic reality but is nonetheless presently classified as an employee. While many commenters warned that economically dependent employees may be improperly classified as independent contractors, none expressed concern that there is widespread classification of individuals who are in business for themselves as employees.[165] Such employees may nonetheless exist and be converted into independent contractors as a result of this rule. Features of these converted workers' work, for example the level of flexibility and stability, would remain unchanged because the job remains the same. Firms could potentially reclassify existing workers who are already in business for themselves in a manner that reduces overall compensation, but their ability do to so would be constrained because such reduction could negatively impact worker morale, productivity, and retention.[166]

Nonetheless, the sharpening of the economic reality test may negatively impact some current employees who could be reclassified as independent contractors in a manner that results in reduced overall compensation but are not afforded non-pecuniary benefits, for example additional flexibility, in return.[167] EPI and likeminded commenters believe these workers would be ''doing the same job for substantially less compensation as an independent contractor,'' and that this class of worker comprises the majority or even all of the workers impacted by this rule. The Department agrees that some workers could be impacted in this manner, but believes such occasions are likely to be rare because two necessary conditions limit the number of such workers.

First, in order for conversion to have an unambiguously negative affect, a converted worker's overall compensation must be at the minimum wage. Generally, firms impacted by the rule can already directly reduce wages and benefits of their employees—they do not need to convert those employees to independent contractor to achieve these labor cost savings. However, most firms do not reduce their employees' compensation due to the risk of lowering morale, reducing productivity, and causing turnover. That is to say, the labor markets in which most firms operate prevents them from setting compensation without regard for worker preferences. The Department believes that a firms' ability and willingness to reduce its employees' compensation is shaped by the tradeoff between labor savings, on one hand, and the risk of lower productivity and higher turnover, on the other. Clarifying the legal requirement for firms to convert a position from employee to independent contractor status would not make firms any more willing or able to reduce compensation unless the worker was already earning the minimum wage and receiving no benefits. According to BLS, based on CPS data, in 2017 there were 370,000 adult [168] employees paid at the minimum wage, which comprise 0.24 percent of the U.S. labor force.[169] Second and as explained above, the converted worker whose job remains unchanged is likely to already have substantial control over the work and a meaningful opportunity for profit or loss such that he or she can be classified as independent contractor with the most legal certainty this rule can provide.

The Department was unable to determine how many of the 370,000 current minimum wage employees also meet these two criteria, although it expects the number to be low. The Department attempted to identify examples of minimum wage employees who enjoy substantial control over their work and a meaningful opportunity for profit or loss, but was unable to do so. Nor did commenters provide specific data or examples of minimum wage employees who would meet these criteria. Several commenters argued that the Department failed to adequately consider the effects of these possible conversions from employee to independent contractor, or the potential negative effects of misclassification on workers. NELA, for instance, asserted that the NPRM's cost-benefit analysis focused solely on companies rather than workers and further claimed that the Department ''ignores the massive cost to misclassified workers.'' Other commenters stated that the final rule would harm workers by either increasing the rate of misclassification or by allowing employers to reduce wages and benefits of employees who are converted into independent contractors. *See, e.g.,* Washington Center for Equitable Growth (Washington Center) (asserting that ''independent contractors tend to be worse-off than their wage-and-salary counterparts''); Appleseed Center (expressing concern that rule ''will harm workers across a broad spectrum, [but] will have a disproportionate impact on Black and Hispanic workers who are overrepresented in the low-paying jobs where independent contractor misclassification is common''); National Women Law Center (''if finalized, this rule will cost workers . . . in the form of reduced compensation''); EPI (estimating that individual ''workers would lose $6,963 per year'').

As is explained in greater detail below, the Department disagrees with these comments that the rule will broadly harm workers. The Department agrees with the numerous commenters, including nearly all individual commenters who self-identified as freelancer workers, who asserted that the rule would encourage flexible work arrangements and thereby create meaningful—though not easily measurable— value for workers. One

[165] Commenters in the business and freelancer community indicated that—rather than classify independent entrepreneurs as employee in response to legal uncertainty regarding classification—business simply decline to do business with those entrepreneurs in the first place. *See, e.g.,* ASTA (''The prospect of inconsistent determinations has had a chilling effect on the growth of businesses in industries reliant on contract workers which has resulted in fewer opportunities for individuals who choose to offer their services as independent entrepreneurs.''); CPIE (''uncertainty associated with worker classification under the FLSA . . . discourages companies from doing business with independent entrepreneurs''). The effects described by these commenters are unsurprising. For example, it makes little sense for a business to classify a worker as an employee, thus obligating themselves to pay a premium rate for overtime work under the FLSA, if it is the worker and not the business who determines how many hours to work each week. Rather, the business likely would either not hire the worker at all or hire him or her as an employee but insist on controlling hours worked.

[166] Most firms can already reduce the overall compensation of their employees whose wages exceed the minimum wage through more direct means than reclassification as independent contractors but do not do so because of risks regarding morale, productivity, and retention.

[167] Employers and employees could make similar conversions to independent contractor status for reasons outside the sharpening of the economic reality test this rule provides. Such shifts would not be identified as impacts in this analysis because the impetus for such conversion is due to factors other than this rule.

[168] This figure excludes workers under the age of 19. If excluding workers under the age of 24, this figure drops over 40 percent to 221,000. This figure does not include workers who make less than the minimum wage, a vast majority of whom work in the restaurant industry and receive tips for their work. The average earnings of a restaurant worker who receives tips is significantly above the minimum wage. The figure includes part time workers, who would not likely receive overtime compensation due to the limited number of hours they work.

[169] In 2017, there were approximately 152,000,000 workers in the U.S., according to the U.S. Bureau of Labor Statistics.

commenter explained that ''[b]eing an independent worker allows for me to do what I can as a single mother, have flexibility.'' Another stated that ''[f]reelancing has afforded me independence and flexibility and the opportunity to be a productive member of society, and do my best work.'' As a final illustrative example, another commenter asserted that ''[t]he primary value for myself as an independent contractor for my services is the freedom to negotiate, to choose, and the freedom to limit what services I provide, the days, and hours of work, and the price of my labor, unencumbered by the less flexible but more secure employer employee relationship.'' Although some workers in positions converted from employees to independent contractor relationships may receive fewer benefits traditionally associated with classification as employees, the Department believes that this would likely be infrequent and their net effect would not necessarily be negative.[170] Moreover, the Department believes any negative effects would be outweighed by the significant value the rule delivers to other workers and businesses by clarifying, simplifying, and reducing transaction costs around independent contractor arrangements.

No commenter provided evidence or specific cases in which individuals or types of workers would, as a result of this rule, be converted from employees to independent contractors. Because the rule does not change the classification of any employee, any jobs converted without meaningful change would have had to already have satisfied the requirements of bona fide independent contracting arrangements under this rule, with the only change likely being a lower assessed litigation risk for certain businesses. While the number of workers for whom reclassification occurs without bringing them meaningful benefits may not be zero, the Department believes such cases will be rare exceptions. Even if the classification of a worker were to change, the business could face market forces that would likely hold overall compensation steady. Furthermore, businesses would need to take caution that any new contract relationship would neither damage worker relations nor its underlying business model, both of which would likely negatively impact productivity.

In summary, the most common categories of job conversions—*e.g.,* new positions—are likely to positively impact workers. And the category of job conversions that is likely to produce negative impacts—*i.e.,* reclassification of workers without changes to the job—is most likely the rarest. For these reasons, the Department believes benefits to workers from job conversions will, on balance, exceed costs.

E. Costs

The Department considered several costs in evaluating the rule. The Department quantified regulatory familiarization costs and estimated that they will total $370.9 million in Year 1. Other potential costs, including those raised by commentators, were not quantified, for reasons explained in the sections that follow.

1. Regulatory Familiarization Costs

Regulatory familiarization costs represent direct costs to businesses and current independent contractors associated with reviewing the new regulation. To estimate the total regulatory familiarization costs, the Department used (1) the number of establishments, government entities, and current independent contractors; (2) the wage rates for the employees and for the independent contractors reviewing the rule; and (3) the number of hours that it estimates employers and independent contractors will spend reviewing the rule. This section presents the calculation for establishments first and then the calculation for independent contractors.

For a rule like this one, it is not clear whether regulatory familiarization costs are a function of the number of establishments or the number of firms.[171] Presumably, the headquarters of a firm will conduct the regulatory review for businesses with multiple locations, and also may require some locations to familiarize themselves with the regulation at the establishment level. Other firms may either review the rule to consolidate key takeaways for their affiliates or they may rely entirely on outside experts to evaluate the rule and relay the relevant information to their organization (*e.g.,* a chamber of commerce). The Department used the number of establishments to estimate the fundamental pool of regulated entities—which is larger than the number of firms. This assumes that regulatory familiarization occurs at both the headquarters and establishment levels.

There may be differences in familiarization cost by the size of establishments; however, the analysis does not compute different costs for establishments of different sizes. Furthermore, the analysis does not revise down for states where the laws may more stringently limit who qualifies as an independent contractor (such as California) and thus the new rule will have little to no effect on classifications. To estimate the number of establishments incurring regulatory familiarization costs, the Department began by using the Statistics of U.S. Businesses (SUSB) to define the total pool of establishments in the United States.[172] In 2017, the most recent year available, there were 7.86 million establishments. These data were supplemented with the 2017 Census of Government that reports 90,075 local government entities, and 51 state and Federal government entities.[173] The total number of establishments and governments in the universe used for this analysis is 7,950,800.

The applicable universe used by the Department for assessing familiarization costs of this final rule is all establishments that engage independent contractors, which is a subset of the universe of all establishments. In its analyses, the Department estimates the impact of regulatory familiarization based upon assessment of the regulated universe. In several recent rulemakings, the Department estimated that the regulated universe comprised all establishments because the rules were broadly applicable to every employer.[174] For those rules, the Department estimated familiarization costs by assuming each establishment would review each rule. Because this final rule affects only some establishments, *i.e.,*

[170] As explained in more detailed above, this is because most workers can be converted from employee into independent contractor classification only if they are provided with greater control over their work and opportunity for profit or loss based on their initiative or investment. Such flexibility and entrepreneurial opportunities may be more valuable to such workers than potential reduction in benefits associated with classification as employees.

[171] An establishment is commonly understood as a single economic unit, such as a farm, a mine, a factory, or a store, that produces goods or services. Establishments are typically at one physical location and engaged in one, or predominantly one, type of economic activity for which a single industrial classification may be applied. An establishment contrasts with a firm, or a company, which is a business and may consist of one or more establishments. *See* BLS, ''Quarterly Census of Employment and Wages: Concepts,'' *https://www.bls.gov/opub/hom/cew/concepts.htm.*

[172] U.S. Census Bureau, 2017 SUSB Annual Data Tables by Establishment Industry. *https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html.*

[173] U.S. Census Bureau, 2017 Census of Governments. *https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html.*

[174] These include Joint Employer Status under the Fair Labor Standards Act; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; and Regular Rate Under the Fair Labor Standards Act.

those that currently or may in short order face an independent contractor versus employee classification determination, the Department accordingly reduces the estimated pool to better estimate the establishments affected by the rule by assessing regulatory familiarity costs only for those establishments that engage independent contractors.

In 2019, Lim et al. used extensive IRS data to model the independent contractor market, finding that 34.7 percent of firms hire independent contractors.[175] These data are based on annual tax filings, so the dataset includes firms that may contract for only parts of a year. The 34.7 percent of establishments provides a figure of 2,758,928, which forms the foundation of the multiplier used in this analysis.

The Department did not estimate familiarization costs for companies that may decide to work with independent contractors only *after* the new rule is finalized, because they would need to familiarize themselves with the current legal framework even in the absence of this rule.[176] Although firms that do not currently use independent contractors are not counted in this universe of employers, to allow for an error margin, the Department is using a rounded 35 percent of the total number of establishments defined above (7,950,800), resulting in 2,782,780 establishments estimated to incur familiarization costs.

The Pennsylvania Department of Labor & Industry (PA L&I) commented that the Department underestimated the cost of the rule by failing to include businesses that are newly incentivized to consider reclassifying workers to independent contractors. As stated above, even without the new rule any firm that does not currently engage any independent contractors but chooses to do so in the future would have already had to familiarize itself in the baseline case, so this rule does not impact those firms. Since the commenter's point is premised on the fact that the firm may be incentivized to investigate the regulation, it would be reasonable to assume that any firm without independent contractors that reviews the new rule and ultimately decides to hire independent contractors is doing so because the firm believes the new relationship will be beneficial to itself and the independent contractor also believes that the new relationship will be beneficial to him or herself. Such a situation would result in net benefits to the employer that more than fully compensate for any familiarization costs. Notably, and for comparability in estimates, the Department does not add these potential firms to the Benefits section either.

The Department assumes that a Compensation, Benefits, and Job Analysis Specialist (SOC 13–1141) (or a staff member in a similar position) will review the rule.[177] According to the Occupational Employment Statistics (OES), these workers had a mean wage of $33.58 per hour in 2019 (most recent data available). Given the proposed clarification to the Department's interpretation of who is an employee and who is an independent contractor under the FLSA, the Department assumes that it will take on average about 1 hour to review the rule as proposed. The Department believes that an hour, on average, is appropriate, because while some establishments will spend longer than one hour to review the rule, many establishments may rely on third-party summaries of the changes or spend little or no time reviewing the rule. Assuming benefits are paid at a rate of 46 percent of the base wage, and overhead costs are 17 percent of the base wage, the reviewer's effective hourly rate is $54.74; thus, the average cost per establishment conducting regulatory familiarization is $54.74. Therefore, regulatory familiarization costs to businesses in Year 1 are estimated to be $152.3 million ($54.74 × 2,782,780) in 2019 dollars.

For regulatory familiarization costs for independent contractors, the Department used its estimate of 18.9 million independent contractors and assumed each independent contractor will spend 15 minutes to review the regulation. The average time spent by independent contractors is estimated to be smaller than for establishments. This difference is in part because the Department believes independent contractors are likely to rely on summaries of the key elements of the rule change published by the Department, worker advocacy groups, media outlets, and accountancy and consultancy firms, as has occurred with other rulemakings. Furthermore, the repercussions for independent contractors are smaller (*i.e.,* the litigation costs, damages, and penalties associated with misclassification tend to fall on establishments).[178] This time is valued at $46.36, which is the mean hourly wage rate for independent contractors in the CWS, $27.27, with an additional 46 percent benefits and 17 percent for overhead, then updated to 2019 dollars. Therefore, regulatory familiarization costs to independent contractors in Year 1 are estimated to be $218.6 million ($46.36 × 15 minutes × 18.9 million).

The estimate of 18.9 million independent contractors captures the universe of workers over a one-year period. Using this figure for the overall cost estimate results in an artificially high value because it includes workers who would have otherwise been included in the baseline case without the rule and thus spent time familiarizing themselves with the legal framework in the matter of course, without incurring a supplementary cost. Furthermore, the Department believes that it is probable that independent contractors would review the regulation only when they had reason to believe that the benefits would outweigh the costs incurred in familiarizing themselves with the rule, and since this analysis does not attempt to calculate those economic benefits it is possible that the costs presented in this section are overestimated.[179]

The total one-time regulatory familiarization costs for establishments and independent contractors are estimated to be $370.9 million. Regulatory familiarization costs in future years are assumed to be de minimis. Similar to the baseline case for employers, independent contractors would continue to familiarize themselves with the applicable legal framework in the absence of the rule, so this rulemaking—anticipated to provide more clarity—is not expected to impose costs after the first year.[180] This

[175] Table 10: Firm sample summary statistics by year (2001–2015), *https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf.*

[176] An added dimension is that the final rule is expected to provide significant clarity, which would result in time and cost savings (net of regulatory familiarization costs) for those outside the pool of firms with existing independent contractor relationships. These (net) cost savings are not included in this analysis, consistent with this analysis' treatment of resulting growth in the independent contractor universe.

[177] A Compensation/Benefits Specialist ensures company compliance with Federal and state laws, including reporting requirements; evaluates job positions, determining classification, exempt or non-exempt status, and salary; plans, develops, evaluates, improves, and communicates methods and techniques for selecting, promoting, compensating, evaluating, and training workers. *See* BLS, ''13–1141 Compensation, Benefits, and Job Analysis Specialists,'' *https://www.bls.gov/oes/current/oes131141.htm.*

[178] An independent contractor that hires independent contractors would already be captured in the ''establishment'' calculation.

[179] For example, independent contractors in states with classification frameworks that are known to be more stringent than the existing FLSA classification framework, such as in California, may not review the rule since it would be unlikely to affect their classification.

[180] As explained below, the Department considers that the regulation may produce benefits along this dimension in future years by simplifying the regulatory environment.

amounts to a 10-year annualized cost of $43.5 million at a discount rate of 3 percent or $52.8 million at a discount rate of 7 percent.

SWACCA commented that regulatory familiarization costs were underestimated because they ''would not only be imposed upon adoption of a final rule but would be ongoing as stakeholders begin to understand whether and how it will be applied.'' Additionally, they asserted the costs for businesses to familiarize themselves with the new guidance would exceed the cost of familiarization for the existing guidance, a claim that the commenter did not substantiate with data. The Department disagrees with this assertion. The rule is expected to reduce the time spent analyzing how the economic reality test's factors interact. Accordingly, the Department reiterates that incremental regulatory familiarization costs in future years are expected to be *de minimis.*

A number of commenters expressed support for the cost estimates. The CGO states that, ''As currently written, the proposed rule carefully quantifies the cost savings of reduced litigation and increased clarity.'' AFPF posited that, if anything, the calculations would tend to reflect ''an overstatement of regulatory familiarization costs.''

2. Other Costs [181]

It is possible this rule will result in costs beyond the above described familiarization costs. In the NPRM, the Department invited comments and data on potential other costs of this rule. The Department received comments responsive to these requests which generally fell into seven categories: Impacts to workers; impacts to tax revenues; impacts on competition; impacts on income inequality and to minorities and women; tax filing; implementation; and impacts on income stability. The Department evaluated all of the potential costs that were identified, and examined many of the citations provided. In general, the commenters did not provide ample data or other evidence to support their claims, and, upon review, the Department was unable to confirm or substantiate the proposed cost categories in its own research. Therefore, in this section of the analysis, the Department addresses the points raised and discusses the qualitative merits, but does not quantify estimates for inclusion in its top line figures.[182] Detailed explanations are presented in each category below, including discussion of the range of uncertainties and data limitations identified.

a. Additional Impacts to Workers

Several commenters asserted that the NPRM's discussion of costs did not include a discussion of effects on workers beyond minimum wage and overtime pay. Ironworkers Local Union 7 stressed the importance of benefits such as workers' compensation for the dangerous nature of the work of their members and other construction workers. The Center for Law and Social Policy (CLASP) noted that the rule could also impact other benefits based on the FLSA's definition of employment, such as access to paid sick leave in general and under the Families First Coronavirus Response Act (FFCRA). The Washington Center, among others, contended it may also impact workers' rights to join a union. The International Brotherhood of Teamsters commented that the liquidated damages remedy for willful or bad faith violations of the FLSA is not available to workers who are classified as independent contractors. Other commenters asserted that independent contractors are also not protected by the Federal anti-discrimination and health and safety statutes, and that the Department failed to consider this effect.[183]

These potential impacts do not change the Department's overarching view that workers as a whole will be better off as a result of this rule, even if some workers may not be better off. Generally speaking, the above commenters raise points that fundamentally rest on the assumption that independent contractors cannot adequately assess their risks, needs, and goals. Furthermore, these commentators seem to assume that the listed features could be obtained by workers with no cost to the worker. The Department does not agree with such assessments. The Independent Women's Forum stated that the flexibility afforded by independent contracting is especially ''crucial for women who are the primary caregivers in their households.'' Palagashvili; Independent Women's Forum (''Women find independent contracting appealing because of the flexibility, autonomy, and freedom it provides.''). Nor did individual freelancer commenters, who repeatedly affirmed their ability to make rational decisions for themselves and their own businesses. One such commenter stated that ''I prefer the option to make my own schedule and decide how I want to proceed in making my money at my own discretion.'' Another explained that, ''[a]s an independent contractor I am free to choose when and where I work. This is important to me as a caregiver for elderly relatives.'' As a final illustrative example, a freelancer stated that ''I have chosen this profession because of the freedom and flexibility it affords me. I also can earn more freelancing than I could working in a similar full-time job [. . .]. I am a far better judge of what is good for me than a politician in Washington.'' Independent workers are a bedrock of the U.S. economy and are acutely aware of their own values and needs. Fundamental to being an independent contractor is the ability to control one's own work, which enables workers to be the deciding factor in accepting or declining work that may be risky or not as rewarding. The commenters above did not cite or offer data to support their assumption that employees covered by the FLSA are intrinsically better off compared to genuine independent contractors who are not covered by the FLSA. Several commenters, notably CLASP and NWLC, who submitted comments related to the pandemic do not address the abundant data demonstrating that access to independent contracting has been essential for many workers attempting to balance responsibilities, especially for women and caregivers. Accordingly, to the extent the final rule will increase the frequency of independent contracting, the Department believes that workers will, on net, benefit from that option.

[181] Various commenters to the NPRM raised points that they considered ''costs,'' although those points may more accurately be defined as transfers under Executive Order 12866. To clearly address these points, the Department decided to address the following areas with the language used by commenters. For further discussion of related impacts, please see the Potential Transfers section.

[182] In some cases, commenters raised points that may very well impact certain individuals in specialized circumstances, but which are not, when aggregated across the economy as a whole, cumulatively significant or representative.

[183] The Department has not conducted a thorough review of discrimination law at the Federal or state level for the purposes of this rulemaking, but notes that independent contractors are protected by at least some Federal anti-discrimination laws. *See, e.g.,* 42 U.S.C. 1981. Further, the scope of these laws is not dependent on employee status under the FLSA. *See, e.g., Gulino* v. *New York State Educ. Dep't,* 460 F.3d 361, 379 (2d Cir. 2006) (''[T]he Supreme Court has given us guidelines for discerning the existence of an employment relationship [in the race-discrimination context]: Traditional indicators of employment under the common law of agency.''); *Weary* v. *Cochran,* 377 F.3d 522, 524 (6th Cir. 2004) (''[T]he proper test to apply in determining whether a hired party is an employee or an independent contractor under the [Age Discrimination in Employment] Act is the 'common law agency test.' '').

b. Impacts to Tax Revenue and Public Assistance

Some commenters asserted that the rule will either reduce tax revenue or increase public assistance. For example, some commenters pointed out that low-income workers who are classified as independent contractors are often forced to rely on public assistance programs. The UFCW cites a study finding 15 percent of platform workers in the San Francisco area receive some form of public support (*e.g.* food stamps, housing assistance) and 30 percent were on state public-access health insurance.[184] This report did not, however, compare this finding with the extent to which low-income employees rely on public assistance. The Department notes that public assistance is available to low-income individual whether they are employees or independent contractors. An increase in independent contracting will not necessarily lead to increased public assistance expenditures. To the contrary, if independent contracting, even at a low income, is the alternative to unemployment or nonparticipation in the labor force, then it would reduce means-tested public assistance expenditures. Several individual commenters suggested that they would not be working at all but for independent contractor opportunities. One commenter said, ''I am an independent contractor, *i.e.* business owner; I am self-employed. I would not be able to work in any capacity, other than self-employed.'' Another explained, ''I am 71 years old and cannot (and will not) take regular employment. Earning an income from my home is safer, more effective and more satisfying.'' As a final illustrative example, a woman explained that ''[a]s a single mother trying to go back to school I have day and night classes. Having a regular job during this time be [sic] very challenging to meet my school hours.'' Thus, making it easier for individuals to work as independent contractors may reduce the burden on public assistance. Furthermore, since this RIA focuses on the changes at the margin based on increased clarity of the classification factors, the concerns raised by the studies cited by these commenters would not necessarily apply to those this rule impacts.

Several commenters noted that taxpayers funded unemployment payments for independent contractors through the Pandemic Unemployment Assistance (PUA) program. SWACCA noted that more than 11 million self-employed individuals have received assistance from PUA.[185] The nationwide response to the COVID–19 pandemic was intentionally robust. PUA assistance was funded by Congress in the CARES Act.

Several commenters noted that any shift from employees to independent contractors will result in lost tax revenue. Specifically, the Michigan Regional Council of Carpenters cites estimates of the loss in taxes in Michigan and other states due to misclassification.[186] Notably, misclassified workers are not the same as independent contractors. In fact, this rule clarifies the classification of workers and is expected to result in fewer total cases of misclassified workers. The Department does not agree with the assumptions about the U.S. labor market held by commenters to this rule that reference studies on the cost of misclassified workers. EPI estimated that the increase in workers classified as independent contractors will lead to a transfer of at least $750 million annually from social insurance funds. EPI's estimate is predicated on an assumption that eligibility for independent contractors to receive unemployment benefits ''will occur in future recessions.'' The unprecedented CARES Act funded unemployment benefits through PUA for the first time in history. EPI's entire estimate rests on such unprecedented relief becoming commonplace, a view which the Department does not share. The Washington Center cites a study by Harvard Law School's Labor and Worklife program that ''found that between 2013 and 2017, the state of Washington lost $152 million in unemployment taxes and the Federal government lost $299 million in payroll taxes due to worker misclassification in the state.'' [187] Again, worker misclassification is erroneously compared to independent contractors. Further, the majority of these estimates of lost revenue are due to an assumption that freelance workers do not report their full earnings, which is a criminal offense. A letter from seven Congressional Representatives cited a 1984 IRS estimate that misclassification cost the Federal government $3.72 billion (adjusted to 2019 dollars), nearly 60 percent of which was from misclassified workers failing to pay income taxes and the remainder was due to failure to pay taxes used to fund social insurance programs. Once again, this comment failed to meaningfully explain how the studies it cites can be extrapolated across independent contractors.

The Department notes that certain employer required taxes, such as unemployment insurance and workers' compensation, are not required for independent contractors, and thus the associated tax revenue will decrease if more individuals choose to work as independent contractors. However, the lack of transfer means that the worker keeps more money, which may be saved to provide for periods of unemployment. Additionally, these are transfer programs where the benefits are paid to the workers who pay into the program through their employers. Thus, if independent contractors are not eligible to participate in these program, government expenditures would also decrease. Therefore, providing unemployment benefit or workers' compensation to independent contractors is generally not a cost to state and local governments. To demonstrate, consider unemployment programs, which are a type of insurance. Reduced unemployment taxes are generally offset by reduced unemployment benefits. The only direct cost would be if workers who no longer pay into these programs continue to receive benefits. These direct costs are expected to be small.

Government revenue from other taxes, such as income and Medicare taxes, may go up or down as a result of this rulemaking depending on the total income of employers, employees, and independent contractors. However, a decrease in tax revenue due to a failure of some independent contractors to fully pay their required taxes is not a cost attributable to the Department's rulemaking revising the standards for independent contractor status under a

[184] C. Benner, E. Johansson, K. Feng, and H. Witt. ''On-Demand and On the Edge: Ride-Hailing & Delivery Workers in San Francisco'' (May 5, 2020), *https://transform.ucsc.edu/on-demand-and-on-the-edge.*

[185] Unemployment Insurance Weekly Claims Report (October 15, 2020), *https://oui.doleta.gov/press/2020/101520.pdf.*

[186] D. Belman and R. Block, ''Informing the Debate: The Social and Economic Costs of Misclassification in the Michigan Construction Industry,'' Institute for Public Policy and Social Research, Michigan State University (2008), *http://ippsr.msu.edu/publications/ARMisClass.pdf.* F. Carre, ''(In)dependent Contractor Misclassification,'' EPI Briefing Paper #403 (June 8, 2015), *https://files.epi.org/pdf/87595.pdf.* O. Cooke, D. Figart, J. Froonjian, and K. Sloane, ''The Underground Construction Economy in New Jersey,'' Stockton University (2016), *https://www.mcofnj.org/wp-content/uploads/2018/05/Underground-Construction-Economy-Summary-June-2016.pdf.*

[187] L. Xu and M. Erlich, ''Economic Consequences of Misclassification in the State of Washington.'' Harvard Law School Labor and Worklife Program (2019), *https://lwp.law.harvard.edu/news/worker-misclassification-washington-state-leads-millions-revenue-losses-new-harvard-report.*

Federal law separate and apart from any tax law.

Finally, the Department notes that overall state and local tax revenue may increase as a result of the efficiency and flexibility this rule promotes. The Department believes that legal clarity provided by this rule will result in, among other things, lower regulatory compliance and litigation costs, more efficient and innovative work arrangements, and new jobs for individuals who otherwise would not work. All of this could increase firms' profits and workers' incomes, which results in a larger pool from which state and local taxes are drawn. The overall positive effect on state and local tax revenue may dwarf, for example, any reduction in unemployment insurance or workers compensation taxes. The Department, however, declines to quantify net effects on state and local tax revenue because it believe any such attempt to do so would require too many assumptions.

c. Fair Competition

Several commenters stated that expanding the scope of independent contractors will ''fuel a race to the bottom,'' where companies will feel pressure to classify workers as independent contractor to reduce labor costs in order to compete in their market. UPS claimed that companies misclassifying workers as independent contractors externalize their costs and hurt other businesses through unfair competition.[188] The Department believes that this will be unlikely because the risks of losing workers likely prevents businesses from reducing overall compensation, which includes the fully burdened wage rate (*i.e.,* with taxes and benefits included). Any decrease in compensation below this level would likely result in firms not being able to hire adequate labor (either quantity or quality). This rule does not, as some commenters claimed, expand the scope of permissible independent contracting arrangements but rather clarifies and sharpens the test for determining proper classification, which is expected to benefit both workers and firms.

d. Income Inequality and Impacts on Minorities and Women

Some commenters asserted that the rule could increase racial and gender income inequality. NWLC wrote that additional protections other than minimum wage and overtime pay afforded by the FLSA were particularly important for working women, such as ''employer obligations to accommodate breastfeeding workers'' [189] and ''protections against pay discrimination.'' The Washington Center cited a study on outsourcing that it believed shows independent contracting ''has contributed to increased wage inequality in the United States.'' [190] But the cited study actually found something different: ''the increased concentration of typically low-wage occupations over time can be explained by changes in the characteristics of establishments *employing* these occupations.'' [191] In other words, the study linked wage inequality to employers outsourcing jobs to other employers that paid lower wages, and made no attempt to isolate the effects of independent contracting. The evidence discussed in this analysis shows that independent contractors often earn more than their employee counterparts further undermines the commenter's assertion.

UFCW wrote that ''[t]he proposed regulation fails to address its potential impact on people of color who are overrepresented in low-wage independent contractor positions such as app-based platform work.'' This rule clarifies for app-based platforms how to properly classify workers, thereby reducing regulatory compliance, litigation, and transaction costs. Some of these cost savings could be shared by app-based workers in the form of increased earnings, bonuses, or more job opportunities.[192] To the extent that certain racial groups make up a disproportionate share of app-based workers, those groups will also enjoy a disproportionate share of benefits. Regarding gender-based inequality in the gig economy, a recent NBER study found that the gender wage gap among on-demand rideshare workers is lower than that of the rest of the economy and is ''entirely attributed'' to differences in experience and preferences.[193] The NBER study specifically found that ''discrimination is *not* creating a gender gap in this setting,'' and ''no other paper has ever estimated such a precise 'zero' gender gap in any setting.'' [194] Several commenters cited other studies that document measurable benefits of independent contractor opportunities for women. Dr. Liya Palagashvili provided a lengthy review of the literature on the beneficial impacts of independent contract work for women. She cited a study that finds that women are the main caregivers at home, and 96 percent of women ''indicate that the primary benefit of engaging in platform-economy work is the flexible working hours.'' *See also* Independent Women's Forum (''Women find independent contracting appealing because of the flexibility, autonomy, and freedom it provides.''). A McKinsey Global Institute study, discussed in an earlier section, found that independent work offers caregivers, who are predominantly women, access to economic opportunity they would otherwise not have, concluding that ''[t]his type of flexibility can ease the burden on financially stressed households facing logistical challenges.'' Dr. Palagashvili cited numerous other studies that are consistent in their findings: Women are very much attracted to work arrangements that offer flexibility, including one that finds ''75 percent of self-identified homemakers, or stay-at-home mothers in the United States, indicated they would be likely to return to work if they were to have flexible options.'' These studies offer data based on primary research, and several sources are based on economy-wide survey data.

Dr. Palagashvili's comments are supported by many individual women who commented to affirm that independent contracting provides necessary flexibility to balance their work and life priorities. One woman explained that ''[a]s a work-at-home mom, I ramped up my business to coincide with the time I had available while raising my kids. I worked during their nap times, and then added more hours as they went to school.'' Another

[188] UPS does not use independent contractors for some of the roles or occupations that its largest competitor, FedEx, does. FedEx relies heavily on independent contractors for its business model, and recently won a legal case against the National Labor Relations Board, in which the court found that certain FedEx drivers were legitimately classified as independent contractors under the NLRA. *See FedEx Home Delivery* v. *NLRB,* 893 F.3d 1123No. 14–1196 (D.C. Cir. 2017).

[189] Independent contractor relationships provide flexibility to accommodate individual worker needs, such as child care and breastfeeding.

[190] Including E. Handwerker and others. ''Increased Concentration of Occupations, Outsourcing, and Growing Wage Inequality in the United States,'' (2015), *https://www.semanticscholar.org/paper/Increased-Concentration-of-Occupations%2C-and-Growing-Handwerker-Abraham/f7d0d2c9cfcbf53f961bb07a2542abefe4be84c0?p2df.*

[191] *Id.* at 13 (emphasis added).

[192] If, for example, the platform were to transfer some of these increased earnings to consumers in the form of discounts, the demand quantity for the services (and thus the job opportunities for the ICs) could increase.

[193] Cody Cook, et al., The Gender Earnings Gap in the Gig Economy: Evidence From Over a Million Rideshare Drivers, NBER Working Paper No. 24732, June 2018, available at *https://www.nber.org/system/files/working_papers/w24732/w24732.pdf.*

[194] *Id.* at 14.

stated, ''I have been a military spouse for 17 years and the ability to work as an independent contractor has been invaluable to my family. Through every move, my job comes with me; all I need is a computer and access to the internet. Had I been forced to find a new job with each [change of station], our family would have had some very tough times.'' As a final illustrative example, a woman informed the Department that, ''I have been an independent contractor for more than 3 decades; it helped me as a single mother and now it helps me help the kids with my granddaughter.''

The Department agrees with the above commenters and data indicating that women would benefit from greater access to independent contracting opportunities. By clarifying how workers can be properly classified as an independent contractor, this rule promotes the formation of such opportunities.

e. Tax Filing Costs

The AFL–CIO and the Washington Center commented that independent contractors have more time-intensive accounting and tax filing processes, and the Department should address these costs. The Washington Center claims that it is inappropriate to quantify time savings from increased clarity but not to quantify the increased time necessary to file taxes, which they estimate to amount to $832.3 million annually. Even assuming independent contractors spent more on their tax filings than employees, the Washington Center's estimate is based on average costs for all business filers in the country, drawn from the IRS's ''Estimated Average Taxpayer Burden for Individuals by Activity'' Table in its 2019 instructions on form 1040.[195] This group of business filers includes anyone with income from rental property, royalties, S corporation earnings, farming, and other business ventures, which dramatically expands the scope beyond independent contractors. The Washington Center neither attempts to adjust for this overestimate nor explain how one might disentangle the conflated grouping, so the Department was unable to assess whether a real impact can be expected. The Department noted in the NPRM that it did not attempt to quantify the numerous benefits that it expects from the increased clarity regarding classification. Instead, it assumed that market actors operate in their own best interest, noting that for those workers that choose to pursue work as an independent contractor, as opposed to an employee, and file taxes as such it can be assumed that they have correctly determined for themselves that the benefits outweigh the costs, including any costs associated with increased time spent on tax filings.[196]

f. Implementation Costs

The PA L&I asserted that the Department ''provided zero estimates for the cost of actual implementation of the regulation.'' PA L&I also claimed that implementation costs include reclassifying current workers and identifying the employment status of new hires. Concerning the first, the Department maintains that workers will only be reclassified when the benefits to businesses outweigh the costs. Concerning the later, the Department believes there will be a cost savings when new employment relationships must be analyzed (see following section on cost savings). The Department believes the implementation costs will be *de minimis.*

g. Income Stability

Several commenters asserted that independent contracting is associated with more volatile earnings. The Washington Center asserted that income stability is important for these workers and their families. UFCW cited literature finding that inconsistent earnings are one of the most reported disadvantages to gig work.[197]

The Department agrees that income volatility may be problematic for some workers and may require better money management to smooth consumption over periods of higher and lower income. However, as stated above, the Department assumes that market actors operate in their own best interest, and if a worker chooses to pursue work as an independent contractor, as opposed to an employee, it can be assumed that the worker has determined for himself or herself that the benefits outweigh the costs. The Department also believes income security is best achieved by removing barriers that prevent laid-off Americans from finding paid work, including as independent contractors. This lesson may be more important in the wake of the COVID–19 emergency, a point that has been presented by hundreds of academics.[198] Additionally, some literature indicates that many independent contractors value flexibility over income stability. CWI submitted a survey they conducted that found 61 percent of independent contractors prefer the ''flexibility to choose when and where to work'' over ''having access to a steady income and benefits.'' [199]

F. Cost Savings

This final rule is expected to result in cost savings to firms and workers. While the Department believes that there are multiple areas where firms and workers may experience cost savings, the Department has quantified only two: The cost savings from increased clarity and reduced litigation. The Department estimates that annual cost savings associated with this rule would be $495.9 million ($447.2 million in increased clarity + $48.7 million in avoided litigation costs). Other areas of anticipated cost savings were not estimated due to uncertainties or data limitations. The Department believe the rule will result in the following additional cost savings, which are discussed qualitatively: Making labor market more efficient; improving worker autonomy satisfaction; providing an alternate source of income for some workers during the pandemic; and facilitating independent contractors' ability to work for multiple customers.

While public comments specific to parts of the calculations are addressed at the corresponding location throughout this section, some commenters submitted general comments about the cost savings estimates. Several commenters offered supportive comments. The CGO said that ''the proposed rule carefully quantifies the cost savings of reduced litigation and increased clarity.'' The AFPF also expressed support but suggested that cost-savings may be underestimated. Conversely, other commenters objected to the estimated cost savings, including that it was inappropriate to quantify the potential cost savings from this rule but not quantify the costs to workers. Representative Pramila Jayapal asserted that the Department's analysis did not include ''any serious, fact-based argument as to why this rules change would be of benefit to the workers who would be most impacted by this rule change.'' Other commenters offered equivocal comments, including one

[195] Based on the difference in estimates of burdens for businesses and nonbusinesses from the table ''Estimated Average Taxpayer Burden for Individuals by Activity'' in U.S. Internal Revenue Services, ''1040 and 1040–SR Instructions,'' p. 101, (2019), *https://www.irs.gov/pub/irs-pdf/i1040gi.pdf.*

[196] All workers are required to file with the IRS regardless of classification. The time and cost of tax filing is highly dependent on the individual circumstances of the workers. The Department believes workers are able to best assess the costs and benefits of tax filing.

[197] Prudential Research, ''Gig Workers in America'' (2017), *https://www.prudential.com/media/managed/documents/rp/Gig_Economy_Whitepaper.pdf.*

[198] *See* 151 Ph.D. Economists and Political Scientists in California, ''Open Letter to Suspend California AB–5'' (April 14, 2020).

[199] Coalition for Workforce Innovation (2020), *supra* note 77.

individual who noted that ''point made about less litigation is a valid one,'' but countered that the ''cost-savings pointed out seem to fall only on the side of the business/employer.''

1. Increased Clarity

This final rule is expected to increase clarity concerning whether a worker is classified as an employee or as an independent contractor under the FLSA. This would reduce the burden faced by employers, potential employers, and workers in understanding the distinction and how the working relationship should be classified. It is unclear exactly how much time would be saved, but the Department provides some quantitative estimates to provide a sense of the magnitude.

The importance of increased clarity is noted by a study coauthored and cited by the Society for Human Resource Management (SHRM) that found human resources professionals' largest challenge concerning external workers that they would like to see resolved is the legal ambiguity regarding the use and management of external workers.[200] Commenters from the business community agreed with the Department that the rule would improve legal clarity. *See, e.g.,* U.S. Chamber of Commerce; CWI; WPI; ATA; NRF; National Restaurant Association. Groups that represent freelancers and individual freelancers who commented also believe this rule would improve legal clarity. *See, e.g.,* CPIE; Fight for Freelancers. However, several commenters dispute the Department's claim that the rule will increase clarity, with some focusing on specific industries. The TRLA stated that ''the proposed rule unnecessarily muddies the waters with respect to the farm labor market'' because they believe it contradicts ''Federal courts' interpretation of a Federal statute.'' The State AGs also stated this rule will create confusion because ''many jurisdictions have applied the economic reality test'' to distinguish between employees and independent contractors for decades.[201]

The Department expects this rule to produce beneficial cost savings by clarifying the classification process. To quantify this benefit, the following variables need to be defined and estimated: (1) The number of new employer-worker relationships being assessed to determine the appropriate classification; (2) the amount of time saved per assessment; and (3) an average wage rate for the time spent. The Department estimates this will result in a $447.2 million in savings annually.

The Department began with its estimate of the number of current independent contractors as the basis for estimating the number of new relationships. As discussed in section VI(C), according to the CWS, there are 10.6 million workers who are independent contractors on their primary job. Adjusting this figure to account for independent contractors on their secondary job results in 18.9 million independent contractors. According to Lim et al. (2019), in 2016 the average number of 1099–MISC forms issued per independent contractor was 1.43. Therefore, the Department assumes the average independent contractor has 1.43 jobs per year.[202] This number does not account for the workers who do not file taxes, a recognized limitation in the cited study. Because it is unclear whether those who do not file taxes would have a higher or lower number of jobs per year, the Department does not believe that this limitation biases the estimate in either direction. Multiplying these two numbers results in an estimated 27.0 million new independent contractor relationships each year.[203]

The independent contracting sector is characterized by churn. In their annual *State of Independence in America* 2019 report, MBO Partners, a leading American staffing firm, finds that 47.8 percent of U.S. adults reported working as an independent contractor at some point in their career; they estimate that figure will reach 53 percent in the next five years.[204] This fits with the range of estimates for the size of the independent contractor universe presented in section VI(C). Thus, it is assumed that over the ten-year time horizon of this analysis, millions of Americans will choose independent contractor work either for the first time or return to it. This churn is not explicitly estimated for use in this analysis, but it provides a qualitative rationale for not attempting to taper the expected size of the independent contractor universe over time.

A subset of new independent contractor relationships may have time savings associated with the final rule. Such a reduction is difficult to quantify because it is unclear how many establishments and independent contractors will realize benefits of increased clarity. It is also possible that the increased clarity of the classification process will lead to compound effects that generate far greater benefits over time. Nonetheless, because it is possible that only a subset of contracts would receive the cost savings associated with increased clarity, the Department has reduced the number of contracts in the estimate by 25 percent. This results in 20.2 million contracts with cost savings to both the employer and the independent contractor.[205]

In her comment, Representative Pramila Jayapal questioned the breadth of the time savings benefit. She claimed that the only beneficiaries of this rulemaking would be large, repeat players that frequently misclassify workers. It is unclear what data Representative Jayapal relied on to come to this conclusion. Furthermore, Representative Jayapal largely ignores the millions of properly classified independent contractors that will benefit from added regulatory clarity. The Department disagrees that the cost savings benefits will be limited to large, repeat players. Other comments concur with the Department's view, supported by data-backed arguments that the expect the rule to enable access to flexible work for caregivers responding to the pandemic, enable workers to readily supplement their income, and unlock the potential of the growing tech sector. Farren and Mitchell, of the Mercatus Center, assert that the rule, ''builds on existing precedent and serves largely as a synthesis and clarification of previous economic reality tests, rather than implementing any sort of radical change,'' adding that independent contractors will likely ''develop more productive economic relationships.''

Per each new contract with time savings, the Department has assumed that employers would save 20 minutes of time and independent contractors

[200] SHRM and SAP SuccessFactors. ''Want Your Business to Thrive? Cultivate Your External Talent'' (2019), *https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/external-workers.aspx.*

[201] While state-imposed requirements may influence the use of flexibilities provided by this rule, and could impact the number of entities and workers affected, the Department does not possess the requisite data to estimate the number of states that would implement measures or the magnitude of their impact on the universe of independent contractors considered in this analysis.

[202] Lim et al., *supra* note 75, at 61.

[203] The Department did not incorporate estimates of potential growth in independent contracting due to uncertainty. For example, the trend in independent contracting varies significantly based on the source. Additionally, the impact of this rule on the prevalence of independent contracting is uncertain. Lastly, state laws, such as those in California discussed below, may have significant impacts on the prevalence of independent contracting, which would make historical growth rates potentially inappropriate.

[204] MBO Partners (2019), *supra* note 131.

[205] 18.9 million independent contractors × 1.43 contracts per year × (1 − 0.25 possible reduction in clarity benefits) = 20.2 million.

would save 5 minutes.[206] These numbers are small because they represent the marginal time savings for each contract, not the entire time necessary to identify whether an independent contractor relationship holds.

The Washington Center commented, ''[t]here is no transparency into what surveys or studies were used to quantify the current amount of time individuals and businesses currently spend on independent contractor regulatory familiarization. Further, there was no attempt to explain with any degree of accuracy how this rule will change that time spent.'' The Washington Center seems to misunderstand the analysis presented. The time savings variables are estimates of how the clarity provided in the rule will facilitate the contracting process. Estimating administrative time spend due to comply with government laws and regulations is a typical component of economic analyses and is often informed by consultation with subject matter experts. The Department requested data to further refine its estimate, but did not receive any. Notwithstanding, numerous commenters expressed support of the analysis the Department presented.

The UFCW believes that there will be an increase in time to assess employment status because employers and independent contractors will now evaluate the classification under both current precedent and the definition laid out in this rule; ''courts may decide to ignore the DOL's new interpretation, meaning that companies and workers would now analyze their FLSA independent contractor determinations under current precedent and also the agency's proposed non-binding new test.'' The Department disagrees that courts will ignore the final rule. The RIA already includes a familiarization cost for the new rule, and, in the baseline, establishments are assumed to be familiar with the status quo environment. Accordingly, additional costs as stated in this comment are likely to be insignificant.

To estimate the cost savings due to the increased clarity this rule provides, the Department applies the following estimates. For employers, this time is valued at a loaded hourly wage rate of $54.74. This is the mean hourly rate of Compensation, Benefits & Job Analysis Specialists (13–1141) from the OES multiplied by 1.63 to account for benefits and overhead. For independent contractors, this time is valued at $46.36 per hour (mean wage rate for independent contractors in the CWS of $27.29 with the amount of benefits and overhead paid by employers for employees, then adjusted to 2019 dollars using the GDP deflator).

Using these numbers, the Department estimates that employers will save $369.0 million annually and independent contractors will save $78.1 million annually due to increased clarity (Table 3). In sum, this is estimated to be a $447.1 million savings. The Department assumes the parameters used in this cost savings estimate will remain constant over time. This assumes no growth in independent contracting, no real wage growth, and no subsequent innovation in the employer-worker relationship. These assumptions facilitate simplicity of calculation.[207] The annualized savings over both a 10-year horizon and in perpetuity, with both the 3 percent and 7 percent discount rates is $447.1 million.

TABLE 3—COST SAVINGS FOR INCREASED CLARITY TO EMPLOYERS AND INDEPENDENT CONTRACTORS

Parameter	Value
Number of new relationships (per year):	
Independent contractors	18,858,000
Number of jobs per contractor	1.43
New independent contractor jobs	26,966,940
Adjustment factor	75%
Total	20,225,205
Time savings per job (minutes):	
Employers	20
Independent contractors	5
Value of time:	
Employers	$54.74
Independent contractors	$46.36
Total savings:	
Employers	$369,011,556
Independent contractors	$78,137,248
Total	$447,148,804

In addition to increased clarity when assessing whether each relationship qualifies as an independent contractor or employment relationship, there may also be upfront time savings for new entrants who must familiarize themselves with the standard for being an employee as compared to an independent contractor, and who now have clearer guidance to aid in that understanding. This would apply to new independent contractors, new establishments, and current establishments that are considering hiring independent contractors for the first time. The Department did not quantify this benefit due to uncertainty and the difficulty of determining reliable variables for the number of new relationships that might occur due to the rule. However, such benefits are expected to be real and significant.

2. Reduced Litigation

The changes included in this rule are expected to result in decreased litigation due to increased clarity and reduced misclassification. The methodology of this section mirrors previous final rules promulgated in recent years.[208] The rule would clarify to stakeholders how to distinguish between employees and independent contractors under the Act. The increased clarity is expected to result in fewer independent contractor misclassification legal disputes, and lower litigation costs. The Department estimates that $48.7 million in litigation costs related to independent contractor disputes will be avoided per year as a result of this rule. This may be a lower-bound estimate, reasons for which are described in more detail below.

The Department estimates litigation cost savings as being equal to an estimate of the number of cases avoided as a result of the rule multiplied by the average litigation cost per case.

Number of Cases Avoided

According to the Public Access to Court Records (PACER) system, there were 7,238 Federal cases relating to the FLSA closed in 2019.[209] The Department estimates that 9.4 percent of these cases relate to independent contractor status.[210]

For the NPRM, to determine this percentage of cases relating to independent contracting, the Department reviewed a previous random sample of FLSA cases closed in 2014.[211] For this final rule, the

[206] These time savings are based on a 33 percent assumed reduction in the estimated familiarization time per contract for both independent contractors (15 minutes) and employers (1 hour).

[207] By applying these assumptions to the Department's estimates, instead of incorporating anticipated growth and innovation impacts, the results may be an underestimate of total cost savings.

[208] For example, the Department applied a similar approach to litigation costs in the 2019 final rule *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,* 81 FR 51230 (2019).

[209] Downloaded from Public Access to Court Electronic Records (PACER).

[210] PACER does not provide a granular classification of FLSA case types to identify the number of cases specific to independent contractor disputes, so the Department performed a keyword analysis with spot checking of a random sample of 500 cases closed in 2019, determining that 9.4 percent of cases were related to independent contractor status (47/500 = 9.4 percent).

[211] The Department used data from 2014 already obtained for use in the analyses performed for the 2019 overtime and regular rate final rules. *See* 84 FR 51230, 51280–81 (reduced litigation estimate for the final rule updating the FLSA's white collar exemptions at 29 CFR part 541); 84 FR 68736,

Department updated its dataset, using a sample that included 500 cases closed in 2019. Of those cases, the Department identified 47 cases within this sample that related to independent contractor status. This ratio was applied to the 7,238 FLSA cases closed in 2019 to estimate 680 cases related to independent contractor status. The Department assumes that the increased clarity of the rule would reduce the number of Federal FLSA cases involving independent contractor classification disputes by 10 percent as stakeholders would better understand and be better able to agree on classification determinations without having to litigate.[212] Multiplying these variables results in an estimated 68 cases related to independent contractor disputes avoided annually. This estimate of the reduction in the number of independent contractor disputes filed does not take into account any reduction in the number of FLSA cases related to independent contractor disputes heard in state courts (*e.g.,* where the state has adopted the FLSA standards for classifying workers), nor does it take into account any reduction in filings resolved before litigation or by alternative dispute resolution, neither of which are captured in PACER data.

Average Litigation Cost per Case

The Department applied a previous estimate of litigation costs of $654,182 per case. To obtain this estimate, the Department conducted a search for FLSA cases concluded between 2012 and 2015 in the Westlaw Case Evaluator tool and on PACER and identified 56 cases that contained sufficient litigation cost information to estimate the average costs of litigation.[213] [214] The Department looked at records of court filings in the Westlaw Case Evaluator tool and on PACER to ascertain how much plaintiffs in these cases were paid for attorney fees, administrative fees, and/or other costs, apart from any monetary damages attributable to the alleged FLSA violations. After determining the plaintiff's total litigation costs for each case, the Department then doubled the figures to account for litigation costs that the defendant employers incurred. According to this analysis, the average litigation cost for FLSA cases concluded between 2012 and 2015 was $654,182. Adjusting for inflation, using the GDP deflator, results in a value of $715,637 in 2019 dollars.[215]

Applying these figures to the estimated 68 cases that could be prevented each year due to this rulemaking, the Department estimates that avoided litigation costs resulting from the rule total $48.7 million per year (2019 dollars).[216] [217]

3. Improved Labor Market Conditions

The Department anticipates the final rule will produce benefits by reducing uncertainty and improving labor market conditions. Removing uncertainty improves labor market efficiency by reducing deadweight loss. As discussed in the need for rulemaking, the Department believes emerging and innovative economic arrangements that benefit both workers and business require reasonable certainty regarding the worker's classification as an independent contractor. The current legal uncertainty may deter businesses from offering these arrangements or developing them in the first place.[218] If so, the result would be economic deadweight loss: Legal uncertainty prevents mutually beneficial independent contractor arrangements. This final rule may produce cost savings by reducing deadweight loss. Nonetheless, due to the abundance of variables at play, the Department has not attempted to quantify the precise amount of that reduction.

The CGO concurred in its public comment, emphasizing that an important benefit of this rule will likely be increased labor market flexibility. They note that ''most labor models suggest flexibility is crucial in allowing labor markets to efficiently match workers with jobs, spur entrepreneurship, and act as an important source of countercyclical income during a recession.'' They cite a study showing that a 10 percent increase in the freelance workforce is correlated with a 1 percent increase in entrepreneurial activity.[219] Similarly, CWI submitted their report that finds independent workers ''can be an important part of improving business performance, such as by increasing speed to market, increasing organizational agility, improving overall financial performance, and allowing firms to compete in a digital world where increasingly relevant, highly-skilled talent is in short-supply.'' [220] By decreasing uncertainty and thus potentially opening new opportunities for firms, this final rule may encourage companies to hire independent contractors whom they otherwise would not have hired. Eisenach (2010) outlines the potential costs of curtailing independent contracting.[221] If

68767–68 (reduced litigation estimate for the final rule updating the FLSA's ''regular rate'' regulations at 29 CFR part 778).

[212] This aligns with the methodology the Department has applied in a number of rulemakings (*See e.g.,* Regular Rate Under the Fair Labor Standards Act), and in the NPRM for this rule. In each rulemaking with this assumption, the Department requested comments and data on this point, which yielded no substantive data or critiques on its merit. Therefore, the Department believes this is an appropriate assumption in this analysis.

[213] Litigation costs are not tracked in a systematic way by any publicly available source. Individual case records are available through various sources (*e.g.* PACER and Westlaw), but litigation costs are often not reported because of undisclosed settlement agreements or because attorney fees are not included in verdict judgements. However, because the FLSA entitles prevailing plaintiffs to litigation cost awards, the Department was able to ascertain costs for 56 relevant cases.

[214] The 56 cases used for this analysis were retrieved from Westlaw's Case Evaluator database using a keyword search for case summaries between 2012 and 2015 mentioning the terms ''FLSA'' and ''fees.'' This was not limited to cases associated with independent contracting. Although the initial search yielded 64 responsive cases, the Department excluded one duplicate case, one case resolving litigation costs through a confidential settlement agreement, and six cases where the defendant employer(s) ultimately prevailed. Because the FLSA only entitles prevailing plaintiffs to litigation cost awards, information about litigation costs was only available for the remaining 56 FLSA cases that ended in settlement agreements or court verdicts favoring the plaintiff employees.

[215] This average litigation cost per case may underestimate total average costs because some attorneys representing FLSA plaintiffs may take a contingency fee atop their statutorily awarded fees and costs.

[216] Using the median litigation cost, rather than the mean, results in a value of $122,341 (2019 dollars) per case, which for the estimated 68 annual cases produces a total annual litigation cost savings of $8.3 million. However, the median values do not adequately capture the magnitude of the impact resulting from the large-scale litigation cases that are expected to benefit from the clarity provided in this final rule. Therefore, the mean average is used for this analysis.

[217] The Department's approach to estimating litigation cost savings takes into account the impact of the rule on the number of relevant cases filed. The approach does not take into account the impact of the rule on promoting settlements in the future among cases that are filed. Clarifying a rule may increase the settlement rate among cases filed, reducing litigation costs further (see Gelbach, J., ''The Reduced Form of Litigation Models and the Plaintiff's Win Rate,'' J. Law & Economics 61(1), (2018), *https://www.journals.uchicago.edu/doi/10.1086/699151).*

[218] *See* Griffin Toronjo Pivateau, *The Prism of Entrepreneurship: Creating A New Lens for Worker Classification,* 70 Baylor L. Rev. 595, 628 (2018) (''The continued demand for innovative work solutions requires a new classification test. Without clarification, parties will be unwilling to engage in new or innovative work arrangements.''); *see also* R. Hollrah and P. Hollrah, ''The Time Has Come for Congress to Finish Its Work on Harmonizing the Definition of 'Employee,' '' *J. L. & Pol'y* 26(2), p. 439 (2018), *https://brooklynworks.brooklaw.edu/jlp/vol26/iss2/1/.*

[219] A. Burke, I. Zawwar, and S. Hussels. ''Do Freelance Independent Contractors Promote Entrepreneurship?'' *Small Business Economics* 55(2), 415–27 (2019), *https://doi.org/10.1007/s11187-019-00242-w.*

[220] J. Langenfeld and C. Ring. ''Analysis of Literature on Technology and Alternative Workforce Arrangements.'' Ankura (October 2020).

[221] J. Eisenach, ''The Role of Independent Contractors in The U.S. Economy,'' Navigant

Continued

independent contracting is expanded due to this rule, this could generate benefits that may include:

- Increased job creation and small business formation.
- Increased competition and decreased prices.
- A more flexible and dynamic work force, where workers are able to more easily move to locations or to employers where their labor and skills are needed.

Eisenach explains several channels through which these efficiency gains may be achieved. First, by avoiding some fixed employment costs, it is easier for firms to adjust their labor needs based on fluctuations in demand. Second, by using pay-for-preference, independent contractors are incentivized to increase production and quality. Third, ''contracting can be an important mechanism for overcoming legal and regulatory barriers to economically efficient employment arrangements.'' The analysis of these benefits assumes that businesses, especially in other industries, would like to increase their use of independent contractors, but have refrained from doing so because of uncertainty regarding who can appropriately be engaged as an independent contractor under the FLSA. Conversely, significant use of independent contractors may not be suitable for all industries, thus limiting the growth in its utilization.

Some commenters agreed that expanding independent contracting can lead to employment gains. For example, Dr. Palagashvili discussed the literature showing how restricting independent contracting can lead to loss of jobs. This final rule, by expanding independent contracting, could conversely increase employment. She also noted the importance of independent contracting for unemployed workers, referencing a paper that found workers who ''suffered a spell of unemployment are 7 to 17 percentage points more likely than observationally similar workers to be employed in an alternative work arrangement when surveyed 1 to 2.5 years later.'' [222] [223]

She also emphasized the importance of independent contracting to startup firms. She references her work conducting interviews and a survey of technology startup executives. During these interviews they found that ''71 percent of startups relied on independent contractors and thought it was necessary to use contract labor during their early stages.'' Independent contractors are important to startups because ''during unpredictable times, when startups are trying to find their market and build their product, they need flexible labor and need to be able to hire and fire easily.''

Several commenters disagreed that the rule would improve outcomes in the labor market. FTC Commissioner Rebecca Kelly Slaughter commented that it is inappropriate to conclude ''that 'competition will increase and prices will decrease' when more workers are classified as independent contractors'' because, according to the commenter, the only support offered in the NPRM was a 2010 non-peer-reviewed article providing little evidence of this claim. The Department maintains that economic laws generally apply to labor markets, and that as supply increases then prices can be expected to decrease. UFCW contested the Department's claim that this rule will lead to increased productivity. They presented an example of how independent contracting hurts efficiency: ''Instead of ecommerce fulfil[l]ment carried out by a team of output-optimizing role players, the 'independent contractor' item selection and packing is carried out by the same individual who does the delivery, adding unnecessary and time consuming steps to the process. The 'independent contractor' must first park his or her car, walk into the store, orient him or herself to the store layout, select and pack the items, transact the payment, then carry the packed items back to the car.'' The Department does not think UFCW's claims are valid across the incredibly dynamic range of independent contractor jobs, and further questions UFCW's unsupported assertion that the expansive emergence of mobile customer-service-focused delivery applications ''reduces the opportunity for productivity-enhancing innovation.'' Further, even the example ignores that efficiencies will likely be gained over time as the independent contractor fulfils additional orders each day, week, and month. The Department does not believe that these commenters provided reliable data to revise its analysis, especially in light of the data provided to its support by other commenters.

4. Improved Worker Satisfaction and Flexibility

The Department believes this rulemaking may also result in greater autonomy and job satisfaction for workers. Several surveys have shown that independent contractors have high job satisfaction.[224] Using the CWS, which only considers primary, active contractors, the Department estimates that of independent contractors with valid responses, 83 percent prefer their current arrangement rather than being an employee, compared with only 9 percent who would prefer an employment arrangement (the remaining 8 percent responded that it depends).

Additionally, the main reasons individuals work as independent contractors demonstrate that being an independent contractor often has valuable benefits. The 2017 CWS asked, ''What is the main reason you are self-employed/an independent contractor?'' The two most popular reasons were (1) being their own boss, and (2) scheduling flexibility.[225] In fact, these two choices were each selected over three times more often than any of the other options.[226] Additionally, McKinsey Global Institute found that ''[i]ndependent workers report higher levels of satisfaction on many aspects of their work life than traditional workers.'' [227] The McKinsey Global Institute examined workers who work

Economics (2010), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1717932.*

[222] L. Katz and A. Krueger, ''The Role of Unemployment in the Rise in Alternative Work Arrangements,'' *American Economic Review,* 107(5), p. 388 (2017), *https://www.aeaweb.org/articles?id=10.1257/aer.p20171092.*

[223] It should be noted that government-mandated coverage is not free. The total value that a worker provides a business must be at least as large as the wage, any provided benefits, and government (state or Federal) mandates combined. Congress and/or state governments may conclude that the value of mandating certain coverages outweighs the costs of such coverage, but that does not necessarily mean that all covered workers receive significant benefits from such coverage or value such coverage compared to other compensation. In fact, in some cases workers may be able to strike a better deal with a business than would be provided under the terms of an employee relationship that operates under the associated mandates. Such as in a situation where a worker has clusters of available time to work punctuated by extended periods of inability to work, such as a long-haul shipper who spends a month at sea and then a month at home or a divorced parent who has five kids to care for every other week but is fully available on the off weeks to work as many hours as needed. In these cases, independent contractor relationships may be pivotal in mutually benefiting workers and business owners.

[224] *See, e.g.,* MBO Partners (2019), *supra* note 131.

[225] The Department used PES26IC to identify preferred work arrangement and PES26IR to identify the reason they work as an independent contractor.

[226] The third most commonly selected reason was ''Money is better,'' supporting the Department's view that monetary and non-pecuniary benefits are central motivations of most independent contractors.

[227] McKinsey Global Institute, *supra* note 89 at 11. A 2009 Pew survey similarly found that self-employed workers are ''significantly more satisfied with their jobs than other workers.'' Rich Morin, ''Job Satisfaction among the Self-Employed,'' Pew Research Center, (September 2009), *http://pewsocialtrends.org/pubs/743/job-satisfaction-highest-among-self-employed.* In particular, 39 percent of self-employed workers reported being ''completely satisfied'' with their jobs, compared with 28 percent of employees. *Id.*

independently by choice and those who do so by necessity (such as needing supplemental income) and found that both groups report being happy with the flexibility and autonomy of their work.[228] Similarly, Kelly Services found that ''free agents''—*i.e.,* workers who ''derive their primary income from independent work and actively prefer it''—report higher satisfaction than traditional workers concerning overall employment situation; work-life balance; opportunities to expand skills; and opportunities to advance career.[229]

Many commenters agreed that the scheduling flexibility afforded to independent contractors is of importance to many of these workers. WPI pointed out that many independent contractors require flexibility to balance work and other obligations. They cite a recent report that found ''48 percent of freelancers report being caregivers, while 33 percent report having a disability in their household.'' [230] Dr. Palagashvili discussed the significance of independent contracting work for women, who tend to be the primary caregiver, and thus value scheduling flexibility. She cited several papers demonstrating the importance of flexible work arrangements for women. For example, a survey by HyperWallet found that ''96 percent of women indicate that the primary benefit of engaging in platform-economy work is the flexible working hours.[231] SHRM pointed to their survey that found that 49 percent of external workers chose that work arrangement for the ability to set their own hours.[232]

Conversely, other commenters asserted that valuing flexibility is not relevant as a benefit to a worker who is classified as an independent contractor. The Department believes that non-pecuniary benefits like flexibility are very important to workers and should receive adequate attention in this RIA. Research has shown that flexibility is a criterion workers consider when evaluating job offers.[233]

The PA L&I wrote that it is inappropriate to present flexibility for independent contractors as a ''replacement for lower wages and no benefits.'' PA L&I also stated that the Department does not discuss independent contractors' counteracting loss of stability in income, location of work, and frequency and schedule of work and instead simply ''presumes that workers prize flexibility over stability'' without citing any evidence. The Department notes that it examined numerous studies that directly address, and provide evidence regarding, the tradeoffs many independent contractors voluntarily make to attain flexibility. To that point, a survey submitted by CWI found 61 percent of independent contractors prefer the ''flexibility to choose when and where to work'' over ''having access to a steady income and benefits.'' [234] Additionally, the workers who value flexibility will be the ones drawn to those independent contracting arrangements that provide flexibility.

The Washington Center posited that in many industries, such as trucking and deliveries, the flexibility benefits for independent contractors are small because workers often do not have control over their routes or work hours. This was echoed by the UFCW, who pointed out that in retail the use of just-in-time scheduling limits the scheduling flexibility for workers classified as independent contractors. The Department acknowledges that the flexibility benefits may differ across industries, but that they tend to exist in all industries to some degree.

UFCW contended that although current independent contractors may be satisfied with their employment status, this will not necessarily hold for newly classified workers. The Department acknowledges that new independent contractors may differ from current independent contractors but lacks any data to show how their satisfaction levels would differ. Lacking such data, which commenters did not provide, the best predictor of job satisfaction for new independent contractors is job satisfaction among current independent contractors. Further, the Department notes, as explained above, that this rule will not directly reclassify any workers but rather provides clarity regarding the current process for determining worker classification.

UFCW used a 2017 report from Prudential Research, specifically regarding gig workers, to dispute the Department's claim that independent contractors are more satisfied than employees. UFCW excerpted from the report that, ''on-demand independent contractors who work full-time hours are less satisfied with their current work situation than full-time employees (44 percent vs. 55 percent).'' [235] However, the commenter did not include all of the findings in the source it cited; the same Prudential study notes that for gig workers who also have other jobs, their job satisfaction rate is 86 percent. Notably, UFCW focused on gig workers in its comment, but conflates such workers with the entire universe of independent contractors. The Department acknowledges that although there may be lower job satisfaction for some subsets of independent contractors, studies that consider all independent contractors generally find that independent contractors report similar or higher job satisfaction than employees. For example, CWI submitted a survey they conducted finding that 94 percent of independent workers are satisfied with their work arrangements.[236]

By clarifying that control and opportunity for profit or loss are the core economic reality factors, this final rule is likely to encourage the creation of independent contractor jobs that provide autonomy and entrepreneurial opportunities that many workers find satisfying. For the same reason, this final rule likely will diminish the incidence of independent contractor jobs that lack these widely desired characteristics. Thus, the Department expects this final rule to result in more independent contractor opportunities which bring with them autonomy and job satisfaction. The benefits of worker autonomy and satisfaction obviously ''are difficult or impossible to quantify,'' but they nonetheless merit consideration.

5. Income Smoothing

Several commenters asserted that independent contracting plays a key role in smoothing income during recessions by providing an alternative source of income. Commenters cited to a JPMorgan Chase Institute study that makes this case.[237] Other commenters

[228] McKinsey Global Institute, *supra* note 89 at 10. The McKinsey survey found that, while ''those working independently out of necessity report being happier with the flexibility and content of the work,'' they also report being ''less satisfied with their level of income level and their income security.'' *Id.* The Department believes this rulemaking is unlikely to negatively impact the average income level of such workers by encouraging independent contractor opportunities. As discussed above, there are data indicating that independent contractors, on average, may earn higher hourly wages than employees. Nor is rulemaking likely to negatively impact workers' income security, on average (see Section VI(E)(2)(viii)).

[229] Kelly Services (2015), *supra* note 89.

[230] Upwork, Freelance Forward 2020: The U.S. Independent Workforce Report (September 2020).

[231] HyperWallet. ''The Future of Gig Work Is Female: A Study on the Behaviors and Career Aspirations of Women in the Gig Economy,'' (2017), *https://www.hyperwallet.com/app/uploads/HW_The_Future_of_Gig_Work_is_Female.pdf.*

[232] SHRM and SAP SuccessFactors (2019), *supra* note 200.

[233] He, H. et al. (2019), *supra* note 131.

[234] Coalition for Workforce Innovation (2020), *supra* note.

[235] Prudential Research (2017), *supra* note.

[236] Coalition for Workforce Innovation (2020), *supra* note.

[237] D. Farrell, F. Greig, and A. Hamoudi, ''The Online Platform Economy in 27 Metro Areas:

Continued

held the opposite view and highlighted the economic downturn related to COVID–19. For example, the Center for Innovation in Worker Organization claimed that high unemployment increases the likelihood that employers fail to pay minimum wage. Because this rule is focused on independent contractors, even assuming the premise of the comment from the Center for Innovation in Worker Organization is correct, this concern does not directly apply. Further, this commenter did not provide clear evidence that independent contracting does not help workers supplement their income.

6. Opportunities To Work for Multiple Customers

In the NPRM, the Department noted that independent contractors may more easily work for multiple companies simultaneously. The Washington Center disputed this claim, asserting that ''economists have found that about 75 percent of workers receiving non-employee compensation are tied to one employer'' and the likelihood of being tied to a single employer is similar for wage earners and contractors.[238] But the economists whom the Washington Center cites in support of their assertion explicitly noted that the independent contractors in their study ''include[ ] those who are primarily employed at a W2 job, and vice versa.'' [239] This overlap prevents meaningful comparisons between independent contractors and W2 employees for the purpose of this RIA. Rebecca Kelly Slaughter, a Commissioner at the FTC wrote: ''Independent contractor status is not what allows a worker to work for two rivals. Indeed, many hourly workers are employed at more than one job, including for two employers who are rivals in the same industry.'' Commissioner Slaughter gave an example of a worker who holds two jobs at competing fast food restaurants, but this does not undermine the Department's discussion of independent contractors being able to use mobile applications to pick which tasks they choose to perform in real time on a job-by-job basis. That fast food worker cannot always decide which job he wants to work for each shift of the day. Additionally, Slaughter commented that working for multiple employers may demonstrate a worker's need to hold multiple jobs to pay bills rather than being indicative of flexibility. This point, however, was not substantiated by data showing that such a critique can effectively be applied across the universe of millions of independent contractors who cite flexibility as a core motivator. And as explained in Sections III(A) and IV(C), courts have repeatedly explained that need for income is not the correct legal lens through which to analyze whether a worker is an independent contractor or employee under the FLSA.[240] Lastly, she noted that ''Uber has been known to discourage multi-apping by monitoring whether drivers were logging into more than one platform simultaneously and penalizing those that did not exclusively take Uber customers.'' [241] Under this rule, Uber's monitoring and controlling certain drivers' ability to multi-app would be a consideration under the control factors of the economic reality test as applied to those drivers. *See Razak,* 951 F.3d at 145–46 (including drivers' contention ''that while 'online' for Uber, they cannot also accept rides through other platforms'' in list of ''disputed facts regarding control''). But it appears that the majority of rideshare drivers are able to multi-app.[242] The Department believes that economy-wide data reveal that many independent contractors hold multiple jobs,[243] and they resoundingly prize the flexibility to work when, where, and how they choose.[244]

G. Regulatory Alternatives

Pursuant to its obligations under Executive Order 12866,[245] the Department assessed three regulatory alternatives to the standard promulgated in this final rule. These three alternatives are the same as those analyzed in the NPRM,[246] listed below in order from least to most restrictive of independent contracting: [247]

(1) Codification of the common law control test, which applies in distinguishing between employees and independent contractors under various other Federal laws; [248]

(2) Codification of the traditional six-factor ''economic reality'' balancing test, as recently articulated in WHD Opinion Letter FLSA2019–6; and

(3) Codification of the ''ABC'' test, as adopted by the California Supreme Court in *Dynamex Operations W., Inc.* v. *Superior Court,* 416 P.3d 1 (Cal. 2018).[249]

Although the Department believes that legal limitations preclude adoption of the ''common law'' and ''ABC'' test alternatives listed above, the Department notes that Congress is presently considering separate bills that would amend the FLSA to adopt these alternatives,[250] and accordingly presents them for the benefit of the public as recommended by OMB guidance.[251] All

JPMorgan Chase Institute,'' JPMorgan Chase Institute (2019), *https://www.jpmorganchase.com/institute/research/labor-markets/report-ope-cities.htm.*

[238] Collins et al. (2019), *supra* note 80.

[239] *Id.* at 14 n.7.

[240] *See, e.g., Halferty,* 821 F.2d at 268 (''[I]t is not dependence in the sense that one could not survive without the income from the job that we examine, but dependence for continued employment''); *DialAmerica,* 757 F.2d at 1385 (''The economic-dependence aspect of the [economic reality] test does not concern whether the workers at issue depend on the money they earn for obtaining the necessities of life.'').

[241] Commissioner Slaughter cited a note submitted as background material for an OECD meeting and a law review article to support this contention. *See* M. Steinbaum, Monopsony and the Business Model of Gig Economy Platforms, OECD 7 (Sept. 17, 2020), *https://one.oecd.org/document/DAF/COMP/WD(2019)66/en/pdf;* M. Steinbaum, ''Antitrust, the Gig Economy, and Labor Market Power,'' 82 Law and Contemp. Probs. 45, 55 (2019), *https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4918&context=lcp.*

[242] *See* This App Lets Drivers Juggle Competing Uber and Lyft Rides, Wired (Feb. 15, 2018) (estimating that over 70 percent of rideshare drivers multi-app), *https://www.wired.com/story/this-app-lets-drivers-juggle-competing-uber-and-lyft-rides/.*

[243] Lim et al., *supra* note 75, at 61.

[244] See the May 2017 CWS supplement to the CPS.

[245] Exec. Order No. 12866 § 6(a)(3)(C)(iii), 58 FR 51741.

[246] *See* 85 FR 60634 (discussing regulatory alternative to the proposed rule).

[247] OMB guidance advises that, where possible, agencies should analyze at least one ''more stringent option'' and one ''less stringent option'' to the proposed approach. OMB Circular A–4 at 16.

[248] *See* 26 U.S.C. 3121(d)(2) (generally defining the term ''employee'' under the Internal Revenue Code as ''any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee''); 42 U.S.C. 410(j) (similarly defining ''employee'' under the Social Security Act); *see also, e.g., Community for Creative Non-Violence* v. *Reid,* 490 U.S. 730, 751 (1989) (applying ''principles of general common law of agency'' to determine ''whether . . . work was prepared by an employee or an independent contractor'' under the Copyright Act of 1976); *Darden,* 503 U.S. 318 (holding that ''a common-law test'' should resolve employee/independent contractor disputes under ERISA).

[249] *See also Hargrove* v. *Sleepy's, LLC,* 106 A.3d 449, 465 (N.J. 2015) (extending the ABC test to state wage claims in New Jersey).

[250] The Modern Worker Empowerment Act, H.R. 4069, 116th Cong. (2019) (introduced by Rep. Elise Stefanik), would amend Sec. 3(e) of the FLSA statute to clarify that the term ''employee'' is ''determined under the usual common law rules (as applied for purposes of section 3121(d) of the Internal Revenue Code of 1986).'' *See also* S. 2973, 116th Cong. (2019) (companion Senate bill introduced by Sen. Tim Scott). By contrast, the Worker Flexibility and Small Business Protection Act, H.R. 8375, 116th Cong. (2020) (introduced by Rep. Rosa DeLauro) would, among other provisions, amend the FLSA and other labor statutes to clarify that ''[a]n individual performing any labor for remuneration shall be considered an employee and not an independent contractor'' unless such individual passes the ''ABC'' test discussed in this analysis. *See also* S. 4738, 116th Cong. (2020) (companion bill introduced by Senators Patty Murray and Sherrod Brown).

[251] OMB Circular A–4 advises that agencies ''should discuss the statutory requirements that affect the selection of regulatory approach. If legal

three regulatory alternatives are analyzed in qualitative terms, due to data constraints and inherent uncertainty in measuring the exact stringency of multi-factor legal tests and likely responses from the regulated community. The Department appreciates the feedback it received on these regulatory alternatives from commenters, which is described and addressed below.

1. Codifying a Common Law Control Test

The least stringent alternative to the final rule's streamlined ''economic reality'' test would be to adopt a common law control test, as is generally used to determine independent contractor classification questions arising under the Internal Revenue Code and various other Federal laws.[252] The overarching focus of the common law control test is ''the hiring party's right to control the manner and means by which [work] is accomplished,'' *Reid,* 490 U.S. at 751, but the Supreme Court has explained that ''other factors relevant to the inquiry [include] the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the parties' relationship; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.'' *Id.* at 751–52.

Although the common law control test considers many of the same factors as those identified in the final rule's ''economic reality'' test (*e.g.,* skill, length of the working relationship, the source of equipment and materials, *etc.*), courts generally recognize that, because of its focus on control, the common law test is more permissive of independent contracting arrangements than the economic reality test, which more broadly examines the economic dependence of the worker. *See, e.g., Diggs* v. *Harris Hospital-Methodist, Inc.,* 847 F.2d 270, 272 n.1 (5th Cir. 1988) (observing that ''[t]he 'economic realities' test is a more expansive standard for determining employee status'' than the common law control test). Thus, if a common law control test determined independent contractor status under the FLSA, it is possible that some workers presently classified as FLSA employees could be reclassified as independent contractors, increasing the overall number of independent contractors and reducing the overall number of employees. The Department is unable to estimate the exact magnitude of such a reclassification effect, but believes that the vast majority of FLSA employees would remain FLSA employees even under a common law control test.

As discussed in the NPRM, codifying a common law control test that is used for purposes of at least some other Federal statutes would create a simpler legal regime for regulated entities interested in receiving services from an independent contractor, thereby reducing confusion, compliance costs, and legal risk for entities interested in doing business with independent contractors. Entities would not have to understand and apply a different employment classification standard for FLSA purposes. Thus, adopting the common law control test would likely increase perpetual cost savings for regulated entities attributable to improved clarity and reduced litigation as compared to the final rule. It could, on the other hand, impose burdens on workers who might prefer to be employees subject to FLSA protections. Moreover, the Supreme Court has interpreted the ''suffer or permit'' language in section 3(g) of the FLSA as establishing a broader definition of employment than the common law. *See, e.g., Darden,* 503 U.S. at 326; *Portland Terminal Co.,* 330 at 150–51.

A handful of business commenters addressed the merits of the common law control test as a regulatory alternative. In a joint comment, Vanliner Insurance Company and the Great American Trucking Division implicitly requested adoption of the common law standard presently used under the National Labor Relations Act (NLRA) and the Social Security Act (SSA), as they urged the Department to ''foster efficiency and consistency by creating uniformity for compliance with the FLSA, the [NLRA], and the [SSA].'' The American Society of Travel Advisors, Inc. (ASTA) asserted that ''the simplest means to accomplish [a uniform classification standard under Federal law] would be to revise the FLSA, either legislatively or through regulation, to replace the economic reality test with the right of control test.'' While appearing to support the common law control test on substance, the Workplace Policy Institute warned that ''any attempt by the Department to depart from the economic reality test likely would result in a successful legal challenge to this rulemaking,'' expressing support for the Department's proposed economic reality test ''in the spirit of 'don't let the perfect be the enemy of the good.' '' *See also* Dr. Palagashvili (''[A]lthough the DOL is constrained in adopting a common law control test, I suggest that lawmakers amend the FLSA to allow for codification thereof.''). By contrast, the National Federation of Independent Business (NFIB) criticized the Department's conclusion in the NPRM that it lacks the legal authority to implement a common law standard through rulemaking as ''unfortunate'' and ''questionable.''

The Department appreciates the policy appeal of establishing a uniform Federal classification standard, and understands that the standard most familiar to the regulated community is likely the common law control test used for tax and other purposes. However, such an approach would be inconsistent with the Supreme Court's statement that FLSA employment is more inclusive than the common law control test. *See, e.g., Walling* v. *Portland Terminal Co.,* 330 U.S. 148, 150 (1947) (''[I]n determining who are 'employees under the [FLSA], common law employee categories . . . are not of controlling significance.''). The overwhelming majority of commenters who mentioned the common law standard in their comment, including business commenters inclined to favor the relative permissiveness of a common law standard, expressed agreement with that conclusion.

2. Codifying the Six-Factor ''Economic Reality'' Balancing Test

As discussed earlier in section II(B), WHD has long applied a multifactor ''economic reality'' balancing test to distinguish between employees and independent contractors in enforcement actions and subregulatory guidance. The six factors in WHD's multifactor balancing test, as recently articulated in WHD Opinion Letter FLSA2019–6, are as follows:

(1) The nature and degree of the potential employer's control;

constraints prevent the selection of a regulatory action that best satisfies the philosophy and principles of Executive Order 12866, [agencies] should identify these constraints and estimate their opportunity cost. Such information may be useful to Congress under the Regulatory Right-to-Know Act.''

[252] *See supra* note 248. The Supreme Court has explained that the common law standard of employment applies by default under Federal law ''unless [Congress] clearly indicates otherwise.'' *Darden,* 503 U.S. at 325; *see also Community for Creative Non-Violence* v. *Reid,* 490 US 730, 739–40 (1989) (''[W]hen Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.'').

(2) The permanency of the worker's relationship with the potential employer;

(3) The amount of the worker's investment in facilities, equipment, or helpers;

(4) The amount of skill, initiative, judgment, or foresight required for the worker's services;

(5) The worker's opportunities for profit or loss; and

(6) The extent of integration of the worker's services into the potential employer's business.

WHD Opinion Letter FLSA2019–6 at 4 (citing *Rutherford Food,* 331 U.S. at 730, and *Silk,* 331 U.S. at 716).

As discussed in the NPRM, the Department believes that this six-factor balancing test is neither more nor less permissive of independent contractor relationships as compared to the streamlined test finalized in this rulemaking. Both tests describe the ''economic dependence'' of the worker at issue as the ultimate inquiry; both emphasize the primacy of actual practice over contractual or theoretical possibilities (*i.e.,* the ''economic reality'' of the work arrangement); and both evaluate the same set of underlying factors, notwithstanding an emphasis and consolidation of certain factors under this rule's streamlined test. Notably, like § 795.105(d)(1)(i) of the final rule, WHD Opinion Letter FLSA2019–6 advised that certain safety measures and quality control standards do not constitute ''control'' indicative of an FLSA employment relationship. *See id.* at 8 n.4. However, the Department explained in the NPRM that the six-factor balancing test used by WHD and most courts, with some significant variations, would benefit from clarification, sharpening, and streamlining.

A number of commenters urged the Department to codify a six-factor balancing test. Several commenters, including NELP, Eastern Atlantic States Regional Council of Carpenters (EASRCC), and the United Brotherhood of Carpenters, specifically requested that the Department reinstate AI 2015–1, which was withdrawn in 2017. SWACCA asserted that ''codification of the six-factor balancing test may well achieve more consistency of application from the courts as it pushes them to develop their similar precedents to align with the Department's views,'' criticizing the proposed rule as ''a novel weighted test that will result in more litigation and less certain outcomes[.]'' SWACCA also disputed the Department's assumption in the NPRM that codifying the six-factor balancing test would not reduce initial regulatory familiarization costs or provide greater per-contract cost savings compared to the proposed rule, *see* 85 FR 60635, arguing that this assumption ''overlooks the fact that codifying the six-factor balancing test would simply incorporate what is now subregulatory guidance at the regulatory level.'' Finally, NELP, NWLC, and the State AGs asserted that the Department has no legal authority to promulgate any regulatory standard except the traditional six-factor balancing test, citing to *Kimble* v. *Marvel Entm't, LLC,* 576 U.S. 446 (2015), for the proposition that the six-factor balancing test derived from *Silk* and *Rutherford Food* has effectively become part of the FLSA's ''statutory scheme.'' *See id.* at 456 (''All [of the Supreme Court's] interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change.'').

While the Department agrees with NELP, NWLC, and the State AGs that Supreme Court precedent requires application of an ''economic reality'' test to evaluate independent contractor claims under the FLSA, we disagree that the Court has definitively prescribed the specific components of such a test. As explained earlier, courts in different Federal circuits have articulated the number and nature of relevant factors in different ways, so any formulation endorsed by the Department would be at least marginally ''novel'' to courts and affected stakeholders across jurisdictions in some respect. Moreover, many commenters are overstating the degree to which the standard finalized in this rule meaningfully departs from existing precedent. If anything, by elevating the two factors that are most probative to what courts have established as the ultimate inquiry of the test—*i.e.,* whether workers ''are in business for themselves,'' *Saleem,* 854 F.3d at 139—the Department's approach is more faithful to courts' instruction that the factors ''must be applied with that ultimate notion in mind.'' *Usery,* 527 F.2d at 1311. Moreover, because the Department's analysis of appellate case law since 1975 has found workers' control and opportunity for profit or loss to be most predictive of a worker's classification status, the finalized standard provides more accurate guidance.

To the extent that some businesses and independent contractors familiar with the Department's earlier subregulatory guidance might spend less time reviewing new regulatory language on the topic under this alternative, any reduction in initial regulatory familiarization costs compared to the streamlined test adopted in this final rule would likely be minimal. By contrast, and as we explained in the NPRM, codification of the traditional six-factor balancing test would yield smaller recurring benefits and cost savings over the long term, as the Department continues to believe in the added clarity of an appropriately weighted test with less overlapping redundancy.

The Department further believes that reinstatement of AI 2015–1's specific articulation of the six-factor test would be inappropriate because that withdrawn guidance exacerbates the very shortcomings that this rule remedies. As discussed in Section III(A), the first such shortcoming is the need for consistent application of economic dependence. While the AI 2015–1 correctly stated that ''[t]he ultimate inquiry under the FLSA is whether the worker is economically dependent on the employer or truly in business for him or herself,'' it failed to apply that concept consistently. Notably, it explained that the investment factor should be analyzed by comparing the amount of the worker's investments with the amount the potential employer invests because ''[i]f the worker's investment is relatively minor, that suggests that the worker and the [potential] employer are not on similar footings and that the worker may be economically dependent on the employer.'' But the correct concept of economic dependence is not an inquiry into whether two entities are on a ''similar footing,'' but rather whether an individual is in business for him- or herself.[253] Such an approach to the investment factor is misleading by placing the focus on the worker's financial means instead of the worker's relationship with the purported employer. Several cases explicitly or implicitly reject the ''similar footing'' analysis, most plainly because independent contractors routinely work for companies with whom they are not on a ''similar footing.'' *See Karlson,* 860 F.3d at 1096 (''Large corporations can hire independent contractors''). The ''similar footing'' concept of economic dependence is also inconsistent with the Supreme Court's analysis in *Silk,* 331 U.S. 718, which found that truck drivers who invested in their own vehicles were independent contractors who transported coal for a coal company. The Court did not compare

[253] The Department is also concerned that the phrase ''similar footing'' lacks a clear meaning and therefore may be confusing to the regulated community.

the relative investment of the drivers with that of the coal company or ask whether they were on a ''similar footing''—they obviously were not. Instead, the Court ruled that the drivers were independent contractors, in part because they had ''the opportunity for profit from sound management'' of their investment. *Id.* at 719. What matters is not the relative size of a worker's investment, but whether the worker has a meaningful opportunity for profit or loss based on that investment.

The second shortcoming discussed at Section III(B) is the need for guidance regarding which economic reality factors are more probative. AI 2015–1 exacerbates this shortcoming by relegating the more probative control factor while elevating the less probative ''integral part'' factor. In particular, AI–2015 stated that ''[t]he control factor should not overtake the other factors of the economic realities test.'' Such guidance is plainly inconsistent with cases in which control explicitly ''overtakes'' other factors. *See, e.g., Saleem;* 854 F.3d at 147 (''whatever 'the permanence or duration' of Plaintiffs' affiliation with Defendants, both its length and the 'regularity' of work was entirely of Plaintiffs' choosing'' (citation omitted)); *Selker Bros.* 84 F.3d at 147 (''Given the degree of control exercised by Selker over the day-to-day operations of the stations, this [use of special skills] cannot be said to support a conclusion of independent contractor status.''). Deemphasizing the control factor is also at odds with commonsense logic; control over the work seems to be extremely probative as to whether an individual is in business for him- or herself. In addition to de-emphasizing a highly probative factor, AI–2015 also states that ''[c]ourts have found the 'integral' factor to be compelling,'' citing *Snell,* 875 F.2d at 811 and *Lauritzen,* F.2d at 1537–38 for support. But both cited cases actually analyzed the ''integral part'' factor as an afterthought: Each devoted only a few conclusory sentences to this factor after more in depth analysis of the other factors *Snell,* 875 F.2d at 811 and *Lauritzen,* 835 F.2d at 1537–38. The ''integral part'' factor falls short of even an afterthought in the Fifth Circuit, which typically does not analyze it at all. As explained in Section IV(D)(5), the ''integral part'' factor—as used in AI 2015–1 to mean a worker's importance to a business—is not supported by Supreme Court precedent and may send misleading signals in many cases.

The third shortcoming discussed at Section III(C) is overlaps between economic reality factors, which undermines the structural benefits of a multifactor test by blurring the lines between factors. One type of overlap highlighted by the NPRM is the importation of the analysis of initiative and business judgment, which are already part of the control and opportunity factors, into the skill factor, thus ''dilut[ing] the consideration of actual skill to the point of irrelevance.'' 85 FR 60607. *Id.* AI 2015–1 reinforces this problem by focusing the skill factor entirely on initiative and business judgment, thus eliminating consideration of skill: ''A worker's business skills, judgment, and initiative, not his or her technical skills, will aid in determining whether the worker is economically independent.'' The withdrawn guidance makes clear that it is not simply that skill matters less than initiative, but that skill matters not at all, because it unequivocally states that ''specialized skill do not indicate that workers are in business for themselves.'' This categorical statement, however, is supported by more circumspect case law explaining that ''skill is *not itself* indicative of independent contractor status.'' AI 2015–1 (quoting *Superior Care,* 84 F.2d at 1060 (emphasis added)); *see also id.* (''the use of special skills is *not itself* indicative of independent contractor status'' (quoting *Selker Bros.* 949 F.d at 1295) (emphasis added)). AI 2015–1's categorical position is also at odds with the Supreme Court's instruction in *Silk* that ''skill required'' may be ''important for decision.'' 331 U.S. at 716; s*ee also Simpkins,* 893 F.3d at 966 (''whether Simpkins had specialized skills, as well as the extent to which he employed them in performing his work, are [material] issues'').

Further, reinstating AI 2015–1 or otherwise adopting a six-factor test with overlapping factors and without guidance regarding the factors' relative probative value would negate the overall beneficial effects that would likely result from this rule, which are discussed above.

For these reasons, the Department declines commenters' requests to reinstate AI 2015–1.The Department further notes that, unlike this rule, AI 2015–1 was issued without notice and comment and thus did not benefit from helpful input from the regulated community.

3. Codifying California's ''ABC'' Test

The most stringent regulatory alternative to the Department's proposed rule would be to codify the ''ABC'' test recently adopted under California's state wage and hour law to distinguish between employee/independent contractor statuses.[254] As described by the California Supreme Court in *Dynamex,* ''[t]he ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies *each* of three conditions: (a) That the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (b) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.'' 416 P.3d at 34.[255] In justifying the adoption of such a stringent test, the *Dynamex* court noted the existence of an ''exceptionally broad suffer or permit to work standard'' in California's wage and hour statute, *id.* at 31,[256] as well as ''the more general principle that wage orders are the type of remedial legislation that must be liberally construed in a manner that serves its remedial purposes.'' *Id.* at 32.

On its face, California's ABC test is far more restrictive of independent contracting arrangements than any formulation of an ''economic reality''

[254] *See Dynamex,* 416 P.3d 1; Assembly Bill (''A.B.'') 5, Ch. 296, 2019–2020 Reg. Sess. (Cal. 2019) (codifying the ABC test articulated in *Dynamex*); A.B. 2257, Ch. 38, 2019–2020 Reg. Sess. (Cal. 2020) (exempting certain professions, occupations, and industries from the ABC test that A.B. 5 had codified). The ABC test originated in state unemployment insurance statutes, but some state courts and legislatures have recently extended the test to govern employee/independent contractor disputes under state wage and hour laws. *See* Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractors of Platform Work,* 39 N. Ill. U. L. Rev. 379, 408–11 (2019) (discussing the origins and recent expansion of the ABC test).

[255] California's ABC test is slightly more stringent than versions of the ABC test adopted (or presently under consideration) in other states. For example, New Jersey provides that a hiring entity may satisfy the ABC test's ''B'' prong by establishing *either:* (1) That the work provided is outside the usual course of the business for which the work is performed, or (2) that the work performed is outside all the places of business of the hiring entity. N.J. Stat. Ann. § 43:21–19(i)(6)(A–C). The Department has chosen to analyze California's ABC test as a regulatory alternative because businesses subject to multiple standards, including nationwide businesses, are likely to comply with the most demanding standard if they wish to make consistent classification determinations.

[256] *See* Cal. Code Regs., tit. 8, § 11090, subd. 2(D) (''Employ' means to engage, suffer, or permit to work.''). The *Dynamex* court noted that California's adoption of the ''suffer or permit to work'' standard predated the enactment of the FLSA and was therefore ''not intended to embrace the Federal economic reality test'' that subsequently developed. 416 P.3d at 35.

balancing test, including the proposed rule. Whereas no single factor necessarily disqualifies a worker from independent contractor status under an economic reality test, *each* of the ABC test's three factors may alone disqualify the worker from independent contractor status. Thus, the NPRM stated that adoption of an ABC test to govern independent contractor status under the FLSA would directly result in a large-scale reclassification of many workers presently classified as independent contractors into FLSA-covered employees, particularly those in industries that depend on independent contracting arrangements within the ''usual course of the hiring entity's business.'' *Dynamex,* 416 P.3d at 34. While some independent contractors might benefit from reclassification by newly receiving overtime pay or a guaranteed minimum wage, these workers might also experience a reduction in work hours or diminished scheduling flexibility as their new employers attempt to avoid incurring additional expenses for overtime work. Others workers, particularly off-site workers who operate free from the business' direct control and supervision, might see their work arrangements terminated by businesses unwilling or unable to assume the financial burden and legal risk of the FLSA's overtime pay requirement. After highlighting some of the reports of adverse consequences experienced by workers and businesses in California following the passage A.B. 5, the Department concluded that adopting the ABC test as the FLSA's generally applicable standard for distinguishing employees from independent contractors would be unduly restrictive and disruptive to the economy. Finally, as a matter of law, the Department asserted that adoption of California's ABC test would be inconsistent with the more flexible economic reality test adopted by the Supreme Court, as it would cover workers who have been held by the Supreme Court to be independent contractors under the economic reality test. *See Silk,* 331 U.S. at 719; *Bartels,* 332 U.S. at 130.

The Department received a large volume of commenter feedback on the merits of California's ABC test. While the majority of these comments were highly critical of the standard, it did have several supporters. Commenters in favor of the ABC test asserted that, as the regulatory alternative most restrictive of independent contracting considered by the Department, it would best effectuate Congress' intent to extend FLSA coverage broadly and reduce unlawful misclassification of employees as independent contractors. *See, e.g.,* Matt Brown; National Domestic Workers Alliance; Public Justice Center; SEIU. Numerous commenters asserted that the ABC test, with its three individually determinative factors, was also the clearest and most predictable approach considered. *See, e.g.,* International Brotherhood of Teamsters; Writers Guild of America, East, AFL–CIO. New York University's People's Parity Project argued that ''[g]iven the importance of the California market to the national economy and the fact that it follows the more stringent ABC standard, any business that wishes to operate in California, and any national business, will have economic motivation to follow the ABC standard.'' NELA similarly disputed concerns that adoption of the ABC test would be unduly disruptive, asserting that Massachusetts wage and hour law has used an ABC test since 2004 and that ''[m]any other states, including New Jersey, Illinois, Connecticut, and Hawaii, use an ABC test for certain [other] purposes, and have similarly suffered no disruption to their economies.'' Finally, regarding the Department's legal authority to adopt the ABC test, NELA asserted that ''none of the cases on which the Department relies suggest that the multi-factor test is the only way to test 'economic reality' or that the ABC test ignores 'economic reality.' ''

A diverse array of commenters voiced strong opposition to adopting an ABC test under the FLSA, including law firms, trade associations, advocacy organizations, academics, and individual freelancers. Several commenters dedicated the entirety or vast majority of their comment towards criticizing California's ABC test. *See, e.g.,* American Consumer Institute Center for Citizen Research (ACI); Fight for Freelancers USA; Institute for the American Worker; Joint Comment of the Pacific Legal Foundation (PLF), the American Society of Journalists and Authors, Inc. (ASJA), and the National Press Photographers Association (NPPA); Dr. Palagashvili; The *People* v. *AB5*. The primary objection voiced by commenters critical of the ABC test regarded the disruptive economic effects of implementing such a stringent standard, with several asserting that an ABC test would devastate their industry. *See, e.g.,* American Council of Life Insurers (''Thousands of jobs would likely have been lost had the California legislature failed to create [an exemption for insurance professionals].''); Coalition of Practicing Translators & Interpreters of California (CoPTIC) (''[A.B. 5] posed an existential threat to the survival of our profession.''); Intermodal Association of North America (IANA)) (''The ABC test essentially eliminates the independent contractor model for motor carriers involved in intermodal drayage.''). Several commenters invoked the numerous exemptions to the ABC test that California lawmakers initially adopted in A.B. 5 and subsequently expanded in A.B. 2257 as evidence of the standard's overreach. *See, e.g.,* California Chamber of Commerce (''During the first few months of the 2020 Legislative Session, more than 30 bills were introduced to add a myriad of exemptions to the ABC test. . . . As a result of the adoption of AB 2257, which was signed into law in September, there are now 109 exemptions to the ABC test.''); Rep. Virginia Foxx et al. (''Rather than setting a dependable and workable standard, the AB 5 framework results in arbitrary treatment of industries based on political considerations to the detriment of workers.''); Joint Comment of PLF, ASJA, and NPPA (''If a law requires dozens of exceptions to avoid destroying the careers of successful independent professionals, it is a strong indication that the law's basic premise—the ABC test—is flawed.''). Some individual freelancers, including writer Karen Kroll, filmmaker/actor Margarita Reyes, unspecified professional Chun Fung Kevin Chiu, and unspecified professional Carola Berger, asserted that the ABC test is falsely premised on the assumption that all independent contractors, or at least those who provide services in a client's usual course of business, feel exploited and would prefer to be employees. The Independent Women's Forum and Dr. Palagashvili asserted that the ABC test implemented in California disproportionately burdened female workers with caregiving responsibilities, who are less able to find adequately flexible work schedules through traditional employment. Finally, some commenters agreed with the Department's conclusion in the NPRM that Supreme Court precedent precludes the Department from adopting an ABC test under the FLSA. *See* NRF; FMI—The Food Industry Association.

After reviewing commenter feedback, the Department continues to believe that the ABC test would be infeasible, difficult to administer, and disruptive to the economy if adopted as the FLSA standard. The weight of data, arguments, and anecdotes that commenters shared about the ABC test's

effects in California support the NPRM's conclusion that adopting an ABC test would have unacceptably disruptive economic effects. For instance, a self-employed ''professional handyman with technical skills in furniture assembly and home repair'' stated that ''[a]s a California resident, it has been concerning to watch the way AB–5 has affected our state. I don't believe legislators should make decisions that make it harder for people like me to find work and earn a living the way we want to.'' A medical translator stated that ''ABC test simply doesn't work in my field and it is not a fair standard to measure my situation. The original AB5 law in California was destructive to the livelihood of many of my colleagues in that state.'' And as a final illustrative example, a freelance journalist in California characterized that state's adoption of the ABC test as an ''attempt to legislate an entire class of entrepreneurs out of business.'' *See also, e.g., People* vs. *AB5*; Fight for Freelancers; NPPA; WPI.

Moreover, as commenters pointed out, the numerous exemptions initially and subsequently passed by the California legislature indicate the ABC test's inadequacy as a generally applicable standard, as well as its unpopularity with affected stakeholders. An ''owner of a small, one-woman business in California'' explained in her comment that ''[t]he absurdity and overreach of AB5 is evidenced by the numerous attempts at clean-up bills in California (SB 875, SB 1039, SB 900, AB 1850, AB 2257 . . .) that clogged the CA legislative landscape for months, culminating in the now adopted AB 2257, which lists too many exemptions to count.'' The recent passage of the high-profile Proposition 22 ballot initiative in California,[257] which occurred shortly after the end of the comment period for this rulemaking and exempted numerous gig workers from the ABC test, is further evidence in this regard.

While California retains the ABC test for some industries but not others, the Department is required to apply the FLSA consistently for all covered industries (absent explicit statutory authority to do otherwise). Thus, if the Department adopted the ABC test, that standard would apply to virtually all industries nationwide, including numerous industries that the Californian legislature and voters exempted because they would suffer undue disruption under that standard. NELA contended that adoption of the ABC test by Massachusetts has not led to the same type of disruption experienced in California, which is disputed by some commenters from Massachusetts. *See e.g.,* New Jobs for Massachusetts; IFA; Fight for Freelancers. But even if NELA were correct, a nationwide ABC test would still disrupt California, the state with the largest population and economy, and likely many others. In the Department's view, the fact that a legal standard may be disruptive in only some states (*e.g.,* California) but not others (*e.g.,* Massachusetts) is not a persuasive reason for nationwide adoption.

Additionally, the Department continues to believe that it lacks legal authority to adopt the ABC test under the FLSA because that test is far too rigid and restrictive of independent contracting arrangements. As a threshold matter, each of the ABC test's three independently determinative factors would contradict binding Supreme Court precedent applying the economic reality test, where ''[n]o one [factor] is controlling.'' *Silk,* 331 U.S. at 716. In particular, the test's ''B'' prong—denying independent contractor status unless the contractor ''performs work that is outside the usual course of the hiring entity's business''—would contradict the Court's recognition in *Silk* that ''[f]ew businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product to the ultimate consumer without assistance from independent contractors.'' 331 U.S. at 714; *see also Rutherford Food,* 331 U.S. at 729 (recognizing that ''[t]here may be independent contractors who take part in [the] production or distribution'' of a hiring party). Indeed, application of California's ABC test would result in different classification outcomes than those the Supreme Court arrived at applying the economic reality test in *Silk,* 331 U.S. at 719 (ruling that truckers who were ''an integral part of the businesses of retailing coal or transporting freight'' were independent contractors), and *Bartels,* 332 U.S. at 130 (concluding that musicians were independent contractors rather than employees of the music hall where they played). Absent revised guidance from the Supreme Court or Congressional legislation amending the FLSA statute, the Department continues to believe that it lacks the legal authority to implement a California-style ''ABC'' test through administrative rulemaking.

NELA contended that ''an ABC test is more faithful to the broad, remedial purpose of the FLSA.'' According to NELA, ''[a]t its core, the FLSA is a remedial statute'' and therefore, the Department should interpret the FLSA's standard of employment to be broader than economic dependence. However, the Supreme Court warned against relying on ''flawed premise that the FLSA 'pursues' its remedial purpose 'at all costs' '' when interpreting the Act. *Encino,* 138 S. Ct. at 1142; *see also Bristol,* 935 F.3d 122 (''[A] fair reading' of the FLSA, neither narrow nor broad, is what is called for.'' (quoting *Encino,* 138 S. Ct. at 1142)); *Diaz,* 751 F. App'x at, 758 (rejecting request to interpret FLSA provisions to provide ''broad'' coverage because ''[w]e must instead give the FLSA a 'fair' interpretation.''). Furthermore, even if remedial statutes should be liberally construed, the ABC test still runs afoul of the Supreme Court's stated limits on the extent of the FLSA's definition of employment, as explained above. As such, the Department may not (and no court has ever suggested that it could) replace the economic reality test with the ABC test to be faithful to the FLSA's remedial purpose.

In sum, legal constraints and the disruptive economic effects of adopting the ABC test in the FLSA context. As we stated in the NPRM, the Department engaged in this rulemaking to clarify the existing standard, not to radically transform it.

H. Summary of Impacts

In summary, the Department believes that this rule will increase clarity regarding whether a worker is classified as an employee or an independent contractor under the FLSA. This clarity could result in an increased use of independent contractors. The costs and benefits to a worker being classified as an independent contractor are discussed throughout this analysis, and are summarized below.

The Department believes that there are real benefits to the use of independent contractor status, for both workers and employers. Independent contractors generally have greater autonomy and more flexibility in their hours, providing them more control over the management of their time. The use of independent contracting for employers allows for a more flexible and dynamic workforce, where workers provide labor and skills where and when they are needed. Independent contractors may more easily work for multiple companies simultaneously, have more control over their labor-leisure balance, and more explicitly

[257] *See* Kate Conger, ''Uber and Lyft Drivers in California Will Remain Contractors,'' NY Times (Nov. 4, 2020), *https://www.nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html.*

define the nature of their work. Independent contractors also appear to have higher job satisfaction.

An increase in the number of job openings for independent contractors can also have benefits for the economy as a whole. Increased job creation and enhanced flexibility in work arrangements are critical benefits during periods of economic uncertainty, such as the current COVID–19 pandemic.

There are also certain challenges that face independent contractors compared to employees subject to the FLSA. Independent contractors are not subject to the protections of the FLSA, such as minimum wage and overtime pay. Independent contractors generally do not receive the same employer-provided benefits as employees, such as health insurance, retirement contributions, and paid time off.[258] Independent contractors may have a higher tax liability than employees, as they are legally obligated to pay both the employee and employer shares of the Federal Insurance Contributions Act (FICA) taxes. However, economists recognize that payroll taxes generally are subtracted from the wage rate of employees. Employers also cover unemployment insurance and workers' compensation taxes for their employees. These costs are also components of businesses' worker costs, and employee wages are expected to reflect that accordingly. Independent contractors do not pay these taxes nor are they generally protected by these insurance programs, but there are private insurance companies that offer equivalent coverage.

Because the Department does not know how many workers may shift from employee status to independent contractor status, or how many people who were previously unemployed or out of the labor force will gain work as an independent contractor, these costs and benefits have not been quantified.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (1996), requires Federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Accordingly, the Department examined the regulatory requirements of this final rule to determine whether they would have a significant economic impact on a substantial number of small entities. Because both costs and cost savings are minimal for small business entities, the Department certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

The Department used the Small Business Administration size standards, which determine whether a business qualifies for small-business status, to estimate the number of small entities.[259] [260] The Department then applied these thresholds to the U.S. Census Bureau's 2012 Economic Census to obtain the number of establishments with employment or sales/receipts below the small business threshold in the industry.[261] These ratios of small to large establishments were then applied to the more recent 2017 Economic Census data on number of establishments.[262] Next, the Department estimated the number of small governments, defined as having population less than 50,000, from the 2017 Census of Governments.[263] In total, the Department estimated there are 6.4 million small establishments or governments.

The Department assumes that a Compensation, Benefits, and Job Analysis Specialist (SOC 13–1141) (or a staff member in a similar position) will review the rule.[264] According to the Occupational Employment Statistics (OES), these workers had a mean wage of $33.58 per hour in 2019 (most recent data available). Given the proposed clarification to the Department's interpretation of who is an employee and who is an independent contractor under the FLSA, the Department assumes that it will take on average about 1 hour to review the rule as proposed. The Department believes that an hour, on average, is appropriate, because while some establishments will spend longer than one hour to review the rule, many establishments may rely on third-party summaries of the changes or spend little or no time reviewing the rule. Assuming benefits are paid at a rate of 46 percent of the base wage, and overhead costs are 17 percent of the base wage, the reviewer's effective hourly rate is $54.74; thus, the average cost per establishment conducting regulatory familiarization is $54.74. The per-entity rule familiarization cost for independent contractors, some of whom would be small businesses, is $11.59, or the fully loaded mean hourly wage of independent contractors in the CWS ($46.36) multiplied by 0.25 hour. The Department believes that 15 minutes, on average, is appropriate, because while some independent contractors will spend longer than one hour to review the rule, many will spend little or no time reviewing the rule.

The cost savings due to increased clarity estimated per year for each small business employer is $18.25, or the fully loaded mean hourly wage of a Compensation, Benefits, and Job Analysis Specialist multiplied by 0.33 hours. The cost savings due to increased clarity for each independent contractor, some of whom would be a small business, is $4.14 per year, or the fully loaded mean hourly wage of independent contractors in the CWS multiplied by 0.89 hours.[265] Because regulatory familiarization is a one-time cost and the cost savings from clarity recur each year, the Department expects cost savings to outweigh regulatory familiarization costs in the long run. Because both costs and cost savings are minimal for small business entities, and well below one percent of their gross annual revenues, which is typically at least $100,000 per year for the smallest businesses, the Department certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

There is some evidence that small firms use independent contractors for a greater proportion of their workforce than large firms.[266] If so, then it may be reasonable to assume that the increased

[258] In some situations, independent contractors may be provided with benefits similar to those provided to employees.

[259] SBA, Summary of Size Standards by Industry Sector, 2017, *www.sba.gov/document/support—table-size-standards.*

[260] The most recent size standards were issued in 2019. However, the Department used the 2017 standards for consistency with the older Economic Census data.

[261] The 2012 data are the most recently available with revenue data.

[262] For this analysis, the Department excluded independent contractors who are not registered as small businesses, and who are generally not captured in the Economic Census, from the calculation of small establishments.

[263] 2017 Census of Governments. *https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html.*

[264] A Compensation/Benefits Specialist ensures company compliance with Federal and state laws, including reporting requirements; evaluates job positions, determining classification, exempt or non-exempt status, and salary; plans, develops, evaluates, improves, and communicates methods and techniques for selecting, promoting, compensating, evaluating, and training workers. *See* BLS, ''13–1141 Compensation, Benefits, and Job Analysis Specialists,'' *https://www.bls.gov/oes/current/oes131141.htm.*

[265] Note that the NPRM reported $3.86 which is the cost per job, rather than the cost per independent contractor.

[266] Lim et al, *supra* note 75 at 51.

use of independent contractors may also favor smaller companies. In which case, costs and benefits and cost savings may be larger for these small firms. Because benefits and cost savings are expected to outweigh costs, the Department does not expect this rule will result in an undue hardship for small businesses.

AFL–CIO disagreed with including cost savings from increased clarity for independent contractors. They argue that ''the independent contractors at issue—those who falls [sic] close to the line separating independent contractors from employees are not themselves employers, they provide services solely as individuals and they have no need to determine if they are themselves independent contractors.'' They additionally stated that the analysis failed to include compliance costs for the new small businesses created—the workers newly classified as independent contractors. Specifically, these new independent contractors will have increased regulatory burden due to additional accounting and tax filing costs. The Department believes it did address this because workers who choose to pursue independent contractor roles will not take them unless they believe the gains will offset the costs.

The AFL–CIO asserts that the Department failed to conduct the outreach to small businesses as required by Section 609(a) of the RFA. The Department notes that these requirements only apply when the rule will have a significant economic impact on a substantial number of small entities, which is not the case for this rulemaking.

VIII. Unfunded Mandates Reform Act Analysis

The Unfunded Mandates Reform Act of 1995 (UMRA) [267] requires agencies to prepare a written statement for rules with a Federal mandate that may result in increased expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of $156 million ($100 million in 1995 dollars adjusted for inflation) or more in at least one year.[268] This statement must: (1) Identify the authorizing legislation; (2) present the estimated costs and benefits of the rule and, to the extent that such estimates are feasible and relevant, its estimated effects on the national economy; (3) summarize and evaluate state, local, and tribal government input; and (4) identify reasonable alternatives and select, or explain the non-selection, of the least costly, most cost-effective, or least burdensome alternative.

A. Authorizing Legislation

This final rule is issued pursuant to the Fair Labor Standards Act, 29 U.S.C. 201, *et seq.*

B. Assessment of Costs and Benefits

For purposes of the UMRA, this rule includes a Federal mandate that is expected to result in increased expenditures by the private sector of more than $156 million in at least one year, but will not result in increased expenditures by state, local, and tribal governments, in the aggregate, of $156 million or more in any one year.

Based on the cost analysis from this final rule, the Department determined that it will result in Year 1 total costs for state and local governments totaling $1.7 million, all for regulatory familiarization. There will be no additional costs incurred in subsequent years.

The Department determined that the rule will result in Year 1 total costs for the private sector of $369.2 million, all of them incurred for regulatory familiarization. The Department included all independent contractors in the private sector total regulatory familiarization costs. There will be no additional costs incurred in subsequent years.

UMRA requires agencies to estimate the effect of a regulation on the national economy if such estimates are reasonably feasible and the effect is relevant and material.[269] However, OMB guidance on this requirement notes that such macroeconomic effects tend to be measurable in nationwide econometric models only if the economic effect of the regulation reaches 0.25 percent to 0.5 percent of Gross Domestic Product (GDP), or in the range of $53.6 billion to $107.2 billion (using 2019 GDP).[270] A regulation with a smaller aggregate effect is not likely to have a measurable effect in macroeconomic terms, unless it is highly focused on a particular geographic region or economic sector, which is not the case with this rule.

The Department's RIA estimates that the total costs of the final rule will be $369.2 million. Given OMB's guidance, the Department has determined that a full macroeconomic analysis is not likely to show that these costs would have any measurable effect on the economy.

Many commenters claim that the rule will result in costs to Federal and state governments in the form of increased public assistance and decreased tax revenue. The Department discussed these potential costs in the RIA and directs the reader to Section VI(E)(2)(ii).

The State AGs stated that the Department failed to include the increased administrative and enforcement costs to states due to the change in the standard for determining independent contractor status under the FLSA. They wrote that states ''would need to invest time and resources into training agency employees and educating the public,'' particularly in states with laws that are more restrictive than the economic reality test. States do not enforce Federal laws and therefore have no need to train their personnel in the enforcement of the FLSA or the Department's regulations. There is also no need for states to be ''educating'' the public about FLSA regulations—aside from pointing out that Federal law may impose different requirements than state labor laws. Finally, under the nation's federalist system, states may and often do enact and enforce labor standards and are more restrictive than Federal standards. A state's decision to do so, however, rests with the state because no state is forced to enact labor standards that are stricter than the Federal standard. Any costs associated with implementing a stricter standard, including training and education, reflect the free choice of the individual state, and not the existence of a different Federal standard. As such, costs that a state choose to bear in enacting and enforcing their own laws are the result of the state's own decision, and are outside the scope of the unfunded mandate concept.

C. Least Burdensome Option Explained

The Department believes that it has chosen the least burdensome but still cost-effective methodology to clarify the FLSA's distinction between employees and independent contractors. Although the regulation will impose costs for regulatory familiarization, the Department believes that its proposal would reduce the overall burden on organizations by simplifying and clarifying the analysis for determining whether a worker is classified as an employee or an independent contractor under the FLSA. The Department believes that, after familiarization, this rule will reduce the time spent by organizations to determine whether a worker is an independent contractor. Moreover, the additional clarification

[267] *See* 2 U.S.C. 1501.

[268] Calculated using growth in the Gross Domestic Product deflator from 1995 to 2019. Bureau of Economic Analysis. Table 1.1.9. Implicit Price Deflators for Gross Domestic Product.

[269] *See* 2 U.S.C. 1532(a)(4).

[270] According to the Bureau of Economic Analysis, 2019 GDP was $21.43 trillion. *https://www.bea.gov/system/files/2020-02/gdp4q19_2nd_0.pdf.*

could promote innovation and certainty in business relationships. The AFPF agreed ''that the Department has adequately analyzed potential alternatives as well as selected the least burdensome option under the Unfunded Mandates Reform Act of 1995.''

IX. Effects on Families

The undersigned hereby certifies that the proposed rule would not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

List of Subjects

29 CFR Part 780

Agriculture, Child labor, Wages.

29 CFR Part 788

Forests and forest products, Wages.

29 CFR Part 795

Employment, Wages.

Signed at Washington, DC, this 31st day of December, 2020.

Cheryl M. Stanton,

Administrator, Wage and Hour Division.

For the reasons set out in the preamble, the Department of Labor amends 29 CFR chapter V as follows:

PART 780—EXEMPTIONS APPLICABLE TO AGRICULTURE, PROCESSING OF AGRICULTURAL COMMODITIES, AND RELATED SUBJECTS UNDER THE FAIR LABOR STANDARDS ACT

■ 1. The authority citation for part 780 continues to read as follows:

Authority: Secs. 1–19, 52 Stat. 1060, as amended; 29 U.S.C. 201–219.

■ 2. Amend § 780.330 by revising paragraph (b) to read as follows:

§ 780.330 Sharecroppers and tenant farmers.

* * * * *

(b) In determining whether such individuals are employees or independent contractors, the criteria laid down in §§ 795.100 through 795.110 of this chapter are used.

* * * * *

PART 788—FORESTRY OR LOGGING OPERATIONS IN WHICH NOT MORE THAN EIGHT EMPLOYEES ARE EMPLOYED

■ 3. The authority citation for part 788 continues to read as follows:

Authority: Secs. 1–19, 52 Stat. 1060, as amended; 29 U.S.C. 201–219.

■ 4. Amend § 788.16 by revising paragraph (a) to read as follows:

§ 788.16 Employment relationship.

(a) In determining whether individuals are employees or independent contractors, the criteria laid down in §§ 795.100 through 795.110 of this chapter are used.

* * * * *

■ 5. Add part 795 to subchapter B to read as follows:

PART 795—EMPLOYEE OR INDEPENDENT CONTRACTOR CLASSIFICATION UNDER THE FAIR LABOR STANDARDS ACT

Sec.

Authority: 52 Stat. 1060, as amended; 29 U.S.C. 201–219.

§ 795.100 Introductory statement.

This part contains the Department of Labor's general interpretations of the text governing individuals' classification as employees or independent contractors under the Fair Labor Standards Act (FLSA or Act). *See* 29 U.S.C. 201–19. The Administrator of the Wage and Hour Division will use these interpretations to guide the performance of his or her duties under the Act, and intends the interpretations to be used by employers, employees, and courts to understand employers' obligations and employees' rights under the Act. To the extent that prior administrative rulings, interpretations, practices, or enforcement policies relating to classification as an employee or independent contractor under the Act are inconsistent or in conflict with the interpretations stated in this part, they are hereby rescinded. The interpretations stated in this part may be relied upon in accordance with section 10 of the Portal-to-Portal Act, 29 U.S.C. 251–262, notwithstanding that after any such act or omission in the course of such reliance, any such interpretation in this part ''is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.'' 29 U.S.C. 259.

§ 795.105 Determining employee and independent contractor classification under the FLSA.

(a) *Independent contractors are not employees under the Act.* An individual who renders services to a potential employer—*i.e.,* a putative employer or alleged employer—as an independent contractor is not that potential employer's employee under the Act. As such, sections 6, 7, and 11 of the Act, which impose obligations on employers regarding their employees, are inapplicable. Accordingly, the Act does not require a potential employer to pay an independent contractor either the minimum wage or overtime pay under sections 6 or 7. Nor does section 11 of the Act require a potential employer to keep records regarding an independent contractor's activities.

(b) *Economic dependence as the ultimate inquiry.* An ''employee'' under the Act is an individual whom an employer suffers, permits, or otherwise employs to work. 29 U.S.C. 203(e)(1), (g). An employer suffers or permits an individual to work as an employee if, as a matter of economic reality, the individual is economically dependent on that employer for work. *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722, 727 (1947); *Bartels* v. *Birmingham,* 332 U.S. 126, 130 (1947). An individual is an independent contractor, as distinguished from an ''employee'' under the Act, if the individual is, as a matter of economic reality, in business for him- or herself.

(c) *Determining economic dependence.* The economic reality factors in paragraph (d) of this section guide the determination of whether the relationship between an individual and a potential employer is one of economic dependence and therefore whether an individual is properly classified as an employee or independent contractor. These factors are not exhaustive, and no single factor is dispositive. However, the two core factors listed in paragraph (d)(1) of this section are the most probative as to whether or not an individual is an economically dependent ''employee,'' 29 U.S.C. 203(e)(1), and each therefore typically carries greater weight in the analysis than any other factor. Given these two core factors' greater probative value, if they both point towards the same classification, whether employee or independent contractor, there is a substantial likelihood that is the individual's accurate classification. This is because other factors are less probative and, in some cases, may not be probative at all, and thus are highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors.

(d) *Economic reality factors*—(1) *Core factors*—(i) *The nature and degree of control over the work.* This factor weighs towards the individual being an independent contractor to the extent the individual, as opposed to the potential employer, exercises substantial control over key aspects of the performance of

the work, such as by setting his or her own schedule, by selecting his or her projects, and/or through the ability to work for others, which might include the potential employer's competitors. In contrast, this factor weighs in favor of the individual being an employee under the Act to the extent the potential employer, as opposed to the individual, exercises substantial control over key aspects of the performance of the work, such as by controlling the individual's schedule or workload and/or by directly or indirectly requiring the individual to work exclusively for the potential employer. Requiring the individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships) does not constitute control that makes the individual more or less likely to be an employee under the Act.

(ii) *The individual's opportunity for profit or loss.* This factor weighs towards the individual being an independent contractor to the extent the individual has an opportunity to earn profits or incur losses based on his or her exercise of initiative (such as managerial skill or business acumen or judgment) or management of his or her investment in or capital expenditure on, for example, helpers or equipment or material to further his or her work. While the effects of the individual's exercise of initiative and management of investment are both considered under this factor, the individual does not need to have an opportunity for profit or loss based on both for this factor to weigh towards the individual being an independent contractor. This factor weighs towards the individual being an employee to the extent the individual is unable to affect his or her earnings or is only able to do so by working more hours or faster.

(2) *Other factors*—(i) *The amount of skill required for the work.* This factor weighs in favor of the individual being an independent contractor to the extent the work at issue requires specialized training or skill that the potential employer does not provide. This factor weighs in favor of the individual being an employee to the extent the work at issue requires no specialized training or skill and/or the individual is dependent upon the potential employer to equip him or her with any skills or training necessary to perform the job.

(ii) *The degree of permanence of the working relationship between the individual and the potential employer.* This factor weighs in favor of the individual being an independent contractor to the extent the work relationship is by design definite in duration or sporadic, which may include regularly occurring fixed periods of work, although the seasonal nature of work by itself would not necessarily indicate independent contractor classification. This factor weighs in favor of the individual being an employee to the extent the work relationship is instead by design indefinite in duration or continuous.

(iii) *Whether the work is part of an integrated unit of production.* This factor weighs in favor of the individual being an employee to the extent his or her work is a component of the potential employer's integrated production process for a good or service. This factor weighs in favor of an individual being an independent contractor to the extent his or her work is segregable from the potential employer's production process. This factor is different from the concept of the importance or centrality of the individual's work to the potential employer's business.

(iv) *Additional factors.* Additional factors may be relevant in determining whether an individual is an employee or independent contractor for purposes of the FLSA, but only if the factors in some way indicate whether the individual is in business for him- or herself, as opposed to being economically dependent on the potential employer for work.

§ 795.110 Primacy of actual practice.

In evaluating the individual's economic dependence on the potential employer, the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible. For example, an individual's theoretical abilities to negotiate prices or to work for competing businesses are less meaningful if, as a practical matter, the individual is prevented from exercising such rights. Likewise, a business' contractual authority to supervise or discipline an individual may be of little relevance if in practice the business never exercises such authority.

§ 795.115 Examples of analyzing economic reality factors.

(a) The following illustrative examples demonstrate how the factors listed in § 795.105(d) may be analyzed under the facts presented and are limited to substantially similar factual situations.

(b)(1)(i) *Example.* An individual is the owner and operator of a tractor-trailer and performs transportation services for a logistics company. The owner-operator substantially controls the key aspects of the work. However, the logistics company has installed, at its own expense, a device that limits the maximum speed of the owner-operator's vehicle and monitors the speed through GPS. The company limits the owner-operator's speed in order to comply with federally mandated motor carrier safety regulations and to ensure that she complies with local traffic laws. The company also requires the owner-operator to meet certain contractually agreed-upon delivery deadlines, and her contract includes agreed-upon incentives for meeting, and penalties for missing, the deadlines.

(ii) *Application.* The owner-operator exercises substantial control over key aspects of her work, indicating independent contractor status. The fact that the company has installed a device that limits and monitors the speed of the owner-operator's vehicle does not change the above conclusion. This measure is implemented in order to comply with specific legal obligations and to ensure safety, and thus under § 795.105(d)(1)(i) would not constitute control that makes the owner-operator more or less likely to be an employee under the Act. The contractually agreed-upon delivery deadlines, incentives, and penalties are typical of contractual relationships between businesses and likewise would not constitute control that makes the owner-operator more or less likely to be an employee under the Act.

(2)(i) *Example.* An individual accepts assignments from a company that provides an app-based service linking those who need home-repair work with those who perform home-repair work. The individual is able to meaningful increase his earnings by exercising initiative and business acumen and by investing in his own equipment. The company, however, has invested millions of dollars in developing and maintaining the app, marketing itself, maintaining the security of information submitted by actual and prospective customers and workers, and monitoring customer satisfaction with the work performed.

(ii) *Application.* The opportunity for profit or loss factor favors independent contractor status for the individual, despite the substantial difference in the monetary value of the investments made by each party. While the company may have invested substantially more in its business, the value of that investment is not relevant in determining whether the individual has a meaningful opportunity for profit or loss through his initiative, investment, or both.

(3)(i) *Example.* An individual worker works full time performing home renovation and repair services for a residential construction company. She is also the part owner of a food truck, which she operates on weekends. In performing the construction work, the worker is paid a fixed hourly rate, and the company determines how many and which tasks she performs. Her food truck recently became very popular and has generated substantial profits for her.

(ii) *Application.* With regard to the construction work, the worker does not have a meaningful opportunity for profit or loss based on her exercise of initiative or investment, indicating employee status. She is unable to profit, *i.e.,* increase her earnings, by exercising initiative or managing investments because she is paid a fixed hourly rate and the company determines the assignment of work. While she earns substantial profits through her food truck, that is a separate business from her work in the construction industry, and therefore is not relevant to the question of whether she is an employee of the construction company or in business for herself in the construction industry.

(4)(i) *Example.* A housekeeper works for a ski resort every winter. At the end of each winter, he stops working for the ski resort because the resort shuts down. At the beginning of each of the past several winters, the housekeeper returned to his prior position at the ski resort without formally applying or interviewing.

(ii) *Application.* The housekeeper has a long-term and indefinite work relationship with the ski resort under the permanence factor, which weighs in favor of classification as an employee. That his periods of working for the ski resort end at the end of each winter is a result of the seasonal nature of the ski industry and is thus not indicative of a sporadic relationship. The fact that the housekeeper returns to his prior position each new season indicates that his relationship with ski resort does not end and is indefinite as a matter of economic reality.

(5)(i) *Example.* An editor works part-time for a newspaper. The editor works from home and is responsible for assigning and reviewing many articles published by the newspaper. Sometimes she also writes or rewrites articles. The editor is responsible for determining the layout and order in which all articles appear in the newspaper's print and online editions. She makes assignment and lay-out decisions in coordination with several full-time editors who make similar decisions with respect to different articles in the same publication and who are employees of the newspaper.

(ii) *Application.* The editor is part of an integrated unit of production of the newspaper because she is involved in the entire production process of the newspaper, including assigning, reviewing, drafting, and laying out articles. This factor points in the direction of her being an employee of the newspaper. This conclusion is further supported by the fact that the editor performs the same work as employees of the newspaper in coordination with those employees. The fact that she does not physically work at the newspaper's office does not outweigh these more probative considerations of the integrated unit factor.

(6)(i) *Example.* A journalist writes articles for a newspaper on a freelance basis. The journalist does not have an office and generally works from home. He submits an article to the newspaper once every 2 to 3 weeks, which the newspaper may accept or reject. The journalist sometimes corresponds with the newspaper's editor regarding what to write about or regarding revisions to the articles that he submits, but he does not otherwise communicate or work with any of the newspaper's employees. The journalist never assigns articles to others nor does he review or revise articles that others submit. He is not responsible for determining where his article or any other articles appear in the newspaper's print and online editions.

(ii) *Application.* The journalist is not part of an integrated unit of production of the newspaper, indicating independent contractor status. His work is limited to the specific articles that he submits and is completely segregated from other parts of the newspaper's processes that serve its specific, unified purpose of producing newspapers. It is not relevant in analyzing this factor that the writing of articles is an important part of producing newspapers. Likewise, the fact that he works at home does not strongly indicate either status, because the nature of the journalist's work is such that the physical location where it is performed is largely irrelevant.

§ 795.120 Severability.

If any provision of this part 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 utter invalidity or unenforceability, in which event the provision shall be severable from this part and shall not affect the remainder thereof.

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