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CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1239

[Docket No. CPSC–2019–0014]

Safety Standard for Gates and Enclosures

AGENCY: Consumer Product Safety Commission.

ACTION: Direct final rule.

SUMMARY: In July 2020, the U.S. Consumer Product Safety Commission (CPSC or Commission) published a consumer product safety standard for gates and enclosures under section 104 of the Consumer Product Safety Improvement Act of 2008 (CPSIA). The Commission's mandatory standard incorporated by reference the American Society for Testing and Materials (ASTM) voluntary standard that was in effect for gates and enclosures at the time, with modifications to make the standard more stringent, to further reduce the risk of injury associated with gates and enclosures. The CPSIA sets forth a process for updating mandatory standards for durable infant or toddler products that are based on a voluntary standard, when a voluntary standards organization revises the standard. In June 2021, ASTM published a revised voluntary standard for gates and enclosures, and it notified the Commission of this revised standard in July 2021. This direct final rule updates the mandatory standard for gates and enclosures to incorporate by reference ASTM's 2021 version of the voluntary standard for gates and enclosures.

DATES: The rule is effective on January 2, 2022, unless the Commission receives a significant adverse comment by October 28, 2021. If the Commission receives such a comment, it will publish a document in the **Federal Register** withdrawing this direct final rule before its effective date. The incorporation by reference of the publication listed in this rule is approved by the Director of the Federal Register as of January 2, 2022.

ADDRESSES: You can submit comments, identified by Docket No. CPSC–2019–0014, by any of the following methods:

Electronic Submissions: Submit electronic comments to the Federal eRulemaking Portal at: *https://www.regulations.gov.* Follow the instructions for submitting comments. CPSC typically does not accept comments submitted by electronic mail (email), except through *https://www.regulations.gov.* CPSC encourages you to submit electronic comments by using the Federal eRulemaking Portal, as described above.

Mail/Hand Delivery/Courier Written Submissions: Submit comments by mail/hand delivery/courier to: Division of the Secretariat, Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814; telephone: (301) 504–7479. Alternatively, as a temporary option during the COVID–19 pandemic, you can email such submissions to: *cpsc-os@cpsc.gov.*

Instructions: All submissions must include the agency name and docket number for this document. CPSC may post all comments without change, including any personal identifiers, contact information, or other personal information provided, to: *https://www.regulations.gov.* Do not submit electronically: Confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public. If you wish to submit such information, please submit it according to the instructions for mail/hand delivery/courier written submissions.

Docket: For access to the docket to read background documents or comments received, go to: *https://www.regulations.gov,* and insert the docket number, CPSC–2019–0014, into the ''Search'' box, and follow the prompts.

FOR FURTHER INFORMATION CONTACT: Justin Jirgl, Compliance Officer, U.S. Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814; telephone (301) 504–7814; email: *jjirgl@cpsc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Authority

Section 104(b)(1) of the CPSIA requires the Commission to assess the effectiveness of voluntary standards for durable infant or toddler products and adopt mandatory standards for these products. 15 U.S.C. 2056a(b)(1). The mandatory standard must be ''substantially the same as'' the voluntary standard, or it may be ''more stringent than'' the voluntary standard, if the Commission determines that more stringent requirements would further reduce the risk of injury associated with the product. *Id.*

Section 104(b)(4)(B) of the CPSIA specifies the process for when a voluntary standards organization revises a standard that the Commission incorporated by reference under section 104(b)(1). First, the voluntary standards organization must notify the Commission of the revision. Once the Commission receives this notification, the Commission may reject or accept the revised standard. The Commission may reject the revised standard by notifying the voluntary standards organization that it has determined that the revised standard does not improve the safety of the consumer product and that it is retaining the existing standard. When rejecting a revision, the Commission must notify the voluntary standards organization of this determination within 90 days of receiving notice of the revision. If the Commission does not take this action to reject the revised standard, the revised voluntary standard will be considered a consumer product safety standard issued under section 9 of the Consumer Product Safety Act (15 U.S.C. 2058), effective 180 days after the Commission received notification of the revision (or a later date specified by the Commission in the **Federal Register**). 15 U.S.C. 2056a(b)(4)(B).

B. Safety Standard for Gates and Enclosures

On July 6, 2020, under section 104 of the CPSIA, the Commission published a final rule that incorporated by reference ASTM F1004–19, *Standard Consumer Safety Specification for Expansion Gates and Expandable Enclosures,* as the mandatory standard for gates and enclosures, with modifications to the standard to further reduce the risk of injury. 85 FR 40100. Modifications in the final rule included the following

additional requirements, depending on the design of a pressure-mounted gate, to further reduce the risk of injury associated with incorrectly installed pressure-mounted gates:

(1) For pressure-mounted gates that include wall cups with the product to meet the 30-pound push-out force test in the standard, the gates must include a separate warning label in a conspicuous location on the top rail of the gate regarding correct installation using wall cups, or

(2) For pressure-mounted gates that do not use wall cups to meet the 30-pound push-out force test in the standard, the gates must use visual side-pressure indicators to provide consumers feedback as to whether the gate is correctly installed.

Id. The final rule is codified at 16 CFR part 1239. The rule for gates and enclosures applies to barriers ''intended to be erected in an opening, such as a doorway, to prevent the passage of young children, but which can be removed by older persons who are able to operate the locking mechanism'' (ASTM F1004 sec. 3.1.7) and ''self-supporting barrier[s] intended to completely surround an area or play-space within which a young child may be confined'' (ASTM F1004 sec. 3.1.6).

On July 6, 2021, ASTM notified CPSC that it had published a revised standard for gates and enclosures, ASTM F1004–21.[1] The revised voluntary standard was approved on May 15, 2021, and published in June 2021. In accordance with the procedures set out in section 104(b)(4)(B) of the CPSIA, the Commission reviewed ASTM F1004–21 to determine whether the revised voluntary standard improves the safety of gates and enclosures and found that ASTM substantively revised the voluntary standard to harmonize with the requirements of the current mandatory standard for gates and enclosures. Based on CPSC's review of ASTM F1004–21,[2] the Commission will allow the revised voluntary standard to become the mandatory standard for gates and enclosures without modification, because the revised performance requirements in ASTM F1004–21 are identical to 16 CFR part 1239, and thus, the revisions are neutral when compared with 16 CFR part 1239. Accordingly, by operation of law under section 104(b)(4)(B) of the CPSIA, ASTM F1004–21 will become the mandatory consumer product safety standard for gates and enclosures on January 2, 2022.[3] 15 U.S.C. 2056a(b)(4)(B). This direct final rule updates 16 CFR part 1239 to incorporate by reference the revised voluntary standard, ASTM F1004–21, without modification.

II. Description of ASTM F1004–21

The ASTM standard for gates and enclosures includes performance requirements, test methods, and requirements for warning labels and instructional literature, to address hazards to infants and children associated with gates and enclosures. This is the first revision ASTM has made to the voluntary standard since the Commission published the final rule for gates and enclosures in July 2020, based on ASTM F1004–19. The June 2021 revision to the voluntary standard, ASTM F1004–21, includes editorial and substantive provisions.

ASTM made minor and editorial changes throughout ASTM F1004–21 including the following examples:

- Hyphenating multiple terms used as adjectives, such as ''single-action,'' ''pressure-mounted,'' ''partially-bounded,'' and ''hold-open,'' throughout;
- Correcting the spelling of ''guage'' to ''gauge'' in section 3.1.16;
- Adding conversions to Celsius in section 4.4;
- Changing the capitalization of some terms, such as ''Small Torso Probe'' to ''small torso probe''; and
- Changing unit expressions to bring the standard into accordance with ASTM Form and Style, such as adding a repeater unit when expressing a range (*e.g.,* ''2 in. x 2 in.'' instead of ''2 x 2 in.'').

These changes are neutral and do not affect the safety of gates and enclosures.

ASTM also made three substantive revisions to the voluntary standard in ASTM F1004–21 to harmonize with the current mandatory standard for gates and enclosures codified in 16 CFR part 1239. The revised voluntary standard adds the following requirements:

(1) A visual side-pressure indicator for pressure-mounted gates that do not incorporate wall-cups.

To implement this change, ASTM:

(a) Added new definitions for ''side-pressure'' and ''visual side-pressure indicators,'' which are identical to those in 16 CFR 1239.2(b)(2)(i) and (ii);

(b) Modified the directions for visual side-pressure indicators in the test method in 7.9.1.2 to be substantially identical to 16 CFR 1239.2(b)(4)(i);

(c) Added a new section, 6.8, specifying requirements for visual side-pressure indicators. This section is substantially identical to the requirements in 16 CFR 1239.2(b)(3)(i) through (vi);

(d) Added section 9.5 with instructional requirements for gates with visual side-pressure indicators, which is identical to the instructional requirements for gates in 16 CFR 1239.2(b)(8)(i); and

(e) Added section X.1.2.5.4 to provide a rationale for the inclusion of visual side-pressure indicators in the rationale section, which is identical to 16 CFR 1239.2(b)(9)(i).

(2) A wall-cup warning located on the top of the gate, by adding a new section 8.5.7, containing warning requirements for gates that use wall-cups or other mounting hardware to meet the requirements of the push-out test in section 6.3. Such gates must display the following warning, separate from all other warnings, and located along the top rail of the gate:

You MUST install [wall-cups] to keep gate in place. Without [wall-cups], child can push out and escape.

This requirement is identical to the provisions in 16 CFR 1239.2(b)(7)(i) through (iv);

(3) Harmonization of the definition of ''conspicuous'' with 16 CFR part 1239 and other ASTM standards, by modifying the definition of ''conspicuous'' to use the definition as 16 CFR 1239.2(b)(1)(i), and by describing the adjective ''conspicuous,'' rather than defining an adjective with a definition that describes a noun (*i.e.,* a label).

Under CPSIA section 104(b)(4)(B), unless the Commission determines that ASTM's revision to a voluntary standard that is referenced in a mandatory standard ''does not improve the safety of the consumer product covered by the standard,'' the revised voluntary standard becomes the new mandatory standard. As described above, ASTM F1004–21 is substantially identical to 16 CFR part 1239. Accordingly, ASTM

[1] Until the standard becomes effective on January 2, 2022, a read-only copy of ASTM's standard is available at: *https://www.astm.org/CPSC.htm.* After the effective date of the revised part 1239, ASTM F1004–21 becomes the mandatory standard for gates and enclosures, and it will be available, to read only, at: *https://www.astm.org/READINGLIBRARY/.*

[2] CPSC staff's briefing memorandum regarding ASTM F1004–21 is available at: *https://www.cpsc.gov/s3fs-public/ASTMs-Revised-Safety-Standard-for-Gates-and-Enclosures.pdf?VersionId=PDxzSc9QGGUVWWsdoLv1iAAl19Fd6P6Y.*

[3] The statute provides that if the Commission does not take action to reject a revised standard, the revised voluntary standard will be considered a consumer product safety standard issued under section 9 of the Consumer Product Safety Act (15 U.S.C. 2058), effective 180 days after the Commission received notification of the revision (or a later date specified by the Commission in the **Federal Register**). 15 U.S.C. 2056a(b)(4)(B). In this case, 180 days from the July 6, 2021 notice date is January 2, 2022.

F1004–21 is safety neutral when compared to 16 CFR part 1239. The Commission will allow ASTM F1004–21 to become the mandatory standard for gates and enclosures, and is updating 16 CFR part 1239 to reference this most recent updated voluntary standard, without modification.

III. Incorporation by Reference

Section 1239.2 of the direct final rule incorporates by reference ASTM F1004–21. The Office of the Federal Register (OFR) has regulations regarding incorporation by reference. 1 CFR part 51. Under these regulations, agencies must discuss, in the preamble to a final rule, ways in which the material the agency incorporates by reference is reasonably available to interested parties, and how interested parties can obtain the material. In addition, the preamble to the final rule must summarize the material. 1 CFR 51.5(b).

In accordance with the OFR regulations, section II. Description of ASTM F1004–21 of this preamble summarizes the major and revised provisions of ASTM F1004–21 that the Commission incorporates by reference into 16 CFR part 1239.[4] The standard is reasonably available to interested parties in several ways. Interested parties can purchase a copy of ASTM F1004–21 from ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428–2959 USA; phone: 610–832–9585; *www.astm.org.* Additionally, until the direct final rule takes effect, a read-only copy of ASTM F1004–21 is available for viewing on ASTM's website at: *https://www.astm.org/CPSC.htm.* Once the rule takes effect, a read-only copy of the standard will be available for viewing on the ASTM website at: *https://www.astm.org/READINGLIBRARY/.* Interested parties can also schedule an appointment to inspect a copy of the standard at CPSC's Division of the Secretariat, U.S. Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814, telephone: 301–504–7479; email: *cpsc-os@cpsc.gov.*

IV. Certification

Section 14(a) of the Consumer Product Safety Act (CPSA; 15 U.S.C. 2051–2089) requires manufacturers of products subject to a consumer product safety rule under the CPSA, or to a similar rule, ban, standard, or regulation under any other act enforced by the Commission, to certify that the products comply with all applicable CPSC requirements. 15 U.S.C. 2063(a). Such certification must be based on a test of each product, or on a reasonable testing program, or, for children's products, on tests of a sufficient number of samples by a third party conformity assessment body accredited by CPSC to test according to the applicable requirements. As noted, standards issued under section 104(b)(1)(B) of the CPSIA are ''consumer product safety standards.'' Thus, they are subject to the testing and certification requirements of section 14 of the CPSA.

Because gates and enclosures are children's products, a CPSC-accepted third party conformity assessment body must test samples of the products for compliance with 16 CFR part 1239. Products subject to part 1239 also must comply with all other applicable CPSC requirements, such as the lead content requirements in section 101 of the CPSIA,[5] the phthalates prohibitions in section 108 of the CPSIA [6] and 16 CFR part 1307, the tracking label requirements in section 14(a)(5) of the CPSA,[7] and the consumer registration form requirements in section 104(d) of the CPSIA.[8]

V. Notice of Requirements

In accordance with section 14(a)(3)(B)(iv) of the CPSIA, the Commission previously published a notice of requirements (NOR) for accreditation of third party conformity assessment bodies (third party labs) for testing gates and enclosures, and codified the requirement at 16 CFR 1112.15(b)(49). 85 FR at 40112. The NOR provided the criteria and process for CPSC to accept accreditation of third party labs for testing gates and enclosures to 16 CFR part 1239. *Id.* The Commission codified NORs for all mandatory standards for durable infant or toddler products in ''Requirements Pertaining to Third Party Conformity Assessment Bodies,'' 16 CFR part 1112.

Because ASTM F1004–21 is substantially identical to the existing mandatory standard for gates and enclosures, the Commission considers third party labs that are currently CPSC-accepted for 16 CFR part 1239 to have demonstrated competence to test gates and enclosures to the revised ASTM F1004–21, as incorporated into part 1239. Third party labs have already begun testing to part 1239 when it became effective on July 6, 2021. Accordingly, the existing accreditations that the Commission has accepted for testing to this standard will cover testing to the revised standard. The existing NOR for the Safety Standard for Gates and Enclosures will remain in place, and CPSC-accepted third party labs are expected to update the scope of the third party lab's accreditations to reflect the revised gates and enclosure standard in the normal course of renewing their accreditations.

VI. Direct Final Rule Process

The Commission is issuing this rule as a direct final rule. Although the Administrative Procedure Act (APA; 5 U.S.C. 551–559) generally requires agencies to provide notice of a rule and an opportunity for interested parties to comment on it, section 553 of the APA provides an exception when the agency, ''for good cause finds'' that notice and comment are ''impracticable, unnecessary, or contrary to the public interest.'' *Id.* 553(b)(B). The Commission concludes that when it updates a reference to an ASTM standard that the Commission incorporated by reference under section 104(b) of the CPSIA, notice and comment are not necessary.

Under the process set out in section 104(b)(4)(B) of the CPSIA, when ASTM revises a standard that the Commission has previously incorporated by reference under section 104(b)(1)(B) of the CPSIA, that revision will become the new CPSC standard, unless the Commission determines that ASTM's revision does not improve the safety of the product. Thus, unless the Commission makes such a determination, the ASTM revision becomes CPSC's standard by operation of law. The Commission is allowing ASTM F1004–21 to become CPSC's new standard. The purpose of this direct final rule is to update the reference in the Code of Federal Regulations (CFR) so that it reflects the version of the standard that takes effect by statute. This rule updates the reference in the CFR, but under the terms of the CPSIA, ASTM F1004–21 takes effect as the new CPSC standard for gates and enclosures, even if the Commission does not issue this rule. Thus, public comments would not alter substantive changes to the standard or the effect of the revised standard as a consumer product safety rule under section 104(b) of the CPSIA. Under these circumstances, notice and comment are unnecessary.

In Recommendation 95–4, the Administrative Conference of the United States (ACUS) endorses direct final rulemaking as an appropriate procedure to expedite rules that are noncontroversial and that are not expected to generate significant adverse

[4] A detailed description of ASTM F1004–19 and the modifications made by the Commission in the final rule are also available in the final rule for gates and enclosures at 85 FR at 40104–05.

[5] 15 U.S.C. 1278a.

[6] 15 U.S.C. 2057c.

[7] 15 U.S.C. 2063(a)(5).

[8] 15 U.S.C. 2056a(d).

comments. *See* 60 FR 43108 (Aug. 18, 1995). ACUS recommends that agencies use the direct final rule process when they act under the ''unnecessary'' prong of the good cause exemption in 5 U.S.C. 553(b)(B). Consistent with the ACUS recommendation, the Commission is publishing this rule as a direct final rule, because CPSC does not expect any significant adverse comments.

Unless CPSC receives a significant adverse comment within 30 days of this notification, the rule will become effective on January 2, 2022. In accordance with ACUS's recommendation, the Commission considers a significant adverse comment to be ''one where the commenter explains why the rule would be inappropriate,'' including an assertion challenging ''the rule's underlying premise or approach,'' or a claim that the rule ''would be ineffective or unacceptable without change.'' 60 FR 43108, 43111. As noted, this rule merely updates a reference in the CFR to reflect a change that occurs by statute.

If the Commission receives a significant adverse comment, the Commission will withdraw this direct final rule. Depending on the comment and other circumstances, the Commission may then incorporate the adverse comment into a subsequent direct final rule or publish a notice of proposed rulemaking, providing an opportunity for public comment.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA; 5 U.S.C. 601–612) generally requires agencies to review proposed and final rules for their potential economic impact on small entities, including small businesses, and prepare regulatory flexibility analyses. 5 U.S.C. 603, 604. The RFA applies to any rule that is subject to notice and comment procedures under section 553 of the APA. *Id.* As discussed in section VI. Direct Final Rule Process of this preamble, the Commission has determined that notice and the opportunity to comment are unnecessary for this rule. Therefore, the RFA does not apply. The Commission also notes the limited nature of this document, which merely updates the incorporation by reference to reflect the mandatory CPSC standard that takes effect under section 104 of the CPSIA.

VIII. Paperwork Reduction Act

The current mandatory standard for gates and enclosures includes requirements for marking, labeling, and instructional literature that constitute a ''collection of information,'' as defined in the Paperwork Reduction Act (PRA; 44 U.S.C. 3501–3521). The revised mandatory standard for gates and enclosures does not alter these requirements. The Commission took the steps required by the PRA for information collections when it adopted 16 CFR part 1239, including obtaining approval and a control number. Because the information collection is unchanged, the revision does not affect the information collection requirements or approval related to the standard.

IX. Environmental Considerations

The Commission's regulations provide a categorical exclusion for the Commission's rules from any requirement to prepare an environmental assessment or an environmental impact statement where they ''have little or no potential for affecting the human environment.'' 16 CFR 1021.5(c)(2). This rule falls within the categorical exclusion, so no environmental assessment or environmental impact statement is required.

X. Preemption

Section 26(a) of the CPSA provides that where a consumer product safety standard is in effect and applies to a product, no state or political subdivision of a state may either establish or continue in effect a requirement dealing with the same risk of injury unless the state requirement is identical to the Federal standard. 15 U.S.C. 2075(a). Section 26(c) of the CPSA also provides that states or political subdivisions of states may apply to CPSC for an exemption from this preemption under certain circumstances. Section 104(b) of the CPSIA deems rules issued under that provision ''consumer product safety standards.'' Therefore, once a rule issued under section 104 of the CPSIA takes effect, it will preempt in accordance with section 26(a) of the CPSA.

XI. Effective Date

Under the procedure set forth in section 104(b)(4)(B) of the CPSIA, when a voluntary standards organization revises a standard that the Commission adopted as a mandatory standard, the revision becomes the CPSC standard within 180 days of notification to the Commission, unless the Commission determines that the revision does not improve the safety of the product, or the Commission sets a later date in the **Federal Register**. 15 U.S.C. 2056a(b)(4)(B). The Commission is taking neither of those actions with respect to the revised standard for gates and enclosures. Therefore, ASTM F1004–21 automatically will take effect as the new mandatory standard for gates and enclosures on January 2, 2022, 180 days after the Commission received notice of the revision on July 6, 2021. As a direct final rule, unless the Commission receives a significant adverse comment within 30 days of this notification, the rule will become effective on January 2, 2022.

XII. Congressional Review Act

The Congressional Review Act (CRA; 5 U.S.C. 801–808) states that before a rule may take effect, the agency issuing the rule must submit the rule, and certain related information, to each House of Congress and the Comptroller General. 5 U.S.C. 801(a)(1). The CRA submission must indicate whether the rule is a ''major rule.'' The CRA states that the Office of Information and Regulatory Affairs (OIRA) determines whether a rule qualifies as a ''major rule.''

Pursuant to the CRA, this rule does not qualify as a ''major rule,'' as defined in 5 U.S.C. 804(2). To comply with the CRA, CPSC will submit the required information to each House of Congress and the Comptroller General.

List of Subjects in 16 CFR Part 1239

Consumer protection, Imports, Incorporation by reference, Infants and children, Labeling, Law enforcement, Toys.

For the reasons discussed in the preamble, the Commission amends 16 CFR chapter II as follows:

PART 1239—SAFETY STANDARD FOR GATES AND ENCLOSURES

■ 1. Revise the authority citation for part 1239 to read as follows:

Authority: 15 U.S.C. 2056a.

■ 2. Revise § 1239.2 to read as follows:

§ 1239.2 Requirements for gates and enclosures.

Each gate and enclosure shall comply with all applicable provisions of ASTM F1004–21, *Standard Consumer Safety Specification for Expansion Gates and Expandable Enclosures,* approved on May 15, 2021. 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 a copy from ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428–2959; phone: (610) 832–9585; *www.astm.org.* A read-only copy of the standard is available for viewing on the ASTM website at *https://www.astm.org/READINGLIBRARY/.* You may inspect a

copy at the Division of the Secretariat, U.S. Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814, telephone (301) 504–7479, email: *cpsc-os@cpsc.gov,* or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email *fr.inspection@nara.gov,* or go to: *www.archives.gov/federal-register/cfr/ibr-locations.html.*

Alberta E. Mills,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2021–20851 Filed 9–27–21; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 300

[TD 9957]

RIN 1545–BP75

User Fee for Estate Tax Closing Letter

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulation.

SUMMARY: This document contains final regulations that establish a new user fee of $67 for persons requesting the issuance of IRS Letter 627, also referred to as an estate tax closing letter. The final regulations affect persons who may request an estate tax closing letter.

DATES:

Effective date: These regulations are effective October 28, 2021.

Applicability date: For date of applicability, see § 300.13(d).

FOR FURTHER INFORMATION CONTACT: Juli Ro Kim at (202) 317–6859 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document amends the User Fee Regulations (26 CFR part 300) to establish a user fee applicable to requests for estate tax closing letters issued by the IRS (currently, IRS Letter 627).

A. Authority To Charge User Fees

The Independent Offices Appropriations Act of 1952 (IOAA) (31 U.S.C. 9701) authorizes each agency to promulgate regulations establishing the charge for services provided by the agency (user fees). The IOAA provides that these user fee regulations are subject to policies prescribed by the President. The policies currently are set forth in the Office of Management and Budget (OMB) Circular A–25, 58 FR 38142 (July 15, 1993; OMB Circular). The OMB Circular requires agencies providing services that confer special benefits on identifiable recipients beyond those accruing to the general public to identify those services, to determine whether user fees should be assessed for those services, and if so, to establish user fees that recover the full cost of providing those services, unless the agency requests, and the OMB grants, an exception to the full cost requirement.

B. Notice of Proposed Rulemaking

On December 31, 2020, the Department of the Treasury (Treasury Department) and the IRS published in the **Federal Register** (85 FR 86871) a notice of proposed rulemaking (REG–114615–16) proposing amendments to the User Fee Regulations in part 300 of title 26 of the Code of Federal Regulations (proposed regulations). Specifically, the proposed regulations proposed the addition of new § 300.13 to the User Fee Regulations to establish a $67 user fee for issuing an estate tax closing letter for an estate.

The preamble to the proposed regulations identifies the issuance of an estate tax closing letter as the provision of a service that confers special benefits, beyond those accruing to the general public, to an estate or other person properly authorized under section 6103 of the Internal Revenue Code (Code) to receive an estate tax closing letter. Accordingly, the preamble to the proposed regulations concludes that the IRS is authorized, pursuant to the IOAA and the OMB Circular, to charge a user fee for the issuance of an estate tax closing letter that reflects the full cost of providing this service. Additionally, the preamble to the proposed regulations explains the special benefits conferred by the issuance of estate tax closing letters and analyzes how the IRS has computed that the full cost of issuing an estate tax closing letter is $67. Finally, the preamble to the proposed regulations states that the Treasury Department and the IRS expect to implement a web-based procedure that will improve convenience and reduce burden for persons requesting estate tax closing letters as compared to the current procedure in place for making such requests.[1]

Summary of Comments

A. Overview

The IRS received a total of five written public comments in response to the proposed regulations, some addressing multiple aspects of the proposed regulations. These comments are available at *https://www.regulations.gov* or upon request. No public hearing on the proposed regulations was requested and accordingly no public hearing was held. After careful consideration of the comments received, the Treasury Department and the IRS adopt the proposed regulations without significant change. Accordingly, new § 300.13 establishes a $67 user fee for issuing an estate tax closing letter.

B. Comments Regarding the Imposition of a User Fee

1. Establishment and Amount of User Fee

One commenter opposed the establishment of a user fee to request an estate tax closing letter and suggested that the IRS return to issuing estate tax closing letters for every estate tax return filed, without the need for making a request or paying a user fee, as was the practice prior to June 2015.[2] Another commenter suggested that the user fee be reduced so that all estates desiring an estate tax closing letter can afford to pay the user fee and request the estate tax closing letter. A third commenter stated that the proposed $67 user fee is both reasonable and appropriate given the impact of returns filed solely to elect portability under section 2010 of the Code and the fact that estate tax returns are most often filed in the context of decedents with substantial gross estates.

As described in the preamble to the proposed regulations, the issuance of an estate tax closing letter, and the return information and procedural and substantive explanations such letters provide, constitutes the provision of a service that confers special benefits on identifiable recipients beyond those accruing to the general public. Because of these special benefits, the IOAA and the OMB Circular require the imposition of a user fee for the issuance of an estate tax closing letter to reflect the full cost of providing the service unless the IRS requests, and the OMB grants, an exception to the full cost requirement. The IRS has not requested an exception to the full cost requirement, for the

[1] For an overview of the procedure applicable to a request for an estate tax closing letter on or before October 28, 2021, see part D of the Background and Explanation of Provisions of the proposed regulations.

[2] See part B of the Background and Explanation of Provisions of the preamble of the proposed regulations for a full discussion of the June 2015 change to the prior IRS practice of issuing estate tax closing letters for every estate tax return filed.

following reasons. First, the IRS views the $67 user fee as not onerous or excessive, but reasonable in relation to the service provided. Second, as also discussed in the preamble to the proposed regulations, an account transcript is a free alternative to the estate tax closing letter that provides certain return information comparable to that found in an estate tax closing letter. Account transcripts can be used to confirm that the examination of an estate tax return has been completed and the IRS file has been closed, which most often is identified as the primary purpose for requesting an estate tax closing letter. See Notice 2017–12, I.R.B. 2017–5 742 (describing the utility of the account transcript in lieu of the estate tax closing letter and its availability at no charge). Thus, if affording the user fee for the issuance of an estate tax closing letter presents a challenge, an estate instead can request an account transcript free of charge. The suggestions of the commenters to reduce or eliminate the user fee, therefore, are not adopted.

2. Comments Regarding a Single User Fee When Multiple Letters Are Issued

The Treasury Department and the IRS note that the preamble to the proposed regulations incorrectly states that the estate tax closing letter is issued to each executor. Instead, regardless of who requests an estate tax closing letter, the letter generally is issued to only one of multiple executors. Generally, the executor to whom the estate tax closing letter is issued is the executor identified on line 6a of Part 1 of the Form 706, *United States Estate (and Generation-Skipping Transfer) Tax Return;* the address of such executor that is entered on line 6b becomes the estate's address of record (unless subsequently updated using Form 8822, *Change of Address (For Individual, Gift, Estate, or Generation-Skipping Transfer Tax Returns).* Currently, estate tax closing letters also are sent to the recognized representative identified in Part 4 of the Form 706 and up to two representatives listed on Form 2848, *Power of Attorney and Declaration of Representative.* Therefore, in almost all cases, each request and corresponding $67 user fee will generate the issuance of an estate tax closing letter to three or four persons.

One commenter referred to the costing analysis in the preamble of the proposed regulations and sought an explanation of the decision to charge the same user fee per request, regardless of the number of estate tax closing letters to be issued in response to that single request. The commenter noted the incremental cost impact that occurs with the need to issue multiple letters in response to a single request, and contended that requests requiring the issuance of only one letter will subsidize the user fee cost of such requests requiring the issuance of multiple letters.

The costing analysis described in part H of the Background and Explanation of Provisions of the proposed regulations is based in large part on the number of requests for estate tax closing letters, rather than the total number of letters issued. The fact that one request generates, on average, three issued letters has only a marginal impact on the calculated user fee. The number of letters factors into the costing analysis in two places: Request processing and quality assurance review.

For request processing costs, the costing analysis in the proposed regulations provides for 0.65 staff hours to review the return, create the estate tax closing letters, and prepare the letters for mailing. Although a detailed description of what each of these tasks entails and a breakdown of the time required for each task is not provided in the proposed regulations, the bulk of the time in processing the request is attributable to the research and analysis of IRS records by qualified personnel and not to the issuance of additional letters to additional persons. Thus, the incremental request processing cost of issuing the same estate tax closing letter at the same time to multiple persons is minimal.

For quality assurance review costs, the costing analysis in the proposed regulations provides that five out of every 100 estate tax closing letters are reviewed for quality assurance. While the issuance of multiple letters per request increases the number of letters reviewed for quality assurance and, therefore, increases the cost estimate for quality assurance review, the impact on the full costing is relatively small, only $3 per letter.

Notwithstanding the marginal impact of issuing multiple letters per request on the calculation of the user fee, a variable user fee structure raises significant administrability concerns. Incorrect payments of the user fee are likely to occur in the event of a variable fee because persons that request the issuance of an estate tax closing letter may not have sufficient information regarding the estate's account to accurately identify the number of persons currently authorized under IRS procedures to receive an estate tax closing letter; the determination of the number of letters to be issued sometimes depends on more information than is shown on the estate tax return. Thus, varying the user fee based on the number of letters to be issued would require the IRS to modify the request processing procedures to add procedures for overpayments and underpayments of the user fee and likely would cause administrative delays as the personnel processing the requests take necessary steps and wait for correction of the payment before issuing letters. The changes to the request processing procedures necessary to accommodate a variable fee in place of a fixed fee would increase the request processing costs that factor into the overall cost estimate for the user fee; it is possible that the increase caused by the changes to the request processing procedures could exceed the marginal increase of issuing multiple letters per request under a fixed fee.

Based on all of these considerations, and recognizing that most requests for estate tax closing letters will require the issuance of multiple letters, the Treasury Department and the IRS have determined that the most economical and least complex approach is to have a fixed user fee based on the average number of letters issued per request. Thus, no change to the costing analysis is required and the proposed user fee of $67 is adopted without change.

C. Comments Regarding Procedural Aspects of Requesting Estate Tax Closing Letters and Paying the User Fee

1. Making the Request and Paying the User Fee With the Estate Tax Return

Two commenters suggested amending the estate tax return or using a separate form to allow an estate to request the estate tax closing letter and pay the user fee with the filing of the estate tax return. The commenters sought to further reduce or eliminate the administrative burden on both the estate and the IRS by removing the need for a separate web-based process. Under this suggestion, an estate would not be required to make a separate request subsequent to filing the estate tax return. The commenters stated that this suggestion would allow for efficient administration of the estate and provide the IRS with immediate notice of the request.

The Treasury Department and the IRS concur that the ability to pay the user fee and make the request for an estate tax closing letter at the time of filing the estate tax return would reduce or eliminate the burden on estates intending to make such requests. However, estate tax closing letters are not issued by the same IRS personnel who are involved in the examination of, and the decision to close the IRS file on,

the estate tax return. Personnel issuing estate tax closing letters are alerted to begin that process only after the examination of the estate tax return has been completed and the IRS file has been closed. Thus, implementing such a change to current IRS procedures and return processing systems would substantially increase the burden on the IRS and would require increases in budget, staffing, and resources not currently available. In addition, as discussed elsewhere in this preamble, the procedure to be put in place for paying the user fee and requesting the estate tax closing letter is a convenient and not unduly burdensome alternative that balances the administrability concerns of both the IRS and the estates making requests for estate tax closing letters. For these reasons, this suggestion is not adopted.

2. Additional User Fee for Requests Related to Supplemental Estate Tax Returns

One commenter requested further clarification of whether an additional user fee is required for estate tax closing letters after the filing of a supplemental estate tax return. Specifically, the commenter references Rev. Proc. 81–27, 1981–2 C.B. 547, and identifies supplemental estate tax returns filed in relation to elections made under section 6166 of the Code as creating an undue burden on such estates if an additional user fee is required for a new estate tax closing letter after each subsequent filing of a supplemental estate tax return. The commenter suggests that only one user fee should be imposed per estate, regardless of how many estate tax returns are filed.

As directed by the OMB Circular, the cost analysis described in the proposed regulations is based on the number of estate tax closing letters requested over a specified period of time, whether related to an initial estate tax return or to a supplemental estate tax return, and the labor and benefits costs of campus employees required to process the requests. Each request requires the same amount of IRS resources to issue the estate tax closing letter, whether the request is related to the initial estate tax return or a supplemental estate tax return. In particular, each such request necessitates research and analysis of IRS records, which makes up a significant part of the cost of the user fee. Therefore, accommodating the commenter's suggestion likely would increase the cost of a single request, and such increase would be borne equally by all estates requesting estate tax closing letters, including simpler estates filing only an initial estate tax return. Further, an estate filing a supplemental estate tax return is not required to request an estate tax closing letter in relation to both the initial estate tax return and the supplemental estate tax return, and presumably will request multiple estate tax closing letters only if the estate determines that the benefits of receiving a second estate tax closing letter merit the payment of the additional user fee. Accordingly, the suggestion is not adopted and each request for an estate tax closing letter will require a separate user fee.

3. Procedures for the Request and Issuance of Estate Tax Closing Letters

Several commenters requested clarification on some of the procedural aspects of requesting estate tax closing letters. For example, commenters sought information on who is permitted to make the request, when the request can be made, how many letters will be issued in response to a single request, and who will be the recipients of the estate tax closing letters.

The procedure for requesting the estate tax closing letter and paying the user fee utilizes *https://www.pay.gov.* In this web-based procedure, a request for the estate tax closing letter and the payment of the user fee will be accomplished by a single request, thus eliminating the potential under the current procedure for multiple requests and necessary duplicative follow-up.

As noted in the preamble to the proposed regulations, specific procedures for requesting an estate tax closing letter and paying the associated user fee for that request are not provided in these regulations. Such procedures change from time to time and therefore are best addressed and kept current in subregulatory guidance. It is clear that, while any person with sufficient information about the estate may request the issuance of a closing letter and pay the user fee, the closing letter will be provided only to certain authorized persons, a category that might not include the person making the request (for example, an employee of the attorney, certified public accountant, or enrolled agent for the estate). Information about who will receive an estate tax closing letter in response to a request, together with specific instructions for requesting the estate tax closing letter and paying the user fee, will be available on *https://www.pay.gov* (and on the IRS website at *https://www.irs.gov*) on or before October 28, 2021. To the extent possible, the procedures will reflect the comments and questions from these commenters, and the instructions and information are expected to address the issues these commenters raised.

In identifying the person liable for the fee for the estate tax closing letter, § 300.13(c) of the proposed regulations includes persons properly authorized under section 6103 of the Code to request and receive the estate tax closing letter with respect to the estate. Consistent with the decision to exclude the relevant procedural guidance for requesting estate tax closing letters from these regulations, § 300.13 is revised in the final regulations by removing the reference to section 6103, which governs the disclosure of return information but does not necessarily govern who would be liable for payment of the user fee for requesting the estate tax closing letter.

4. Recommended Changes to Account Transcripts

One commenter stated that, although the account transcript is a free alternative to the estate tax closing letter, the account transcript does not provide all of the information needed by an estate, including potentially the amount of net estate tax and the amount of generation-skipping transfer tax (information that an estate tax closing letter provides). The commenter suggested that the IRS should modify the account transcript to include additional detailed information.

As discussed in Notice 2017–12, an account transcript may be an acceptable substitute for an estate tax closing letter, even though the information provided by each is not identical. As discussed earlier in this preamble, both documents can be relied upon for confirmation that the IRS examination of the estate tax return has been closed, which most often is identified as the primary purpose for requesting an estate tax closing letter. The commenter's suggestion to change the information provided in the account transcript to include additional information also included in the estate tax closing letter is consistent with the determination that the issuance of an estate tax closing letter confers special benefits on identifiable recipients. Making changes to the account transcript as the commenter suggests would require costly programming changes and, moreover, is beyond the scope of this rulemaking. Accordingly, the commenter's suggestion is not adopted.

Special Analyses

These regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department

and the Office of Management and Budget regarding review of tax regulations. Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. The regulations, which prescribe a fee to obtain a particular service, affect decedents' estates, which generally are not ''small entities'' as defined under 5 U.S.C. 601(6). In addition, the dollar amount of the fee ($67 as currently determined) is not substantial enough to have a significant economic impact on any entities (including small entities) that could be affected by establishing such a fee. Accordingly, the Secretary of the Treasury's delegate certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Pursuant to section 7805(f) of the Code, the proposed regulations (85 FR 86871) preceding these regulations were submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comment on their impact on small business. No comments on the proposed regulations were received from the Chief Counsel for the Office of Advocacy of the Small Business Administration.

Statement of Availability of IRS Documents

IRS Revenue Procedures, Revenue Rulings, Notices, and other guidance cited in this document are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at *https://www.irs.gov.*

Drafting Information

The principal author of these regulations is Juli Ro Kim of the Office of Associate Chief Counsel (Passthroughs and Special Industries). Other personnel from the Treasury Department and the IRS participated in the development of the regulations.

List of Subjects in 26 CFR Part 300

Estate taxes, Excise taxes, Gift taxes, Income taxes, Reporting and recordkeeping requirements, User fees.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 300 is amended as follows:

PART 300—USER FEES

■ **Paragraph 1.** The authority citation for part 300 continues to read as follows:

Authority: 31 U.S.C. 9701.

■ **Par. 2.** Section 300.0 is amended by adding paragraph (b)(13) to read as follows:

§ 300.0 User fees; in general.

* * * * *

(b) * * *

(13) Requesting an estate tax closing letter.

■ **Par. 3.** Section 300.13 is added to read as follows:

§ 300.13 Fee for estate tax closing letter.

(a) *Applicability.* This section applies to the request by a person described in paragraph (c) of this section for an estate tax closing letter from the IRS.

(b) *Fee.* The fee for issuing an estate tax closing letter is $67.

(c) *Person liable for the fee.* The person liable for the fee is the estate of the decedent or other person requesting, in accordance with applicable procedures and policies, an estate tax closing letter to be issued with respect to the estate.

(d) *Applicability date.* This section applies to requests for estate tax closing letters received by the IRS on or after October 28, 2021.

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

Approved: September 22, 2021.

Mark J. Mazur,

Acting Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2021–21029 Filed 9–27–21; 8:45 am]

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FEDERAL MEDIATION AND CONCILIATION SERVICE

29 CFR Part 1401

RIN 3076–AA13

Production or Disclosure of Information

AGENCY: Federal Mediation and Conciliation Service.

ACTION: Final rule.

SUMMARY: The Federal Mediation and Conciliation Service (FMCS) issues a final rule amending its existing regulations under the Freedom of Information Act (''FOIA'') to reflect amendments to the FOIA by the Freedom of Information Improvement Act of 2016 (the ''FOIA Improvement Act'').

DATES: This final rule is effective September 28, 2021.

FOR FURTHER INFORMATION CONTACT: Alisa Silverman, Attorney-Advisor, Office of General Counsel, Federal Mediation and Conciliation Service, 250 E St. SW, Washington, DC 20427; Office/Fax/Mobile 202–606–5488; *asilverman@fmcs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The FOIA was enacted to give the public a right to access records held by the executive branch that, although not classified, were not otherwise available to them. Since its enactment in 1966, the FOIA has been amended on a number of occasions to adapt to the times and changing priorities. On June 30, 2016, President Obama signed the Freedom of Information (''FOIA'') Improvement Act of 2016 (the ''FOIA Improvement Act''). Among other things, the FOIA Improvement Act requires that agencies (i) make records that have been both released previously and requested three or more times available to the public in electronic format, (ii) establish a minimum of ninety days for requestors to appeal an adverse determination, and (iii) provide, or direct requestors to, dispute resolution services at various times throughout the FIOA process. The FOIA Improvement Act also updates how agencies may charge search duplication and review fees. After undertaking a review of its FOIA regulations in accordance with the FOIA Improvement Act, FMCS is revising its FOIA regulations, 29 CFR part 1401, subpart B, to incorporate the statutory mandates.

II. Discussion of Amendments Section by Section

The following paragraphs describe the specific changes adopted by this rulemaking.

In § 1401.20, FMCS removes the current language to add language that ensures this section is read with the text of the FOIA and the Uniform Freedom of Information Act Fee Schedule and Guidelines published by the Office of Management and Budget (''OMB Guidelines''). The added language will also align with the Privacy Act of 1974, 5 U.S.C. 552a, for requests made by individuals.

In § 1401.21, FMCS removes the current language in paragraph (a) to add language to include requirements that will make requests available for public inspection on its website if the information has been requested for 3 or

more times and to make the public aware that FMCS has a FOIA Public Liaison that will locate records for a request. FMCS removes language in paragraph (b) to add language to account for the foreseeable harm threshold standard that gives FMCS the ability to withhold information if FMCS ''reasonably foresees'' the information would harm interest protected by an exemption or otherwise allowed by law. FMCS removes language in paragraph (c) to add language regarding partial disclosures, full disclosures, and inextricably intertwined records. FMCS removes paragraphs (d) and (e) becomes the new paragraph (d).

In § 1401.22, FMCS removes the current language to add the section titled *Requirements for Making Requests.* It adds paragraphs (a)(1), (2), and (3), (b), (c), and (d) to include FMCS' contact information for making requests, requester requirements, requests from requesters seeking information pertaining to another individual, what information should be included in a request and the preferred format, and requester providing contact information for requests.

In § 1401.23, FMCS removes the current language to add the section titled *Responsibility for Responding to Requests.* It adds paragraphs (a), (b), (c) introductory text, (c)(1), (2), and (3), (d), and (e) to include information regarding FMCS' responsibilities in responding to requests.

FMCS adds the following sections in accordance with the 2016 FOIA Improvement Act:

- § 1401.24 Timing of responses to requests.
- § 1401.25 Responses to requests.
- § 1401.26 Confidential commercial information (''CCI'').
- § 1401.27 Appeals.
- § 1401.28 Preservation of records.
- § 1401.29 Fees.

In § 1401.30, FMCS removes the current language to add language that doesn't entitle any person to service or disclosure of any records which a person isn't entitled to under the FOIA.

FMCS removes §§ 1401.31, 1401.32, 1401.33, 1401.34, 1401.35, and 1401.36 because the information in these sections was consolidated into other sections in revised subpart B.

III. Rulemaking Procedure

Under the Administrative Procedures Act (5 U.S.C. 553(b)), an agency may waive the normal notice and comment requirements if it finds, for good cause, that they are impracticable, unnecessary, or contrary to the public interest. As authorized by 5 U.S.C. 553(b)(3)(B), FMCS finds good cause the waive notice and opportunity for comment on the amendments. Notice and opportunity for comment are unnecessary, because the FMCS is issuing this final rule for the limited purpose of complying with specific direction in the Act requiring agencies to update their FOIA regulations in accordance with the Act, and the final rule updates FMCS regulations only as necessary to bring them into compliance with the Act.

IV. Plain Writing

The Plain Writing Act of 2010 (Pub. L. 111–274) requires Federal agencies to write documents in a clear, concise, and well-organized manner. FMCS has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, ''Plain language in Government Writing,'' published June 10, 1998 (62 FR 31883).

V. National Environmental Policy Act

FMCS has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

VI. Paperwork Reduction Act

This final rule does not contain a collection of information as defined in the Paperwork Reduction Act of 1995 (44 U.S.C. 33501 *et seq.*) and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1995.

VII. Congressional Review Act

This final rule is a rule defined in the Congressional Review Act (5 U.S.C. 801–808). However, the Office of Management and Budget has not found it to be a major rule as defined in the Congressional Review Act.

List of Subjects in 29 CFR Part 1401

Administrative practice and procedure, Fees, Freedom of information, Privacy.

For the reasons discussed in the preamble, and under the authority 29 U.S.C. 172 of the Taft Harley Act of 1947 and the FOIA Improvement Act, FMCS amends 29 CFR part 1401 as follows:

PART 1401—PUBLIC INFORMATION

■ 1. The authority citation for part 1401 continues to read as follows:

Authority: Sec. 202, 61 Stat. 136, as amended; 5 U.S.C. 552.

■ 2. Revise subpart B to read as follows:

Subpart B—Production or Disclosure of Information

Sec.

§ 1401.20 Purpose and scope.

This subpart contains the rules that the Federal Mediation and Conciliation Service (''FMCS'' or ''the Agency'') follows in processing requests for records under the Freedom of Information Act (''FOIA''), 5 U.S.C. 552. The regulations in this subpart should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Act Fee Schedule and Guidelines published by the Office of Management and Budget (''OMB Guidelines''). Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed in accordance with Privacy Act criteria as well as under this subpart.

§ 1401.21 Proactive disclosures and other disclosure requirements.

(a) The FMCS will make available for public inspection in an electronic format on the Agency's website any record that has been requested 3 or more times. The Agency has a FOIA Public Liaison who can assist individuals in locating records particular to an agency. The FMCS FOIA Public Liaison's contact information is available on the FMCS FOIA web page (*www.fmcs.gov/foia*).

(b) The FMCS will withhold information under FOIA only if the Agency ''reasonably foresees'' that disclosure would harm an interest protected by an exemption or as otherwise allowed by law.

(c) Partial disclosures are appropriate for use by the FMCS when full disclosure is inappropriate or impossible. If a record contains both disclosable and exempt information, the exempt information will be redacted and the remaining record will be disclosed unless the two are so inextricably intertwined that it is not possible to separate them. Records disclosed in part shall be marked or annotated to show both the amount and

the location of the information redacted and the applicable exemption.

(d) All existing FMCS records are subject to disposition according to Agency record retention schedules and the General Records Schedules promulgated by the National Archives and Records Administration.

§ 1401.22 Requirements for making requests.

(a) *General information.* (1) A requester can submit requests through one of the following ways: Submitting a request through the public portal on the FMCS FOIA website; sending an electronic request to the Office of General Counsel, *foia@fmcs.gov;* or writing directly to the FMCS FOIA office at 250 E Street SW, Washington, DC 20427. Any additional requirements for submitting a request to the Agency are listed in paragraphs (a)(2) and (3) of this section and in the submitted form available by selecting ''FOIA'' at the bottom of the FMCS website *www.fmcs.gov/foia.*

(2) A requester who is making a request for records about the requester must comply with the verification of identity requirements as determined by the FMCS to include providing documentation and completing a verification of identity form.

(3) Where a request for records pertains to another individual, a requester may receive greater access by submitting either a notarized authorization signed by that individual or a declaration made in compliance with the requirements set forth in 28 U.S.C. 1746 by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual is deceased (*e.g.,* a copy of a death certificate or an obituary). As an exercise of administrative discretion, the Agency can require a requester to supply additional information, if necessary, to verify that a particular individual has consented to disclosure.

(b) *Description of records sought.* Requesters must describe the records sought in sufficient detail to enable agency personnel to locate them with a reasonable amount of effort. To the extent possible, requesters should include specific information that may help the Agency identify the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number. Before submitting requests, requesters may contact the Agency's FOIA Public Liaison, as identified at *www.fmcs.gov/foia,* to discuss the records they seek and to receive assistance in describing the records. If after receiving a request the FMCS determines that it does not reasonably describe the records sought, the FMCS will inform the requester what additional information is needed or why the request is otherwise insufficient. If a request does not reasonably describe the records sought, the FMCS's response to the request may be delayed.

(c) *Format for requests.* Requesters may specify the preferred form or format (including electronic formats) for the records. The FMCS will accommodate the request if the record is readily reproducible in that form or format.

(d) *Content of requests.* Requesters must provide contact information, such as their full name, organization, phone number, email address, and/or mailing address, to assist the Agency in communicating with them and providing released records.

§ 1401.23 Responsibility for responding to requests.

(a) *In general.* Where the FMCS first receives a request for a record and maintains that record, it is responsible for responding to the request. In determining which records are responsive to a request, the Agency ordinarily will include only records in its possession as of the date that it begins its search. If any other date is used, the Agency must inform the requester of that date. If the FMCS uses any other date due to needing to clarify the request or obtain a fee agreement, it must inform the requester of that date. A record that is excluded from the requirements of the FOIA, pursuant to 5 U.S.C. 552(c), is not considered responsive to a request.

(b) *Authority to grant or deny requests.* The Director of FMCS or designee is authorized to grant or to deny any requests for records that are maintained by the Agency.

(c) *Consultation, referral, and coordination.* When reviewing records in response to a request, the Agency will determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA. As to any such record, the Agency must proceed in one of the following ways:

(1) *Consultation.* When records originated with the agency processing the request but contain information of interest to another agency or other Federal Government office, the FMCS will generally consult with that other entity prior to making a release determination.

(2) *Referral.* (i) Ordinarily, when the FMCS is the originating agency, it is presumed to be in the best position to make the disclosure determination. When the FMCS believes that a different agency is best able to determine whether to disclose the record, the FMCS typically will request the other agency make the final response to the requester.

(ii) Whenever the FMCS refers any part of the responsibility for responding to a request to another agency, it will document the referral, maintain a copy of the record that it refers, and notify the requester of the referral, informing the requester of the name(s) of the agency to which the record was referred, including that agency's FOIA contact information.

(3) *Coordination.* The standard referral procedure in paragraph (c)(2) of this section will not be followed where disclosure of the identity of the agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. In such instances, FMCS would coordinate with the originating agency to seek its views on whether the records should be exempt from disclosure. FMCS will issue the final response to the requester.

(d) *Classified information.* On receipt of any request involving classified information, the FMCS will determine whether the information is currently and properly classified in accordance with applicable classification rules. Whenever a request involves a record containing information that has been classified or may be appropriate for classification by another agency under any applicable executive order concerning the classification of records, FMCS must refer the responsibility for responding to the request regarding that information to the agency that classified the information, or that should consider the information for classification. Whenever the FMCS's record contains information that has been derivatively classified (for example, when it contains information classified by another agency), the FMCS must refer the responsibility for responding to that portion of the request to the agency that classified the underlying information.

(e) *Timing of responses to consultations and referrals.* All consultations and referrals received by the FMCS will be handled according to the date that the first agency received the perfected FOIA request.

§ 1401.24 Timing of responses to requests.

(a) *In general.* The FMCS ordinarily will respond to requests according to their order of receipt. A request may be made directly to the FMCS by referring to procedures described on

www.fmcs.gov or by email to *foia@fmcs.gov.*

(b) *Timing of response.* The obligation to respond to a request for records arises on the first business day when the request is received by the Office of General Counsel.

(c) *Multi-track processing.* FMCS designates a specific track for requests that are granted expedited processing, in accordance with the standards set forth in paragraph (e) of this section. FMCS may also designate additional processing tracks that distinguish between simple and more complex requests based on the estimated amount of work or time needed to process the request. Among the factors an agency may consider are the number of records requested, the number of pages involved in processing the request, and the need for consultations or referrals. FMCS must advise requesters of the track into which their request falls and, when appropriate, should offer the requesters an opportunity to narrow or modify their request so that it can be placed in a different processing track.

(d) *Unusual circumstances.* Whenever the FMCS cannot meet the statutory time limit for processing a request because of ''unusual circumstances,'' as defined in the FOIA, and the FMCS extends the time limit on that basis, the FMCS must, before expiration of the 20-day response period, notify the requester in writing of the unusual circumstances involved and of the date by which the Agency estimates it will complete processing of the request. Where the extension exceeds 10 working days, the FMCS will provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. The FMCS will make available its designated FOIA contact or its FOIA Public Liaison for this purpose. The name and contact information for the FMCS's FOIA Public Liaison is available at *www.fmcs.gov* by selecting FOIA at the bottom of the screen. FMCS will also alert requesters to the availability of the Office of Government Information Services to provide dispute resolution services. Whenever the FMCS extends the time limits by more than ten additional working days, the FMCS must notify the requester of the right to seek dispute resolution services from the Office of the Government Information Services (OGIS).

(e) *Aggregating requests.* To satisfy unusual circumstances under the FOIA, agencies may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances. Agencies cannot aggregate multiple requests that involve unrelated matters.

(f) *Expedited processing.* (1) The Agency will process requests and appeals on an expedited basis whenever it is determined that they involve:

(i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information.

(2) A request for expedited processing may be made at any time. When making a request for expedited processing of an administrative appeal, the request should be submitted to the FMCS's Office of the Director via *foia@fmcs.gov* or through the online portal located at *www.fmcs.gov/foia.*

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. For example, under paragraph (c) of this section, a requester who is not a full-time member of the news media must establish that the requester is a person whose primary professional activity or occupation is information dissemination, though it need not be the requester's sole occupation. Such a requester also must establish a particular urgency to inform the public about the government activity involved in the request—one that extends beyond the public's right to know about government activity generally. The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an ''urgency to inform'' the public on the topic. As a matter of administrative discretion, the FMCS may waive the formal certification requirement in this paragraph (f)(3).

(4) The FMCS must notify the requester within 10 calendar days of the receipt of a request for expedited processing of its decision whether to grant or deny expedited processing. If expedited processing is granted, the request must be given priority, placed in the processing track for expedited requests, and must be processed as soon as practicable. If a request for expedited processing is denied, the FMCS must act on any appeal of that decision expeditiously.

§ 1401.25 Responses to requests.

(a) *In general.* To the extent practicable, the FMCS will communicate electronically with requesters.

(b) *Acknowledgments of requests.* The FMCS will acknowledge a request in writing and assign it an individualized tracking number if it will take longer than 10 working days to process.

(c) *Estimated dates of completion and interim responses.* Upon request, the Agency will provide an estimated date by which it expects to provide a response to the requester. If a request involves a voluminous amount of material, or searches in multiple locations, the FMCS may provide interim responses, releasing the records on a rolling basis.

(d) *Grants of requests (fees).* Once the Agency determines it will grant a request in full or in part, it will notify the requester in writing. The Agency will also inform the requester of any fees charged under § 1401.30 and will disclose the requested records to the requester promptly upon payment of any applicable fees. The Agency will inform the requester of the availability of its FOIA Public Liaison to offer assistance.

(e) *Adverse determinations of requests.* If the Agency makes an adverse determination denying a request in any respect, it must notify the requester of that determination in writing. Adverse determinations, or denials of requests, include decisions that: The requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Adverse determinations also include denials involving fees or fee waiver matters or denials of requests for expedited processing.

(f) *Content of denial.* The denial must be signed by the head of the Agency or designee and must include:

(1) The name and title or position of the person responsible for the denial;

(2) A brief statement of the reasons for the denial, including any FOIA exemption applied by the Agency in denying the request;

(3) An estimate of the volume of any records or information withheld, such as the number of pages or some other reasonable form of estimation, although such an estimate is not required if the volume is otherwise indicated by deletions marked on records that are

disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption;

(4) A statement that the denial may be appealed under § 1401.27, and a description of the appeal requirements; and

(5) A statement notifying the requester of the assistance available from the Agency's FOIA Public Liaison, and the dispute resolution services offered by Office of Government Information Services.

(g) *Markings on released documents.* Records disclosed in part must be marked clearly to show the amount of information redacted and the exemption under which the redaction was made unless doing so would harm an interest protected by an applicable exemption. The location of the information redacted must also be indicated on the record, if technically feasible.

(h) *Use of record exclusions.* (1) In the event the FMCS identifies records that may be subject to exclusion from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), the Agency will confer with Department of Justice, Office of Information Policy (OIP), to obtain approval to apply the exclusion.

(2) In the event the FMCS applies an exclusion, it will maintain an administrative record of the process of invocation and approval of the exclusion by OIP.

§ 1401.26 Confidential commercial information ("CCI").

(a) *Definitions.* For purposes of this section:

Confidential commercial information means information obtained by the FMCS from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

Submitter means any person or entity, including a corporation, State, or foreign government, but not including another Federal Government entity, that provides confidential commercial information, either directly or indirectly to the Federal Government.

(b) *Designation of confidential commercial information.* A submitter of confidential commercial information must use good faith efforts to designate by appropriate markings, at the time of submission, any portion of its submission that it considers to be protected from disclosure under Exemption 4. These designations expire 10 years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(c) *When notice to submitters is required.* (1) The FMCS will promptly notify the submitter in writing whenever such confidential commercial information is requested under the FOIA and the Agency determines that it may be required to disclose the information, provided:

(i) The requested information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(ii) The FMCS has a reason to believe that the requested information may be protected from disclosure under Exemption 4, but has not yet made that determination.

(2) The notice must either describe the commercial information requested or include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, the Agency may post or publish a notice in a place or manner reasonably likely to inform the submitters of the proposed disclosure, instead of sending individual notifications.

(d) *Exceptions to submitter notice requirements.* The notice requirements of this section do not apply if:

(1) The Agency determines that the information is exempt under the FOIA, or the information has been lawfully published or has been officially made available to the public;

(2) Disclosure of the information is required by a statute other than the FOIA or by a regulation issued in accordance with the requirements of Executive Order 12600 of June 23, 1987; or

(3) The designation made by the submitter appears obviously frivolous.

(e) *Opportunity to object to disclosure.* (1) The FMCS must specify a reasonable time period within which the submitter must respond to the notice referenced in paragraph (c) of this section.

(2) If a submitter has any objections to disclosure, it should provide the Agency a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as the basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is privileged or confidential.

(3) A submitter who fails to respond within the time period specified in the notice will be considered to have no objection to disclosure of the information. The FMCS is not required to consider any information received after the date of any disclosure decision. Any information provided by a submitter under this subpart may itself be subject to disclosure under the FOIA.

(f) *Analysis of objections.* The Agency must consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(g) *Notice of intent to disclose.* Whenever the FMCS decides to disclose information over the objection of a submitter, it must provide the submitter written notice, which must include:

(1) A statement of the reasons why each of the submitter's disclosure objections was not sustained;

(2) A description of the information to be disclosed or copies of the records as the Agency intends to release them; and

(3) A specified disclosure date, which must be within a reasonable time after the notice.

(h) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of confidential commercial information, the Agency must promptly notify the submitter.

(i) *Requester notification.* The Agency must notify the requester whenever it provides the submitter with notice and an opportunity to object to disclosure; whenever it notifies the submitter of its intent to disclose the requested information; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

§ 1401.27 Appeals.

(a) *Requirements for making an appeal.* A requester may appeal any adverse determinations to the Agency's Deputy Director, FOIA Appeal, Federal Mediation and Conciliation Service, 250 E Street SW, Washington, DC 20427; *foia@fmcs.gov.* Requesters can submit appeals by mail, email, or via the online portal at *www.fmcs.gov*/foia. The requester must make the appeal in writing, clearly identifying the grounds therefore and providing any supporting documentation. To be considered timely it must be postmarked or, in the case of electronic submissions, transmitted within 90 calendar days after the date of the response. The appeal should clearly identify the determination that is being appealed and the assigned request number, if known. To facilitate handling, the requester should mark both the appeal letter and envelope, or subject line of the electronic transmission, ''Freedom of Information Act Appeal.''

(b) *Adjudication of appeals.* An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation.

(c) *Decisions on appeals.* The Deputy Director of the FMCS or designee will provide a decision on an appeal. A

decision that upholds the FMCS's determination in whole or in part must contain a statement that identifies the reasons for the affirmance, including any FOIA exemptions applied. The decision must provide the requester with notification of the statutory right to file a lawsuit and will inform the requester of the dispute resolution services offered by the OGIS as a non-exclusive alternative to litigation. If the decision is remanded or modified on appeal, the Deputy Director will notify the requester of that determination in writing. The Office of General Counsel will then further process the request in accordance with that appeal determination and will respond directly to the requester. Alternatively, the Deputy Director may decide to modify the decision and decide the appeal on its merits in a single step.

(d) *Engaging in dispute resolution services provided by OGIS.* Dispute resolution is a voluntary process. If the Agency agrees to participate in the dispute resolution services provided by OGIS, the Deputy Director or designee will participate on behalf of the FMCS.

(e) *When appeal is required.* Before seeking review by a court of the Agency's adverse determination, a requester generally must first submit a timely administrative appeal.

§ 1401.28 Preservation of records.

The FMCS must preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until final disposition of the ''request'' case: No sooner than 91 days after the final response is sent to the requester to allow for a timely appeal. The Agency must not dispose of or destroy records while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

§ 1401.29 Fees.

(a) *In general.* (1) The FMCS will charge for processing requests under the FOIA in accordance with the provisions of this section and with the OMB Guidelines. For purposes of assessing fees, the FOIA establishes three categories of requesters:

(i) Commercial use requesters;

(ii) Non-commercial scientific or educational institutions or news media requesters; and

(iii) All other requesters.

(2) Different fees are assessed depending on the category. Requesters may seek a fee waiver. The Agency will consider requests for fee waivers in accordance with the requirements in subsection (k) of the FOIA. To resolve any fee issues that arise under this section, the FMCS may contact a requester for additional information. The Agency is to conduct searches, review, and duplication in an efficient and cost-effective manner. The FMCS ordinarily will collect all applicable fees before sending copies of records to a requester. Requesters must pay fees by check or money order made payable to the Treasury of the United States, or by another method as determined by the Agency.

(b) *Definitions.* For purposes of this section:

Commercial use request is a request that asks for information for a use or a purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation. The FMCS's decision to place a requester in the commercial use category will be made on a case-by-case basis based on the requester's intended use of the information. The Agency will notify requesters of their placement in this category.

Direct costs are those expenses that an agency incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records in order to respond to a FOIA request. For example, direct costs include the salary of the employee performing the work (*i.e.,* the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits) and the cost of operating electronic equipment, such as photocopiers and scanners. Direct costs do not include overhead expenses such as the costs of space, and of heating or lighting a facility.

Duplication is reproducing a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, audiovisual materials, or electronic records, among others.

Educational institution is any school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with the requester's role at the educational institution. The FMCS may seek verification from the requester that the request is in furtherance of scholarly research and will advise requesters of their placement in this category.

Noncommercial scientific institution is an institution that is not operated on a ''commercial'' basis, as defined in this paragraph (b) and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. A requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use. The FMCS will advise requesters of their placement in this category.

Representative of the news media is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations that broadcast news to the public at large and publishers of periodicals that disseminate news and make their products available through a variety of means to the general public, including news organizations that disseminate solely on the internet. A request for records supporting the news-dissemination function of the requester will not be considered to be for a commercial use. Freelance journalists who demonstrate a solid basis for expecting publication through a news media entity will be considered as a representative of the news media. A publishing contract would provide the clearest evidence that publication is expected. However, the Agency can also consider a requester's past publication record in making this determination. The Agency will advise requesters of their placement in this category.

Review is the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of redacting the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter under § 1401.26, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

Search is the process of looking for and retrieving records or information responsive to a request. Search time includes page-by-page or line-by-line identification of information within records and the reasonable efforts expended to locate and retrieve information from electronic records.

(c) *Charging fees.* In responding to FOIA requests, the Agency will charge

the following fees unless a waiver or reduction of fees has been granted under paragraph (k) of this section. Because the fee amounts provided in paragraphs (c)(1) through (3) of this section already account for the direct costs associated with a given fee type, the FMCS will not add any additional costs to charges calculated under this section.

(1) *Search.* (i) Requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media are not subject to search fees. The FMCS will charge search fees for all other requesters, subject to the restrictions of paragraph (d) of this section. The Agency may properly charge for time spent searching even if it does not locate any responsive records or if the Agency determines that the records are entirely exempt from disclosure.

(ii) For each quarter hour spent by personnel searching for requested records, including electronic searches that do not require new programming, the fees will be charged as follows:

(A) The Agency will charge the direct costs associated with conducting any search that requires the creation of a new computer program to locate the requested records. The Agency will notify the requester of the costs associated with creating such a program, and the requester must agree to pay the associated costs before the costs may be incurred.

(B) For requests that require the retrieval of records stored by the Agency at a Federal records center operated by the National Archives and Records Administration (NARA), the Agency will charge additional costs in accordance with the Transactional Billing Rate Schedule established by NARA.

(2) *Duplication.* The FMCS will charge duplication fees to all requesters, subject to the restrictions of paragraph (d) of this section. The Agency must honor a requester's preference for receiving a record in a particular form or format where the Agency can readily reproduce it in the form or format requested. Where photocopies are supplied, the Agency will provide one copy per request at cost ($0.05 per page). For copies of records produced on tapes, disks, or other media, the FMCS will charge the direct costs of producing the copy, including operator time. Where paper documents must be scanned in order to comply with a requester's preference to receive the records in an electronic format, the requester must also pay the direct costs associated with scanning those materials. For other forms of duplication, the Agency will charge the direct costs.

(3) *Review.* The Agency will charge review fees to requesters who make commercial use requests. Review fees will be assessed in connection with the initial review of the record, *i.e.,* the review conducted to determine whether an exemption applies to a particular record or portion of a record. No charge will be made for review at the administrative appeal stage of exemptions applied at the initial review stage. However, if a particular exemption is deemed to no longer apply, any costs associated with the Agency's re-review of the records in order to consider the use of other exemptions may be assessed as review fees. Review fees will be charged at the same rates as those charged for a search under paragraph (c)(1)(ii) of this section.

(d) *Restrictions on charging fees.* (1) When the FMCS determines that a requester is an educational institution, non-commercial scientific institution, or representative of the news media, and the records are not sought for commercial use, it will not charge search fees.

(2) FMCS cannot charge fees:

(i) If the Agency fails to comply with the FOIA's time limits in which to respond to a request, it may not charge search fees or, in the instances of requests from requesters described in paragraph (d)(1) of this section, may not charge duplication fees, except as described in paragraphs (d)(2)(ii) through (iv) of this section.

(ii) If the Agency has determined that unusual circumstances as defined by the FOIA apply and the Agency provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit shall be excused for an additional 10 days.

(iii) If the Agency has determined that unusual circumstances, as defined by the FOIA, apply and more than 5,000 pages are necessary to respond to the request, the Agency may charge search fees or, in the case of requesters described in paragraph (d)(1) of this section, may charge duplication fees, if the following steps are taken. The Agency must have provided timely written notice of unusual circumstances to the requester in accordance with the FOIA, and the Agency must have discussed with the requester via written mail, email, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5. U.S.C. 552(a)(6), (B)(ii). If the exception in this paragraph (d)(2)(iii) is satisfied, the Agency may charge all applicable fees incurred in the processing of the request.

(iv) If a court has determined that exceptional circumstances exist as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(3) No search or review fees will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(4) Except for requesters seeking records for a commercial use, the FMCS will provide without charge:

(i) The first 100 pages of duplication (or the cost equivalent for other media); and

(ii) The first two hours of search.

(5) No fee will be charged when the total fee, after deducting the 100 free pages (or its cost equivalent) and the first two hours of search, is equal to or less than $25.00.

(e) *Notice of anticipated fees in excess of $25.00.* (1) When the FMCS determines or estimates that the fees to be assessed in accordance with this section will exceed $25.00, the Agency must notify the requester of the actual or estimated amount of the fees, including a breakdown of the fees for search, review, or duplication, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily, the Agency will advise the requester accordingly. If the request is for noncommercial use, the notice will specify that the requester is entitled to the statutory entitlements of 100 pages of duplication at no charge and, if the requester is charged search fees, two hours of search time at no charge, and the notice will advise the requester whether those entitlements have been provided.

(2) If the Agency notifies the requester that the actual or estimated fees are in excess of $25.00, the request will not be considered received and further work will not be completed until the requester commits in writing to pay the actual or estimated total fee, or designates some amount of fees the requester is willing to pay, or in the case of a noncommercial use requester who has not yet been provided with the requester's statutory entitlements, designates that the requester seeks only that which can be provided by the statutory entitlements. The requester must provide the commitment or designation in writing and must, when applicable, designate an exact dollar amount the requester is willing to pay. The FMCS is not required to accept payments in installments.

(3) If the requester has indicated a willingness to pay some designated amount of fees, but the Agency estimates that the total fee will exceed that amount, the Agency will toll the processing of the request when it notifies the requester of the estimated fees in excess of the amount the requester has indicated a willingness to pay. The Agency will inquire whether the requester wishes to revise the amount of fees the requester is willing to pay or modify the request. Once the requester responds, the time to respond will resume from where it was at the date of the notification.

(4) The FMCS will make available its FOIA Public Liaison or other FOIA professional to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(f) *Charges for other services.* Although not required to provide special services, if the Agency chooses to do so as a matter of administrative discretion, the direct costs of providing the service will be charged. Examples of such services include certifying that records are true copies, providing multiple copies of the same document, or sending records by means other than first class mail.

(g) *Charging interest.* The Agency may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the billing date until payment is received by the Agency. The Agency will follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97–365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset (see 29 CFR part 1450).

(h) *Aggregating requests.* When the FMCS reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees, the Agency may aggregate those requests and charge accordingly. The Agency may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. For requests separated by a longer period, the Agency will aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters cannot be aggregated.

(i) *Advance payments.* (1) For requests other than those described in paragraph (i)(2) or (3) of this section, the Agency cannot require the requester to make an advance payment before work on a request starts or continues. Payment owed for work already completed (*i.e.,* payment before copies are sent to a requester) is not an advance payment.

(2) When the Agency determines or estimates that a total fee to be charged under this section will exceed $250.00, it may require that the requester make an advance payment up to the amount of the entire anticipated fee before beginning to process the request. The Agency may elect to process the request prior to collecting fees when it receives a satisfactory assurance of full payment from a requester with a history of prompt payment.

(3) Where a requester has previously failed to pay a properly charged FOIA fee to the Agency within 30 calendar days of the billing date, the Agency may require that the requester pay the full amount due, plus any applicable interest on that prior request, and the Agency may require that the requester make an advance payment of the full amount of any anticipated fee before the Agency begins to process a new request or continues to process a pending request or any pending appeal. Where the Agency has a reasonable basis to believe that a requester has misrepresented the requester's identity in order to avoid paying outstanding fees, it may require that the requester provide proof of identity.

(4) In cases in which the Agency requires advance payment, the request will not be considered received and further work will not be completed until the required payment is received. If the requester does not pay the advance payment within 30 calendar days after the date of the Agency's fee determination, the request will be closed.

(j) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires an agency to set and collect fees for particular types of records. In instances where records responsive to a request are subject to a statutorily-based fee schedule program, the Agency must inform the requester of the contact information for that program.

(k) *Requirements for waiver or reduction of fees.* (1) Requesters may seek a waiver of fees by submitting a written application demonstrating how disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(2) The Agency must furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that the factors described in paragraphs (k)(2)(i) through (iii) of this section are satisfied:

(i) Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(ii) Disclosure of the requested information is likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(A) Disclosure of the requested records must be meaningfully informative about government operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding.

(B) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's ability and intention to effectively convey information to the public must be considered. The FMCS will presume that a representative of the news media will satisfy this consideration.

(iii) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, the Agency will consider the following criteria:

(A) The FMCS must identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or profit interest. Requesters must be given an opportunity to provide explanatory information regarding this consideration.

(B) If there is an identified commercial interest, the Agency must determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of paragraphs (k)(2)(i) and (ii) of this section are satisfied and any commercial interest is

not the primary interest furthered by the request. The Agency ordinarily will presume that when a news media requester has satisfied paragraphs (k)(2)(i) and (ii), the request is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(3) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver must be granted for those records.

(4) Requests for a waiver or reduction of fees should be made when the request is first submitted to the Agency and should address the criteria referenced in paragraphs (k)(1) and (2) of this section. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester must pay any costs incurred up to the date the fee waiver request was received.

§ 1401.30 Other rights and services.

Nothing in this subpart shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

Dated: September 10, 2021.

Sarah Cudahy,

General Counsel.

[FR Doc. 2021–19906 Filed 9–27–21; 8:45 am]

BILLING CODE 6732–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2019–0215; FRL–8999–02–R5]

Air Plan Approval; Michigan; Partial Approval and Partial Disapproval for Infrastructure SIP Requirements for the 2015 Ozone NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is partially approving and partially disapproving elements of a State Implementation Plan (SIP) submission from Michigan regarding the infrastructure requirements of section 110 of the Clean Air Act (CAA) for the 2015 ozone National Ambient Air Quality Standards (NAAQS). The infrastructure requirements are designed to ensure that the structural components of each state's air quality management program are adequate to meet the state's responsibilities under the CAA. The disapproval portion of this action does not begin a new Federal Implementation Plan (FIP) clock, because the FIPs are already in place. EPA proposed to approve this action on Friday, July 2, 2021 and received no adverse comments.

DATES: This final rule is effective on October 28, 2021.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2019–0215. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either through *www.regulations.gov* or at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. 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 Olivia Davidson, Environmental Scientist, at (312) 886–0266 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Olivia Davidson, Environmental Scientist, Attainment Planning and Maintenance Section, Air Programs Branch (AR18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–0266, *davidson.olivia@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

I. Background Information

On July 2, 2021, EPA proposed to approve most elements and disapprove an element of a submission from the Michigan Department of Environment, Great Lakes, and Energy (EGLE) certifying that its current SIP is sufficient to meet the required infrastructure elements under sections 110(a)(1) and (2) for the 2015 ozone NAAQS (86 FR 35247). An explanation of the CAA requirements, a detailed analysis of the revisions, and EPA's reasons for proposing approval were provided in the notice of proposed rulemaking (NPRM) and will not be restated here. The public comment period for this proposed rule ended on August 2, 2021.

During the comment period, EPA received two comments on the proposed rule. The first comment was in support of the action, and a second comment was submitted by the New Jersey Department of Environmental Protection (NJDEP) pertaining to the prong 4 visibility requirements portion of which EPA is disapproving. EPA does not believe the comment received from NJDEP pertains to this action. At the time of submittal, EGLE referenced their five-year progress report from the first planning period approved on June 1, 2018 (83 FR 25375) which cites the regional haze FIP currently in place to show compliance with the Regional Haze Program, approved April 12, 2016 (81 FR 21672). The comment addressed an emission source affecting a Federal Class I area in New Jersey and asked that EPA consider the source's contribution to visibility degradation in future actions. Further, EPA received an email identifying a small typographical error in the table at the end of the proposed rulemaking identifying which elements we are approving, disapproving, or not taking action on. The table incorrectly stated that EPA was approving 110(a)(2)(D)(1)–(2), referred to as prong 1 and prong 2, interstate transport with significant contribution to nonattainment and interference with maintenance, respectively. The table is corrected in this action to reflect taking no action on said transport requirements. EPA will take action on those portions in a separate rulemaking. All of the comments received are included in the docket for this action.

We do not consider these comments to be germane or relevant to this action and therefore not adverse to this action. The comments lack the required specificity to the proposed SIP revision and the relevant requirements of CAA section 110. Moreover, none of the comments address a specific regulation or provision in question, or recommend a different action on the SIP submission from what EPA proposed. Therefore, we are finalizing our action as proposed.

II. Final Action

EPA is approving most elements and disapproving an element of a March 8, 2019 submission from EGLE certifying that its current SIP is sufficient to meet

the required infrastructure elements under sections 110(a)(1) and (2) for the 2015 ozone NAAQS. The disapproved prong 4 does not begin a new FIP clock, as FIPs are already in place in response to those deficiencies.

EPA's actions for the state's satisfaction of infrastructure SIP requirements, by element of section 110(a)(2) are contained in the table below.

Element	2015 ozone
(A)—Emission limits and other control measures	A
(B)—Ambient air quality monitoring/data system	A
(C)1—Program for enforcement of control measures	A
(C)2—Minor NSR	A
(C)3—PSD	A
(D)1—I Prong 1: Interstate transport—significant contribution to nonattainment	NA
(D)2—I Prong 2: Interstate transport—interference with maintenance	NA
(D)3—II Prong 3: Interstate transport—interference with PSD	A
(D)4—II Prong 4: Interstate transport—interference with visibility protection	D
(D)5—Interstate and international pollution abatement	A
(E)1—Adequate resources	A
(E)2—State board requirements	NA
(F)—Stationary source monitoring system	A
(G)—Emergency powers	A
(H)—Future SIP revisions	A
(I)—Nonattainment planning requirements of part D	*
(J)1—Consultation with government officials	A
(J)2—Public notification	A
(J)3—PSD	A
(J)4—Visibility protection	*
(K)—Air quality modeling/data	A
(L)—Permitting fees	A
(M)—Consultation/participation by affected local entities	A

In the above table, the key is as follows:

A ..... Approve.
D ..... Disapprove.
NA .... No Action/Separate Rulemaking.
* ..... Not germane to infrastructure SIPs.

III. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

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

Under section 307(b)(1) of the 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 November 29, 2021. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements.

Dated: September 15, 2021.

Cheryl Newton,

Acting Regional Administrator, Region 5.

For the reasons stated in the preamble, EPA amends title 40 CFR part 52 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.*

■ 2. In § 52.1170, the table in paragraph (e) is amended by adding an entry for ''Section 110(a)(2) infrastructure requirements for the 2015 ozone NAAQS'' immediately following the entry for ''Section 110(a)(2) Infrastructure Requirements for the 2012 particulate matter ($PM_{2.5}$) NAAQS'' to read as follows:

§ 52.1170 Identification of plan.

* * * * *

(e) * * *

EPA-APPROVED MICHIGAN NONREGULATORY AND QUASI-REGULATORY PROVISIONS

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Comments
*	*	*	*	*
Infrastructure				
*	*	*	*	*
Section 110(a)(2) infrastructure requirements for the 2015 ozone NAAQS.	Statewide	3/8/2019	9/28/2021, [INSERT **Federal Register** CITATION].	Approved CAA elements: 110(a)(2)(A), (B), (C), (D)(i)(II) Prong 3, D(ii), (F), (G), (H), (J), (K), (L), and (M). Disapproved CAA element 110(a)(2)(D)(i)(II) Prong 4. No action on CAA element 110(a)(2)(D)(i)(I).
*	*	*	*	*

* * * * *

[FR Doc. 2021–20794 Filed 9–27–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2020–0726; FRL–8939–02–R4]

Air Plan Approval; North Carolina; Mecklenburg Miscellaneous Rules Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve a State Implementation Plan (SIP) revision to the Mecklenburg County portion of the North Carolina SIP, hereinafter referred to as the Mecklenburg Local Implementation Plan (LIP). The revision was submitted by the State of North Carolina, through the North Carolina Division of Air Quality (NCDAQ), on behalf of Mecklenburg County Air Quality (MCAQ) via a letter dated April 24, 2020, and was received by EPA on June 19, 2020. The revision updates several Mecklenburg County Air Pollution Control Ordinance (MCAPCO) rules incorporated into the LIP. EPA is finalizing these changes pursuant to the Clean Air Act (CAA or Act).

DATES: This rule is effective October 28, 2021.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2020–0726. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information may not be publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Evan Adams, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9009. Mr. Adams can also be reached via electronic mail at *adams.evan@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In a notice of proposed rulemaking (NPRM) published on July 2, 2021 (86 FR 35244), EPA proposed to approve changes to several rules in the Mecklenburg County LIP. The April 24, 2020, submittal includes changes and updates to the following rules to more closely align them with their analog SIP-

approved North Carolina regulations.[1] The submission includes changes and updates to MCAPCO Rules 2.0101, *Definitions;* 2.0201, *Classification of Air Pollution Sources;* 2.0202, *Registration of Air Pollution Sources;* 2.0302, *Episode Criteria;* 2.0303, *Emission Reduction Plans;* and 2.0304, *Preplanned Abatement Program.*[2]

The submittal also asks EPA to reincorporate the following rules into the LIP with a new effective date: MCAPCO Rules 1.5301, *Special Enforcement Procedures;* 1.5302, *Criminal Penalties;* 1.5303, *Civil Injunction;* 1.5304, *Civil Penalties;* 1.5306, *Hearings;* 1.5307, *Judicial Review;* 2.0301, *Purpose;* and 2.0305, *Emission Reduction Plant: Alert Level.* The text of these rules has not changed.

The July 2, 2021, NPRM provides additional detail regarding the background and rationale for EPA's action. Comments were due on or before August 2, 2021. EPA only received one comment, and it was in favor of this action. This comment will be posted in the docket for this action for public review.

II. Incorporation by Reference

In this document, EPA is finalizing approval of regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is approving MCAPCO Rules 1.5301—*Special Enforcement Procedures;* 1.5302—*Criminal Penalties;* 1.5303—*Civil Injunction;* 1.5304—*Civil Penalties;* 1.5306—*Hearings;* 1.5307—*Judicial Review;* 2.0301—*Purpose;* and 2.0305—*Emission Reduction Plan: Alert Level,* all of which have an effective date of December 15, 2015; as well as MCAPCO Rules 2.0101—*Definitions;* 2.0201—*Classification of Air Pollution Sources;* 2.0202—*Registration of Air Pollution Sources;* 2.0302—*Episode Criteria;* 2.0303—*Emission Reduction Plans;* and 2.0304—*Preplanned Abatement Program,* all of which have an effective date of December 18, 2018, into the Mecklenburg County portion of the North Carolina SIP to update the rules to more closely align them with their analog North Carolina rules in the SIP.

EPA has made and will continue to make these materials generally available through *www.regulations.gov* and at the EPA Region 4 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by 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 EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[3]

III. Final Action

EPA is taking final action to approve the aforementioned changes to the Mecklenburg LIP. Specifically, EPA is finalizing approval of revisions to MCAPCO Rules 1.5301—*Special Enforcement Procedures;* 1.5302—*Criminal Penalties;* 1.5303—*Civil Injunction,* 1.5304—*Civil Penalties;* 1.5306—*Hearings;* 1.5307—*Judicial Review;* 2.0101—*Definitions;* 2.0201—*Classification of Air Pollution Sources;* 2.0202—*Registration of Air Pollution Sources;* 2.0301—*Purpose;* 2.0302—*Episode Criteria;* 2.0303—*Emission Reduction Plans;* 2.0304—*Preplanned Abatement Program;* and 2.0305—*Emission Reduction Plan: Alert Level.* EPA is taking final action to approve these revisions because they are consistent with the CAA.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided they meet the criteria of the CAA. This action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 29, 2021. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of

[1] EPA notes that the April 24, 2020, submittal was received by EPA on June 19, 2020.

[2] The April 24, 2020 submittal contains changes to other Mecklenburg LIP-approved rules that are not addressed in this notice. EPA will be acting on those rules in separate actions.

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

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, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: September 9, 2021.

John Blevins,

Acting Regional Administrator Region 4.

For the reasons stated in the preamble, EPA amends 40 CFR part 52 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 II—North Carolina

■ 2. In § 52.1770 amend the table in paragraph (c)(3) by:

■ a. Revising the title of ''Article 1.000 Permitting Provisions for Air Pollution Sources, Rules and Operating Regulations for Acid Rain Sources, Title V and Toxic Air Pollutants'';

■ b. Under Section 1.5300 Enforcement; Variances; Judicial Review by revising the entries for ''Section 1.5301,'' ''Section 1.5302,'' ''Section 1.5303,'' ''Section 1.5304,'' ''Section 1.5306,'' and ''Section 1.5307'';

■ c. Under ''Section 2.0100 Definitions and References'' by revising the entry for ''Section 2.0101'';

■ d. Under ''Section 2.0200 Air Pollution Source'' by revising the entries for ''Section 2.0201'' and ''Section 2.0202,''; and

■ e. Under ''Section 2.0300 Air Pollution Emergencies'' by revising the entries for ''Section 2.0301,'' ''Section 2.0302,'' ''Section 2.0303,'' ''Section 2.0304,'' and ''Section 2.0305'' .

The revisions read as follows:

§ 52.1770 Identification of plan.

* * * * *

(c) * * *

(3) EPA-Approved Mecklenburg County Regulations

State citation	Title/subject	State effective date	EPA approval date	Explanation
Article 1.0000 Permitting Provisions for Air Pollution Sources, Rules and Operating Regulations for Acid Rain Sources, Title V and Toxic Air Pollutants				
*	*	*	*	*
Section 1.5300 Enforcement; Variances; Judicial Review				
Rule 1.5301	Special Enforcement Procedures	12/15/2015	9/28/2021, [Insert citation of publication].	
Rule 1.5302	Criminal Penalties	12/15/2015	9/28/2021, [Insert citation of publication].	
Rule 1.5303	Civil Injunction	12/15/2015	9/28/2021, [Insert citation of publication].	
Rule 1.5304	Civil Penalties	12/15/2015	9/28/2021, [Insert citation of publication].	
*	*	*	*	*
Rule 1.5306	Hearings	12/15/2015	9/28/2021, [Insert citation of publication].	
Rule 1.5307	Judicial Review	12/15/2015	9/28/2021, [Insert citation of publication].	
*	*	*	*	*
Section 2.0100 Definitions and References				
Rule 2.0101	Definitions	12/18/2018	9/28/2021, [Insert citation of publication].	
*	*	*	*	*
Section 2.0200 Air Pollution Sources				
Rule 2.0201	Classification of Air Pollution Sources.	12/18/2018	9/28/2021, [Insert citation of publication].	
Rule 2.0202	Registration of Air Pollution Sources.	12/18/2018	9/28/2021, [Insert citation of publication].	
Section 2.0300 Air Pollution Emergencies				
Rule 2.0301	Purpose	12/15/2015	9/28/2021, [Insert citation of publication].	
Rule 2.0302	Episode Criteria	12/18/2018	9/28/2021, [Insert citation of publication].	
Rule 2.0303	Emission Reduction Plans	12/18/2018	9/28/2021, [Insert citation of publication].	

(3) EPA-APPROVED MECKLENBURG COUNTY REGULATIONS—Continued

State citation	Title/subject	State effective date	EPA approval date	Explanation
Rule 2.0304	Preplanned Abatement Program	12/18/2018	9/28/2021, [Insert citation of publication].	
Rule 2.0305	Emission Reduction Plan: Alert Level.	12/15/2015	9/28/2021, [Insert citation of publication].	
*	*	*	*	* * *

* * * * *

[FR Doc. 2021–20008 Filed 9–27–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[EPA–R04–OAR–2021–0322; FRL–8874–02–R4]

Air Quality Designations; NC: Redesignation of the Brunswick County 2010 Sulfur Dioxide Unclassifiable Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a submission by the State of North Carolina, through the Department of Air Quality (DAQ), received on April 23, 2021, to redesignate the Brunswick County, North Carolina, unclassifiable area (hereinafter referred to as the ''Brunswick County Area'' or ''Area'') to attainment/unclassifiable for the 2010 1-hour primary sulfur dioxide (SO_2) national ambient air quality standard (hereinafter referred to as the ''2010 1-hour SO_2 NAAQS''). Because EPA now has sufficient information to determine that the Brunswick County Area is attaining the 2010 1-hour SO_2 NAAQS, the Agency is approving the State's request to redesignate the Area from unclassifiable to attainment/unclassifiable for the 2010 1-hour SO_2 NAAQS.

DATES: This rule is effective October 28, 2021.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2021–0322. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information may not be publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Evan Adams, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. Mr. Adams can be reached by telephone at (404) 562–9009 or via electronic mail at adams.evan@*epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

The Clean Air Act (CAA or Act) establishes a process for air quality management through the establishment and implementation of the NAAQS. On June 2, 2010, EPA revised the primary SO_2 NAAQS, establishing a new 1-hour SO_2 standard of 75 parts per billion (ppb). *See* 75 FR 35520 (June 22, 2010).[1] After the promulgation of a new or revised NAAQS, EPA is required to designate all areas of the country pursuant to section 107(d)(1)–(2) of the CAA. For the 2010 1-hour SO_2 NAAQS, designations were based on EPA's application of the nationwide analytical approach to, and technical assessment of, the weight of evidence for each area, including but not limited to available air quality monitoring data and air quality modeling results.

EPA completed the first set of initial area designations for the 2010 1-hour SO_2 NAAQS in 2013 (Round 1). Pursuant to a March 2, 2015, consent decree and court-ordered schedule,[2] EPA finalized a second set of initial area designations for the 2010 1-hour SO_2 NAAQS in 2016 (also called, ''Round 2''). For the Round 2 designations, after review of all available information at that time of Round 2 designations, including modeling provided by the State, EPA was unable to determine whether the Brunswick County Area met the definition of a nonattainment area or the definition of an attainment area.[3] As a result, EPA designated the entire Brunswick County Area, based on modeling of the Capital Power Incorporated (CPI) Southport Cape Fear facility, as unclassifiable, which was published in the **Federal Register** on July 12, 2016.[4] CPI Southport, located on the coast of southeastern North Carolina in the southeastern portion of Brunswick County, was an electric power generation plant with two

[1] On February 25, 2019 (effective April 17, 2019), EPA issued a decision to retain the existing NAAQS for SO_2. *See* 84 FR 9866 (March 18, 2019).

[2] *See Sierra Club et al.* v. *McCarthy*, Civil Action No. 3:13–cv–3953–SI (N.D. Cal.) and 79 FR 31325 (June 2, 2014).

[3] EPA's March 20, 2015, guidance specified the designation category definitions to be used in the Round 2 designations. Specifically, EPA defined a ''nonattainment'' area as an area that EPA has determined violates the 2010 1-hour SO_2 NAAQS based on the most recent three years of quality-assured, certified ambient air quality monitoring data or an appropriate modeling analysis, or that EPA has determined contributes to a violation in a nearby area; and defined an ''attainment'' area as an area that EPA has determined meets the 2010 1-hour SO_2 NAAQS and does not contribute to a violation of the NAAQS in a nearby area based on either: (a) The most recent three years of ambient air quality monitoring data from a monitoring network in an area that is sufficient to be compared to the NAAQS, or (b) an appropriate modeling analysis.

[4] *See* 81 FR 45039 (July 12, 2016), effective September 12, 2016) codified at 40 CFR 81.334. Detailed rationale, analyses, and other information supporting EPA's original Round 2 designation including all supporting materials for the Brunswick County Area, including the technical support document (TSD), can be found on EPA's SO_2 designations website at *https://www.epa.gov/sulfur-dioxide-designations/epa-completes-second-round-sulfur-dioxide-designations*.

electric generating units (EGUs) that were permitted to combust a variety of solid fuels, including coal, woody biomass fuels, and tire derived fuel. The unclassifiable area included all six townships (Lockwood Folly Township, Northwest Township, Shallotte Township, Smithville Township, Town Creek Township, Waccamaw Township) within the jurisdictional boundary of Brunswick County.

To address EPA's 2015 Data Requirements Rule (DRR),[5] DAQ decided to characterize the air quality in the vicinity of the CPI Southport[6] facility by installing an air quality monitor (Southport DRR monitor; AQS ID: 370190005) in the area of maximum concentration for the facility.[7] North Carolina began collecting monitoring data on January 1, 2017.[8]

On April 23, 2021, North Carolina submitted a letter to EPA requesting that the entirety of Brunswick County be redesignated to attainment/unclassifiable based on the newly available monitoring information, which demonstrates attainment of the 2010 1-hour SO_2 NAAQS. To evaluate North Carolina's redesignation request, EPA considered the design value for the air quality monitor in Brunswick County by assessing the most recent three consecutive years (*i.e.,* 2018–2020) of quality-assured, certified ambient air quality data in the EPA Air Quality System (AQS) using data from the Southport DRR monitor that was sited and operated in accordance with 40 CFR parts 50 and 58.[9] As noted previously, the 2010 1-hour SO_2 NAAQS is met when the design value is 75 ppb or less. The most recent three years of ambient SO_2 monitoring data available shows that the Area is attaining the 2010 1-hour SO_2 NAAQS with a design value of 54 ppb for the period 2018–2020.[10] Additionally, on March 31, 2020, the CPI Southport facility ceased operation, and the DAQ rescinded the facility's operating permit effective April 1, 2021.[11]

After reviewing North Carolina's redesignation request under CAA section 107(d)(3)(D) and all available information, EPA is now approving North Carolina's request to redesignate the Brunswick County Area from unclassifiable to attainment/unclassifiable for the 2010 1-hour SO_2 NAAQS based on a valid ambient SO_2 design value that adequately characterizes the SO_2 air quality in the Brunswick County Area and demonstrates attainment of the 1-hour SO_2 standard.

In a notice of proposed rulemaking (NPRM) published on July 2, 2021 (86 FR 35254), EPA proposed to redesignate to attainment/unclassifiable the Brunswick County Area in its entirety. As discussed in the NPRM, this final action is based on the currently available monitoring data described in that NPRM that demonstrate attainment of the 2010 1-hour SO_2 NAAQS. The 30-day public comment period for the NPRM closed on August 16, 2021. EPA did not receive any comments on the proposed redesignation of Brunswick County, North Carolina. The details of North Carolina's redesignation request and the rationale for EPA's actions are further explained in the NPRM.

III. Final Action

EPA is approving North Carolina's April 23, 2021, request to redesignate the Brunswick County Area from unclassifiable to attainment/unclassifiable for the 2010 1-hour SO_2 NAAQS. The final action is based on the currently available monitoring data for the Brunswick County Area that demonstrate attainment of the 2010 1-hour SO_2 NAAQS. This approval of the redesignation request changes the legal designation, found at 40 CFR part 81, of Brunswick County from unclassifiable to attainment/unclassifiable for the 2010 1-hour SO_2 NAAQS.

IV. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment/unclassifiable is an action that affects the status of a geographical area and does not impose any additional regulatory requirements on sources beyond those imposed by state law. A redesignation to attainment/unclassifiable does not in and of itself create any new requirements, but rather results in the applicability of requirements contained in the CAA for areas that have been redesignated to attainment. Accordingly, this action merely redesignates an area to attainment/unclassifiable and does not impose additional requirements. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National

[5] Data Requirements Rule for the 2010 1-Hour Sulfur Dioxide (SO_2) Primary National Ambient Air Quality Standard (NAAQS), Final Rule, 80 FR 51052, August 21, 2015 (*https://www.govinfo.gov/content/pkg/FR-2015-08-21/pdf/2015-20367.pdf*), which required states to undertake air quality characterization for areas with SO_2 sources meeting certain criteria. Specifically, the DRR required state air agencies to provide additional monitoring or modeling information to characterize air quality in areas associated with sources meeting certain criteria or that have otherwise been listed under the DRR by EPA or state air agencies, or to instead impose federally enforceable emission limitations on those sources restricting their annual SO_2 emissions to less than 2,000 tons per year, or provide documentation that the sources have been shut down, by specified dates. The information generated by implementation of the DRR informed EPA's designations.

[6] CPI Southport was subject to EPA's 2015 Data Requirements Rule (DRR) for the 2010 SO_2 1-hour NAAQS. *See https://www.epa.gov/sites/production/files/2016-06/documents/nc.pdf* for North Carolina's letter and DRR source list, dated January 15, 2016.

[7] The Southport DRR monitor is located at the site of maximum concentration based on modeling following the procedures in EPA's February 2016 SO_2 Monitoring TADs, ''SO_2 NAAQS Designations Source-Oriented Monitoring Technical Assistance Document'' and 40 CFR parts 50 and 58. More details on the analyses used to support the monitor placement are contained in the State's 2016 annual monitoring annual network plan located in the docket for this final action.

[8] In accordance with the DRR, 40 CFR part 51, subpart BB, through a letter dated June 30, 2016, North Carolina notified EPA that the State chose to characterize peak 1-hour SO_2 concentrations for CPI through air quality monitoring. See *https://www.epa.gov/sites/production/files/2016-07/documents/north_carolina_source_characterization.pdf.*

[9] Procedures for using monitored air quality data to determine whether a violation has occurred are provided in 40 CFR part 50, appendix T.

[10] North Carolina early certified the Southport monitor 2018–2020 air quality data in AQS on January 13, 2021. See Table 2 in North Carolina's April 23, 2021, redesignation request.

[11] The DAQ's April 1, 2021 letter rescinding Air Quality Permit No. 05884T21 and the January 20, 2021, certified letter from Mr. Frank Hayward, General Manager, CPI USA North Carolina, LLC—Southport Plant to Mr. Brad Newland, P.E., Regional Air Quality Supervisor, Wilmington Regional Office, NC Division of Air Quality, requesting permit rescission are located in the docket for this final action.

Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

• Will not have disproportionate human health or environmental effects under Executive Order 12898 (59 FR 7629, February 16, 1994).

This final redesignation does not apply to any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 29, 2021. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: September 20, 2021.

John Blevins,

Acting Regional Administrator, Region 4.

For the reasons stated in the preamble, EPA amends 40 CFR part 81 as follows:

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

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

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

■ 2. In § 81.334, the table titled ''North Carolina–2010 Sulfur Dioxide NAAQS [Primary]'' is amended by:

■ a. Revising the ''Designated area'' and ''Date'' column headings;

■ b. Removing the entries for ''Brunswick County, NC'', ''Brunswick County'', ''Lockwood Folly Township, Northwest Township, Shallotte Township, Smithville Township, Town Creek Township, Waccamaw Township'', and ''Rest of State:'';

■ c. Adding an entry for ''Brunswick County'' before ''Buncombe County'';

■ d. Adding an entry for ''Lockwood Folly Township, Northwest Township, Shallotte Township, Smithville Township, Town Creek Township, Waccamaw Township'' under ''Brunswick County''; and

■ e. Removing footnote 2 and redesignating footnotes 1 and 3 as footnotes 2 and 1, respectively.

The revisions and additions read as follows:

§ 81.334 North Carolina.

* * * * *

NORTH CAROLINA—2010 SULFUR DIOXIDE NAAQS

[Primary]

Designated area[1]	Designation	
	Date[2]	Type
* * * * *	*	*
Brunswick County	October 28, 2021	Attainment/Unclassifiable.
Lockwood Folly Township, Northwest Township, Shallotte Township, Smithville Township, Town Creek Township, Waccamaw Township.		
* * * * *	*	*

[1] Includes any Indian country in each county or area, unless otherwise specified. EPA is not determining the boundaries of any area of Indian country in this table, including any area of Indian country located in the larger designation area. The inclusion of any Indian country in the designation area is not a determination that the state has regulatory authority under the Clean Air Act for such Indian country.

[2] This date is April 9, 2018, unless otherwise noted.

* * * * *

[FR Doc. 2021–20639 Filed 9–27–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2019–0385; FRL–8400–02–OCSPP]

Metaflumizone; Pesticide Tolerances; Technical Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Correcting amendment.

SUMMARY: EPA issued a final rule in the **Federal Register** of April 19, 2021, establishing tolerances for residues of the insecticide metaflumizone in or on multiple commodities requested by BASF Corporation under the Federal Food, Drug, and Cosmetic Act (FFDCA). That document inadvertently requested removal of tolerances for the crop group fruit, stone, group 12–12. This document corrects the final regulation.

DATES: This correction is effective September 28, 2021.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2019–0385, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805.

Due to the public health concerns related to COVID–19, the EPA Docket Center (EPA/DC) and Reading Room is closed to visitors with limited exceptions. The staff continues to provide remote customer service via email, phone, and webform. For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Marietta Echeverria, Acting Director, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Does this action apply to me?

The Agency included in the April 19, 2021 final rule a list of those who may be potentially affected by this action.

II. What does this technical correction do?

EPA issued a final rule in the **Federal Register** of April 19, 2021 (86 FR 20290) (FRL–10018–60) that established tolerances for residues of the insecticide metaflumizone in or on multiple commodities. While establishing tolerances in response to a petition requesting these tolerances, EPA included erroneous language in its instructions to the **Federal Register**, by directing the removal of the existing tolerance established in § 180.657 for ''Fruit, stone, group 12–12''. Instead of instructing the **Federal Register** to Remove the entries for ''Fruit, citrus, group 10–10''; ''Fruit, pome, group 11–10''; and ''Fruit, stone, group 12–12'' the instructions should have only directed the removal of entries for ''Fruit, citrus, group 10–10'' and ''Fruit, pome, group 11–10''. EPA's instructions to remove the tolerances for ''Fruit, stone, group 12–12'' were not consistent with its authority under FFDCA section 408(d)(4)(A). Therefore, EPA is rescinding its instruction to remove ''Fruit, stone, group 12–12'' and reinstating the tolerance level at 0.04 parts per million.

III. Why is this correction issued as a final rule?

Section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)(3)(B)) provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, the agency may issue a final rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for making this technical correction final without prior proposal and opportunity for comment, because EPA inadvertently deleted the existing tolerance established for ''Fruit, stone, group 12–12''. EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(3)(B).

IV. Do any of the statutory and executive order reviews apply to this action?

No. For a detailed discussion concerning the statutory and Executive order review, refer to Unit VI. of the April 19, 2021 final rule.

V. Congressional review act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: September 14, 2021.

Marietta Echeverria,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, for the reasons stated in the preamble, EPA is correcting 40 CFR part 180 as follows:

PART 180—TOLERANCES AND EXEMPTIONS FOR PESTICIDE CHEMICAL RESIDUES IN FOOD

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.657, amend the table in paragraph (a)(1) by adding in alphabetical order the entry ''Fruit, stone, group 12–12'' to read as follows:

§ 180.657 Metaflumizone; tolerances for residues.

(a) * * *

(1) * * *

TABLE 1 TO PARAGRAPH (a)(1)

Commodity	Parts per million
* * * * *	
Fruit, stone, group 12–12	0.04
* * * * *	

* * * * *

[FR Doc. 2021–20357 Filed 9–27–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[EPA–R09–RCRA–2021–0431; FRL–8828–02–R9]

Arizona: Final Authorization of State Hazardous Waste Management Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final action/decision/authorization.

SUMMARY: The Environmental Protection Agency (EPA) is taking direct final action on the authorization of Arizona's changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). These changes were outlined in an application to the EPA and correspond to certain Federal rules promulgated between July 1, 2007, and June 30, 2020. We have determined that these changes satisfy all requirements needed for final authorization.

DATES: This authorization is effective on November 29, 2021 without further notice, unless the EPA receives adverse comment by October 28, 2021. If the EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the authorization will not take effect.

ADDRESSES: All documents in the docket are listed in the *www.regulations.gov* index. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy. You may also view

Arizona's application by contacting the Arizona Department of Environmental Quality Records Center at 602–771–4380, Monday through Friday, 8:30 a.m. to 4:30 p.m.

Instructions: Submit your comments to EPA, identified by Docket ID No. EPA–R09–RCRA–2021–0047, at *https://www.regulations.gov*. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). The *https://www.regulations.gov* website is an ''anonymous access'' system, which means 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 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, EPA recommends that you include your name and other contact information in the body of your comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, 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.

FOR FURTHER INFORMATION CONTACT: Sorcha Vaughan, *Vaughan.Sorcha@epa.gov,* 415–947–4217.

SUPPLEMENTARY INFORMATION:

A. Why is the EPA using a direct final authorization?

The EPA is publishing this authorization without a prior proposal because we view this as a noncontroversial action and anticipate no adverse comment. This action is a routine program change. However, in the ''Proposed Rules'' section of this **Federal Register**, we are publishing a separate document that will serve as the proposed rulemaking allowing the public an opportunity to comment. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on this authorization, see the **ADDRESSES** section of this document.

If the EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this direct final authorization will not take effect. We will address all public comments in a subsequent final authorization and base any further decision on the authorization of the state program changes after considering all comments received during the comment period.

B. Why are revisions to state programs necessary?

States that have received final authorization from the EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal program. As the Federal program changes, states must change their programs and ask the EPA to authorize the changes. Changes to state 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) parts 124, 260 through 268, 270, 273, and 279.

New Federal requirements and prohibitions imposed by Federal regulations that the EPA promulgates pursuant to the Hazardous and Solid Waste Amendments of 1984 (HSWA) take effect in authorized states at the same time they take effect in unauthorized states. Thus, the EPA will implement those requirements and prohibitions in Arizona, including the issuance of new permits implementing those requirements, until the State is granted authorization to do so.

C. What decisions has the EPA made in this authorization?

Arizona submitted a complete program revision application dated June 7, 2021, seeking authorization of changes to its hazardous waste program corresponding to certain Federal rules promulgated between July 1, 2007 and June 30, 2020. The EPA concludes that Arizona's application to revise its authorized program meets all of the statutory and regulatory requirements established under RCRA, as set forth in RCRA section 3006(b), 42 U.S.C. 6926(b), and 40 CFR part 271. Therefore, the EPA proposes to grant Arizona final authorization to operate its hazardous waste program with the changes described in the authorization application, and as outlined below in section F of this document.

Arizona has responsibility for permitting treatment, storage, and disposal facilities within its borders (except in Indian country) and for carrying out the aspects of the RCRA program described in its program revision application, subject to the limitations of HSWA, as discussed above.

D. What is the effect of this authorization decision?

The effect of this decision is that the changes described in Arizona's authorization application will become part of the authorized State hazardous waste program and will therefore be federally enforceable. Arizona will continue to have primary enforcement authority and responsibility for its State hazardous waste program. The EPA will maintain its authorities under RCRA sections 3007, 3008, 3013, and 7003, including its authority to: Conduct inspections, and require monitoring, tests, analyses, and reports; enforce RCRA requirements, including authorized State program requirements, and suspend or revoke permits; and take enforcement actions regardless of whether the State has taken its own actions.

This action does not impose additional requirements on the regulated community because the regulations for which the EPA is authorizing Arizona are already effective under State law and are not changed by this action.

E. What has Arizona previously been authorized for?

Arizona initially received final authorization on November 20, 1985, to implement its base hazardous waste management program. Arizona received authorization for revisions to its program on August 6, 1991 (56 FR 37290 effective October 7, 1991), July 13, 1992 (57 FR 30905 effective September 11, 1992), November 23, 1992 (57 FR 54932 effective January 22, 1993), October 27, 1993 (58 FR 57745 effective December 27, 1993), July 18, 1995 (60 FR 36731 effective June 12, 1995), March 7, 1997 (62 FR 10464 effective May 6, 1997), October 28, 1998 (63 FR 57605–57608 effective December 28, 1998), March 17, 2004 (69 FR 12544 effective March 17, 2004, originally published on October 27, 2000 (65 FR 64369)), and December 20, 2017 (82 FR 60550 effective January 20, 2018).

F. What changes is the EPA authorizing with this action?

Arizona submitted a final complete program revision application to EPA dated June 7, 2021, seeking authorization of changes to its hazardous waste program that correspond to certain Federal rules promulgated between July 1, 2007 and June 30, 2020 (Checklists 217–220, 222, 223, 225–242). EPA proposes to determine, subject to receipt of written comments that oppose this action, that Arizona's hazardous waste program revisions are equivalent to, consistent with, and no less stringent than the Federal program, and therefore satisfy all the requirements necessary to qualify for authorization. Arizona adopts by reference the Federal RCRA regulations in effect as of June 30, 2020, at Arizona Administrative Code Title 18, Chapter 8, Article 2 (A.A.C R18–8–260 through 280, effective as of December 31, 2020).

Description of Federal requirement and checklist No.	**Federal Register** volume, page and date	Arizona Administrative Register (A.A.R) and effective date	Arizona Administrative Code (A.A.C) implementing rule sections
NESHAP: Final Standards for Hazardous Waste Combustors (Phase I Final Replacement Standards and Phase II) Amendments (217).	73 FR 18970 (4/8/2008).	21 A.A.R 1246 (9/05/2015).	R18–8–264 (A), R18–8–266 (A).
F019 Exemption for Wastewater Treatment Sludges from Auto Manufacturing Zinc Phosphating Processes.	73 FR 31756 (6/04/2008).	21 A.A.R 1246 (9/05/2015).	R18–8–261 (A).
Revisions to DSW Rule (219)	73 FR 64668–64788 (10/30/2008).	26 A.A.R 2949 (11/03/2020).	R18–8–260 (C), R18–8–261 (A), R18–8–270 (A).
Academic Laboratories Generator Standards (220).	73 FR 72912 (12/01/2008).	21 A.A.R 1246 (9/05/2015).	R18–8–262 (A).
OECD Requirements; Export Shipments of Spent Lead-Acid Batteries (222).	75 FR 1236–1262 (1/8/2010).	21 A.A.R 1246 (9/05/2015).	R 18–8–262 (A), R18–8–263 (A), R18–8–264 (A), R18–8–264 (A), R18–8–266 (A).
Technical Corrections/Clarifications (223)	75 FR 12989–13009 (3/18/2010), 75 FR 31716–31717 (6/4/2010).	21 A.A.R 1246 (9/05/2015).	R18–8–260 (C), R18–8–262 (A), R18–8–262 (A), R18–8–263(A), R18–8–264 (A), R18–8–265 (A), R18–8–266 (A), R18–8–268, R18–8–270 (A).
Removal of Saccharin and its Salts from the list of HW (225).	75 FR 78918–78926 (12/17/2010).	21 A.A.R 1246 (9/05/2015).	R18–8–261(A), R18–8–268.
Academic Laboratories Generator Standards Technical Corrections (226).	75 FR 79304 (12/20/2010).	21 A.A.R 1246 (9/05/2015).	R18–8–261 (A), R18–8–262 (A).
Revisions to Treatment Standards of Carbamate Wastes (227).	76 FR 34147–34157 (6/13/2011).	21 A.A.R 1246 (9/05/2015).	R18–8–268.
Technical Correction/Clarification (228)	77 FR 22229–22232 (4/13/2012).	21 A.A.R 1246 (9/05/2015).	R18–8–261 (A), R18–8–266 (A).
Conditional Exclusions for Solvent Contaminated Wipes (229).	78 FR 46448–46485 (7/31/2013).	21 A.A.R 1246 (9/05/2015).	R18–8–260 (A), R18–8–261 (A).
Conditional Exclusion for Carbon Dioxide (CO2) Streams in Geologic Sequestration Activities (230).	79 FR 350 (1/03/2014)	25 A.A.R 435 (2/05/2019).	R18–8–260 (C), R18–8–261 (A).
Hazardous Waste Electronic Manifest System (231).	79 FR 7518–7563 (2/7/2014).	25 A.A.R 435 (2/05/2019).	R18–8–260 (C), R18–8–262 (A), R18–8–263 (A), R18–8–264 (A), R18–8–265 (A).
Revisions to Export Provisions of the Cathode Ray Tube (CRT) Rule (232).	79 FR 36220–36231 (6/26/2014).	25 A.A.R 435 (2/05/2019).	R18–8–260 (C), R18–8–261 (A).
Revision to DSW Rule–Non-waste determinations and variances (233).	80 FR 1694–1814 (1/13/2015).	26 A.A.R 2949 (11/03/2020).	R18–8–260 (C), R18–8–261 (A), R18–8–270 (A).
Vacatur of Comparable Fuels and Gasification (234).	80 FR 18777–18780 (4/8/2015).	25 A.A.R 435 (2/05/2019).	R18–8–260 (C), R18–8–261 (A).
Disposal of Coal Combustion Residuals from Electric Utilities (235).	80 FR 21302 (4/17/2015).	25 A.A.R 435 (2/05/2019).	R18–8–261 (A).
Imports and Exports of Hazardous Waste (236).	81 FR 85696–85729 (11/28/2016), 82 FR 41015–41016 (8/29/2017).	25 A.A.R 435 (2/05/2019).	R18–8–260 (C), R18–8–261 (A), R18–8–262 (A), R18–8–263 (A), R18–8–264 (A), R18–8–265 (A), R18–8–266 (A), R18–8–273
Generator Improvements Rule (237)	81 FR 85732–85829 (11/28/2016).	25 A.A.R 435 (2/05/2019).	R18–8–260 (C), R18–8–265 (A), R18–8–268, R18–8–270(A), R18–8–273.
Confidentiality Determinations for Hazardous Waste Export and Import Documents (238).	82 FR 60894–60901 (12/26/2017).	25 A.A.R 435 (2/05/2019).	R18–8–260 (C), R18–8–261 (A), R18–8–262 (A).
Hazardous Waste Electronic Manifest System User Fee (239).	83 FR 420–462 (1/3/2018).	25 A.A.R 435 (2/05/2019).	R18–8–260 (C), R18–8–262 (A), R18–8–263 (A), R18–8–264 (A), R18–8–265 (A).
Safe Management of Recalled Airbags (240)	83 FR 61552 (11/30/2018).	26 A.A.R 2949 (11/03/2020).	R18–8–260 (C), R18–8–261 (A), R18–8–262 (A).
Management Standards for Hazardous Waste Pharmaceuticals and Amendment to the P075 Listing for Nicotine (241).	84 FR 5816 (2/22/2019).	26 A.A.R 2949 (11/03/2020).	R18–8–260 (C), R18–8–261(A), R18–8–262 (A), R18–8–263 (A), R18–8–264 (A), R18–8–265 (A), R18–8–266(A), R18–8–286, R18–8–270 (A), R18–8–273.
Universal Waste Regulations: Addition of Aerosol Cans (242).	84 FR 67202 (12/09/2019).	26 A.A.R 2949 (11/03/2020).	R18–8–260 (C), R18–8–261 (A), R18–8–264 (A), R18–8–265 (A), R18–8–268, R18–8–270 (A), R18–8–273.

G. Where are the revised state rules different than the Federal rules?

More Stringent: When revised state rules differ from the Federal rules in the RCRA state authorization process, the EPA determines whether the state rules are equivalent to, more stringent than, or broader in scope than the Federal program. Pursuant to RCRA section 3009, 42 U.S.C. 6929, state programs may contain requirements that are more stringent than the Federal regulations. Such more stringent requirements can be federally authorized and, once authorized, become federally enforceable. Although the statute does not prevent states from adopting regulations that are broader in scope than the Federal program, states cannot receive Federal authorization for such regulations, and they are not federally enforceable.

Since 1984, Arizona's hazardous waste rules have contained several procedural requirements that are more stringent than EPA's. These more stringent procedural requirements are authorized by Arizona Revised Statutes (ARS) section 49–922, which in directing Arizona to adopt hazardous waste rules, prohibits only nonprocedural standards that are more stringent than EPA's. There are no State requirements in the program revisions listed in the table above that are considered to be more stringent or broader in scope than the Federal requirements.

Removed Rules: On March 1, 2019, Arizona updated its hazardous waste program rules and removed the following procedural requirements that were more stringent than the EPA's Rules:

- Annual Reports: Arizona eliminated the requirement that Large Quantity Generators, Transfer, Storage and Disposal (TSD) Facilities, and Recyclers submit annual reports [previously in AAC R18–8–260(E)(3); R18–8–262(H), R18–8–264(I) and R18–8–265(I), ACC R18–8–261(J)].
- Hazardous Waste Manifest: Arizona no longer requires hazardous waste generators, transporters and TSD Facilities to provide a copy of all hazardous waste manifests to Arizona's Department of Environmental Quality monthly [previously in AAC R18–8–262(I) and (J); R18–8–263(C), R18–8–264(J) and R18–8–265(J)].

Nondelegable Rules: The EPA cannot authorize states to implement certain Federal requirements associated with the Revisions to the Export Provisions of the Cathode Ray Tube (CRT) Rule (Checklist 232), Confidentiality Determinations for Hazardous Waste Export and Import Documents Rule (Checklist 238), and the Hazardous Waste Electronic Manifest User Fee Rule (Checklist 239). Arizona has adopted these requirements and appropriately preserved the EPA's authority to implement them.

Other than the differences discussed above, Arizona incorporates by reference the remaining Federal rules listed in section F, so there are no significant differences between the remaining Federal rules and the revised State rules being authorized in this action.

H. Who handles permits after the authorization takes effect?

When final authorization takes effect, Arizona will issue permits for all the provisions for which it is authorized and will administer the permits it issues. The EPA will continue to administer any RCRA hazardous waste permits or portions of permits that the EPA issued prior to the effective date of authorization until they expire or are terminated. The EPA will not issue any new permits or new portions of permits for the provisions listed in the table above after the effective date of the final authorization. The EPA will continue to implement HSWA requirements for which Arizona is not yet authorized. The EPA has the authority to enforce state-issued permits after the state is authorized.

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

Arizona is not authorized to carry out the hazardous waste program in Indian country. Therefore, this action has no effect on Indian country. EPA retains jurisdiction over Indian country and will continue to implement and administer the RCRA program on these lands.

J. What is codification and is the EPA codifying Arizona's hazardous waste program as authorized in this authorization?

Codification is the process of placing citations and references to the state's statutes and regulations that comprise the state's authorized hazardous waste program into the Code of Federal Regulations. The EPA does this by adding those citations and references to the authorized state rules in 40 CFR part 272. The EPA is not codifying the authorization of Arizona's revisions at this time. However, the EPA reserves the ability to amend 40 CFR part 272, subpart L, for the authorization of Arizona's program changes at a later date.

K. Statutory and Executive Order Reviews

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 authorizes state requirements for the purpose of RCRA section 3006 and imposes no additional requirements beyond those imposed by state law. Therefore, this action is not subject to review by OMB. 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.*). Because this action authorizes 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). 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 authorizes state requirements as part of a state RCRA hazardous waste program without altering the relationship or the distribution of power and responsibilities established by RCRA. 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. This action 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 under Executive Order 12866.

Under RCRA section 3006(b), the EPA grants a state's application for authorization as long as the state meets the criteria required by RCRA. It would thus be inconsistent with applicable law for the EPA, when it reviews a state authorization 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) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this authorization, the EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. The EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of this action in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order. This action 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). Executive Order 12898 (59 FR 7629, February 16, 1994), as amended by Executive Order 14008 (86 FR 7619, February 1, 2021), 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 action authorizes 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, this authorization is not subject to Executive Order 12898.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The 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).

Authority: This action is issued under the authority of sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act as amended, 42 U.S.C. 6912(a), 6926, and 6974(b).

Dated: September 1, 2021.

Deborah Jordan,

Acting Regional Administrator, Region IX.

[FR Doc. 2021–19986 Filed 9–27–21; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 75

RIN 0991–AC16

Health and Human Services Grants Regulation

AGENCY: Assistant Secretary for Financial Resources (ASFR), Health and Human Services (HHS or the Department).

ACTION: Notification; postponement of effectiveness.

SUMMARY: The U.S. District Court for the District of Columbia in *Facing Foster Care et al.* v. *HHS,* 21–cv–00308 (D.D.C. Feb. 2, 2021), has postponed the effective date of portions of the final rule making amendments to the Uniform Administrative Requirements, promulgated on January 12, 2021.

DATES: Pursuant to court order, the effectiveness of the final rule published January 12, 2021, at 86 FR 2257, is postponed until November 9, 2021. See **SUPPLEMENTARY INFORMATION** for details.

FOR FURTHER INFORMATION CONTACT: Johanna Nestor at *Johanna.Nestor@hhs.gov* or 202–205–5904.

SUPPLEMENTARY INFORMATION: On January 12, 2021, the Department issued amendments to and repromulgated portions of the Uniform Administrative Requirements, 45 CFR part 75 (86 FR 2257). That rule repromulgated provisions of part 75 that were originally published late in 2016. It also made amendments to 45 CFR 75.300(c) and (d).

Specifically, the rule amended paragraph (c), which had stated, ''It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Recipients must comply with this public policy requirement in the administration of programs supported by HHS awards.'' The rule amended paragraph (c) to state, ''It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services, to the extent doing so is prohibited by federal statute.''

Additionally, the rule amended paragraph (d), which had stated, ''In accordance with the Supreme Court decisions in *United States* v. *Windsor* and in *Obergefell* v. *Hodges,* all recipients must treat as valid the marriages of same-sex couples. This does not apply to registered domestic partnerships, civil unions or similar formal relationships recognized under state law as something other than a marriage.'' The rule amended paragraph (d) to state, ''HHS will follow all applicable Supreme Court decisions in administering its award programs.''

On February 2, the portions of rulemaking amendments to § 75.300 (and a conforming amendment at § 75.101(f)) were challenged in the U.S. District Court for the District of Columbia. *Facing Foster Care et al.* v. *HHS,* 21–cv–00308 (D.D.C. filed Feb. 2, 2021). On February 9, the court postponed, pursuant to 5 U.S.C. 705, the effective date of the challenged portions of the rule by 180 days, until August 11, 2021.[1] On August 5, the court further postponed the effective date of the rule until November 9, 2021.[2] The Department is issuing this document to apprise the public of the court's order.

Xavier Becerra,

Secretary.

[FR Doc. 2021–20753 Filed 9–27–21; 8:45 am]

BILLING CODE 4151–19–P

[1] *See* Order, *Facing Foster Care et al.* v. *HHS,* No. 21–cv–00308 (D.D.C. Feb. 2, 2021) (order postponing effective date), ECF No. 18.

[2] *See* Order, *Facing Foster Care et al.* v. *HHS,* No. 21–cv–00308 (D.D.C. Aug. 5, 2021) (order postponing effective date), ECF No. 23.

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 95

[WT Docket No. 10–119; FCC 21–90; FRS 45644]

Review of the Commission's Personal Radio Services Rules

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) addresses three petitions for reconsideration of the 2017 Report and Order in this proceeding, which reorganized and updated the Personal Radio Services rules. Cobra Electronics Corporation (Cobra), Motorola Solutions, Inc. (Motorola), and Medtronic, Inc. (Medtronic) each filed a petition for reconsideration of particular aspects of the Report and Order regarding specific services. In the *Memorandum Opinion and Order on Reconsideration,* the Commission finds that the public interest will be served by granting the petitions and making some additional rule corrections.

DATES: *Effective date:* October 28, 2021.

ADDRESSES: Federal Communications Commission, 45 L Street NE, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Thomas Derenge of the Wireless Telecommunications Bureau, Mobility Division, at (202) 418–2451 or *Thomas.Derenge@fcc.gov,* or Melissa Conway of the Wireless Telecommunications Bureau, Mobility Division, at (202) 418–2887 or *Melissa.Conway@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Memorandum Opinion and Order on Reconsideration* in WT Docket No. 10–119, FCC 21–90, adopted August 3, 2021, and released August 4, 2021. The full text of the *Memorandum Opinion and Order on Reconsideration,* including all Appendices, is available for inspection and copying during normal business hours in the FCC Reference Center, 45 L Street NE, Washington, DC 20554, or available for viewing via the Commission's ECFS website by entering the docket number, WT Docket No. 10–119. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an email to *FCC504@fcc.gov* or calling the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

The Commission will send a copy of this *Memorandum Opinion and Order on Reconsideration* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' In the 2017 Report and Order in this proceeding, the Commission determined that the reorganization of Part 95 and substantive changes made to rules governing certain services would not have a significant economic impact on a substantial number of small entities and included a Final Regulatory Flexibility Certification (FRFC) in the Report and Order which is subject to review in this *Memorandum Opinion and Order on Reconsideration*. No comments or petitions for reconsideration were received on the FRFC. The Commission's actions in this *Memorandum Opinion and Order on Reconsideration* will not have a significant economic impact on a substantial number of small entities. Therefore, the Commission certifies that the requirements of this *Memorandum Opinion and Order on Reconsideration* will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

This *Memorandum Opinion and Order on Reconsideration* does not contain any new or modified information collection requirements subject to the Paperwork Reduction Act of 1985, 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.

Congressional Review Act

The Commission will send a copy of this *Memorandum Opinion and Order on Reconsideration,* including the Supplemental Final Regulatory Flexibility Certification, to Congress and the Government Accountability Office pursuant to the Congressional Review Act. *See* 5 U.S.C. 801(a)(1)(A). In addition, the Commission will send a copy of this *Memorandum Opinion and Order on Reconsideration,* including the Supplemental Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

Synopsis

1. *Cobra Petition.* CB Radio Service is a mobile and fixed two-way voice communications service for facilitating personal, business, or voluntary public service activities, including communications to provide assistance to highway travelers. Cobra's petition requests that the Commission permit Frequency Modulation (FM) operation as part of an optional dual modulation scheme for CB radios (*i.e.,* a CB radio could have both Amplitude Modulation (AM) and FM capability). Cobra and others suggest that an FM option will benefit the CB radio user—both professional and recreational—in that it will provide better quality and clarity of communications.

2. The Commission concludes that allowing manufacturers to add FM as an optional modulation scheme will not substantially change the fundamental nature of the CB Radio Service and will improve the user experience. Continuing to mandate AM capability while permitting dual modulation will provide benefits to CB radio users who will have an additional modulation option, while maintaining the basic character of the service. The addition of FM as a permitted mode will not result in additional interference because users who hear unintelligible audio on a particular channel can simply select another channel or switch modes.

3. The Commission grants the Cobra Petition to the extent described in the *Memorandum Opinion and Order on Reconsideration*. Specifically, the Commission amends Section 95.971(a) of the Commission's rules to permit CB Radio Service transmitters to transmit FM voice emissions along with AM. The Commission notes that AM and FM operations are permitted in other Part 95 services under similar technical parameters, so the Commission generally applies the technical rules to FM signals as currently apply to AM signals for the CB Radio Service. In the case of peak frequency deviation, however, the Commission adopts a limit of ±2 kHz due to the 10 kHz channel spacing and 8 kHz occupied bandwidth maximum in the CB Radio Service. Although this specific limit differs from those established in other Part 95 services (*e.g.,* ±5 kHz for 20 kHz channel bandwidth and ±2.5 kHz for 12.5 kHz channel bandwidth in both General Mobile Radio Service (GMRS) and Multi-Use Radio Service (MURS)), it is consistent across Part 95 services

considering the respective occupied bandwidths. The Commission also finds it appropriate to use the common FM emission designator used for Part 95 GMRS and MURS for FM CB Radio Service. These technical rules are implemented through the amendment of Sections 95.967, 95.971, 95.973, 95.975, and 95.979 of the Commission's rules to reflect the addition of FM as an optional additional mode of transmission. The Commission notes that parties planning to incorporate the FM mode into CB radios will have to obtain a valid grant of certification under the Commission's equipment authorization rules.

4. *Motorola Petition.* GMRS is a mobile two-way voice communications service, with limited data applications, for facilitating activities of individual licensees and their family members, including communications during emergencies and natural disasters. Similarly, Family Radio Service (FRS) is a very short-distance, two-way voice communications service, with limited data applications, between low-power hand-held radios, for facilitating individual, family, group, recreational, and business activities. GMRS and FRS co-exist on the same frequencies, except for the GMRS 467 MHz main channels. In its petition, Motorola seeks reconsideration of the Commission's decision in the 2017 Report and Order not to permit automatic or periodic location and data transmissions. It seeks harmonized rule amendments for both the GMRS and FRS, since the two services coexist on the same frequencies. Motorola argues that automatic transmissions should be allowed because almost all of the reasons that support permitting manual data transmissions apply equally to transmissions initiated automatically, except for how frequently a user could transmit the data information. Members of the GMRS community support Motorola's suggestion to permit automatic or periodic location and data transmissions. Motorola contends that allowing automatic data transmissions is in the public interest and will enhance public safety. Motorola explains that automatic location transmissions will provide tracking capabilities for individuals in remote areas where these expanded capabilities will aid search and rescue missions.

5. The Commission concludes that the public interest will be furthered by allowing automatic or periodic location and data transmission on all GMRS channels. Automatic or periodic location and data transmissions will be subject to the same technical limitations as manual data transmissions. Automatic or periodic transmissions will be limited to no more than once every 30 seconds and no more than one second in duration. Consistent with the Commission's approach to treating GMRS and FRS similarly with regard to digital data transmissions, the Commission amends its rules to permit automatic or periodic location and data transmissions for both GMRS and FRS. Indeed, because FRS operates on channels shared with GMRS, automatic or periodic location and data transmissions would be permitted on those channels even if we did not amend the FRS rules.

6. The Commission finds that the public interest will be furthered by granting the Motorola Petition to the extent described in the *Memorandum Opinion and Order on Reconsideration.* Specifically, the Commission amends Sections 95.531, 95.587, and 95.1787 of its rules to permit FRS and GMRS units to transmit location and data information automatically or periodically, subject to the same restrictions as are currently in place for manual data transmissions. The Commission also corrects a typographical error in the GMRS frequency listings in Section 95.1763(d) as adopted in the 2017 Report and Order by correcting the erroneous entry for 467.5675 MHz to refer to 467.5625 MHz.

7. *Medtronic Petition.* Medtronic points out in its petition that several rule revisions in the 2017 Report and Order meant to be ''ministerial'' inadvertently may have modified the existing MedRadio Service rules. Medtronic requests that the Commission revise certain rules to fix the inadvertent substantive changes and correct typographical errors.

8. The Commission grants the Medtronic Petition and amends the rules as requested, with a few modifications, to undo inadvertent changes to the MedRadio Service rules. First, Medtronic points out that the new version of Section 95.303 defines the ''authorized bandwidth'' for Part 95 services in terms of ''occupied bandwidth,'' but the flexible rules applicable to the MedRadio Service do not require the measurement of occupied bandwidth. The Commission resolves this inconsistency by amending the MedRadio rules to remove the incompatible ''authorized bandwidth'' concept. Specifically, the Commission amends Section 95.2573 to clarify that the emission bandwidth definition in Section 95.2503 should be used for the MedRadio Service and make other conforming edits to indicate the channelization flexibility up to the bandwidth limits outlined in Section 95.2573. Further, the Commission amends Section 95.2579 to remove the use of the term ''occupied bandwidth,'' which has a specific definition in Section 95.303, and instead refer to the ''MedRadio channel the transmission is intended to occupy'' in order to make the language consistent with similar language in other MedRadio Service rules. These changes will remove the use of similar yet incompatible terms from the MedRadio rules. The Commission accepts Medtronic's suggested changes to Sections 95.2557(b), (c) and 95.2559(a)(6) because it agrees they return the rules back to their original intent. Further, the Commission corrects certain typographical errors, as suggested by Medtronic and on its own motion, in Sections 95.2503, 95.2509(e)(2), 95.2533(e)(2), and 95.2559(f) of the MedRadio Service rules.

9. Finally, the Commission clarifies the language in Section 95.2569(c) to remove incorrect terminology regarding ''SAR Measurement techniques'' and return the rule to be closer to its previous language. Section 95.2569(c) is designed to address the measurement of field strength and radiated power of devices that are implanted within a body. SAR measurements, by contrast, are used in connection with the evaluation of radiofrequency exposure and are already addressed in Section 95.2585. Because the original language and measurement guidance accurately described in-body simulations, the Commission corrects Section 95.2569(c) to refer to the ''dielectric parameters for the tissue-equivalent material'' with regard to measuring energy emitted from implanted devices.

List of Subjects in 47 CFR Part 95

Communications, Radio equipment.

Federal Communications Commission.

Marlene Dortch,

Secretary.

Final Rules

The Federal Communications Commission amends part 95 of Title 47 of the Code of Federal Regulations (CFR) as set forth below:

PART 95—PERSONAL RADIO SERVICES

■ 1. The authority citation for part 95 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 307.

■ 2. Section 95.531 is amended by revising paragraph (a) to read as follows:

§ 95.531 Permissible FRS uses.

* * * * *

(a) *Digital data.* In addition to voice conversations, FRS units may transmit digital data containing location information, or requesting location information from one or more other FRS or GMRS units, or containing a brief text message to another specific GMRS or FRS unit. Digital data transmissions may be initiated by a manual action of the operator or on an automatic or periodic basis, and a FRS unit receiving an interrogation request may automatically respond with its location. *See also* § 95.587(c).

* * * * *

■ 3. Section 95.587 is amended by revising paragraph (c)(2) to read as follows:

§ 95.587 FRS additional requirements.

* * * * *

(c) * * *

(2) Digital data transmissions may be initiated by a manual action or command of the operator or on an automatic or periodic basis, and FRS units may be designed to automatically respond with location data upon receiving an interrogation request from another FRS unit or a GMRS unit.

* * * * *.

■ 4. Section 95.967 is amended by revising paragraph (a) to read as follows:

§ 95.967 CBRS transmitter power limits.

* * * * *

(a) When transmitting amplitude modulated (AM) voice signals or frequency modulated (FM) voice signals, the mean carrier power must not exceed 4 Watts.

* * * * *

■ 5. Section 95.971 is amended by revising paragraph (a) to read as follows:

§ 95.971 CBRS emission types.

* * * * *

(a) *Permitted emission types.* CBRS transmitter types must transmit AM voice emission type A3E or SSB voice emission types J3E, R3E or H3E, and may also transmit FM voice emission type F3E.

* * * * *

■ 6. Section 95.973 is amended by revising paragraph (a) to read as follows:

§ 95.973 CBRS authorized bandwidth.

* * * * *

(a) *AM and FM.* The authorized bandwidth for emission types A3E and F3E is 8 kHz.

* * * * *

■ 7. Section 95.975 is amended by adding paragraph (c) to read as follows:

§ 95.975 CBRS modulation limits.

* * * * *

(c) When emission type F3E is transmitted the peak frequency deviation shall not exceed ±2 kHz.

■ 8. Section 95.979(a) is amended by revising the first row of the table to read as follows:

§ 95.979 CBRS unwanted emissions limits.

* * * * *

(a) * * *

Emission type	Paragraph
A3E, F3E	(1), (3), (5), (6).
* * * * *	

* * * * *

■ 9. Section 95.1763 is amended by revising paragraph (d) to read as follows:

§ 95.1763 GMRS channels.

* * * * *

(d) *467 MHz interstitial channels.* Only hand-held portable units may transmit on these 7 channels. The channel center frequencies are: 467.5625, 467.5875, 467.6125, 467.6375, 467.6625, 467.6875, and 467.7125 MHz.

■ 10. Section 95.1787 is amended by revising paragraph (a)(1) to read as follows:

§ 95.1787 GMRS additional requirements.

* * * * *

(a) * * *

(1) Digital data transmissions may contain location information, or requesting location information from one or more other GMRS or FRS units, or containing a brief text message to another specific GMRS or FRS unit. Digital data transmissions may be initiated by a manual action of the operator or on an automatic or periodic basis, and a GMRS unit receiving an interrogation request may automatically respond with its location.

* * * * *

■ 11. Section 95.2503 is amended by revising the definition of ''*Medical implant transmitter*'' to read as follows:

§ 95.2503 Definitions, MedRadio.

* * * * *

Medical implant transmitter. A MedRadio transmitter in which both the antenna and transmitter device are designed to operate within a human body for the purpose of facilitating communications from a medical implant device.

* * * * *

■ 12. Section 95.2509 is amended by revising the paragraph (e)(2) to read as follows:

§ 95.2509 MBAN registration and frequency coordination.

* * * * *

(e) * * *

(2) If the MBAN is within line-of-sight of an AMT receive facility, the MBAN frequency coordinator shall achieve a mutually satisfactory coordination agreement with the AMT frequency coordinator prior to the MBAN beginning operations in the band. Such coordination agreement shall provide protection to AMT receive stations consistent with International Telecommunication Union (ITU) Recommendation ITU–R M.1459, ''Protection criteria for telemetry systems in the aeronautical mobile service and mitigation techniques to facilitate sharing with geostationary broadcasting-satellite and mobile-satellite services in the frequency bands 1 452–1 525 and 2 310–2 360 MHz,'' May 2000, as adjusted using generally accepted engineering practices and standards that are mutually agreeable to both coordinators to take into account the local conditions and operating characteristics of the applicable AMT and MBAN facilities, and shall specify when the device shall limit its transmissions to segments of the 2360–2390 MHz band or must cease operation in the band. This ITU document is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than that specified in this section, the Federal Communications Commission must publish a document in the **Federal Register** and the material must be available to the public. Copies of the recommendation may be obtained from ITU, Place des Nations, 1211 Geneva 20, Switzerland, or online at *http://www.itu.int/en/publications/Pages/default.aspx.* You may inspect a copy at the Federal Communications Commission, 445 12th Street SW, Washington, DC 20554, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* ''Generally accepted engineering practices and standards'' include, but are not limited to, engineering analyses and measurement data as well as limiting MBAN operations in the band by time or frequency.

* * * * *

■ 13. Section 95.2533 is amended by revising paragraph (e)(2) to read as follows:

§ 95.2533 Prohibited MedRadio uses.

* * * * *

(e) * * *

(2) A non-radio frequency actuation signal generated by a device external to the body with respect to which the MedRadio implant or body-worn transmitter is used.

■ 14. Section 95.2557 is amended by revising paragraphs (b) and (c) to read as follows:

§ 95.2557 MedRadio duration of transmissions.

* * * * *

(b) MedRadio transmitters may transmit in the 401–406 MHz band in accordance with the provisions of § 95.2559(b)(2) and § 95.2559(b)(3) for no more than 3.6 seconds in total within a one hour time period.

(c) MedRadio transmitters may transmit in the 401–406 MHz band in accordance with the provisions of § 95.2559(b)(4) for no more than 360 milliseconds in total within a one hour time period.

* * * * *

■ 15. Section 95.2559 is amended by revising paragraphs (a)(6) introductory text, (a)(6)(iii) and the paragraph heading to paragraph (f) to read as follows:

§ 95.2559 MedRadio channel access requirements.

* * * * *

(a) * * *

(6) When a channel is selected prior to a MedRadio communications session, it is permissible to select an alternate channel for use if communications are interrupted, provided that the alternate channel selected is the next best choice using the criteria specified in paragraphs (a)(1) through (5) of this section. The alternate channel may be accessed in the event a communications session is interrupted by interference. The following criteria must be met:

* * * * *

(iii) In the event that this alternate channel provision is not used by the MedRadio system, or if the criteria in paragraphs (i) and (ii) of this section are not met, a channel must be selected using the access criteria specified in paragraphs (a)(1) through (5) of this section.

* * * * *

(f) *Requirements for MBANs.* * * *

■ 16. Section 95.2569 is amended by revising paragraph (c) to read as follows:

§ 95.2569 MedRadio field strength measurements.

* * * * *

(c) For a MedRadio transmitter intended to be implanted in a human body, radiated emissions and M–EIRP measurements for transmissions by stations authorized under this section may be made in accordance with an FCC-approved human body simulator and test technique. Guidance regarding dielectric parameters for the tissue-equivalent material can be found in the Office of Engineering and Technology (OET) Laboratory Division Knowledge Database (KDB).

■ 17. Section 95.2573 is revised to read as follows:

§ 95.2573 MedRadio authorized bandwidths.

Each MedRadio transmitter type must be designed such that the MedRadio emission bandwidth (as defined in § 95.2503) does not exceed the applicable limits set forth in this section.

(a) For MedRadio transmitters operating in the 402–405 MHz band, the maximum MedRadio emission bandwidth is 300 kHz. Such transmitters must not use more than 300 kHz of bandwidth (total) during a MedRadio communications session. This provision does not preclude full duplex or half duplex communications provided that the total bandwidth of all of the channels employed in a MedRadio communications session does not exceed 300 kHz.

(b) For MedRadio transmitters operating in the 401–401.85 MHz band or the 405–406 MHz band, the maximum MedRadio emission bandwidth is 100 kHz. Such transmitters must not use more than 100 kHz of bandwidth (total) during a MedRadio communications session. This provision does not preclude full duplex or half duplex communications provided that the total bandwidth of all of the channels employed in a MedRadio communications session does not exceed 100 kHz.

(c) For MedRadio transmitters operating in the 401.85–402 MHz band, the maximum MedRadio emission bandwidth is 150 kHz. Such transmitters must not use more than 150 kHz of bandwidth (total) during a MedRadio communications session. This provision does not preclude full duplex or half duplex communications, provided that the total bandwidth of all of the channels employed in a MedRadio communications session does not exceed 150 kHz.

(d) For MedRadio transmitters operating in the 413–419 MHz, 426–432 MHz, 438–444 MHz or 451–457 MHz bands, the maximum MedRadio emission bandwidth is 6 MHz.

(e) For MedRadio transmitters operating in the 2360–2400 MHz band, the maximum MedRadio emission bandwidth is 5 MHz.

(f) Lesser emission bandwidths may be employed, provided that the unwanted emissions are attenuated as provided in § 95.2579. See also § 95.2567 regarding maximum radiated power limits, § 95.2565 on frequency accuracy, § 95.2569 on field strength measurements, and § 95.2585 on RF exposure.

■ 18. Section 95.2579 is amended by revising paragraphs (c)(1), (d) introductory text, (d)(1)(i) and (ii), and (g) to read as follows:

§ 95.2579 MedRadio unwanted emissions limits.

* * * * *

(c) * * *

(1) 20 dB, on any frequency within the 402–405 MHz band that is more than 150 kHz away from the center frequency of the MedRadio channel the transmission is intended to occupy;

* * * * *

(d) *Attenuation requirements, 401–402 MHz, 405–406 MHz.* For MedRadio transmitter types designed to operate in the 401–402 MHz band or 405–406 MHz band, the power of unwanted emissions must be attenuated below the maximum permitted transmitter output power by at least:

(1) * * *

(i) More than 75 kHz away from the center frequency of the MedRadio channel the transmission is intended to occupy if the MedRadio transmitter type is operating on a frequency between 401.85 and 402 MHz; or,

(ii) More than 50 kHz away from the center frequency of the MedRadio channel the transmission is intended to occupy and 100 kHz or less below 401 MHz or above 406 MHz.

* * * * *

(g) *Measurements.* Compliance with the limits in paragraphs (c), (d) and (e) of this section is based on the use of measurement instrumentation using a peak detector function with an instrument resolution bandwidth approximately equal to 1.0 percent of the emission bandwidth of the device under measurement.

[FR Doc. 2021–19399 Filed 9–27–21; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 86, No. 185
Tuesday, September 28, 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.

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 702 and 741

[NCUA 2021–0127]

RIN 3133–AF38

Subordinated Debt

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed rule.

SUMMARY: The NCUA Board (Board) is proposing to amend the Subordinated Debt rule, which the Board finalized in December 2020 with an effective date of January 1, 2022. The Board proposes to amend the definition of ''Grandfathered Secondary Capital'' to include any secondary capital issued to the United States Government or one of its subdivisions (U.S. Government), under an application approved before January 1, 2022, irrespective of the date of issuance. The proposed change would benefit eligible low-income credit unions (LICUs) that are either participating in the U.S. Department of the Treasury's (Treasury) Emergency Capital Investment Program (ECIP) or other programs administered by the U.S. Government that can be used to fund secondary capital, if they do not receive the funds for such programs by December 31, 2021. The Board also proposes to extend the expiration of regulatory capital treatment for these issuances to the later of 20 years from the date of issuance or January 1, 2042.

DATES: Comments must be received on or before October 28, 2021.

ADDRESSES: You may submit written comments, identified by RIN 3133–AF38, by any of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments on Docket NCUA 2021–0127.
- *Fax:* (703) 518–6319. Include ''[Your Name]—Comments on Proposed Rule: Subordinated Debt 2021'' in the transmittal.
- *Mail:* Address to Melane Conyers-Ausbrooks, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.
- *Hand Delivery/Courier:* Same as mail address.

Public Inspection: You may view all public comments on the Federal eRulemaking Portal at *http://www.regulations.gov,* as submitted, except for those we cannot post for technical reasons. The NCUA will not edit or remove any identifying or contact information from the public comments submitted. Due to social distancing measures in effect, the usual opportunity to inspect paper copies of comments in the NCUA's law library is not currently available. After social distancing measures are relaxed, visitors may make an appointment to review paper copies by calling (703) 518–6540 or emailing *OGCMail@ncua.gov.*

FOR FURTHER INFORMATION CONTACT: Justin M. Anderson, Senior Staff Attorney, Office of General Counsel, 1775 Duke Street, Alexandria, VA 22314–3428. Justin Anderson also can be reached at (703) 518–6540.

SUPPLEMENTARY INFORMATION:

I. Background

A. Subordinated Debt Rule

At its December 2020 meeting, the Board issued a final Subordinated Debt rule (the final rule) permitting LICUs, Complex Credit Unions, and New Credit Unions to issue Subordinated Debt for purposes of Regulatory Capital treatment.[1] Relevant to this proposal, the final rule grandfathered secondary capital issued before January 1, 2022, and allowed such secondary capital to receive regulatory capital treatment until January 1, 2042 (20 years from the effective date of the final rule).[2] The grandfathering provision of the final rule allowed LICUs with grandfathered secondary capital to continue to be subject to the requirements of § 701.34(b), (c), and (d) (recodified in the final rule as § 702.414), rather than the requirements of the final rule.[3] The final rule also includes a provision stating that any issuances of secondary capital not completed by January 1, 2022, are, as of January 1, 2022, subject to the requirements applicable to Subordinated Debt in the final rule.[4] This provision would nullify any approved secondary capital application if the associated issuance was not completed before January 1, 2022. Any LICU in this situation would be required to reapply under the final rule if such LICU sought to proceed with its planned secondary capital issuance.

B. Emergency Capital Investment Program

Subsequent to the issuance of the final rule, Congress passed the Consolidated Appropriations Act, 2021.[5] The CAA, among other things, created the ECIP. Under ECIP, Congress appropriated funds and directed Treasury to make investments in ''eligible institutions'' to support their efforts to ''provide loans, grants, and forbearance for small businesses, minority-owned businesses, and consumers, especially in low-income and underserved communities.''[6] The definition of ''eligible institutions'' includes federally insured credit unions that are minority depository institutions or community development financial institutions, provided such credit unions are not in troubled condition or subject to any formal enforcement actions related to unsafe or unsound lending practices.[7]

Under the terms developed by Treasury, investments in eligible credit unions will be in the form of subordinated debt. Treasury also aligned its investments in LICUs with the Federal Credit Union Act and the NCUA's regulations to allow eligible LICUs to apply to the NCUA for secondary capital treatment for these investments.

Treasury opened the ECIP application process on March 4, 2021, with an application deadline of May 7, 2021. Treasury has subsequently extended this deadline multiple times, with the most recent deadline, as of the date of this proposal, being September 1, 2021. As of September 17, 2021, 44 LICUs have received approval from the NCUA to issue secondary capital under the

[1] 86 FR 11060 (Feb. 23, 2021).
[2] *Id.* at 11074.
[3] *Id.* at 11074.
[4] *Id.* at 11083.
[5] Consolidated Appropriations Act, 2021, Public Law 116–260 (H.R. 133), Dec. 27, 2020.
[6] *Id.* codified at 12 U.S.C. 4703a *et seq.*
[7] 12 U.S.C. 4703a(a)(2).

ECIP for an aggregate amount of approximately $1.9 billion.

II. Proposed Rule

The changes proposed in this rule are narrowly tailored to address a specific situation with funding of approved secondary capital applications. Therefore, the Board notes that it is not considering any other changes to the final Subordinated Debt rule. Comments outside the scope of the changes discussed herein will be treated as such for the purposes of any final rule the Board may issue. In light of this targeted scope and the prior public comment period on the Subordinated Debt rule, the Board finds that a 30-day comment period will provide an adequate opportunity for public input.[8]

In the event approved LICU ECIP investments, or investments from any other programs administered by the U.S. government that can fund secondary capital, are not funded by the end of 2021, those approved LICUs would be required to reapply for regulatory capital treatment under the Subordinated Debt rule. As this scenario would impose an unnecessary burden on these LICUs, the Board is proposing to amend the Subordinated Debt rule to permit funding of secondary capital approved under the current rule, beyond 2021, without the need to reapply under the Subordinated Debt rule. Regardless of the issuance date of the secondary capital, such secondary capital would, for the purposes of the Subordinated Debt rule be considered Grandfathered Secondary Capital, and remain subject to § 701.34(b), (c) and (d) of the NCUA's regulations, (recodified in the final rule as § 702.414). The Board notes that the proposed changes in this rule are narrowly tailored to provide an exception to the issuance cutoff date, if the secondary capital issuance is:

1. To the U.S. Government; and

2. Being conducted under a secondary capital application that was approved before January 1, 2022, under either § 701.34 of the NCUA's regulations, for federal credit unions, or § 741.203 of the NCUA's regulations, for federally insured, state-chartered credit unions.[9]

Consistent with the final Subordinated Debt rule, any LICU not meeting the above criteria will remain subject to the requirement to complete any issuance by the end of 2021 or such issuance will be subject to the requirements of the final Subordinated Debt rule.

The Board believes it is appropriate to narrowly tailor this rule, using the above criteria, for the following reasons. First, the issuances targeted by this rule were applied for and approved under the requirements of the current secondary capital rule. The Board included the issuance cutoff date in the Subordinated Debt rule to ensure future issuances were done in accordance with the more robust requirements in that rule, particularly in the area of disclosures and investor protections. As the issuances that are the subject of this rule are to the U.S. Government, the Board believes that the sharing of non-public, confidential supervisory information between the NCUA and the U.S. Government investor is sufficient to warrant a limited exception. The sharing of non-public, confidential supervisory information also separates the issuances subject to this proposed rule and issuances to non-U.S. Government investors. As such, the Board is not proposing to apply the exception in this proposed rule to secondary capital issuances to entities or persons other than the U.S. Government. Further, the Board notes that, as of September 7, 2021, there were four approved secondary capital applications not related to U.S. Government programs that have not been funded.

While the Board is permitting this limited exception for issuances to the U.S. Government, the Board continues to believe that the requirements of the Subordinated Debt rule, including the issuance of an Offering Document, should apply to all future issuances, regardless of the identity of the investor. The Board notes that information sharing between government agencies is not a substitute for executing an offering document. However, given the non-recurring nature of the transition from the current secondary capital requirements to the new Subordinated Debt requirements, the Board is willing to rely on information sharing in this instance.

The Board is proposing the above criteria to limit the scope to address potential funding timelines under U.S. Government programs that extend beyond the end of 2021. As such, if funding is completed by the end of 2021 for these limited number of applications, there may be no need to finalize this proposed rule. However, out of an abundance of caution, the Board believes it is prudent to be prepared to act should funding delays continue beyond the end of 2021.

The Board reiterates that any LICU that would qualify for the exception granted by this proposed rule must be operating under a secondary capital plan approved before January 1, 2022 under either §§ 701.34 or 741.204 of the NCUA's regulations. Operating under an approved secondary capital plan means that a LICU may only conduct secondary capital issuances in accordance with the terms and conditions included in the LICU's approved secondary capital plan. Further, any LICU that receives an investment from the U.S. Government that is less than the amount approved under its secondary capital application with the NCUA would be limited to only that lesser investment and would not be permitted to use the proposed exception to conduct subsequent issuances. For example, if a LICU was approved to issue $100 million of secondary capital by the NCUA, but under the U.S. Government program was only granted a $60 million investment, the LICU would not be permitted to issue the remaining $40 million of approved secondary capital to another investor or under another U.S. Government program. Further, if a LICU receives a lesser investment amount, the NCUA reserves the right to revisit the LICU's approved plan to verify that the LICU continues to operate in accordance with that plan.

Finally, the Board is proposing to amend the starting point for Grandfathered Secondary Capital to retain its status as Regulatory Capital. Currently, the Subordinated Debt rule states that all Grandfathered Secondary Capital will be treated as regulatory capital until January 1, 2042 (20 years from the effective date of the final rule). As this proposal would allow limited issuances of Grandfathered Secondary Capital beyond January 1, 2022, the Board is proposing to allow such secondary capital to count as regulatory capital for up to 20 years from the date of issuance. The Board notes that this proposed amendment would provide equitable treatment for all issuances of Grandfathered Secondary Capital. Finally, the Board notes that this proposed change does not change the Board's rationale, as articulated in the proposed and final Subordinated Debt rules, for imposing a 20-year cutoff for regulatory capital treatment.

This change also would not permit LICUs to issue secondary capital with terms longer than 20 years. The Board was clear in both the proposed and final Subordinated Debt rules that the maximum 20-year maturity was necessary to help ensure Subordinated Debt was not considered equity, which

[8] *See* NCUA Interpretive Ruling and Policy Statement (IRPS) 87–2, as amended by IRPS 03–2 and IRPS 15–1. 80 FR 57512 (Sept. 24, 2015), available at *https://www.ncua.gov/files/publications/irps/IRPS1987-2.pdf.*

[9] 12 CFR 701.34 and 741.203.

is an impermissible issuance for federal credit unions.[10] To permit longer term issuances of secondary capital would be counter to the Board's concerns and reasons articulated in the aforementioned rules.

III. Regulatory Procedures

A. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) requires that the Office of Management and Budget approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a valid Office of Management and Budget control number. This proposed rule extends the time for certain issuances of secondary capital and the corresponding Regulatory Capital treatment of such issuances. As such, this rule would not require any information collection as defined by the Paperwork Reduction Act of 1995.

B. Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. The NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the Executive Order to adhere to fundamental federalism principles.

This 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. The NCUA has therefore determined that this proposed rule does not constitute a policy that has federalism implications for purposes of the Executive Order.

C. Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this rule will not affect family well-being within the meaning of § 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998).

D. Regulatory Flexibility Act

The Regulatory Flexibility Act[11] requires the NCUA to prepare an analysis to describe any significant economic impact a regulation may have on a substantial number of small entities (primarily those under $100 million in assets).[12] This proposed rule would affect a small number of LICUs with approved secondary capital applications for issuances to the U.S. Government or its subdivisions. This rule extends the deadline for such credit unions to complete their issuance of secondary capital. Accordingly, the NCUA certifies that this proposed rule would not have a significant economic impact on a substantial number of small credit unions.

List of Subjects

12 CFR Part 702

Credit unions, Reporting and recordkeeping requirements.

12 CFR Part 741

Bank deposit insurance, Credit unions, Reporting and recordkeeping requirements.

By the NCUA Board on September 23, 2021.

Melane Conyers-Ausbrooks,

Secretary of the Board.

For the reasons discussed in the preamble, NCUA proposes to amend 12 CFR parts 702 and 741, as amended by 86 FR 11060 (Feb. 23, 2021) and scheduled to become effective on January 1, 2022, as follows:

PART 702—CAPITAL ADEQUACY

■ 1. The authority citation for part 702 continues to read as follows:

Authority: 12 U.S.C. 1766(a), 1790d.

■ 2. In § 702.2 revise the definitions for ''Grandfathered Secondary Capital'' and ''Regulatory Capital'' to read as follows:

§ 702.2 Definitions.

* * * * *

Grandfathered Secondary Capital means any secondary capital issued under § 701.34 of this chapter, before January 1, 2022 or, in the case of a federally insured, state-chartered credit union, with § 741.204(c) of this chapter, before January 1, 2022. (12 CFR 701.34 was recodified as § 702.414 as of January 1, 2022). This term also includes issuances of secondary capital to the U.S. Government or any of its subdivisions, under applications approved before January 1, 2022, pursuant to §§ 701.34 or 741.204(c) of this chapter, irrespective of the date of issuance.

* * * * *

Regulatory Capital means:

(1) With respect to an Issuing Credit Union that is a LICU and not a complex credit union, the aggregate outstanding principal amount of Subordinated Debt and, until the later of 20 years from the date of issuance or January 1, 2042, Grandfathered Secondary Capital that is included in the credit union's net worth ratio;

(2) With respect to an Issuing Credit Union that is a complex credit union and not a LICU, the aggregate outstanding principal amount of Subordinated Debt that is included in the credit union's RBC Ratio;

(3) With respect to an Issuing Credit Union that is both a LICU and a Complex Credit Union, the aggregate outstanding principal amount of Subordinated Debt and, until the later of 20 years from the date of issuance or January June 1, 2042, Grandfathered Secondary Capital that is included in its net worth ratio and in its RBC Ratio; and

(4) With respect to a new credit union, the aggregate outstanding principal amount of Subordinated Debt and, until the later of 20 years from the date of issuance or January 1, 2042, Grandfathered Secondary Capital that is considered pursuant to § 702.207.

* * * * *

■ 3. Revise § 702.401 to read as follows:

§ 702.401 Purpose and scope.

(a) *Subordinated Debt.* This subpart sets forth the requirements applicable to all Subordinated Debt issued by a federally insured, natural person credit union, including the NCUA's review and approval of that credit union's application to issue or prepay Subordinated Debt. This subpart shall apply to a federally insured, state-chartered credit union only to the extent that such federally insured, state-chartered credit union is permitted by applicable state law to issue debt instruments of the type described in this subpart. To the extent that such state law is more restrictive than this subpart with respect to the issuance of such debt instruments, that state law shall apply. Except as provided in the next sentence, any secondary capital, as that term is used in the Federal Credit Union Act, issued after January 1, 2022, is Subordinated Debt and subject to the requirements of this subpart. Issuances of secondary capital, as that term is used in the Federal Credit Union Act, to the U.S. Government or any of its subdivisions, under applications approved before January 1, 2022, pursuant to §§ 701.34 or 741.204(c) of this chapter, are not subject to the requirements applicable to Subordinated Debt, discussed elsewhere in this subpart, irrespective of the date of issuance.

(b) *Grandfathered Secondary Capital.* Any secondary capital defined as

[10] *See* 86 FR 11071 (Feb. 23, 2021) and 85 FR 13986, 14000 (Mar. 10, 2020).

[11] 5 U.S.C. 601 *et seq.*

[12] *Id.* at 603(a).

''Grandfathered Secondary Capital,'' under § 702.402 of this part, is governed by § 702.414 of this part. Grandfathered Secondary Capital will no longer be treated as Regulatory Capital as of the later of 20 years from the date of issuance or January 1, 2042.

■ 4. In § 702.402 revise the definition for ''Grandfathered Secondary Capital'' to read as follows:

§ 702.402 Definitions.

* * * * *

Grandfathered Secondary Capital means any secondary capital issued under § 701.34 of this chapter before January 1, 2022, or, in the case of a federally insured, state-chartered credit union, with § 741.204(c) of this chapter, before January 1, 2022. (12 CFR 701.34 was recodified as § 702.414 as of January 1, 2022). This term also includes issuances of secondary capital to the U.S. Government or any of its subdivisions, under applications approved before January 1, 2022, pursuant to §§ 701.34 or 741.204(c) of this chapter, irrespective of the date of issuance.

* * * * *

■ 5. In § 702.414 revise the introductory text and paragraph (a)(2) to read as follows:

§ 702.414 Regulations governing Grandfathered Secondary Capital.

This section recodifies the requirements from 12 CFR 701.34(b), (c), and (d) that were in effect as of December 31, 2021, with minor modifications. The terminology used in this section is specific to this section. Except as provided in the next sentence, all secondary capital issued under § 701.34 of this chapter before January 1, 2022, or, in the case of a federally insured, state-chartered credit union, § 741.204(c) of this chapter, that is referred to elsewhere in this subpart as ''Grandfathered Secondary Capital,'' is subject to the requirements set forth in this section. Issuances of secondary capital to the U.S. Government or any of its subdivisions, under applications approved before January 1, 2022, pursuant to §§ 701.34 or 741.204(c) of this chapter, are also considered ''Grandfathered Secondary Capital'' irrespective of the date of issuance.

(a) * * *

(2) *Issuances not completed before January 1, 2022.* Except as provided in the next sentence, any issuances of secondary capital not completed by January 1, 2022, are, as of January 1, 2022, subject to the requirements applicable to Subordinated Debt discussed elsewhere in this subpart. Issuances of secondary capital to the U.S. Government or any of its subdivisions, under applications approved before January 1, 2022, pursuant to § 701.34 or 741.204(c) of this chapter, are not subject to the requirements applicable to Subordinated Debt, discussed elsewhere in this subpart, irrespective of the date of issuance.

* * * * *

PART 741—REQUIREMENTS FOR INSURANCE

■ 6. The authority citation for part 741 continues to read as follows:

Authority: 12 U.S.C. 1757, 1766(a), 1781–1790, and 1790d; 31 U.S.C. 3717.

■ 7. Amend § 741.204 by revising paragraph (c) to read as follows:

§ 741.204 Maximum public unit and nonmember accounts, and low-income designation.

* * * * *

(c) Follow the requirements of § 702.414 of this chapter for any Grandfathered Secondary Capital (as defined in part 702 of this chapter).

[FR Doc. 2021–21055 Filed 9–27–21; 8:45 am]

BILLING CODE 7535–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 5 and 200

[Docket No. FR–6160–N–02]

Notice of Continuation of Demonstration To Assess the National Standards for the Physical Inspection of Real Estate and Associated Protocols

AGENCY: Office of the Assistant Secretary for Housing; Office of the Assistant Secretary for Public and Indian Housing, U.S. Department of Housing and Urban Development.

ACTION: Demonstration continuation.

SUMMARY: Through this notification, HUD announces the continuation of the Demonstration to Assess the National Standards for the Physical Inspection of Real Estate and Associated Protocols through April 30, 2023. This demonstration allows HUD to test the NSPIRE standards and protocols as the means for assessing the physical conditions of HUD-assisted and HUD-insured housing. The continuation provides the authority to further evaluate and refine the future state of HUD's physical inspection model.

DATES: The demonstration continuation is effective September 28, 2021.

FOR FURTHER INFORMATION CONTACT: Timothy Weese, NSPIRE Program Manager, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th Street SW, Suite 100, Washington, DC 20410–4000, telephone number 202–475–8811 (this is not a toll-free number) or via email to *NSPIRE@hud.gov.* Persons with hearing or speech impairments may contact the numbers above via TTY by calling the Federal Relay Service at 800–877–8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION: On August 21, 2019, the U.S. Department of Housing and Urban Development published a document implementing the ''Demonstration To Assess the National Standards for the Physical Inspection of Real Estate and Associated Protocols.'' (''the 2019 document'').[1] Through this demonstration, HUD is collecting, processing, and evaluating physical inspection data and information, and is improving and refining the NSPIRE model. The NSPIRE model will revise the way that HUD-assisted housing is inspected and evaluated to reduce regulatory burden and improve HUD oversight through a unified assessment of housing quality and a prioritization of resident health and safety.

HUD has decided to extend this demonstration to assess the improvements and alignment of the inspection protocol. This decision furthers the direction contained in the Joint Explanatory Statement accompanying the Consolidated Appropriations Act of 2016, Public Law 114–113, approved December 18, 2015; the statutory requirements detailed in the Economic Growth and Recovery, Regulatory Relief, and Consumer Protection Act of 2018, Public Law 115–174; [2] and the proposed guidance the Department has outlined in the *Economic Growth, Regulatory Relief, and Consumer Protection Act: Implementation of National Standards for the Physical Inspection of Real Estate* proposed rule.[3] All participant

[1] Originally announced in the *Notice of Demonstration To Assess the National Standards for the Physical Inspection of Real Estate and Associated Protocols, 84 FR 43536* (August 21, 2019) *https://www.federalregister.gov/documents/2019/08/21/2019-17910/notice-of-demonstration-to-assess-the-national-standards-for-the-physical-inspection-of-real-estate.*

[2] The text of the *Economic Growth Act,* along with a summary prepared by the Congressional Research Service, can be found at *https://www.congress.gov/bill/115th-congress/senate-bill/2155/text.*

[3] See *Economic Growth Regulatory Relief and Consumer Protection Act: Implementation of National Standards for the Physical Inspection of Real Estate (NSPIRE),* 86 FR 2582 (January 13, 2021) *https://www.federalregister.gov/documents/2021/*

and program-specific requirements highlighted in the 2019 document continue to apply, including the extension of the inspection periodicity for participating properties as outlined in section V. HUD extends this demonstration through April 30, 2023. HUD may amend the demonstration dates in response to changes in programmatic and environmental conditions through subsequent **Federal Register** publications.

This notification provides operating instructions and procedures in connection with activities under a **Federal Register** document that has previously been subject to a required environmental review. Accordingly, under § 50.19(c)(4), this notification is categorically excluded from environmental review under the National Environmental Policy Act (42 U.S.C. 4321, *et seq.*)

Dominique G. Blom,

General Deputy Assistant Secretary for Public and Indian Housing.

[FR Doc. 2021–21049 Filed 9–27–21; 8:45 am]

BILLING CODE 4210–67–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2020–0567; FRL–9001–01–R9]

Air Plan Approval; Hawaii; Interstate Transport for the 2015 Ozone NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a state implementation plan (SIP) submission from the State of Hawaii addressing requirements in the Clean Air Act (CAA or ''Act'') regarding interstate transport for the 2015 ozone national ambient air quality standards (NAAQS). Hawaii submitted a SIP revision on November 12, 2019 addressing the CAA provision prohibiting any source or other type of emissions activity in one state from emitting any air pollutant in amounts that will contribute significantly to nonattainment or interfere with maintenance of the NAAQS in any other state (''the good neighbor provision''). The EPA is proposing to approve Hawaii's good neighbor SIP revision for the 2015 ozone NAAQS.

01/13/2021-00098/economic-growth-regulatory-relief-and-consumer-protection-act-implementation-of-national-standards.

DATES: Any comments must arrive by October 28, 2021.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2020–0567 at *https://www.regulations.gov.* Follow the online instructions for submitting comments at *Regulations.gov.* Once submitted, comments cannot be edited or removed from *Regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, or 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 the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Tom Kelly, EPA Region IX, (415) 972–3856, *kelly.thomasp@epa.gov.* 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.

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

I. Background

On October 1, 2015, the EPA promulgated a revision to the ozone NAAQS (''2015 ozone NAAQS''), lowering the level of both the primary and secondary standards to 0.070 parts per million (ppm).[1] Section 110(a)(1) of the CAA requires states to submit, within 3 years after promulgation of a new or revised standard, SIP submissions meeting the applicable requirements of section 110(a)(2).[2] One of these applicable requirements is found in section 110(a)(2)(D)(i)(I), otherwise known as the good neighbor provision, which generally requires SIPs to contain adequate provisions to prohibit in-state emissions activities from having certain adverse air quality effects on other states due to interstate transport of pollution. There are two so-called ''prongs'' within CAA section 110(a)(2)(D)(i)(I). A SIP for a new or revised NAAQS must contain adequate provisions prohibiting any source or other type of emissions activity within the state from emitting air pollutants in amounts that will: Significantly contribute to nonattainment of the NAAQS in another state (prong 1); or interfere with maintenance of the NAAQS in another state (prong 2). The EPA and states must give independent significance to prong 1 and prong 2 when evaluating downwind air quality problems under CAA section 110(a)(2)(D)(i)(I).[3]

We note that the EPA has addressed the interstate transport requirements of CAA section 110(a)(2)(D)(i)(I) with respect to prior ozone NAAQS in several regional regulatory actions, including the Cross-State Air Pollution Rule (CSAPR), which addressed interstate transport with respect to the 1997 ozone NAAQS as well as the 1997 and 2006 fine particulate matter standards,[4] the CSAPR Update, and, most recently, the Revised CSAPR Update for the 2008 ozone NAAQS.[5] [6]

Through the development and implementation of CSAPR and other regional rulemakings pursuant to the good neighbor provision,[7] the EPA,

[1] National Ambient Air Quality Standards for Ozone, Final Rule, 80 FR 65292 (October 26, 2015). Although the level of the standard is specified in the units of ppm, ozone concentrations are also described in parts per billion (ppb). For example, 0.070 ppm is equivalent to 70 ppb.

[2] SIP revisions that are intended to meet the applicable requirements of section 110(a)(1) and (2) of the CAA are often referred to as infrastructure SIPs and the applicable elements under 110(a)(2) are referred to as infrastructure requirements.

[3] See *North Carolina* v. *EPA,* 531 F.3d 896, 909–911 (2008).

[4] 76 FR 48208 (August 8, 2011).

[5] The Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS (86 FR 23054; April 30, 2021) was signed by the EPA Administrator on March 15, 2021 and responded to the remand of the CSAPR Update (81 FR 74504; October 26, 2016) and the vacatur of a separate rule, the CSAPR Close-Out (83 FR 65878; December 21, 2018) by the D.C. Circuit. *Wisconsin* v. *EPA,* 938 F.3d 303 (D.C. Cir. 2019); *New York* v. *EPA,* 781 F. App'x. 4 (D.C. Cir. 2019).

[6] In 2019, the D.C. Circuit Court of Appeals remanded the CSAPR Update to the extent it failed to require upwind states to eliminate their significant contribution by the next applicable attainment date by which downwind states must come into compliance with the NAAQS, as established under CAA section 181(a). 938 F.3d 303, 313.

[7] In addition to the CSAPR rulemakings, other regional rulemakings addressing ozone transport

Continued

working in partnership with states, developed the following four-step interstate transport framework to address the requirements of the good neighbor provision for the ozone NAAQS: (1) Identify downwind air quality problems; (2) identify upwind states that impact those downwind air quality problems sufficiently such that they are considered ''linked'' and therefore warrant further review and analysis; (3) identify the emissions reductions necessary (if any), applying a multifactor analysis, to prevent linked upwind states identified in step 2 from contributing significantly to nonattainment or interfering with maintenance of the NAAQS at the locations of the downwind air quality problems; and (4) adopt permanent and enforceable measures needed to achieve those emissions reductions.

The EPA has released several documents containing information relevant to evaluating interstate transport with respect to the 2015 ozone NAAQS. First, on January 6, 2017, the EPA published a notice of data availability (NODA) with preliminary interstate ozone transport modeling with projected ozone design values for 2023 using a 2011 base year platform, on which we requested comment.[8] In the NODA, the EPA used the year 2023 as the analytic year for this preliminary modeling because that year aligns with the expected attainment year for Moderate ozone nonattainment areas for the 2015 ozone NAAQS.[9] On October 27, 2017, we released a memorandum (''2017 memorandum'') containing updated modeling data for 2023, which incorporated changes made in response to comments on the NODA, and noted that the modeling may be useful for states developing SIPs to address good neighbor obligations for the 2008 ozone NAAQS.[10] On March 27, 2018, we issued a memorandum (''March 2018 memorandum'') noting that the same 2023 modeling data released in the 2017 memorandum could also be useful for identifying potential downwind air quality problems with respect to the 2015 ozone NAAQS at step 1 of the four-step interstate transport framework. The March 2018 memorandum also included the then newly available contribution modeling results to assist states in evaluating their impact on potential downwind air quality problems for the 2015 ozone NAAQS under step 2 of the interstate transport framework. The EPA subsequently issued two additional memoranda in August and October 2018, providing additional information to states developing good neighbor SIPs for the 2015 ozone NAAQS concerning, respectively, potential contribution thresholds that may be appropriate to apply in step 2 of the framework, and considerations for identifying downwind areas that may have problems maintaining the standard at step 1 of the framework.[11]

On October 30, 2020, in the Notice of Proposed Rulemaking for the Revised CSAPR Update, the EPA released and accepted public comment on updated 2023 modeling that used the 2016 emissions platform developed under the EPA/Multi-Jurisdictional Organization (MJO)/state collaborative project as the primary source for the base year and future year emissions data.[12] On March 15, 2021, the EPA signed the final Revised CSAPR Update using the same modeling released at proposal.[13] Although Hawaii relied in part on the modeling included in the March 2018 memorandum to develop its SIP submission, the EPA now proposes to primarily rely on the updated and newly available 2016 base year modeling in evaluating this submission. By using the updated modeling results, EPA is using the most current and technically appropriate information as the primary basis for this proposed rulemaking. EPA's independent analysis, which also evaluated historical monitoring data, recent ambient air monitoring design values, and emissions trends, found that such information provides additional support and further substantiates the results of the 2016 base year modeling as the basis for this proposed rulemaking. Section II of this document and the Air Quality Modeling technical support document (TSD) included in the docket for this proposed action contain additional detail on this modeling.[14]

In the CSAPR, CSAPR Update, and the Revised CSAPR Update, the EPA used a threshold of one percent of the NAAQS to determine whether a given upwind state was ''linked'' at step 2 of the interstate transport framework and would, therefore, contribute to downwind nonattainment and maintenance sites identified in step 1. If a state's impact did not equal or exceed the one percent threshold, the upwind state was not ''linked'' to a downwind air quality problem, and the EPA, therefore, concluded the state would not significantly contribute to nonattainment or interfere with maintenance of the NAAQS in the downwind states. However, if a state's impact equaled or exceeded the one percent threshold, the state's emissions were further evaluated in step 3, to determine what, if any, emissions might be deemed ''significant'' and, thus, must be eliminated under the good neighbor provision. The EPA is proposing to rely on the one percent threshold (*i.e.,* 0.070 ppb) for the purpose of evaluating Hawaii's contributions to nonattainment or maintenance of the 2015 ozone NAAQS in downwind areas.

Several D.C. Circuit court decisions have addressed the issue of the relevant analytic year for the purposes of evaluating ozone transport air-quality problems. On September 13, 2019, the D.C. Circuit issued a decision in *Wisconsin* v. *EPA,* remanding the CSAPR Update to the extent that it failed to require upwind states to eliminate their significant contribution by the next applicable attainment date by which downwind states must come into compliance with the NAAQS, as established under CAA section 181(a).[15]

On May 19, 2020, the D.C. Circuit issued a decision in *Maryland* v. *EPA*

include the NO_X SIP Call, 63 FR 57356 (October 27, 1998), and the Clean Air Interstate Rule (CAIR), 70 FR 25162 (May 12, 2005).

[8] See Notice of Availability of the Environmental Protection Agency's Preliminary Interstate Ozone Transport Modeling Data for the 2015 Ozone National Ambient Air Quality Standard (NAAQS), 82 FR 1733 (January 6, 2017).

[9] 82 FR 1735 (January 6, 2017).

[10] See Information on the Interstate Transport State Implementation Plan Submissions for the 2008 Ozone National Ambient Air Quality Standards under Clean Air Act Section 110(a)(2)(D)(i)(I), October 27, 2017, available in the docket for this action or at *https://www.epa.gov/interstate-air-pollution-transport/interstate-air-pollution-transport-memos-and-notices.*

[11] See Analysis of Contribution Thresholds for Use in Clean Air Act Section 110(a)(2)(D)(i)(I) Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards, August 31, 2018) (''August 2018 memorandum''), and Considerations for Identifying Maintenance Receptors for Use in Clean Air Act Section 110(a)(2)(D)(i)(I) Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards, October 19, 2018, available in the docket for this action or at *https://www.epa.gov/airmarkets/memo-and-supplemental-information-regarding-interstate-transport-sips-2015-ozone-naaqs.*

[12] See 85 FR 68964, 68981. The results of this modeling are included in a spreadsheet in the docket for this action. The underlying modeling files are available for public review in the docket for the Revised CSAPR Update (EPA–HQ–OAR–2020–0272).

[13] 82 FR 23054 (April 30, 2021).

[14] See ''Air Quality Modeling Technical Support Document for the Proposed Revised Cross-State Air Pollution Rule Update,'' 85 FR 68964 (October 30, 2020), available in the docket for this action or at *https://www.epa.gov/csapr/revised-cross-state-air-pollution-rule-update.* This TSD was originally developed to support EPA's proposed action in the Revised CSAPR Update, as relating to outstanding good neighbor obligations under the 2008 ozone NAAQS. While developed in this separate context, the data and modeling outputs, including interpolated design values for 2021, may be evaluated with respect to the 2015 ozone NAAQS and used in support of this action.

[15] 938 F.3d 303, 313.

that cited the *Wisconsin* decision in holding that the EPA must assess the impact of interstate transport on air quality at the next downwind attainment date, including Marginal area attainment dates, in evaluating the basis for the EPA's denial of a petition under CAA section 126(b).[16] The court noted that ''section 126(b) incorporates the Good Neighbor Provision,'' and, therefore, ''the EPA must find a violation [of section 126] if an upwind source will significantly contribute to downwind nonattainment at the *next downwind attainment deadline.* Therefore, the agency must evaluate downwind air quality at that deadline, not at some later date.'' [17] The EPA interprets the court's holding in *Maryland* as requiring the Agency, under the good neighbor provision, to assess downwind air quality by the next applicable attainment date, including a Marginal area attainment date under section 181 for ozone nonattainment.[18] The Marginal area attainment date for the 2015 ozone NAAQS is August 3, 2021.[19] Historically, the EPA has considered the full ozone season prior to the attainment date as supplying an appropriate analytic year for assessing good neighbor obligations. While this would be 2020 for an August 2021 attainment date (which falls within the 2021 ozone season running from May 1 to September 30), in this circumstance, when the 2020 ozone season is wholly in the past, it is appropriate to focus on 2021 in order to address good neighbor obligations to the extent possible by the 2021 attainment date. The EPA does not believe it would be appropriate to select an analytical year that is wholly in the past, because the agency interprets the good neighbor provision as forward looking.[20] Consequently, in this proposed action the EPA will use the analytical year of 2021 to evaluate Hawaii's good neighbor obligations with respect to the 2015 ozone NAAQS.[21]

II. HDOH SIP Submission

The Hawaii Department of Health (HDOH) submitted its good neighbor SIP submission for the 2015 ozone NAAQS by letter dated November 12, 2019.[22] The submittal included documentation of public participation proceedings to meet the requirements of CAA section 110(a)(2) and 40 CFR 51.102. The EPA determined that the submittal was complete on November 13, 2019.[23]

HDOH concluded that Hawaii does not significantly contribute to nonattainment or interfere with maintenance of the 2015 ozone NAAQS in any other state, citing the distance from Hawaii to the continental U.S, the relatively small quantity of ozone precursor emissions in Hawaii, and an evaluation of ozone transport using trajectory analysis of emissions from Hawaii to the continental U.S.

In the HDOH submittal, the State notes that Hawaii is approximately 2,390 miles from the nearest state, California. HDOH also points to Hawaii's 2016 Annual Summary of Air Quality Data to note that Hawaii is in attainment for all NAAQS and compares Hawaii's ozone precursor emissions to those of California and Nevada. Hawaii's analysis states that emissions of ozone precursors, nitrogen oxides (NO_X) and volatile organic compounds (VOC), from Hawaii were 7.57 and 6.28 percent, respectively, of California's emissions in 2011 and 7.95 and 5.21 percent in 2014.[24] Cumulatively, emissions of ozone precursors from Hawaii in 2011 and 2014 were 6.97 and 6.54 percent, respectively, of California's emissions. Furthermore, HDOH points out that the State's ozone precursor emissions have exhibited a downward trend, having decreased since the 2011 National Emissions Inventory (NEI), and notes that their emissions continue to be relatively low compared to California. To demonstrate that Hawaii's ozone precursor emissions would not significantly contribute to interstate transport, even if California and Hawaii were directly adjacent to each other, the submittal compares Hawaii's ozone precursor emissions to those of Nevada, which shares a border with California, but does not significantly contribute to interstate transport to any other state.[25] Emissions of NO_X and VOCs from Hawaii were 51.24 and 49.28 percent, respectively, of Nevada's emissions in 2014. Cumulatively, emissions of ozone precursors from Hawaii in 2014 were 50.35 percent of Nevada's emissions.

Appendix 1 of the HDOH submittal provides trajectories for emissions from Hawaii's Campbell Industrial Park, which includes a refinery and power generation facility, based on 2010 meteorological data during January and July. HDOH found that a comparison between the trajectory modeling results and ozone monitoring data supports the conclusion that it is highly unlikely that Hawaii is currently impacting nonattainment or maintenance areas of other states and that it is highly unlikely to do so in the future.

III. EPA Evaluation

As explained in Section I of this document, in consideration of the holdings in *Wisconsin* and *Maryland,* the EPA's four-step interstate transport analysis relies on 2021 as the relevant attainment year for evaluating Hawaii's good neighbor obligations with respect to the 2015 ozone NAAQS.[26] In step 1, we identify locations where the Agency expects there to be nonattainment or maintenance receptors for the 2015 8-hour ozone NAAQS in the 2021 analytic future year. Where the EPA's analysis shows that a monitoring site does not fall under the definition of a

[16] *Maryland* v. *EPA,* 958 F.3d 1185, 1203–04 (D.C. Cir. 2020).

[17] Id. at 1204.

[18] We note that the court in *Maryland* did not have occasion to evaluate circumstances in which EPA may determine that an upwind linkage to a downwind air quality problem exists at steps 1 and 2 of the interstate transport framework by a particular attainment date, but for reasons of impossibility or profound uncertainty the Agency is unable to mandate upwind pollution controls by that date. *See Wisconsin,* 938 F.3d at 320. The D.C. Circuit noted in *Wisconsin* that upon a sufficient showing, these circumstances may warrant flexibility in effectuating the purpose of the good neighbor provision. Such circumstances are not at issue in the present action.

[19] CAA section 181(a); 40 CFR 51.1303; 83 FR 25776 (June 4, 2018, effective Aug. 3, 2018).

[20] See 85 FR at 68981; see also *Wisconsin,* 938 F.3d at 322.

[21] EPA recognizes that by the time final action is taken with respect to this SIP submission, the 2021 ozone season will be wholly in the past. As discussed below, the available modeling information indicates that our analysis would not change even using 2023 as the analytic year. The 2023 modeling results are included in the ''Ozone Design Values and Contributions Revised CSAPR Update.xlsx'', included in the docket for this action.

[22] Letter dated November 12, 2019, from Bruce Anderson, Ph.D., Director of Health, HDOH, to Mike Stoker, Regional Administrator, U.S. EPA, Region IX.

[23] Letter dated November 13, 2019, from Elizabeth J. Adams, Acting Director, Air Division, EPA Region 9, to Bruce Anderson, HDOH.

[24] 2014 data was the most recent available at the time Hawaii prepared its submittal.

[25] Hawaii cited EPA's 2015 Ozone NAAQS Interstate Transport Assessment Design Values and Contributions spreadsheet, released in a memorandum from Peter Tsirigotis, to Regional Air Division Directors, Region 1–10, dated March 27, 2018. See ''2015 Ozone NAAQS Interstate Transport Assessment Design Values and Contributions'' at *https://www.epa.gov/airmarkets/memo-and-supplemental-information-regarding-interstate-transport-sips-2015-ozone-naaqs.* File name: Updated_2023_modeling_dvs_collective_contributions.xlsx.

[26] We recognize that Hawaii and other states may have been influenced by EPA's 2018 guidance memos (issued prior to the *Wisconsin* and *Maryland* decisions) in making good neighbor submissions that relied on EPA's modeling of 2023. When there are intervening changes in relevant law or legal interpretation of CAA requirements, states are generally free to withdraw, supplement, and/or re-submit their SIP submissions with new analysis (in compliance with CAA procedures for SIP submissions). While Hawaii has not done this, as explained in this section, the independent analysis EPA has conducted at its discretion confirms that the state's submission in this instance is ultimately approvable.

nonattainment or maintenance receptor, that site is excluded from further analysis under the EPA's four-step interstate transport framework. For monitoring sites that are identified as nonattainment or maintenance receptors in 2021, we proceed to the next step of our four-step framework by identifying the upwind state's contribution to those receptors.

The EPA's approach to identifying ozone nonattainment and maintenance receptors in this proposed action is consistent with the approach used in the CSAPR, the CSAPR Update, and the Revised CSAPR Update. The EPA's approach gives independent consideration to both the ''contribute significantly to nonattainment'' and the ''interfere with maintenance'' prongs of section 110(a)(2)(D)(i)(I), consistent with the D.C. Circuit's direction in *North Carolina*.[27] Further, in its decision on the remand of CSAPR from the Supreme Court in the *EME Homer City* case, the D.C. Circuit confirmed that the EPA's approach to identifying maintenance receptors in CSAPR comported with the court's prior instruction to give independent meaning to the ''interfere with maintenance'' prong in the good neighbor provision.[28]

For purposes of this proposed action, the EPA identifies nonattainment receptors as those monitoring sites that are projected to have average design values that exceed the NAAQS and that are also measuring nonattainment based on the most recent monitored design values.[29] This approach is consistent with prior transport rulemakings, such as the CSAPR Update, where the EPA defined nonattainment receptors as those areas that both currently monitor nonattainment and that the EPA projects will be in nonattainment in the future analytic year.[30] In addition, in this proposed action, the EPA identifies a receptor to be a ''maintenance'' receptor for purposes of defining interference with maintenance, consistent with the method used in CSAPR and upheld by the D.C. Circuit in *EME Homer City II*.[31] [32]

Recognizing that nonattainment receptors are also, by definition, maintenance receptors, the EPA often uses the term ''maintenance-only'' to refer to receptors that are not also nonattainment receptors. Consistent with the methodology described above, monitoring sites with a projected maximum design value that exceeds the NAAQS, but with a projected average design value that is below the NAAQS, are identified as maintenance-only receptors. In addition, those sites that are currently measuring ozone concentrations below the level of the applicable NAAQS but are projected to be nonattainment based on the average design value and that, by definition, are projected to have a maximum design value above the standard are also identified as maintenance-only receptors.

To evaluate future air quality in steps 1 and 2 of the interstate transport framework, the EPA is using the 2016 and 2023 base case emissions developed under the EPA/MJO/state collaborative emissions modeling platform project as the primary source for base year and 2023 future year emissions data for this proposed rule. Because this platform does not include emissions for 2021, the EPA developed an interpolation technique based on modeling for 2023 and measured ozone data to determine ozone concentrations for 2021. To estimate average and maximum design values for 2021, the EPA first performed air quality modeling for 2016 and 2023 to obtain design values in 2023. The 2023 design values were then coupled with the corresponding 2016 measured design values to estimate design values in 2021. Details on the modeling, including the interpolation methodology, can be found in the Air Quality Modeling TSD, in the docket for this proposed action.

To quantify the contribution of emissions from specific upwind states on 2021 8-hour design values for the identified downwind nonattainment and maintenance receptors, the EPA first performed nationwide, state-level ozone source apportionment modeling for 2023. The source apportionment modeling provided contributions to ozone from precursor emissions of anthropogenic NO_X and VOCs in each individual state. The modeled contributions were then applied in a relative sense to the 2021 average design value to estimate the contributions in 2021 from each state to each receptor. Details on the source apportionment modeling and the methods for determining contributions in 2021 are in the Air Quality Modeling TSD in the docket.

The EPA generally does not consider modeling to be necessary for isolated states like Hawaii for the purposes of evaluating interstate transport. Therefore, Hawaii was not included in the modeling domain, and the apportionment modeling analysis described above does not calculate emissions contributions from Hawaii to the downwind nonattainment and maintenance areas identified in step 1 in the contiguous United States. In lieu of apportionment modeling, at step 2 of the interstate transport framework, a proper and well-supported weight of evidence approach can provide sufficient information for purposes of addressing Hawaii's interstate transport for the 2015 ozone NAAQS. In a weight of evidence analysis, no single piece of information is by itself dispositive of the issue. Instead, the total weight of all the evidence taken together is used to evaluate significant contribution to nonattainment or interference with maintenance of the 2015 ozone NAAQS in another state. In the weight of evidence analysis detailed below, we consider (1) the distance between sources in Hawaii and the nonattainment and maintenance receptors identified in step 1; (2) the relative magnitude of state-wide emissions of ozone precursors; (3) an evaluation of prevailing wind direction that may impact of transport of emissions from Hawaii during the summer ozone season; and (4) a comparison of Hawaii's impact on California to California's impact on Connecticut.

The state with the nearest nonattainment receptors to Hawaii is California, based on the modeling supporting the Revised CSAPR Update.[33] The nearest California

[27] 531 F.3d at 910–911 (holding that the EPA must give ''independent significance'' to each prong of CAA section 110(a)(2)(D)(i)(I)).

[28] *EME Homer City Generation, L.P.* v. *EPA,* 795 F.3d 118, 136 (D.C. Cir. 2015) (*EME Homer City II*).

[29] Average projected design values are based on the average design value during the five-year base monitoring period (*i.e.,* 2014–2016, 2015–2017 and 2016–2018), as discussed in the Final Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS (86 FR 23054, April 30, 2021) and further clarified in the Air Quality Modeling Technical Support Document for the Final Revised Cross State Air Pollution Rule Update, which is available in the docket for that rulemaking EPA–HQ–OAR–2020–0272.

[30] See 81 FR 74504 (October 26, 2016). The Revised CSAPR Update also used this approach. See 86 FR 23054 (April 30, 2021). This same concept, relying on both current monitoring data and modeling to define nonattainment receptors, was also applied in CAIR. See 70 FR 25241 (January 14, 2005); see also *North Carolina,* 531 F.3d at 913–14 (affirming as reasonable EPA's approach to defining nonattainment in CAIR).

[31] See 795 F.3d at 136.

[32] Maximum projected design values are based on the maximum design value during the five-year base monitoring period from 2014 to 2018.

[33] Projected ozone 2021 receptor concentrations and interstate contributions are contained in spreadsheet titled, ozone_design_values_contributions_proposed_revised_csapr_update.xlsx. The spreadsheet and accompanying TSD, Air Quality Modeling TSD for the Proposed Revised Cross-State Air Pollution Rule Update, are contained in the docket for the Proposed Revised CSAPR Update, Docket Number EPA–HQ–OAR–2020–0272, and have also been included in the docket for this action. In total, in California 22

nonattainment receptor is the Modesto-14th Street monitor, located in Stanislaus County, which is 2,384 miles from the easternmost edge of Hawaii.[34] The next closest nonattainment receptors outside of California are located in Douglas County, Jefferson County, and Larimer County in Colorado, and Davis County and Salt Lake County in Utah.

The nearest California maintenance-only receptor to Hawaii is the Tracy-Airport monitor, located in San Joaquin County, which is 2,363 miles from the easternmost edge of Hawaii.[35] The next closest maintenance-only receptors outside of California are in Yuma County, Arizona; Clark County, Nevada; Dona Ana County, New Mexico; and Weber County, Utah.

Sheer distance alone makes it unlikely that emissions from Hawaii contribute to nonattainment or interfere with maintenance in these states. However, we also compare the emissions of ozone precursors from Hawaii to those of other western states.[36] Hawaii's emissions of ozone precursors are substantially lower than emissions from other western states, as shown in Table 1.[37] The table represents the most recent data available on emissions of ozone precursors. NEI data, which is released every three years, is not yet available for 2020.

TABLE 1—EMISSIONS OF OZONE PRECURSORS

[Tons per year] [a]

Pollutant	NO_X			VOC		
Year	2011	2014	2017	2011	2014	2017
HI	54,398	43,061	40,809	38,781	26,593	31,079
AZ	241,993	215,643	163,779	167,951	120,100	141,160
CA	724,362	546,495	466,555	617,658	539,159	527,313
NV	99,234	84,746	69,539	68,526	50,601	68,547
OR	147,112	125,922	115,886	152,142	103,811	126,818
UT	178,586	172,488	90,975	217,880	176,188	135,231

Source: Data lists all point, nonpoint, onroad and nonroad emissions from EPA's National Emissions Inventory downloaded from EPA's Emissions Information System, files 2017NEI_Apr2020, 2014 NEI Final V2, 2011 NEI V2.

[a] Biogenic emission from plants and soil and wildfire emissions have been excluded from this data.

The relative magnitude of Hawaii's emissions compared to Arizona, California, Nevada, Oregon, and Utah, coupled with the distance between Hawaii and these states, further indicates that Hawaii is unlikely to contribute to nonattainment or interfere with maintenance in California, or any other state.

The next step in our analysis is to look at prevailing wind direction in Hawaii. In the trajectory analysis in Appendix 1 of the State's submittal, HDOH concluded that the predominant transport patterns in January and July of 2010—which are from the northeast to the southwest (*i.e.,* generally opposite the direction from Hawaii to the location of nonattainment and maintenance-only receptors in the U.S.)—support the conclusion that Hawaii is unlikely to contribute to nonattainment or interfere with maintenance in California or other western states.[38] While HDOH only analyzed wind trajectories in January and July of 2010, Hawaii's 2017 Regional Haze SIP contains 2013 and 2015 wind rose plots, which also illustrate that the predominant wind transport patterns year-round blow from northeast to southwest.[39] This is further verified by the National Weather Service, which lists persistent trade winds, the prevailing easterly winds [40] that circle the earth near the equator as a result of the earth's rotation, from the northeast as a feature of Hawaii's climate.[41] Based on the State's trajectory analysis and wind rose plots from its 2017 Regional Haze SIP, along with information from the National Weather Service, we expect emissions from Hawaii would initially travel westwards before turning eastwards on the vast majority of days. This would make the pathway to the continental U.S. considerably longer than the more than 2,000 miles separating the continental U.S. from Hawaii. These trajectories further indicate that Hawaii is unlikely to contribute to nonattainment or interfere with maintenance in California or any other state.

Finally, we compare the impact of Hawaii on California, with California's impact on Connecticut, because the distance between Hawaii and California, and Connecticut and California, is roughly equivalent. As previously mentioned, we have modeled contributions among the continental states in the Revised CSAPR Update. In terms of distance, Hawaii is slightly farther to nonattainment and maintenance-only receptors in California, at 2,384 and 2,363 miles, respectively, than California is to nonattainment and maintenance only

counties have nonattainment receptors and 2 counties have maintenance-only receptors.

[34] Determination of the nearest nonattainment and maintenance-only receptors was based on final 2020 Ozone Design values. Final 2020 design value reports can be found at *https://www.epa.gov/air-trends/air-quality-design-values#report.* California has numerous other nonattainment receptors in the following counties: Calaveras, El Dorado, Fresno, Imperial, Kern, Los Angeles, Madera, Mariposa, Merced, Nevada, Orange, Placer, Riverside, Sacramento, San Bernardino, San Diego, San Joaquin, Stanislaus, Tulare, and Tuolumne.

[35] Monitor ID: 60773005.

[36] Emissions estimates downloaded from the EPA's National Emissions Inventory, datasets: 2017NEI_Apr2020, 2014 NEI Final V2, on January 4 and 5, 2021, and saved as Excel spreadsheet files in the docket for this action.

[37] In this analysis, we focus primarily on 2017 emissions. The most recent available. The Docket for this document contains additional information about Event Emissions, which are comprised of wildfire, prescribed fire and agricultural burning.

[38] The U.S. EPA has also relied on this trajectory analysis in approving Hawaii's State Implementation Plan submittals addressing interstate transport for the 2008 ozone NAAQS (84 FR 40266, September 13, 2019, see the proposed rule at 84 FR 6736, February 28, 2019), and the 1997 ozone NAAQS (77 FR 47530, October 9, 2012). See Technical Support Document, Evaluation of 2011 Hawaii Infrastructure SIP for 1997 Ozone; 1997 Particulate Matter; and 2006 Particulate Matter NAAQS, U.S. EPA, Region 9, March 2012.

[39] Appendix C, 5 Year Regional Haze Progress Report for the Federal Implementation Plan, Hawaii Department of Health, October 2017. The EPA approved the Regional Haze Progress Report on May 13, 2019 (84 FR 14634).

[40] In meteorology, wind direction is described as the direction from which the wind is blowing (*i.e.,* the Hawaiian trade winds blow from the northeast to the southwest), see *https://www.weather.gov/cae/weatherterms.html.*

[41] U.S. Department of Commerce, National Oceanic and Atmospheric Association (NOAA). ''Honolulu, HI.'' Pacific Region Headquarters, NOAA's National Weather Service, *https://www.weather.gov/hfo/climate_summary,* accessed on June 28, 2021.

receptors in Connecticut, which are 2,263 and 2,285 miles away, respectively.[42] California's contribution to these monitors is 0.03 ppb to both the nonattainment and maintenance-only receptors in 2021, which represents the maximum contribution of California to any nonattainment and maintenance-only receptor in Connecticut. This is well below the threshold of 1 percent of the NAAQS that would link the two states, triggering further review in steps 3 and 4 of the interstate transport analysis framework. Given that the distance between California and Connecticut is comparable to the distance between Hawaii and California, and ozone precursor emissions from California are more than 10 times larger than ozone precursor emissions from Hawaii, because California's contributions to Connecticut are well below the 1 percent threshold, it is reasonable to conclude that Hawaii's contribution to California would also be below the 1 percent threshold. Therefore, it is not necessary to evaluate potential NO_X reductions as part of step 3 in the EPA's four-step interstate transport framework.

Based on the weight of evidence, including (1) the distance between Hawaii and California, (2) the relative magnitude of ozone precursor emissions from Hawaii, (3) the predominant wind direction of the trade winds in Hawaii, and (4) the comparison to the impact of ozone precursor emissions from California on Connecticut, we propose to find that Hawaii will not significantly contribute to nonattainment or interfere with maintenance in any other state.

IV. The EPA's Proposed Action

Based on our review of the interstate transport SIP submission from HDOH to address the 2015 ozone NAAQS and the additional analysis discussed in this document, we propose to find that emissions from Hawaii will not significantly contribute to nonattainment or interfere with maintenance of the 2015 ozone NAAQS in any other state. Accordingly, we propose to approve the HDOH Submittal as satisfying the requirements of CAA section 110(a)(2)(D)(i)(I) for the 2015 ozone NAAQS.

V. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this proposed action merely proposes to approve state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide the EPA with the discretionary authority to address disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to 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. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogenoxides, Volatile organic compounds, Interstate transport, Infrastructure SIP.

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

Dated: September 18, 2021.

Deborah Jordan,

Acting Regional Administrator, Region IX.

[FR Doc. 2021–20619 Filed 9–27–21; 8:45 am]

BILLING CODE 6560–50–P

[42] Nonattainment Receptor at Monitor ID 90019003, Fairfield, CT and Maintenance-Only Receptor at Monitor ID 90090027, New Haven, CT.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[EPA–R09–RCRA–2021–0431; FRL–8828–03–R9]

Arizona: Authorization of State Hazardous Waste Management Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed action/decision/authorization.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to authorize changes to Arizona's hazardous waste program under the Resource Conservation and Recovery Act (RCRA). These changes were outlined in an application to the EPA and correspond to certain Federal rules promulgated between July 1, 2007 and June 30, 2020. The EPA reviewed Arizona's application and has determined that these changes satisfy all requirements needed to qualify for final authorization. Therefore, in the ''Rules and Regulations'' section of this **Federal Register**, we are authorizing Arizona for these changes as a direct final authorization without a prior proposed action. If we receive no adverse comment, we will not take further action on this proposed authorization.

DATES: Comments must be received on or before October 28, 2021.

ADDRESSES: Submit your comments to EPA, identified by Docket ID No. EPA–R09–RCRA–2021–0431, at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video,

etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). The *https://www.regulations.gov* website is an ''anonymous access'' system, which means 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 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, EPA recommends that you include your name and other contact information in the body of your comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, 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.

FOR FURTHER INFORMATION CONTACT: Sorcha Vaughan, *Vaughan.Sorcha@epa.gov,* 415–947–4217.

SUPPLEMENTARY INFORMATION: This document proposes to take action on Arizona's changes to its hazardous waste management program under the Resource Conservation and Recovery Act (RCRA), as amended. We have published a direct final action authorizing these changes in the ''Rules and Regulations'' section of this **Federal Register** because we view this as a noncontroversial action and anticipate no adverse comment. We have explained our reasons for this action in the preamble to the direct final authorization.

If we receive no adverse comment, we will not take further action on this proposed rulemaking. If we receive adverse comment, we will withdraw the direct final authorization and it will not take effect. We would then address all public comments in a subsequent final action and base any further decision on the authorization of the state program changes after considering all comments received during the comment period.

We do not intend to institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information, please see the information provided in the **ADDRESSES** section of this document.

Authority: This action is issued under the authority of sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act as amended, 42 U.S.C. 6912(a), 6926, and 6974(b).

Dated: September 1, 2021.

Deborah Jordan,

Acting Regional Administrator, Region IX.

[FR Doc. 2021–19987 Filed 9–27–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 372

[EPA–HQ–OPPT–2018–0155; FRL–6004–01–OCSPP]

RIN 2070–AK42

Parent Company Definition for Toxics Release Inventory (TRI) Reporting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to codify the definition of ''parent company'' for purposes of reporting to the Toxics Release Inventory (TRI). Although the existing regulation requires facilities reporting to TRI to identify their parent company in annual reporting forms, no codified definition of this data element exists. Among the facilities reporting to TRI are those with complicated corporate ownership structures. As such, effort is required each year by reporting facilities and EPA to clarify how the parent company data element should be represented on the form. A codified definition of parent company would allow EPA to address various corporate ownership scenarios explicitly and reduce the reporting burden caused by regulatory uncertainty. This proposed rule would clarify existing regulations to reporting facilities and add a foreign parent company data element, if applicable, while improving the Agency's data quality.

DATES: Comments must be received on or before November 29, 2021. Under the Paperwork Reduction Act, comments on the information collection provisions are best assured of consideration if the Office of Management and Budget (OMB) receives a copy of your comments on or before October 28, 2021.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2018–0155, using the *Federal eRulemaking Portal* at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Due to the public health concerns related to COVID–19, the EPA Docket Center (EPA/DC) and Reading Room is closed to visitors with limited exceptions. The staff continues to provide remote customer service via email, phone, and webform. For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Stephanie Griffin, Data Gathering and Analysis Division, Mailcode 7410M, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–1463; email address: *griffin.stephanie@epa.gov.*

For general information contact: The Emergency Planning and Community Right-to-Know Information Center; telephone number: (800) 424–9346, TDD (800) 553–7672; website: *https://www.epa.gov/home/epa-hotlines.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this action apply to me?

You may be potentially affected by this action if your facility submits annual reports under section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. 11023, and section 6607 of the Pollution Prevention Act (PPA), 42 U.S.C. 13106, to EPA and States or Tribes of the facility's environmental releases or other waste management quantities of covered chemicals. (Pursuant to 40 CFR 372.30(a), facilities located in Indian country are required to report to the appropriate tribal government official and EPA instead of to the State and EPA. See April 19, 2012 (77 FR 23409) (FRL–9660–9)). To determine whether your facility is affected by this action, you should carefully examine the applicability criteria in 40 CFR part 372, subpart B. 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:

- Facilities included in the following NAICS manufacturing codes

(corresponding to Standard Industrial Classification (SIC) codes 20 through 39): 311*, 312*, 313*, 314*, 315*, 316, 321, 322, 323*, 324, 325*, 326*, 327, 331, 332, 333, 334*, 335*, 336, 337*, 339*, 111998*, 113310, 211130*, 212324*, 212325*, 212393*, 212399*, 488390*, 511110, 511120, 511130, 511140*, 511191, 511199, 512230*, 512250*, 519130*, 541713*, 541715*, or 811490*. (* Exceptions and/or limitations exist for these NAICS codes.)

- Facilities included in the following NAICS codes (corresponding to SIC codes other than SIC codes 20 through 39): 212111, 212112, 212113 (corresponds to SIC code 12, Coal Mining (except 1241)); or 212221, 212222, 212230, 212299 (corresponds to SIC code 10, Metal Mining (except 1011, 1081, and 1094)); or 221111, 221112, 221113, 221118, 221121, 221122, 221330 (all are limited to facilities that combust coal and/or oil for the purpose of generating power for distribution in commerce) (corresponds to SIC codes 4911, 4931, and 4939, Electric Utilities); or 424690, 425110, 425120 (limited to facilities previously classified in SIC code 5169, Chemicals and Allied Products, Not Elsewhere Classified); or 424710 (corresponds to SIC code 5171, Petroleum Bulk Terminals and Plants); or 562112 (limited to facilities primarily engaged in solvent recovery services on a contract or fee basis (previously classified under SIC code 7389, Business Services, NEC)); or 562211, 562212, 562213, 562219, 562920 (limited to facilities regulated under the Resource Conservation and Recovery Act, subtitle C, 42 U.S.C. 6921 *et seq.*) (corresponds to SIC code 4953, Refuse Systems).
- Federal facilities.

B. What is the Agency's authority for taking this action?

Covered facilities in specified SIC codes that manufacture, process, or otherwise use listed toxic chemicals in amounts above specified threshold levels report certain facility specific information about such chemicals, including the annual releases and other waste management quantities. EPCRA section 313(g)(1) requires EPA to publish a uniform toxic chemical release form for these reporting purposes, and it also prescribes, in general terms, the types of information that must be submitted on the form. Congress also granted EPA broad rulemaking authority to allow the Agency to fully implement the statute, to ensure the release forms are available to inform the public of toxic chemical releases and ''to assist governmental agencies, researchers, and other persons in the conduct of research and data gathering'' (EPCRA section 313(h)). EPCRA section 328 states that: ''The Administrator may prescribe such regulations as may be necessary to carry out this chapter'' (42 U.S.C. 11048).

C. What action is the Agency taking?

EPA is proposing to codify the definition of ''parent company'' for TRI reporting purposes. Under this proposed action, EPA would clarify existing guidance and provide reporting clarity for facilities, including those owned by corporate subsidiaries, multiple owners, foreign entities, or that are publicly owned.

Currently, facilities required to report to TRI must also report their parent companies and identify whether any reportable off-site transfers of TRI chemicals are sent to a facility also owned by that same parent company. Reporting facilities rely on the TRI Reporting Forms and Instructions (RFI) to report this information and to address questions, including what constitutes a ''parent company'' for TRI reporting purposes. The RFI does not address all scenarios applicable to many TRI facilities, including facilities owned by subsidiaries of larger companies; facilities with multiple owners, none of whom are a majority owner; joint ventures that are not purely 50:50; facilities directly owned by foreign entities; and publicly-owned facilities. EPA is proposing to codify that the ''parent company'' for TRI reporting purposes is the highest-level company with the largest ownership interest in the TRI facility as of December 31 of the reporting year. This proposal addresses the following ownership scenarios:

- A facility is owned by a single company, which is not owned by another company;
- A facility is owned by a single company, which is owned by another company;
- A facility is owned by multiple companies, including companies that are themselves owned by other entities;
- A facility is owned by a joint venture or cooperative;
- A facility is owned, at least in part, by a foreign company; and
- A facility is owned by the federal government, or a state, tribal, or municipal government.

EPA is also proposing to require facilities reporting to TRI to utilize standardized naming conventions for parent company reporting, as provided in the annual TRI RFI, available as a downloadable Excel file (''Standardized Parent Company Names'') at *www.epa.gov/tri/rfi.* These naming conventions address common formatting discrepancies, such as punctuation, capitalization, and abbreviations (for example, ''Corp'' for ''Corporation'').

D. Why is the Agency proposing this action?

The Agency's current guidance on reporting the parent company on a TRI form has resulted in reporter confusion in situations such as a facility having multiple owners, or no single entity owning at least 50% of the facility. Further, codifying the definition of parent company for the variety of ownership scenarios that exist for TRI reporting facilities will provide regulatory certainty and reporting clarity for the facilities. In previous years, relying only on a broad definition of parent company in the RFI, the Agency has found that many facilities inaccurately report parent company information to TRI, resulting in efforts to contact individual facilities to verify their facility's ownership structure after every annual reporting cycle. EPA has also worked to standardize parent company formatting for data quality purposes. As a result of the formatting standardization, TRI facilities are instructed to report parent companies using common abbreviations (for example, reporting ''Inc'' for ''Incorporation'') and identical punctuation and capitalization styles, where appropriate (Ref. 1). Thus, TRI reports and EPA databases more accurately reflect which facilities are owned by the same parent company, rather than counting parent companies reported with variations in spelling, capitalization, punctuation, or abbreviations as unique companies.

Without a straightforward definition and a standardized format, regularly having to complete data quality screenings on TRI reporting forms is a considerable burden for TRI reporting facilities. Each year, after receiving TRI reporting forms, EPA conducts initial analyses on parent company data received and identifies potential errors on forms, such as unexplained changes in the parent company listed by a facility on its TRI reporting form (*e.g.,* change in name from what was reported for the previous year, misspellings, or discrepancies in formatting). After the initial analyses, EPA then reaches out to individual facilities both to verify whether a different parent company name should have been submitted on the reporting form and to confirm whether the updated and standardized naming format should be used going forward.

For example, for Reporting Year 2019, the Agency received TRI reporting forms

from 21,394 facilities. EPA needed to contact 2,119 of those facilities regarding their submitted parent company name to conform the submitted name to the standardized format and reflect the highest-level parent company in the U.S. (9.9% of all TRI facilities). The number of facilities affected by the parent company standardization effort for Reporting Year 2019 was similar to the numbers in Reporting Years 2012 (19% of TRI facilities), 2013 (21% of facilities), 2014 (15% of facilities), 2015 (14% of facilities), 2016 (8.5% of facilities), 2017 (4.5% of facilities), and 2018 (6.8% of facilities). Even though EPA prepopulates standardized parent company names into TRI–MEweb—the reporting software used by TRI facilities—for use in the next reporting year, the Agency still has to reach out to thousands of TRI facilities annually to ensure they submit accurate, standardized parent company names. While time-saving measures have been implemented over the past few years, regulatory uncertainty over this definition remains, and verifying and standardizing parent company information remains burdensome for reporters, necessitating a rule to improve reporting efficiency for TRI facilities and the Agency's data quality efforts.

Additionally, collecting the highest-level foreign parent company name in addition to the highest level-U.S.-based parent company name would ensure greater data consistency for TRI data users than just including one name (*i.e.,* either the highest-level U.S.-based company, or the foreign parent company). The distinct data elements for U.S.-based and foreign parent company names enable data users to include or exclude any foreign parent companies from analyses or searches as they choose. Allowing either a U.S.-based or foreign parent company name to be reported for the same data element would prevent TRI's public data tools from distinguishing companies that are owned by U.S.-based entities from those that are foreign-owned. TRI data users include researchers, industry, the public, and other EPA and government reporting programs. Conversely, a single data element that reflects just the single highest-level parent company, whether it is based in the U.S. or abroad, would prevent any data user from reasonably and efficiently determining where the company is based, unless further data of the listed parent company, such as address, was also required.

Finally, this proposed rule would more closely align the definition of parent company for TRI reporters with the definition codified by the Chemical Data Reporting (CDR) Program at 40 CFR 711.3. Differences in this proposed definition and the definition codified in the CDR regulations result from differences in the respective programs' longstanding terms of art (*e.g.,* TRI uses ''facilities,'' whereas CDR uses ''sites''), as well as from edits intended to provide greater clarity in the TRI context. For instance, the proposed TRI definition slightly differs from CDR regulations in the paragraph referring to 50:50 joint ventures (40 CFR 372.3) in order to clarify that a joint venture should be reported as its own parent company, irrespective of whether any of the joint participants is owned by a higher-level company. Nonetheless, this proposed rule would bring the codified definition of ''parent company'' under TRI regulations much closer to the codified definition under CDR regulations. Having nearly identical definitions between the TRI and CDR programs will support EPA's ability to compare the databases for data quality purposes. Additionally, the Greenhouse Gas Reporting program (GHGRP) has codified the definition of parent company at 40 CFR 98.3(c)(11). While the GHGRP definition of this data element has some differences from the CDR definition and this rulemaking's proposed definition, there are many similarities between the definitions, including the need to report the highest-level company in the facility's ownership hierarchy and the requirement to refer to reporting instructions for standardized naming conventions. Thus, this proposed definition and reporting requirement is similar to those codified under other EPA reporting rules. Ultimately, this proposed definition is expected to promote understanding of the data element within the regulated community, especially among those facilities which also report to CDR and are already familiar with the codified definition.

E. What are the estimated incremental impacts?

EPA has evaluated the potential incremental impacts of this proposed rulemaking, including alternative options. The details are presented in the economic analysis prepared for the proposed rule (Ref. 2), which is available in the docket and is briefly summarized here.

EPA estimates the incremental impacts across all facilities to be up to $1,209,202 in the first year, and up to $14,020 every subsequent year, with no annualized capital or operation and maintenance costs. The paperwork burden is estimated to be up to 18,091 hours the first year, and up to 210 hours every subsequent year. However, these estimated impacts do not include the cost and time savings for facilities who have previously had difficulty interpreting EPA's guidance on this data element, nor do these impacts include the reduced need for communication between the Agency and facilities in the annual effort to standardize parent company names. The benefits of the proposed rule are described qualitatively in the economic analysis, as some of the benefits are unable to be monetized (such as the improved ability of various TRI data users to analyze parent company-level information thoroughly); thus, the estimated incremental impact listed does not factor in benefits. EPA estimates that a total of 21,458 entities may be impacted by this proposed rule.

F. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit CBI to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *http://www.epa.gov/dockets/comments.html.*

II. Background

A. What is a facility's ''Parent Company'' for TRI reporting purposes?

In the RFI, ''parent company'' is described as: ''the highest-level company, located in the United States, that directly owns at least 50 percent of the voting stock of [the facility's] company . . . . [A] facility that is a 50:50 joint venture is its own parent company. When a facility is owned by more than one company and none of the facility owners directly owns at least 50 percent of its voting stock, the facility should provide the name of the parent company of either the facility operator

or the owner with the largest ownership interest in the facility.''

B. How does the Agency use parent company data?

After receiving annual TRI reporting forms, EPA uses TRI's parent company data to better understand typical industry practices regarding chemical use and waste management activities. Pursuant to PPA section 6607, TRI reporting facilities must also report information on source reduction and other waste management activities.

The TRI National Analysis, published annually (see: *https://www.epa.gov/trinationalanalysis*), looks at how the top parent companies (based on quantity of production-related waste managed) managed their wastes in terms of recycling, treatment, energy recovery, and releases. EPA uses this parent company-level data to compare the methods by which the various parent companies are managing their wastes, especially when considering the number of facilities owned by each parent company, in keeping with the PPA. Similarly, the TRI National Analysis highlights the top source reduction activities used by the top parent companies (based on number of source reduction activities), such as improved process modifications and product substitutions (Ref. 3). Further, considering facilities owned by the same parent company allows EPA to compare waste management and pollution prevention activities within a given sector, particularly when a parent company is primarily composed of same-sector facilities. In addition to improving EPA's understanding of industry waste management and source reduction practices, collecting parent company-level data allows TRI data users and reporting facilities to highlight best practices, which may also help other facilities and companies achieve the pollution prevention goals of the PPA. A more precise understanding of the structures and practices at TRI facilities leads to improvements in the source reduction information that is relied upon to develop effective control strategies (PPA section 6602(a)).

C. What are the benefits of foreign parent company data?

Environmental agencies, industry, and the public also use TRI data. EPA program offices use TRI data, along with other data, to help establish programmatic priorities, evaluate potential hazards to human health and the natural environment, and undertake appropriate regulatory and/or enforcement activities. EPA believes that TRI data on the facility's foreign parent company are of interest to the public because of the potential social benefits resulting from the availability of these data. Making TRI information on foreign parent companies available to the public may provide incentives for facilities to reduce TRI chemical releases. For example, the public availability of release information aggregated at the foreign parent company level may induce these parent companies to encourage facilities to reduce releases when such changes would not otherwise be in the parent company's interest if release information were not in the public domain. Potential social benefits derived from voluntary follow-on activities include decreased costs of waste treatment and disposal, lower probability of accidental releases and lower clean-up costs in the event of such releases, reduced contamination of natural resources, improved air and water quality, and reduced risks to human health. Such social benefits would be partially offset by the social costs to implement the changes, such as using flare gas recovery recycling and installing vapor recovery systems. The net social benefits of the information provided by the proposed rule and the possible follow-on activities equal the difference between the total benefits and the total costs of the activities leading to reduced releases (Ref. 2).

For facilities that are owned by a foreign company (*i.e.,* the facility itself or its highest-level U.S.-based parent company are owned by a foreign-based company), identifying foreign parent companies would bring additional clarity on reporting guidelines. Current TRI reporting definitions result in the facility reporting a U.S.-based parent entity that is often a subsidiary or holding company of a larger, foreign company. In many cases, facility personnel know the foreign company's name more readily than the domestic holding company's name. Further, in cases where TRI facilities are directly owned by a foreign company, with no U.S.-based subsidiary or holding company, the facilities are unable to report any parent company under the existing definition, only indicating ''No U.S. Parent Company (for TRI reporting purposes)'' in the TRI reporting form checkbox. Issues surrounding foreign ownership of TRI reporting facilities have caused reporting uncertainty for facilities in the past. The reporting of the highest-level foreign company in these situations would help improve TRI reporting for facilities by possibly allowing TRI reporting software to help suggest parent company names submitted by facilities with similar parent company data and industrial activities.

Reporting a facility's foreign parent company name and its Dun and Bradstreet identification number (D–U–N–S number), if applicable, would not only create greater certainty among relevant TRI reporting facilities, it would also provide TRI data users with more accurate parent company-level data. Including foreign parent company data would enhance parent company data collected at the U.S. level. Notably, this would allow TRI data users to compare the data across the same foreign parent when no U.S.-based parent exists and conduct the same trend analyses as users could for the highest-level U.S.-based parent. For TRI data analysis purposes, listing a subsidiary or holding company rather than the actual parent company is an impediment to TRI data users seeking to conduct a more accurate and comprehensive assessment of the waste management and source reduction activities by parent companies. As multiple subsidiaries or holding companies may exist underneath larger corporations, excluding foreign parent companies proves difficult to aggregate at the actual parent company level. Whereas facilities whose highest-level parents are foreign-based cannot be identified easily by current TRI data, requiring the reporting of a highest-level foreign parent would allow EPA and its data users to analyze trends at a more appropriate corporate level, similar to current analysis of U.S.-based companies. Under complex corporate ownership structures, TRI facilities ultimately owned by foreign parent companies are required to report a U.S.-based company that may not be easily recognizable as an entity within a larger, foreign firm. For instance, holding companies and subsidiaries with different names from their foreign parent are currently listed in TRI data under the subsidiary and lesser-known names that do not accurately represent the true ownership structure of a facility. This may skew analyses of TRI parent company data by suggesting foreign firms may not be as involved in the ownership and operation of TRI reporting facilities as U.S.-based companies. Collecting and analyzing data on foreign parent companies of TRI facilities would provide more accurate data for TRI data users.

D. Will additional information need to be reported to TRI under this proposal?

EPA will continue to provide a data element in the facility identification

sections of the Form R and Form A Certification Statement for a facility to report the name of the highest-level U.S.-based parent company, as well as the D–U–N–S number for this company when one exists (see: *http://www.dnb.com/duns-number.html*). Additionally, the Agency is proposing to add a data element to the Form R and Form A certification for a facility to report the name and identification-U–N–S number of a foreign-based parent company, if there is one. A facility whose highest-level U.S.-based parent company is owned by a foreign company would report both the U.S.-based parent company (Part I, Section 5.1 on the reporting forms) and the foreign parent company (the proposed Part I, Section 5.3 on the reporting forms), and their D–U–N–S numbers.

A facility whose U.S.-based parent company is not owned by any foreign-based company would simply check an ''NA'' box (or similar) in the proposed Part I, Section 5.3 on the reporting forms.

E. Request for Comments

EPA requests comments on the implementation of this proposed rulemaking, including alternative reporting scenarios for this data element. EPA solicits comments on the extent to which TRI reporting form regulations and guidance includes a facility's foreign parent company, if applicable. First, EPA is interested in receiving comments on whether to include reporting the applicable foreign parent company. The alternative would be to codify the parent company definition but limit the guidance and reporting form data elements such that only the highest U.S.-based company would be reported. Additionally, EPA is interested in receiving comments on whether to add a new data element to the reporting form to identify the proper foreign parent company, if any. EPA considered the following three options, and the proposed rulemaking reflects Option 3:

- Option 1: Parent company definition would be codified and included in the Reporting Forms and Instructions (RFI). The reporting regulations would only require reporting the highest-level U.S.-based parent company in the current data element under Part I, Section 5.1.
- Option 2: Codified parent company definition would be similar to that proposed in this document, plus EPA would include instructions for how to report a foreign parent company in Part I, Section 5.1 instead of the highest-level U.S.-based parent company when applicable. No additional data element would be added to the reporting form.
- Option 3: Codified parent company definition identical to that proposed in this document, including reporting both the highest-level U.S.-based parent company and highest-level foreign parent company, and add a new data element to Part I, Section 5 of the reporting forms for reporting the name of a foreign company and its D–U–N–S number, in addition to reporting the highest-level U.S.-based parent company, when applicable.

All three options are included in the economic analysis, which is available in the docket for this rulemaking (Ref. 2).

Additionally, Part II, Section 6.2 of the Form R includes a checkbox which indicates whether an off-site, non-POTW (publicly owned treatment works) location that receives a transfer from the reporting facility is under the management or control of the reporting facility, or under the management or control of that facility's parent company. EPA included this element on the Form R to ''give users of [TRI] data an important indication of the relative level of responsibility for the ultimate disposition of the chemical in the environment'' (52 FR 21159; June 4, 1987). When the Agency added this checkbox, it indicated that this information would likely to be readily available to submitters. Id. Accordingly, EPA believes that extending this checkbox to apply to an off-site, non-POTW location that receives a transfer from the reporting facility that is under the management or control of the reporting facility, or under the management or control of that facility's U.S.-based or foreign parent company would provide users of TRI data an important indication of the relative level of responsibility for the ultimate disposition of the chemical in the environment. The proposed regulatory text changes in this action do not address this additional data element at this time. EPA does not anticipate a measurable increase in burden were the checkbox to apply to foreign parent ownership and thus the economic analysis does not reflect Section 6.2 checkbox reporting. Similarly, EPA believes that a facility is likely to know whether or not it is transferring waste to another facility with a common parent company, either U.S.-based or international; transfers to such a facility are likely conducted at least in part due to their common ownership. EPA is requesting comment on the benefits and burdens that might accrue should EPA extend this checkbox to include parent ownership beyond the U.S.-based parent.

III. References

The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

1. USEPA, OPPT. 2020 Standardized Parent Company Names. January 2021.
2. USEPA, OPPT. Economic Analysis of the Proposed Parent Company Definition for TRI Reporting. March 29, 2021.
3. USEPA, OPPT. TRI National Analysis 2019. January 2021.
4. USEPA, OPPT. Information Collection Request Supporting Statement. Proposed Rule ICR: Parent Company. Definition for TRI Reporting. April 2021.

IV. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *http://www2.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review 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. Paperwork Reduction Act (PRA)

The information collection activities in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the PRA. The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 2597.01 (Ref. 4). You can find a copy of the ICR in the docket for this proposed rule, and it is briefly summarized here.

This proposed action would require all TRI reporters to refer to TRI regulatory text in reporting their parent company(s). Facilities which report to TRI currently rely on guidance for this required data element but lack a codified definition. Additionally, all TRI reporters with foreign parent companies would be required to submit additional information (indicate the foreign parent company name or not applicable). This proposed action would allow TRI data users, which include the general public, industry, researchers,

and the media, to better aggregate and understand this data.

Respondents/affected entities: The proposed rule will affect any facility required to report to TRI. This proposed action would not change the universe of TRI reporting facilities.

Respondent's obligation to respond: Mandatory, 42 U.S.C. 11023.

Estimated number of respondents: 21,458.

Frequency of response: Annual.

Total estimated burden hours: Across all facilities, the total first year burden hours will be up to 18,091 hours, and up to 210 hours every subsequent year. Burden is defined at 5 CFR 1320.3(b).

Total estimated burden cost: Up to $1,209,202 in the first year, and up to $14,020 every subsequent year, includes $0 annualized capital or operation and maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9.

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates and any suggested methods for minimizing respondent burden to the EPA using the docket identified at the beginning of this proposed rule. You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs using the interface at *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after receipt, OMB must receive comments no later than October 28, 2021. The EPA will respond to any ICR-related comments in the final rule.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. The small entities subject to the requirements of this action are small privately-owned facilities and municipal government-owned facilities who are required to report to EPA under EPCRA section 313. The Agency has determined that all entities, including any small entities, may experience an impact of incurring annualized costs of less than 1%. Details of this analysis are presented in EPA's economic analysis (Ref. 2).

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications 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.

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

This action does not have tribal implications as specified in Executive Order 13175 (65 FR 67249). This proposed rule will not impose substantial direct compliance costs on Indian tribal governments. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

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

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

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

The EPA believes that this action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard. This action is a procedural change and does not have any impact on human health or the environment.

List of Subjects in 40 CFR Part 372

Community right-to-know, Environmental protection, Reporting and recordkeeping requirements.

Dated: September 21, 2021.

Michal Freedhoff,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

For the reasons discussed in the preamble, EPA proposes to amend 40 CFR part 372 as follows:

PART 372—TOXIC CHEMICAL RELEASE REPORTING: COMMUNITY RIGHT-TO-KNOW

■ 1. The authority citation for part 372 continues to read as follows:

Authority: 42 U.S.C. 11023 and 11048.

■ 2. In § 372.3, add in alphabetical order the definition for ''Parent company'' to read as follows:

§ 372.3 Definitions.

* * * * *

Parent company means the highest-level company(s) of the facility's ownership hierarchy as of December 31 of the year for which data are being reported according to the following instructions. The U.S. parent company is located within the United States while the foreign parent company is located outside the United States:

(1) If the facility is entirely owned by a single U.S. company that is not owned by another company, that single company is the U.S. parent company.

(2) If the facility is entirely owned by a single U.S. company that is, itself, owned by another U.S.-based company (*e.g.,* it is a division or subsidiary of a higher-level company), the highest-level company in the ownership hierarchy is the U.S. parent company. If there is a higher-level parent company that is outside of the United States, the highest-level foreign company in the ownership hierarchy is the foreign parent company.

(3) If the facility is owned by more than one company (*e.g.,* company A owns 40 percent, company B owns 35 percent, and company C owns 25 percent), the highest-level U.S. company

with the largest ownership interest in the facility is the U.S. parent company. If there is a higher-level foreign company in the ownership hierarchy, that company is the foreign parent company.

(4) If the facility is owned by a 50:50 joint venture or a cooperative, the joint venture or cooperative is its own parent company.

(5) If the facility is entirely owned by a foreign company (*i.e.,* without a U.S.-based subsidiary within the facility's ownership hierarchy), the highest-level foreign parent company is the facility's foreign parent company.

(6) If the facility is federally owned, the highest-level federal agency or department operating the facility is the U.S. parent company.

(7) If the facility is owned by a non-federal public entity (such as a municipality, State, or tribe), that entity is the U.S. parent company.

* * * * *

■ 3. In § 372.85, revise paragraph (b)(8) to read as follows:

§ 372.85 Toxic chemical release reporting form and instructions.

* * * * *

(b) * * *

(8) Legal name of the facility's U.S.-based parent company and its Dun and Bradstreet identification number.

(i) Legal name of the facility's highest-level foreign parent company and its Dun and Bradstreet identification number, when applicable.

(ii) The facility must report using the standardized conventions for the naming of a parent company as provided in the toxic chemical release inventory reporting instructions identified in paragraph (a) of this section.

* * * * *

■ 4. In § 372.95, revise paragraph (b)(12) to read as follows:

§ 372.95 Alternate threshold certification and instructions.

* * * * *

(b) * * *

(12) Legal name of the facility's U.S.-based parent company and its Dun and Bradstreet identification number.

(i) Legal name of the facility's highest-level foreign parent company and its Dun and Bradstreet identification number, when applicable.

(ii) The facility must report using the standardized conventions for the naming of a parent company as provided in the toxic chemical release inventory reporting instructions identified in paragraph (a) of this section.

* * * * *

[FR Doc. 2021–20965 Filed 9–27–21; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2020–0042; FF09E21000 FXES11110900000 212]

RIN 1018–BD94

Endangered and Threatened Wildlife and Plants; Endangered Species Status for the Peñasco Least Chipmunk and Designation of Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 12-month finding on a petition to list the Peñasco least chipmunk (*Neotamias minimus atristriatus*), a mammal from New Mexico, as an endangered or threatened species under the Endangered Species Act of 1973, as amended (Act). After review of the best available scientific and commercial information, we find that listing the species is warranted. Accordingly, we propose to list the Peñasco least chipmunk as an endangered species under the Act. If we finalize this rule as proposed, it would add this species to the List of Endangered and Threatened Wildlife and extend the Act's protections to the species. We also propose to designate critical habitat for the Peñasco least chipmunk under the Act. The proposed critical habitat designation includes approximately 2,660 hectares (6,574 acres) in three units in New Mexico. We also announce the availability of a draft economic analysis of the proposed designation of critical habitat.

DATES: We will accept comments on the proposed rule or draft economic analysis that are received or postmarked on or before November 29, 2021. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by November 12, 2021.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *https://www.regulations.gov.* In the Search box, enter the docket number or RIN for this rulemaking (presented above in the document headings). For best results, do not copy and paste either number; instead, type the docket number or RIN into the Search box using hyphens. Then, click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on ''Comment.''

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS–R2–ES–2020–0042, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *https://www.regulations.gov.* This generally means that we will post any personal information you provide us (see *Public Comments,* below, for more information).

Availability of supporting materials: For the critical habitat designation, the coordinates or plot points or both from which the maps are generated are included in the administrative record and are available on the New Mexico Ecological Services Field Office website at *https://www.fws.gov/southwest/es/NewMexico/* and at *https://www.regulations.gov* under Docket No. FWS–R2–ES–2020–0042. Any additional tools or supporting information that we may develop for the critical habitat designation will also be available at the Service website set out above and may also be included in the preamble and/or at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Shawn Sartorius, Field Supervisor, U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna Road NE, Albuquerque, NM 87113; telephone 505–346–2525. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act, if we determine that a species is an endangered or threatened species throughout all or a significant portion of its range, we are required to promptly publish a proposal in the **Federal**

Register and make a determination on our proposal within 1 year. To the maximum extent prudent and determinable, we must designate critical habitat for any species that we determine to be an endangered or threatened species under the Act. Listing a species as an endangered or threatened species and designation of critical habitat can be accomplished only by issuing a rule.

What this document does. We propose to list the Peñasco least chipmunk as an endangered species under the Act, and we propose the designation of critical habitat for the species.

The basis for our action. Under the Act, we may determine that a species is an endangered or threatened species based on any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We have determined that stressors affecting the viability of the Peñasco least chipmunk include vegetation shifts, wildfire, forest encroachment, recreation, development, and land use (Factor A, disease (Factor C), nonnative species (Factors A and C), and small population size and lack of connectivity (Factor E).

Although small population size is the primary stressor to the Peñasco least chipmunk, *Risk Factors for Peñasco Least Chipmunk,* below, presents a broader discussion of the threats. We have found that existing regulatory mechanisms do not adequately reduce the threats acting on the species to eliminate the risk of extinction (Factor D).

Section 4(a)(3) of the Act requires the Secretary of the Interior (Secretary) to designate critical habitat concurrent with listing to the maximum extent prudent and determinable. Section 3(5)(A) of the Act defines critical habitat as (i) the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. Section 4(b)(2) of the Act states that the Secretary must make the designation on the basis of the best available scientific data after taking into consideration the economic impact, the impact on national security, and any other relevant impacts of specifying any particular area as critical habitat.

Peer review. In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we sought the expert opinions of five appropriate specialists regarding the species status assessment report. We received comments from three, and their input informed this proposed rule. The purpose of peer review is to ensure that our listing and critical habitat designations are based on scientifically sound data, assumptions, and analyses. Additionally, we received reviews from several partners, including the State of New Mexico and U.S. Forest Service.

Because we will consider all comments and information we receive during the comment period, our final determinations may differ from this proposal. Based on the new information we receive (and any comments on that new information), we may conclude that the species is threatened instead of endangered, or we may conclude that the species does not warrant listing as either an endangered species or a threatened species. For critical habitat, our final designation may not include all areas proposed, may include some additional areas that meet the definition of critical habitat, and may exclude some areas if we find the benefits of exclusion outweigh the benefits of inclusion.

Information Requested

Public Comments

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned governmental agencies, Native American tribes, the scientific community, industry, or any other interested parties concerning this proposed rule. We particularly seek comments concerning:

(1) The species' biology, range, and population trends, including:

(a) Biological or ecological requirements of the species, including habitat requirements for feeding, breeding, and sheltering;

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution patterns;

(d) Historical and current population levels, and current and projected trends; and

(e) Past and ongoing conservation measures for the species, its habitat, or both.

(2) Factors that may affect the continued existence of the species, which may include habitat modification or destruction, overutilization, disease, predation, the inadequacy of existing regulatory mechanisms, or other natural or manmade factors.

(3) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to the species and existing regulations that may be addressing those threats.

(4) Additional information concerning the historical and current status, range, distribution, and population size of the species, including the locations of any additional populations.

(5) The reasons why we should or should not designate habitat as ''critical habitat'' under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including information to inform the following factors that the regulations identify as reasons why designation of critical habitat may be not prudent:

(a) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(b) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

(c) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States; or

(d) No areas meet the definition of critical habitat.

(6) Specific information on:

(a) The amount and distribution of Peñasco least chipmunk habitat;

(b) What areas, that were occupied at the time of listing (*i.e.,* are currently occupied) and that contain the physical or biological features essential to the conservation of the species, should be included in the designation and why;

(c) Any additional areas occurring within the range of the species, *i.e.,* the Sacramento and White Mountains in New Mexico, that should be included in the designation because they (1) are occupied at the time of listing and

contain the physical or biological features that are essential to the conservation of the species and that may require special management considerations, or (2) are unoccupied at the time of listing and are essential for the conservation of the species;

(d) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change; and

(e) What areas not occupied at the time of listing are essential for the conservation of the species. We particularly seek comments:

(i) Regarding whether occupied areas are adequate for the conservation of the species;

(ii) Providing specific information regarding whether or not unoccupied areas would, with reasonable certainty, contribute to the conservation of the species and contain at least one physical or biological feature essential to the conservation of the species; and

(iii) Explaining whether or not unoccupied areas fall within the definition of ''habitat'' at 50 CFR 424.02 and why.

(7) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(8) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation, and the related benefits of including or excluding specific areas.

(9) Information on the extent to which the description of probable economic impacts in the draft economic analysis is a reasonable estimate of the likely economic impacts.

(10) Information on land ownership within proposed critical habitat areas, particularly Tribal land ownership (allotments, trust, and/or fee) so that the Service may best implement Secretarial Order 3206 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act).

(11) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act. Specific information we seek includes information on any conservation plans within the proposed designated critical habitat areas that provide conservation for the Peñasco least chipmunk and its habitat. For any additional areas that you may request be excluded from the designation, we will undertake an exclusion analysis if you provide credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of inclusion or if we otherwise decide to exercise the discretion to evaluate the areas for possible exclusion.

(12) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

(13) Ongoing or proposed conservation efforts that could result in direct or indirect ecological benefits to the associated habitat for the species; as such, those efforts would lend to the recovery of the species and therefore areas covered may be considered for exclusion from the final critical habitat designation.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or a threatened species must be made ''solely on the basis of the best scientific and commercial data available.''

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *https://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *https://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *https://www.regulations.gov.*

Public Hearing

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received by the date specified above in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing. For the immediate future, we will provide these public hearings using webinars that will be announced on the Service's website, in addition to the **Federal Register**. The use of these virtual public hearings is consistent with our regulations at 50 CFR 424.16(c)(3).

Previous Federal Actions

WildEarth Guardians petitioned us to list Peñasco least chipmunk in October 2011. The Service published a substantial 90-day finding and a warranted but precluded 12-month finding on November 21, 2012 (77 FR 69994), stating that listing of the subspecies was warranted due to the present or threatened destruction, modification, or curtailment of its habitat or range and the fragmentation and isolation of small populations. In 2018, we completed a species status assessment (SSA) to provide the biological support for a decision on whether or not to propose to list the subspecies as threatened or endangered under the Act and, if so, where to propose designating critical habitat. This proposed listing rule also constitutes our 12-month petition finding for the species.

Supporting Documents

A species status assessment (SSA) team prepared an SSA report for the Peñasco least chipmunk. The SSA team was composed of Service biologists, in consultation with other species experts. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species. The Service sent the SSA report to five independent peer reviewers, and three provided a review of the document. The Service also sent the SSA report to three partner agencies, including the State of New Mexico, U.S. Forest Service, and the Mescalero Apache Tribe, for review. We received reviews from the U.S. Forest Service and the State of New Mexico.

I. Proposed Listing Determination

Background

The Peñasco least chipmunk (*Neotamias minimus atristriatus*) is currently recognized as one of 17 subspecies of least chipmunk (*Neotamias [=Tamias] minimus*) (Wilson and Reeder 2005, p. 815). Least chipmunks are smaller than most other chipmunk species and belong to the family Sciuridae. The Peñasco least chipmunk is known from the Sacramento Mountains and White Mountains in Lincoln and Otero Counties in southern New Mexico.

Peñasco least chipmunks are grayish-brown mixed with cinnamon-buff on the rump and thighs (Sullivan 1993, p. 1), with a blackish head with white and cinnamon, and a whitish patch behind each ear. The sides of their bodies are light brown, and underparts are whitish with buff; their feet are light pink-cinnamon; the tail is blackish or brown with pinkish-cinnamon; and dark stripes on the back and head are blackish to blackish-brown, edged with tawny along the spine, and bordered with white on the face and sides (Sullivan 1993, pp. 1–2). The Peñasco least chipmunk has pale yellowish orange hindfeet, a light beige, yellowish, or orange belly, and dark underfur (Frey 2010, p. 11). A full species description and description of its habitat can be found in chapter 2 of the SSA report.

The Peñasco least chipmunk was first described as a new species, *Eutamias atristriatus,* in 1913 based on 10 specimens collected from ponderosa pine forest in the Sacramento Mountains in 1902 (Bailey 1913, entire). This taxonomy has been revised multiple times as the taxonomy of chipmunks and least chipmunks changed, including use of the synonyms *Eutamias* and *Tamias* for *Neotamias.* Howell (1929, entire) designated the taxon a subspecies of least chipmunk, *Tamias minimus atristriatus.* Conley (1970, entire) purported that the South Sacramento (= Sacramento Mountains) population was the only population of least chipmunks in New Mexico worthy of nomenclatural distinction based on morphological distinctiveness. However, Sullivan and Peterson (1988, p. 21) recommended the retention of *N. m. atristriatus* as a subspecies that included both the New Mexico White Mountains and Sacramento Mountains, based on more in-depth morphological and genetic analyses. Verts and Carraway (2001, entire) and Wilson and Reeder (2005, p. 815) continue to support *N. m. atristriatus* as a recognized subspecies of *N. minimus.* Least chipmunks are currently recognized as belonging to the genus *Neotamias* (Patterson and Norris 2016, p. 248). There is currently no disagreement regarding the distinctiveness of the subspecies from other subspecies of least chipmunk, nor from the sympatric gray-footed chipmunk (*N. canipes*). The Peñasco least chipmunk is thus currently recognized as a valid subspecies, *N. minimus atristriatus* (Wilson and Reeder 2005 p. 815).

Habitat occupied by Peñasco least chipmunk varies by population between the Sacramento and White Mountains. In the Sacramento Mountains, Peñasco least chipmunk habitat use has generally been mature, open ponderosa pine forest savanna and adjacent valley meadows (Frey and Hays 2017, p. 1). Specimens of the Peñasco least chipmunk from the Sacramento Mountains were originally described from the yellow pine zone (= ponderosa pine) (Bailey 1913, p. 130) and within the transition zone from the juncture of yellow pines and junipers up to the edge of spruce-fir forest (Bailey 1931, p. 91). However, the Peñasco least chipmunk has not been detected in the Sacramento Mountains since 1966, so our understanding of habitat use and distribution in that area is limited to historical records and reports.

In the White Mountains, the Peñasco least chipmunk is associated with the high-elevation subalpine Thurber's fescue meadow biotic community (Frey and Hays 2017, p. 34). This habitat is distinctly different from the lower elevation, montane meadow grassland communities within mixed conifer and ponderosa pine forest zones (Dyer and Moffett 1999, entire; Dick-Peddie 1993, pp. 101 104), as would be found in the Sacramento Mountains. In the White Mountains, our understanding of subspecies occurrence and habitat use is informed by capture information as recent as 2018, but is still limited by few observational records of the subspecies.

Least chipmunks forage mainly on the ground or in shrubs (Hoffmeister 1986, p. 15). They eat a variety of seeds of shrubs, forbs, and some conifers, and other plant parts and fungi as their main food sources; they also feed on animal foods such as arthropods, carrion, and bird eggs (Bailey 1931, p. 91; Vaughn 1974, pp. 770–772; Reid 2006, p. 212). The least chipmunk does not develop additional fat deposits in the fall, but relies primarily on brief periods of activity to consume cached food for survival over the winter (Verts and Carraway 2001, p. 7), hibernating (in this case, overwintering with periods of both torpor and activity) in special underground chambers (Reid 2006, p. 212). Peñasco least chipmunks in the White Mountains likely forage primarily on the seeds and flowers of forbs, particularly species of Asteraceae (Frey and Hays 2017, p. 34). Bailey (1931, p. 91) observed the subspecies foraging on sunflower (*Helianthus* spp.) seeds along fencelines and on wheat (*Triticum* sp.) and oats (*Avena sativa*) at the edges of agricultural fields in the Sacramento Mountains. The diet also includes flowers and fruits of gooseberry (*Ribes* spp.) and wild strawberry (*Fragaria* spp.), pinyon (*Pinus edulis*) nuts, Gambel oak (*Quercus gambelii*) acorns, insects, and other items (Sullivan 1993, p. 3). Like other least chipmunks, the Peñasco least chipmunk likely has relatively low water requirements, which may allow it to exploit the drier conditions of open subalpine meadows (Frey and Hays 2017, p. 34).

Least chipmunk breeding takes place soon after emergence from the hibernation chambers (Reid 2006, p. 212). In spring, females typically produce one litter of four to five pups (Skryja 1974, p. 223), but the size of the litter can range from three to eight, with young being born in May or June (Reid 2006, p. 212). For Peñasco least chipmunks, young are thought to be born in mid- to late-summer, as half-grown juveniles were observed historically in early September in the Sacramento Mountains (Bailey 1931, p. 91). The average lifespan of least chipmunks overall is 0.7 years (Erlien and Tester 1984, p. 2), but individuals have been known to live up to 6 years (Reid 2006, p. 212).

Regulatory and Analytical Framework

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species is an ''endangered species'' or a ''threatened species.'' The Act defines an endangered species as a species that is ''in danger of extinction throughout all or a significant portion of its range,'' and a threatened species as a species that is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The Act requires that we determine whether any species is an ''endangered species'' or a ''threatened species'' because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the expected response by the species, and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term ''foreseeable future'' extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

Analytical Framework

The SSA report documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent a decision by the Service on whether the species should be proposed for listing as an endangered or threatened species under the Act. It does, however, provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies. The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found at Docket No. FWS–R2–ES–2020–0042 on *https://www.regulations.gov* and on the New Mexico Ecological Services Field Office website at *https://www.fws.gov/southwest/es/NewMexico/.*

To assess Peñasco least chipmunk viability, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency supports the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years), redundancy supports the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation supports the ability of the species to adapt over time to long-term changes in the environment (for example, climate changes). In general, the more resilient and redundant a species is and the more representation it has, the more likely it is to sustain populations over time, even under changing environmental conditions. Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We use this information to inform our regulatory decision.

Summary of Biological Status and Threats

In this discussion, we review the biological condition of the species and its resources, and the threats that influence the species' current and future condition, in order to assess the species' overall viability and the risks to that viability.

Summary of Analysis

To evaluate the current and future viability of the Peñasco least chipmunk, we assessed a range of conditions to allow us to consider the species' resiliency, representation, and redundancy. To maintain long-term viability, Peñasco least chipmunk requires multiple (redundancy) self-sustaining populations (resiliency) distributed across the landscape (representation). Maintaining representation in the form of genetic or ecological diversity is important to maintain the Peñasco least chipmunk's capacity to adapt to future environmental changes.

Current Condition of Peñasco Least Chipmunk

To analyze population-level resiliency, we identified and described the demographic and habitat conditions needed for resilient populations of Peñasco least chipmunk (Table 1). The demographic factors we analyzed include trap rate, population trends,

connectivity between populations, and number of subpopulations within populations. The habitat factors we analyzed include suitable habitat size to support population viability, habitat availability trends, and habitat. For each of these demographic and habitat factors, we characterized the condition (High, Moderate, Low, and Very Low/Extirpated) of each factor for each population (Table 1) to assess overall population resiliency. Where more data were available, we assigned scores (High = 1, Moderate = 0, Low = −1, and Very Low/Extirpated = −2) to each demographic and habitat factor and calculated an overall score for each population. We averaged all of the demographic and habitat condition category scores for each population to determine the overall resiliency score for that population (Service 2018, p. 64).

TABLE 1—POPULATION RESILIENCY CATEGORY DEFINITIONS FOR PEÑASCO LEAST CHIPMUNK

High (1)	Moderate (0)	Low (−1)	Very low/extirpated (−2)
• density or relative abundance is high. • population is increasing over time. • there is connectivity between the populations. • the number of subpopulations is high, spatially dispersed, and able to withstand or recover from stochastic events. • large, contiguous areas of increasing availability of suitable habitat with no detectable impacts from land use or management.	• density or relative abundance is moderate. • population is stable over time ... • populations are adjacent to each other, but unsuitable habitat precludes dispersal. • multiple subpopulations, allowing for some ability to withstand or recover from stochastic events. • areas of moderately sized habitat with some isolated habitat patches. • land use or management occurs but does not significantly limit chipmunk resources.	• density or relative abundance is low. • population is decreasing over time but still extant. • populations are extremely isolated from one another. • two subpopulations allow for some, but limited, ability to withstand or recover from stochastic events. • habitat occurs as small isolated patches. • land use or management reduces chipmunk resources.	• abundance decreases over time, such that population may be extirpated completely. • no connectivity with other populations exists. • if extant, no subpopulation structure occurs. • little to no suitable habitat is available. • if patches exist, they are small and isolated and will lead or have led to high probability of extirpation. • land use or management removes chipmunk resources.

The current condition of each demographic and habitat factor and the overall condition of each population of the Peñasco least chipmunk is displayed in Table 2. Historically, there were two known populations of Peñasco least chipmunk, the Sacramento Mountains population and the White Mountains population. Based on the demographic and habitat factors discussed in detail in the SSA (Service 2018, pp. 60–62), the Sacramento Mountains population is considered to be in Very Low/Extirpated overall condition. There have been no detections of Peñasco least chipmunk in the Sacramento Mountains since 1966, despite extensive survey effort, indicating that this population is likely extirpated. Even if it is still extant, it has no connectivity with other populations and likely no subpopulation structure (Service 2018, p. 11). The Sacramento Mountains have little to no remaining suitable habitat, and land use and management have severely decreased the condition of the resources upon which Peñasco least chipmunk depends.

For the White Mountains population, current habitat availability is moderate. Habitat has experienced a moderate change from historical conditions, and land use or management is not known to significantly reduce Peñasco least chipmunk resources. However, in terms of demographic factors, the White Mountains population has a low density and decreasing population trend. The population is the only remaining population of the subspecies, and the White Mountains population has no known subpopulation structure. Given these Low and Very Low condition demographic factors, the White Mountains population is in Low overall condition. The current resiliency of Peñasco least chipmunk is low to very low, with one population likely extirpated and the remaining population isolated with no subpopulation structure.

Maintaining representation in the form of genetic or ecological diversity is important to preserve the capacity of the Peñasco least chipmunk to adapt to future environmental changes. Because one of the two populations of Peñasco least chipmunk is likely extirpated, and the extant population persists in extremely low numbers, genetic diversity is likely extremely low. Peñasco least chipmunks in the White Mountains showed the lowest levels of within-population genetic variation out of nine least chipmunk populations in New Mexico, Arizona, and Colorado (Sullivan 1985, pp. 431–433). In addition, the subspecies has a historical distribution in two very different ecological settings: One in a high-elevation subalpine meadow zone in the White Mountains, and one in a lower elevation ponderosa pine zone in the Sacramento Mountains. Because the Sacramento Mountains may no longer support the subspecies, the Peñasco least chipmunk has already lost ecological representation across its range. Low genetic variation and the loss of one ecological setting results in low representation for the Peñasco least chipmunk (Service 2018, p. 65).

To be robust in the face of stochastic events, the Peñasco least chipmunk needs to have at least two resilient populations (Service 2018, p. 64). Historically there were only two known populations, one each in the White and Sacramento Mountains. Generally, the more populations a species has, and the wider the distribution of those populations, the more redundancy the species will exhibit. Redundancy reduces the risk that a large portion of the species' range will be negatively affected by a catastrophic natural or anthropogenic event (*e.g.,* wildfire) at a given point in time. Species (or subspecies) that are well-distributed across a wide geographic range are less susceptible to extinction and more likely to be viable than taxa that are confined to small areas where stochastic events are likely to affect all of the individuals simultaneously (Carroll et al. 2010, entire). Because one of the two populations of Peñasco least chipmunk is likely extirpated, the Peñasco least chipmunk currently lacks any redundancy (Service 2018, p. 65).

TABLE 2—CURRENT RESILIENCY OF THE PEÑASCO LEAST CHIPMUNK POPULATIONS

Population	Demographic factors				Habitat factors			Condition category
	Trap rate (number individuals/ trap hour) surrogate for density	Population trends	Population connectivity	Subpopulations within populations	Available suitable habitat to support population persistence	Habitat availability trends	Habitat condition with land use or management	
White Mountains	Low	Low	Very Low	Very Low	Moderate	Moderate	Moderate	Low.
	−1.5	−1	−2	−2	0	0	0	−1.
Sacramento Mountains	Very Low	Very Low	Very Low	Very Low	Very Low	Very Low	Very Low	Very Low.
	−2	−2	−2	−2	−2	−2	−2	−2.

See the SSA report for the complete current condition analysis for the Peñasco least chipmunk (Service 2018, pp. 54–65).

Risk Factors for Peñasco Least Chipmunk

We evaluated the past, current, and future stressors that affect the Peñasco least chipmunk's needs for long-term viability. Additionally, we evaluated several potential stressor sources that are not described here because the stressor source is predicted to have low impact on Peñasco least chipmunk viability. More information on these stressors, including interspecific competition, scientific collection, and climate change can be found in the SSA (Service 2018, pp. 50–52).

Stressors affecting the viability of the Peñasco least chipmunk include vegetation shifts, wildfire, forest encroachment, recreation, development, and land use (Factor A, disease (Factor C), nonnative species (Factors A and C), and small population size and lack of connectivity (Factor E). Considerations under Factor D are described below.

Peñasco least chipmunk habitat is afforded some protection under the Wilderness Act of 1964 (16 U.S.C. 1131–1136). Within the White Mountains, approximately 54 percent of the current range of the Peñasco least chipmunk is within the Lincoln National Forest White Mountain Wilderness Area. This designation limits management options and conservation efforts in designated wilderness areas to some degree. The Wilderness Act states that wilderness should be managed to preserve its natural conditions and yet remain untrammeled by man, and defines wilderness ''. . . as an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habituation . . .'' (16 U.S.C. 1131–1136). Within designated wilderness areas, no commercial activities are permitted, no permanent or temporary roads, no motorized equipment or any form of mechanical transport, and no structures are permitted within the area (16 U.S.C. 1131–1136). Habitat for the Peñasco least chipmunk appears to be relatively unaltered in the White Mountains Wilderness Area, except for the encroachment of trees into meadows (Service 2018, p. 35).

Additionally, the range of the Peñasco least chipmunk overlaps with designated Mexican spotted owl critical habitat; the management of that habitat for the Mexican spotted owl does allow for some level of grazing. This may result in changes to the plant community that do not adversely affect the prey base of the Mexican spotted owl but is detrimental to the specific plant community needs of the Peñasco least chipmunk (Service 2018, pp. 38–40).

Vegetation Shifts, Wildfire, and Forest Encroachment

Over the last ~150 years, land management practices have shifted the vegetative components of Peñasco least chipmunk habitat in the Sacramento Mountains, resulting in an overall lack of suitable habitat for the subspecies. The historically open, park-like stands of ponderosa pine forest that comprised Peñasco least chipmunk habitat have been replaced with high-density, small-diameter ponderosa pine, with encroaching Douglas fir (*Pseudotsuga menziesii*) and white fir (*Abies concolor*), and a lack of native grass meadow habitat (Service 2018, pp. 39–41).

These changes in vegetation composition (inclusion of less fire-tolerant species of trees such as Douglas fir and white fir) and structure (from low-density, large-diameter trees with few low branches to high-density, small-diameter trees with many low branches), coupled with the loss and conversion of native to nonnative grass meadows, alter the suitability of the habitat for the Peñasco least chipmunk in the Sacramento Mountains. Effective fire exclusion and suppression actions have also contributed to the changes in forest composition and structure and have resulted in the additional stressor source of altered fire regimes.

Forest encroachment into grasslands is occurring in both the Sacramento Mountains and in the White Mountains, although the causes for each are likely different. The causes for tree encroachment into meadows in the Sacramento Mountains is likely related to land use and land management practices, while the White Mountains are influenced by climatic events and successional encroachment processes. While some landscape restoration projects are planned (*i.e.,* the South Sacramento Forest Restoration Project) that may address some areas of meadow encroachment, no additional projects are planned within the historical range of the Peñasco least chipmunk either in the Sacramento Mountains or the White Mountains to control or limit tree encroachment into meadow habitat.

Recreation, Development, Land Use, and Land Management

Agricultural land use in the Sacramento Mountains appears to have shifted from cultivation in the early part of the 20th century to pasture use. This conversion likely affected a potentially significant food resource (*i.e.,* crops) for Peñasco least chipmunks in the Sacramento Mountains, specifically James Canyon (Service 2018, p. 42). It is likely that the high-quality, abundant food resource of wheat and oat fields drew Peñasco least chipmunks to the fields and roads where the animals were easily observable, as early records noted that Peñasco least chipmunks were especially abundant along rail fences, eating oats and wheat at field edges (Bailey 1931, p. 91). However, Peñasco least chipmunks were also abundant in the open, mature ponderosa pine forests (Bailey 1931, p. 91). Peñasco least chipmunks were noted as abundant throughout the Sacramento Mountains during the early 1900s, in both natural open habitat and near agricultural fields (Service 2018, p. 43). The change in land use from crop fields to pasture for livestock likely impacted Peñasco least chipmunks by decreasing the

availability of an abundant, high-quality food source. Grasslands in the bottom of canyons that are currently used for pasture or livestock are likely not usable by the Peñasco least chipmunk because the grasses are likely not tall enough to provide shelter and cover (Service 2018, p. 43).

U.S. Forest Service lands are managed for multiple uses. In the Sacramento Mountains, these uses currently include recreation, livestock grazing, and special use permits for a variety of actions. Recreational use includes camping, hiking, biking, and motorized vehicle use, among other activities. The historical role of livestock grazing and timber harvest are described in the SSA report (Service 2018, pp. 30–38) in terms of altering forest composition, structure, and fire regimes. However, grazing within the White Mountains Wilderness Allotment has been closed for 20 years and will remain closed (Williams, pers. comm. 2020).

The most significant recreational, development, and land use activities likely to affect the Peñasco least chipmunk in the White Mountains are related to the opening, operating, and maintaining of the Ski Apache Resort on Lookout Mountain (Service 2018, p. 44). Access roads to Ski Apache and the adjacent Buck Mountain were constructed in 1960 (Dyer and Moffett 1999, p. 451). The Resort opened in 1961 and has since been owned and operated by the Mescalero Apache Tribe (Ski Apache Resort 2018, entire). Ski Apache hosts both winter and summer recreation and occurs mostly on Forest Service land, operating under a Special Use permit issued by the Forest Service. Some of the activities also occur on Mescalero Apache Tribal lands. We address impacts and use of the area regardless of ownership. Summer use of Ski Apache Resort includes gondola rides, mountain biking, hiking, and zip-lining (Service 2018, p. 44).

In 2016, three Peñasco least chipmunks were observed on two survey trap lines on Lookout Mountain within Ski Apache Resort (Service 2018, p. 45). Lookout Mountain was selected to survey for several reasons, the main one being that it is located in the same large patch of subalpine meadow/tundra as that of Sierra Blanca Peak (Frey and Hays 2017, p. 9), where many historical records show that Peñasco least chipmunk were located. Two of the three Peñasco least chipmunk observations in 2016 were located just off the access road that leads to, and is in close proximity to, the Ski Apache zip line infrastructure. Vehicle use on the access road and human use for the zip line have the potential to be a stressor to the Peñasco least chipmunk due to vehicle strikes and disturbance from human presence.

Disease

A variety of pathogens and diseases have the potential to affect or have affected the Peñasco least chipmunk. Of these, sylvatic plague has the greatest likelihood of being a stressor to the subspecies (Service 2018, p. 46). The plague is caused by the bacteria *Yersinia pestis,* a highly virulent organism that can quickly cause lethal disease in susceptible mammals (Abbott and Rocke 2012, p. 7). Transmission of *Y. pestis* typically occurs through fleas, whereby fleas feed on infected hosts and move to new hosts. The plague is most commonly transmitted through fleas, but can also be transferred through inhalation, eating of infected animals, or through bites, scratches, or direct contact with infected animals, tissues, or fluids (Abbott and Rocke 2012, p. 18). Modes of transmission of *Y. pestis* in wildlife are likely similar, whereby flea transmission is most common, but other avenues may also occur.

Rodents are the major group of animals infected by *Y. pestis,* and some species may act as a reservoir or as an ''amplifying host'' for the organism (Abbott and Rocke 2012, p. 18). Generally, an amplifying host is a host in which disease agents, such as viruses or bacteria, increase in number (Abbott and Rocke 2012, p. 71); in this case, ''amplifying hosts'' also applies to hosts that are more uniformly susceptible to plague and undergo dramatic die-offs during outbreaks of plague (Abbott and Rocke 2012, p. 17). It is unknown if the plague has affected the Peñasco least chipmunk in the past, is currently affecting the subspecies now, or will in the future. However, there is supporting evidence that suggests that the plague has been and could be a significant stressor to the viability of Peñasco least chipmunk (Service 2018, p. 46).

The *Y. pestis* organism likely arrived in New Mexico at a time that is approximately coincident with observed declines of Peñasco least chipmunk populations (that is, beginning in the early 1950s through the 1960s). Chipmunks, in general, and least chipmunks more specifically, have been tested in the laboratory and are susceptible to the plague (Quan and Karman 1962, p. 128). Some epizootics caused by the plague have been observed in chipmunks and other ground squirrels (Smith et al. 2010, entire).

Nonnative Species

Feral hogs have become established as a nuisance species in New Mexico and elsewhere in the United States (USDA Wildlife Services 2010, entire). In New Mexico, feral hogs occur within Lincoln and Otero Counties. One of the last remaining locations in New Mexico with significant feral hog numbers is the Lincoln National Forest, including the 47,000-acre USFS White Mountain Wilderness Area (USDA 2019, pp. 112–114). This area includes the majority of the known locations of recent Peñasco least chipmunk occurrences (Service 2018, pp. 47–48). Feral hogs are voracious, flexible, and opportunistic omnivores (USDA Wildlife Services 2010, p. 6) and will persistently root in an area until the resources are depleted (USDA Wildlife Services 2010, p. 7).

Rooting can be extremely destructive to habitat. Feral hogs cause long-term degradation of native ecosystems and plant communities and spread of invasive weeds through their rooting behavior (USDA Wildlife Services 2010, pp. 10–12, 19–20). In addition to influencing habitat, feral hogs consume a multitude of vertebrate and invertebrate species (USDA Wildlife Services 2010, p. 13). In 2010, USDA Wildlife Services (2010, p. 14) reported that 90% of the small mammal species listed under the Act were in areas of expanding feral hog populations and documented how feral hogs could influence small mammal populations through heavy and persistent predatory activities. In addition to direct predation, feral hogs can strip an area of food resources and are competitors with native species for food and water resources (USDA Wildlife Services 2010 pp. 12–13). An active feral hog population control program in the White and Sacramento Mountains of New Mexico by the U.S. Department of Agriculture ended in 2018. It is anticipated that feral hog population in the White Mountains, including within the proposed Peñasco least chipmunk critical habitat, will exponentially increase as a result.

Additionally, feral hogs are susceptible to at least 30 viral and bacteriological diseases, 20 of which can be transmitted from non-human animals to humans, and at least 37 parasites have been identified (USDA Wildlife Services 2010, p. 15). Among the many diseases, pathogens, and parasites that feral hogs carry, in New Mexico feral hogs have tested positive for swine brucellosis and pseudorabies. While the ability of feral hogs to transfer disease to wildlife is not well-studied, pseudorabies virus is highly contagious,

and rodents are reported as being susceptible (USDA Wildlife Services 2010, p. 15). The prevalence of antibodies of *Y. pestis* was reported for 17 species of mammals from the western United States (Abbott and Rocke 2012, p. 26); of those, feral hogs had the highest prevalence rate at 74%. Although the sample size for this assessment was relatively low (18 out of 23 were positive), these data demonstrate that feral hogs in both the Sacramento Mountains and White Mountains could contribute to disease dynamics in the small mammal communities in these mountain ranges (Abbott and Rocke 2012, p. 26).

Impacts from feral hogs may include rooting, predation, spreading diseases and parasites, spreading invasive weed species, and competition with native species for water and food resources (Service 2018, p. 48). We lack specific data demonstrating overlap of feral hog occurrence with Peñasco least chipmunk occurrence; however, feral hogs are known to occur in the vicinity of Peñasco least chipmunk habitat or areas formerly known to be occupied by the Peñasco least chipmunk (Service 2018, p. 48).

Small Population Size and Lack of Connectivity

Compared to large populations, small populations are more vulnerable to extirpation from environmental, demographic, and genetic stochasticity (random natural occurrences), and unforeseen natural or unnatural catastrophes (Shaffer 1981, p. 131). Small populations are less able to recover from losses caused by random environmental changes (Shaffer and Stein 2000, pp. 308–310), such as fluctuations in reproduction (demographic stochasticity), sweeping losses from disease events, or changes in the frequency or severity of wildfires (environmental stochasticity).

Another type of random fluctuation, genetic stochasticity, results from: (1) Changes in gene frequencies due to the founder effect, which is the loss of genetic variation that occurs when a new population is established by a small number of individuals (Hedrick 2000, p. 226); (2) random fixation, or the complete loss of all but one allele at a locus (Hedrick 2000, p. 258); or (3) inbreeding depression, which is the loss of fitness or vigor due to mating among relatives (Hedrick 2000, p. 208). Additionally, small populations generally have an increased chance of genetic drift, or random changes in gene frequencies from generation to generation that can lead to a loss of variation, and inbreeding (Ellstrand and Elam 1993, p. 225). Allee effects, when there is a positive relationship between any component of individual fitness and either numbers or density of conspecifics (Stephens et al. 1999, p. 186), may also occur when a population is in decline (Dennis 1989, pp. 481–538). In a declining population, an extinction threshold or ''Allee threshold'' (Berec et al. 2007, pp. 185–191) may be crossed, in which adults in the population either cease to breed or the population becomes so compromised that breeding does not contribute to population growth. Allee effects typically fall into three broad categories (Courchamp et al. 1999, pp. 405–410): Lack of facilitation (including low mate detection and loss of breeding cues), demographic stochasticity, and loss of heterozygosity. Environmental stochasticity amplifies Allee effects (Dennis 1989, pp. 481–538; Dennis 2002, pp. 389–401). In Peñasco least chipmunks, random fixation and loss of heterozygosity have been observed (Sullivan 1985, pp. 431–433). The extinction risk for a subspecies represented by few small populations is magnified when those populations are isolated from one another, as is the case for the White Mountains and the Sacramento Mountains (Service 2018, p. 50).

It is suspected that the White Mountains and Sacramento Mountains populations may have been physically separated over a long time period with little to no genetic interchange, based on morphometric differences in collected specimens (Sullivan 1985, pp. 424–425). However, connectivity could play an important role as it relates to the overall viability to the subspecies if it is found to be present in the Sacramento Mountains in the future. Connectivity between White Mountain and Sacramento populations would contribute to the number of reproductively active individuals in a population; mitigate the genetic, demographic, and environmental effects of small population size; and recolonize extirpated areas (Service 2018, pp. 48–49). Additionally, the fewer the populations a species or subspecies has, the greater the risk of extinction. The combination of a very small population in the White Mountains, a likely extirpated population in the Sacramento Mountains, and no population connectivity between the mountain ranges, synergistically interacting with the other stressors and potential stressors described above, greatly increases extinction risk for the Peñasco least chipmunk (Service 2018, p. 50). Because of this combination, the stressor of small population size is included in our analysis of future subspecies viability.

Conservation Actions

The White Mountains Wilderness Area within the Lincoln National Forest is currently closed to grazing and will remain closed for the recovery and protection of the Peñasco least chipmunk (Williams pers. comm. 2020). As part of the SSA, we also developed multiple future scenarios to capture the range of uncertainties regarding future threats and the projected responses by the Peñasco least chipmunk. Our scenarios included a continuing conditions scenario, which incorporated the current risk factors continuing on the same trajectory that they are on now. We also evaluated an optimistic scenario and a scenario with increased stressors. Because we determined that the current condition of the Peñasco least chipmunk was consistent with an endangered species (see Determination of Species Status, below), we are not presenting the results of the future scenarios in this proposed rule. Please refer to the SSA report (Service 2018) for the full analysis of future scenarios.

Determination of Species Status

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of an endangered species or a threatened species. The Act defines an ''endangered species'' as a species that is ''in danger of extinction throughout all or a significant portion of its range,'' and a ''threatened species'' as a species that is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The Act requires that we determine whether a species meets the definition of ''endangered species'' or ''threatened species'' because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

Status Throughout All of Its Range

The range of the Peñasco least chipmunk once included the Sacramento and White Mountains in Lincoln and Otero Counties in New Mexico. The Peñasco least chipmunk is now found in only one isolated

population within the White Mountains. The one remaining population has low resiliency, meaning that the population has a low probability of remaining extant and withstanding periodic or stochastic disturbances under its current condition. Representation is low, with the loss of one of two populations within its historical range. Species-level genetic and ecological diversity is likely extremely low, as one population is likely extirpated and the remaining population is small. Redundancy has declined dramatically because the Peñasco least chipmunk remains on the landscape in only one population. As such, the Peñasco least chipmunk is at greater risk of extinction due to a catastrophic event when compared to historical conditions.

The Peñasco least chipmunk faces threats that put it at risk of extinction, including vegetation shifts, wildfire, forest encroachment, recreation, development, land use, and land management (Factor A, nonnative species (Factors A and C), disease (Factor C), and small population size and lack of connectivity (Factor E). We found small population size to be the main threat to the species currently. The current population is small and isolated, making it vulnerable to catastrophic or stochastic events. The risk of species extinction from a disease outbreak, large wildfire, or extreme drought is high. The one remaining population is currently small and isolated, and we expect it to remain so in the future. Neither ongoing management activities, nor existing regulatory mechanisms (Factor D), are sufficient to mitigate the threats facing the Peñasco least chipmunk.

Based on the assessment of the species' resiliency, representation, and redundancy, which are at levels that put the species at risk of extinction throughout its range, we find the Peñasco least chipmunk meets the definition of an endangered species. We find that a threatened species status is not appropriate for the Peñasco least chipmunk because it is currently at risk of extinction.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. We have determined that the Peñasco least chipmunk is in danger of extinction throughout all of its range and accordingly did not undertake an analysis of any significant portion of its range. Because the Peñasco least chipmunk warrants listing as endangered throughout all of its range, our determination is consistent with the decision in *Center for Biological Diversity* v. *Everson,* 2020 WL 437289 (D.D.C. Jan. 28, 2020), in which the court vacated the aspect of the Final Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (79 FR 37578; July 1, 2014) that provided the Services do not undertake an analysis of significant portions of a species' range if the species warrants listing as threatened throughout all of its range.

Determination of Status

Our review of the best available scientific and commercial information indicates that the Peñasco least chipmunk meets the definition of an endangered species. Therefore, we propose to list the Peñasco least chipmunk as an endangered species in accordance with sections 3(6) and 4(a)(1) of the Act.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness and conservation by Federal, State, Tribal, and local agencies, as well as private organizations and individuals. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species. The protection required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning consists of preparing draft and final recovery plans, beginning with the development of a recovery outline and making it available to the public within 30 days of a final listing determination. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan also identifies recovery criteria for review of when a species may be ready for reclassification from endangered to threatened (''downlisting'') or removal from protected status (''delisting''), and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outlines, draft recovery plans, and the final recovery plans will be available on our website (*https://www.fws.gov/endangered*), or from our New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.,* restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

If this species is listed, funding for recovery actions may be available from a variety of sources, including Federal budgets, State programs, and cost share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the State of New Mexico may be eligible for Federal funds to implement management actions that promote the protection or recovery of the Peñasco least chipmunk. Information on our

grant programs that are available to aid species recovery can be found at *https://www.fws.gov/grants.*

Although the Peñasco least chipmunk is only proposed for listing under the Act at this time, please let us know if you are interested in participating in recovery efforts for the species. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as an endangered or threatened species and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service.

Federal agency actions within the species' habitat that may require conference or consultation or both as described in the preceding paragraph may include, but are not limited to, management and any other landscape-altering activities on Federal lands including those administered by the U.S. Forest Service, issuance of section 404 Clean Water Act (33 U.S.C. 1251 *et seq.*) permits by the U.S. Army Corps of Engineers, and construction and maintenance of roads or highways by the Federal Highway Administration.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered wildlife. The prohibitions of section 9(a)(1) of the Act, codified at 50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the United States to take (which includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these) endangered wildlife within the United States or on the high seas. In addition, it is unlawful to import; export; deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of commercial activity; or sell or offer for sale in interstate or foreign commerce any species listed as an endangered species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to employees of the Service, the National Marine Fisheries Service, other Federal land management agencies, and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22. With regard to endangered wildlife, a permit may be issued for the following purposes: For scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities. There are also certain statutory exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a proposed listing on proposed and ongoing activities within the range of the species proposed for listing. Based on the best available information, the following actions are unlikely to result in a violation of section 9, if these activities are carried out in accordance with existing regulations and permit requirements; this list is not comprehensive:

(1) Winter activities at the ski resort;

(2) Hiking on established trails; and

(3) Routine road maintenance.

Based on the best available information, the following activities may potentially result in a violation of section 9 of the Act if they are not authorized in accordance with applicable law; this list is not comprehensive:

Activities that the Service believes could potentially harm the Peñasco least chipmunk and result in ''take'' include, but are not limited to:

(1) Unauthorized handling or collection of the species;

(2) Creation and modification of trails;

(3) Ski resort maintenance during summer months; and

(4) Organized mountain bike races.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

II. Proposed Critical Habitat Designation

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.,* range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals). Additionally, our regulations at 50 CFR 424.02 define the word ''habitat'' as follows: ''for the purposes of designating critical habitat only, habitat is the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species.''

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies

ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. The designation also does not allow the government or public to access private lands, nor does designation require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the Federal agency would be required to consult with the Service under section 7(a)(2) of the Act. However, even if the Service were to conclude that the proposed activity would result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement ''reasonable and prudent alternatives'' to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features that occur in specific occupied areas, we focus on the specific features that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will consider unoccupied areas to be essential only where a critical habitat designation limited to geographical areas occupied by the species would be inadequate to ensure the conservation of the species. In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the SSA report and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in section 9 of the Act. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, the Secretary shall designate critical habitat at the time the species is determined to be an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that the Secretary may, but is not required to, determine that a designation would not be prudent in the following circumstances:

(i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

(iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for

a species occurring primarily outside the jurisdiction of the United States;

(iv) No areas meet the definition of critical habitat; or

(v) The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.

As discussed in the SSA Report (Service 2018, p. 50), there is currently no imminent threat of collection or vandalism identified under Factor B for this species, and identification and mapping of critical habitat is not expected to initiate any such threat. In our SSA and the above proposed listing determination for the Peñasco least chipmunk, we determined that the present or threatened destruction, modification, or curtailment of habitat or range is a threat to the Peñasco least chipmunk and that those threats in some way can be addressed by section 7(a)(2) consultation measures. The species occurs wholly in the jurisdiction of the United States and we are able to identify areas that meet the definition of critical habitat. Therefore, because none of the circumstances enumerated in our regulations at 50 CFR 424.12(a)(1) have been met and because there are no other circumstances the Secretary has identified for which this designation of critical habitat would be not prudent, we have determined that the designation of critical habitat is prudent for the Peñasco least chipmunk.

Critical Habitat Determinability

Having determined that designation is prudent, under section 4(a)(3) of the Act we must find whether critical habitat for the Peñasco least chipmunk is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Data sufficient to perform required analyses are lacking, or

(ii) The biological needs of the species are not sufficiently well known to identify any area that meets the definition of ''critical habitat.''

When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

We reviewed the available information pertaining to the biological needs of the species and habitat characteristics where the species is located. This and other information represent the best scientific data available and led us to conclude that the designation of critical habitat is determinable for the Peñasco least chipmunk.

Physical or Biological Features Essential to the Conservation of the Species

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas we will designate as critical habitat from within the geographical area occupied by the species at the time of listing, we consider the physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection. The regulations at 50 CFR 424.02 define ''physical or biological features essential to the conservation of the species'' as the features that occur in specific areas and that are essential to support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

For example, physical features essential to the conservation of the species might include gravel of a particular size required for spawning, alkaline soil for seed germination, protective cover for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic essential to support the life history of the species.

In considering whether features are essential to the conservation of the species, the Service may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance.

We derive the specific physical or biological features essential for the Peñasco least chipmunk from studies of the species' habitat, ecology, and life history. Peñasco least chipmunk habitat is characterized as high-elevation subalpine habitat in the White Mountains, composed of Thurber's fescue (*Festuca thurberi*) meadows, where rock outcrops or talus are present (Frey and Hays 2017, p. 34). Subalpine Thurber's fescue meadow/grassland community occurs within openings in high-elevation spruce-fir forest and above tree line in the glacial cirque. These Thurber's fescue grasslands contain tall bunchgrasses, including Thurber's fescue, sedges, flowering forbs, and shrubs (Frey and Hays 2017, pp. 2–3). Bunchgrasses and forbs provide cover from predators. The elevation of subalpine habitat in the White Mountains ranges from 2,500 m to 3,597 m (8,200 ft to 11,800 ft). Forage for Peñasco least chipmunks consists of the seeds and flowers of forbs, particularly species of Asteraceae (Frey and Hays 2017, p. 34). The diet also includes flowers and fruits of gooseberry (*Ribes* spp.) and wild strawberry (*Fragaria* spp.), pinyon (*Pinus edulis*) nuts, Gambel oak (*Quercus gambelii*) acorns, insects, and other items (Sullivan 1993, p. 3).

The Peñasco least chipmunk is likely extirpated from the Sacramento Mountains, and the habitat no longer supports the species; therefore, we did not include the Sacramento Mountains in our critical habitat designation or analysis of physical or biological features. The habitat occupied by Peñasco least chipmunks is different for the subspecies in the White Mountains versus the Sacramento Mountains. A full description of the needs of individuals, populations, and the species is available in the SSA report.

Summary of Essential Physical or Biological Features

In summary, we derive the specific physical or biological features essential to the conservation of Peñasco least chipmunk from studies of this species' habitat, ecology, and life history as described in the Background portion of this rule, above. Additional information can be found in the SSA Report (Service 2018) available on the internet at *https://www.regulations.gov* under Docket No. FWS–R2–ES–2020–0042. We have determined that the following physical or biological features are

essential to the conservation of the Peñasco least chipmunk:

(1) Areas within the White Mountains:

(a) Between elevations of 2,500–3,597 meters (8,200–11,800 feet),

(b) That contain rock outcrops or talus, and

(c) That are subalpine Thurber's fescue meadow/grassland communities found within openings of spruce-fir forest, above tree line in the glacial cirque, containing tall bunchgrasses, including Thurber's fescue, sedges, flowering forbs, and shrubs.

(2) Forage, including species of Asteraceae, flowers and fruits of gooseberry (*Ribes* spp), wild strawberry (*Fragaria* spp.), pinyon (*Pinus edulis*) nuts, Gambel oak (*Quercus gambelii*) acorns, and insects.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features that are essential to the conservation of the species and which may require special management considerations or protection. The features essential to the conservation of the Peñasco least chipmunk may require special management considerations or protections to reduce the following threats: (1) Forest encroachment due to altered fire regime; (2) recreation, development, land use, and land management; (3) destruction of habitat by nonnative species (feral hogs); and (4) disease.

Management activities that could ameliorate these threats include, but are not limited to: Prescribed fire and forest management to maintain the open subalpine meadows with native vegetation; continued closure of the encompassing Forest Service allotment to grazing; disease management; and feral hog management.

In summary, we find that the occupied areas we are proposing to designate as critical habitat contain the physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection. Special management considerations or protection may be required of Federal agencies that may take actions in designated critical habitat in order to eliminate, or to reduce to negligible levels, the threats affecting the physical and biological features of the unit.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the subspecies to be considered for designation as critical habitat.

We are proposing to designate critical habitat in areas within the geographical area that was occupied by the species at the time of listing. We also are proposing to designate specific areas outside the geographical area that was occupied by the species at the time of listing because we have determined that a designation limited to occupied areas would be inadequate to ensure the conservation of the species. Furthermore, we conclude there is a reasonable certainty that the unoccupied area will contribute to the conservation of the species and contains one or more of those physical or biological features essential to the conservation of the species. We have also determined that the unoccupied area falls within the regulatory definition of ''habitat'' at 50 CFR 424.02.

The current distribution of the Peñasco least chipmunk is much reduced from its historical range. We anticipate that recovery will require continued protection of the existing population and its habitat, and potentially reintroduction of Peñasco least chipmunk into historically occupied areas in the Sacramento Mountains, ensuring there are adequate numbers in both of the two historical locations. This strategy will help to ensure that catastrophic events, such as the effects of fire, cannot simultaneously affect all known populations. Rangewide recovery considerations, such as maintaining existing genetic diversity and striving for connectivity within portions of the species' current range to allow adequate movement to assure genetic diversity, were considered in formulating this proposed critical habitat.

Sources of data for this proposed critical habitat designation include multiple reports and discussions with species experts, including New Mexico Department of Game and Fish (see SSA report). We have also reviewed available information that pertains to the habitat requirements of this species. Sources of information on habitat requirements include studies conducted at occupied sites and published in peer-reviewed articles and agency reports, and data collected during monitoring efforts.

Areas Occupied at the Time of Listing

The proposed critical habitat designation does not include all areas known to have been occupied by the Peñasco least chipmunk historically; instead, it focuses on the currently occupied area within the historical range that retains the necessary physical or biological features that will allow for the maintenance and expansion of the existing population. We are not proposing any critical habitat in the Sacramento Mountains because we conclude that the area no longer has the ability to support the species.

We delineated occupied and unoccupied critical habitat unit boundaries using the following geospatial methodology:

(1) First, we compiled all known Peñasco least chipmunk observations (*i.e.,* captures) in the White Mountains from 1931–2018, mapped their locations, and eliminated duplicate records. This process provided a bounded estimate of the subspecies' known range.

(2) Using existing U.S. Forest Service vegetation mapping for the Lincoln National Forest, we identified and exported all vegetation classes that coincided with the known observations. The vegetation classes included (1) mixed grass-forb and (2) Gambel oak, which are consistent with physical habitat descriptions for the subspecies in the White Mountains. Vegetation characterized by meadow/grassland community within openings of spruce-fir forest are one of the physical or biological features essential to the conservation of the Peñasco least chipmunk.

(3) Next, we determined the elevation interval in which the White Mountains population has been observed. We used that interval to further define the extent of the grass-forb and Gambel oak vegetation classes. Although the upper limit of the occupied interval did not extend to the highest points within the critical habitat units, we assumed that the Peñasco least chipmunk is capable of occupying these higher elevations as the difference (roughly 100 meters or 330 feet) is not substantial. Therefore, we extended the interval to include the highest peaks within each unit. This process resulted in a basic model of potential habitat.

(4) Finally, we refined the output of step 3 (above) through aerial photo interpretation in order to correct for the

coarse resolution imparted by the vegetation mapping. Essentially, this process allows the model to be more accurate and applicable at a finer scale.

The critical habitat area was mapped using ArcMap version 10.6.1 (Environmental Systems Research Institute, Inc. 2018), a Geographic Information Systems (GIS) computer application. We identified two critical habitat units in the White Mountains known to be occupied by Peñasco least chipmunks as of 2019. We identified a third critical habitat unit between these two occupied units that has the physical and biological features required by the Peñasco least chipmunk but has not yet been surveyed for occupancy.

We have determined that a designation limited to the two occupied units would be inadequate to ensure the conservation of the subspecies because there is only one remaining population, which has low resiliency and no redundancy, making it vulnerable to catastrophic or stochastic events and further compounding the risks of small population sizes. The risk of subspecies extinction from a disease outbreak, large wildfire, or extreme drought is high. A low-resiliency single population provides no redundancy for the species, and a single catastrophic event could cause species extinction.

Areas Outside the Geographic Area Occupied at the Time of Listing

Because we have determined known occupied areas alone are not adequate for the conservation of the species, we have evaluated whether any unoccupied areas are essential for the conservation of the species. We are proposing as critical habitat one unit situated between the two known occupied units that is currently considered unoccupied because of a lack of survey data. We have determined that it is essential for the conservation of the species as it provides important connectivity between the two occupied units and could support population expansion into this area, if not populated already. Limited functional habitat exists within the White Mountains, and connectivity between known locations of Peñasco least chipmunk is essential to the conservation of the subspecies because it provides more of the physical or biological features upon which the subspecies depends for feeding, sheltering and reproducing. This unit provides a link between the two known occupied units. The unit has all of the physical or biological features necessary for the conservation of the Peñasco least chipmunk; it's in the White Mountains, at elevations of 2,500–3,597 meters (8,200–11,800 feet), with rock outcrop, and the vegetation is characterized by meadow/grassland community within openings of spruce-fir forests.

Small, isolated populations of animals with restricted movement and low genetic diversity are more likely to become extirpated than larger populations with greater movement between sub-populations within them and greater genetic diversity. Due to the small population sizes found within the two occupied units, either or both could become extirpated from local catastrophic events or the deleterious effects of genetic bottlenecking resulting from inbreeding that reduces the viability of a population, if they had no connectivity. The unoccupied unit in between these two known occupied units has never been surveyed for Peñasco least chipmunk, due to its remoteness and difficulty to access. It does, however, maintain all the physical or biological features of the occupied areas. We analyzed this using remote GIS vegetation and landscape feature data from the U.S. Forest Service and the U.S. Department of Agriculture National Agricultural Imagery Program. It is possible the Peñasco least chipmunk is present in the unoccupied unit; however, with no confirmed records, we are treating it as unoccupied for purposes of this designation. Physical or biological features essential to the conservation of Peñasco least chipmunk are areas within the White Mountains, between elevations of 2,500–3,597 meters (8,200–11,800 feet), that contain rock outcrops, and vegetation associated with meadow/grassland communities within openings of spruce-fir forests. This unoccupied unit provides all of the physical or biological features to allow for breeding, feeding, sheltering and dispersal of Peñasco least chipmunk. The unoccupied unit is within the White Mountains with varying elevations between 2,500–3,597 meters (8,200–11,800 feet), and rock outcrops, and approximately 44 percent of this unit is classified as grass-forb mix or Gambel oak. We find that this unit currently contains the resources and conditions necessary to support multiple life processes (*i.e.,* breeding, feeding, sheltering and dispersal) of the Peñasco least chipmunk.

General Information on the Maps of the Proposed Critical Habitat Designation

The proposed critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document under Proposed Regulation Promulgation. We include more detailed information on the boundaries of the proposed critical habitat designation in the discussion of individual units, below. We will make the coordinates or plot points or both on which each map is based available to the public on *https://www.regulations.gov* under Docket No. FWS–R2–ES–2020–0042.

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by pavement, buildings, and other structures because such lands lack physical or biological features necessary for the Peñasco least chipmunk. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation under the Act with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

We propose to designate as critical habitat lands that we have determined are occupied at the time of listing (*i.e.,* currently known to be occupied) and that contain one or more of the physical or biological features essential to support life-history processes of the species. We have determined that the known occupied areas are inadequate to ensure the conservation of the species. Therefore, we have also identified, and propose for designation as critical habitat, unoccupied areas that are essential for the conservation of the species. For those unoccupied areas, we have determined that it is reasonably certain that the unoccupied areas will contribute to the conservation of the species and contain one or more of the physical or biological features that are essential to the conservation of the species. We have also determined that the unoccupied areas fall within the regulatory definition of ''habitat'' at 50 CFR 424.02.

Proposed Critical Habitat Designation

We are proposing to designate approximately 2,660 hectares (6,574 acres) in three units in New Mexico as critical habitat for the Peñasco least chipmunk. The critical habitat areas we describe below constitute our current best assessment of areas that meet the

definition of critical habitat for the Peñasco least chipmunk. The three distinct units we propose as critical habitat are: (1) Nogal Peak, (2) Crest Trail, and (3) Sierra Blanca. Two of the units are currently occupied by the subspecies and the occupancy status by the subspecies of one of the units is currently unknown but contains the physical and biological features and is essential to the conservation of the subspecies. All units proposed may require special management considerations or protection to address stressors associated with managing prescribed and wildland fire, road management and maintenance, development and use around Ski Apache Resort, feral hog management, and plague management. Table 4, below, shows the proposed units' names, land ownership, and approximate area. Land ownership is predominantly Federal. Unit 3 consists of Federal and Tribal lands.

TABLE 4—PROPOSED CRITICAL HABITAT UNITS FOR THE PEÑASCO LEAST CHIPMUNK

Critical habitat unit	Occupied at the time of listing	Ownership	Area of unit, in hectares, (acres)	Area of overlap with Mexican spotted owl designated critical habitat	Overlap with Lincoln National Forest wilderness area
Unit 1. Nogal Peak	Yes	Federal	393 (972)	100%, 393 hectares, 972 acres.	100%, 393 hectares, 972 acres.
Unit 2. Crest Trail	No	Federal	910 (2,249)	89.5%, 814 hectares, 2,011 acres.	100%, 910 hectares, 2,249 acres.
Unit 3. Sierra Blanca	Yes	Federal; Tribal	1,357 (3,353)	56.9%, 772 hectares, 1,098 acres.	17.2%, 234 hectares, 577 acres.
Total	2,660 (6,574)				

Unit 1: Nogal Peak, New Mexico

Unit 1 consists of approximately 393 hectares (972 acres) of subalpine habitat within the Lincoln National Forest Wilderness Area and is occupied. This unit is within the critical habitat designation in Lincoln County, New Mexico, for the Mexican spotted owl, which is listed as a threatened species under the Act. Elevation ranges approximately 2,570–3,031 m (8,432–9,944 ft) above mean sea level (MSL). Mean elevation in Unit 1 is 2,772 m (9,094 ft) with a standard deviation of 70 meters (230 ft). Approximately 79 percent of Unit 1 is classified as grass-forb mix or Gambel oak. Unit 1 contains all the physical or biological features that are essential to the conservation of the species; it is within the White Mountains, between elevations of 2,500–3,597 meters (8,200–11,800 feet), with rock outcrops and talus, and 79 percent of the unit is characterized by meadow/grassland community within opening of spruce-fir forests. This unit is federally owned by the U.S. Forest Service; it is 100 percent within the Lincoln National Forest Wilderness Area. Threats to the unit include forest encroachment into the open meadows, grazing, and destruction of habitat by nonnative species (feral hogs); these can be ameliorated through prescribed fire and forest management to maintain the open subalpine meadows with native vegetation, continued closure of the encompassing Forest Service allotment to grazing, and feral hog management.

Unit 2: Crest Trail, New Mexico

Unit 2 consists of approximately 910 hectares (2,249 acres) of subalpine habitat. Although it is considered unoccupied, Unit 2 contains the physical or biological features essential to the conservation of the species and serves as a connectivity corridor between Unit 1 and Unit 3. Due to the location between Units 1 and 3 and the overall suitability of the habitat, it is possible the Peñasco least chipmunk is present in the unoccupied unit; however, with no confirmed records, we are treating it as unoccupied for purposes of this designation. Approximately 89 percent of this unit is within the critical habitat designation for the Mexican spotted owl in Lincoln County, New Mexico. This unit is federally owned by the U.S. Forest Service and is 100 percent within the Lincoln National Forest Wilderness Area. Elevation ranges approximately 2,621–3,292 m (8,599–10,800 ft) above MSL. Mean elevation in Unit 2 is 2,876 m (9,436 ft) with a standard deviation of 139 meters (456 ft). Approximately 44 percent of Unit 2 is classified as grass-forb mix or Gambel oak. Unit 2 contains all the physical or biological features that are essential to the conservation of the species; it is within the White Mountains, between elevations of 2,500–3,597 meters (8,200–11,800 feet), with rock outcrops and talus, and 44 percent of the unit is characterized by meadow/grassland community within openings of spruce-fir forests.

Unit 3: Sierra Blanca, New Mexico

Unit 3 includes approximately 1,357 hectares (3,353 acres) of subalpine habitat, contains the physical or biological features that are essential to the conservation of the species, and is known to be occupied. The proportion of Unit 3 located on Mescalero Tribal lands is approximately 581 hectares (1,435 acres) or 43 percent. The unit contains the Ski Apache Resort; the land is owned by the U.S. Forest Service, but managed under a permit by the Mescalero Apache Tribe. The resort occupies 543 hectares (1,431 acres), 40 percent of the unit. The remaining 17 percent is U.S. Forest Service land, part of the Lincoln National Forest Wilderness Area. Approximately 57 percent of the unit is also Mexican spotted owl critical habitat in Lincoln and Otero Counties, New Mexico. Elevation ranges approximately 2,763–3,638 m (9,065–11,936 ft) above MSL. Mean elevation in Unit 3 is 3,219 m (10,561 ft) with a standard deviation of 145 m (476 ft). Approximately 52 percent of Unit 3 is classified as grass-forb mix or Gambel oak. Unit 3 contains all the physical or biological features that are essential to the conservation of the species; it is within the White Mountains, between elevations of 2,500–3,597 meters (8,200–11,800 feet), with rock outcrops and talus, and 52 percent of the unit is characterized by meadow/grassland community within openings of spruce-fir forests. Threats to the unit include forest encroachment into the open meadows, recreation, development, land use, and land management, grazing, and destruction of habitat by nonnative species (feral hogs); these can be ameliorated through prescribed fire and forest management to maintain the open subalpine meadows with native vegetation, continued closure of the encompassing

Forest Service allotment to grazing, and feral hog management.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action that is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

We published a final rule revising the definition of destruction or adverse modification on August 27, 2019 (84 FR 44976). Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local, or private lands that are not federally funded or authorized, do not require section 7 consultation.

Compliance with the requirements of section 7(a)(2) is documented through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Service Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 set forth requirements for Federal agencies to reinitiate formal consultation on previously reviewed actions. These requirements apply when the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law) and, subsequent to the previous consultation, we have listed a new species or designated critical habitat that may be affected by the Federal action, or the action has been modified in a manner that affects the species or critical habitat in a way not considered in the previous consultation. In such situations, Federal agencies sometimes may need to request reinitiation of consultation with us, but the regulations also specify some exceptions to the requirement to reinitiate consultation on specific land management plans after subsequently listing a new species or designating new critical habitat. See the regulations for a description of those exceptions.

Application of the ''Destruction or Adverse Modification'' Standard

The key factor related to the destruction or adverse modification determination is whether implementation of the proposed Federal action directly or indirectly alters the designated critical habitat in a way that appreciably diminishes the value of the critical habitat as a whole for the conservation of the listed species. As discussed above, the role of critical habitat is to support physical or biological features essential to the conservation of a listed species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may violate section 7(a)(2) of the Act by destroying or adversely modifying such habitat, or that may be affected by such designation.

Activities that the Services may, during a consultation under section 7(a)(2) of the Act, find are likely to destroy or adversely modify critical habitat include, but are not limited to:

(1) Management of the Ski Apache Resort to include maintaining ski runs or recreational paths that are clear of trees, maintaining existing roads through grading, and maintaining facilities that include structures and features for ski lifts, the gondola, and zip line;

(2) Forest management activities, including timber harvest, prescribed fire, etc.;

(3) Road maintenance activities; and

(4) Recreation site maintenance and development of new sites, including trails.

Exemptions

Application of Section 4(a)(3) of the Act

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan [INRMP] prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.'' There are no Department of Defense (DoD) lands with a completed INRMP within the proposed critical habitat designation.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying

any particular area as critical habitat. The Secretary may exclude an area from critical habitat if we determine that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless we determine, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face and the legislative history are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

We describe below the process that we undertook for taking into consideration each category of impacts and our analyses of the relevant impacts.

Lands owned by the Mescalero Apache Tribe are included in this critical habitat proposal. We are considering these lands for exclusion from critical habitat (see Exclusions, below). However, the final decision on whether to exclude any areas will be based on the best scientific data available at the time of the final designation, including information we obtain during the comment period and information about the economic impacts of the designation. Accordingly, we have prepared a draft economic analysis (DEA) concerning the proposed critical habitat designation, which is available for review and comment (see **ADDRESSES**, above).

Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific critical habitat designation may have on restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species. The probable economic impact of a proposed critical habitat designation is analyzed by comparing scenarios both ''with critical habitat'' and ''without critical habitat.'' The ''without critical habitat'' scenario represents the baseline for the analysis, which includes the existing regulatory and socio-economic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat (*e.g.,* under the Federal listing as well as other Federal, State, and local regulations). The baseline, therefore, represents the costs of all efforts attributable to the listing of the species under the Act (*i.e.,* conservation of the species and its habitat incurred regardless of whether critical habitat is designated). The ''with critical habitat'' scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts would not be expected without the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs. These are the costs we use when evaluating the benefits of inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct a discretionary section 4(b)(2) exclusion analysis.

For this particular designation, we developed an incremental effects memorandum (IEM) considering the probable incremental economic impacts that may result from this proposed designation of critical habitat. The information contained in our IEM was then used to develop a screening analysis of the probable effects of the designation of critical habitat for the Peñasco least chipmunk (Industrial Economics, Incorporated (IEc) 2019).

We began by conducting a screening analysis of the proposed designation of critical habitat in order to focus our analysis on the key factors that are likely to result in incremental economic impacts. The purpose of the screening analysis is to filter out the geographic areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur incremental economic impacts. In particular, the screening analysis considers baseline costs (*i.e.,* absent critical habitat designation) and includes probable economic impacts where land and water use may be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species. Ultimately, the screening analysis allows us to focus our analysis on evaluating the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation. If there are any unoccupied units in the proposed critical habitat designation, the screening analysis assesses whether any additional management or conservation efforts may incur incremental economic impacts. This screening analysis, combined with the information contained in our IEM, is what we consider our draft economic analysis (DEA) of the proposed critical habitat designation for the Peñasco least chipmunk and is summarized in the narrative below.

Executive Orders (E.O.s) 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consistent with the E.O. regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly affected entities, where practicable and reasonable. If sufficient data are available, we assess to the extent practicable the probable impacts to both directly and indirectly affected entities. As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely affected by the critical habitat designation.

In our evaluation of the probable incremental economic impacts that may result from the proposed designation of critical habitat for the Peñasco least chipmunk, first we identified, in the IEM dated July 2019, probable incremental economic impacts associated with certain activities. These activities include (1) management of the Ski Apache Resort, to include maintaining: ski runs or recreational paths that are clear of trees, existing roads through grading, and facilities that include structures and features for ski lifts, the gondola, and zip line (permitted by the U.S. Forest Service); and (2) road management, maintenance, and new construction (U.S. Forest Service). We considered each industry or category individually. Additionally, we considered whether their activities have any Federal involvement. Critical habitat designation generally will not affect activities that do not have any Federal involvement; under the Act, designation of critical habitat affects only activities conducted, funded, permitted, or authorized by Federal agencies. If we list the species, in areas where the Peñasco least chipmunk is present, Federal agencies would be required to consult with the Service under section 7 of the Act on activities they fund, permit, or implement that may affect the species. If, when we list the species, we also finalize this proposed critical habitat designation, consultations to avoid the destruction or

adverse modification of critical habitat would be incorporated into the existing consultation process.

In our IEM, we attempted to clarify the distinction between the effects that would result from the species being listed and those attributable to the critical habitat designation (*i.e.,* the difference between the jeopardy and adverse modification standards) for the Peñasco least chipmunk's critical habitat. Because the designation of critical habitat for the Peñasco least chipmunk was proposed concurrently with the listing, it has been our experience that it is more difficult to discern which conservation efforts are attributable to the species being listed and those which will result solely from the designation of critical habitat. However, the following specific circumstances in this case help to inform our evaluation: (1) The essential physical and biological features identified for critical habitat are the same features essential for the life requisites of the species, and (2) any actions that would result in sufficient harm or harassment to constitute jeopardy to the Peñasco least chipmunk would also likely adversely affect the essential physical and biological features of critical habitat. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this proposed designation of critical habitat.

We have identified and delineated three proposed critical habitat units, totaling approximately 2,660 hectares (6,574 acres), two of which are currently occupied by the Peñasco least chipmunk and one that is unoccupied but essential to the conservation of the subspecies. The two occupied units (Units 1 and 3) are considered occupied year-round for the purposes of consultation based on current survey data. In the occupied area, any actions that may affect the species or its habitat would also affect designated critical habitat, and it is unlikely that any additional conservation efforts would be recommended to address the adverse modification standard over and above those recommended as necessary to avoid jeopardizing the continued existence of the Peñasco least chipmunk. While this additional analysis in the occupied critical habitat would require time and resources by both the Federal action agency and the Service, it is believed that, in most circumstances, these costs would predominantly be administrative in nature and would not be significant.

One of the proposed critical habitat units (Unit 2) is unoccupied. No surveys for Peñasco least chipmunk have been done in the unit. We assume any costs associated with this unit would be attributable to critical habitat rather than the listing of the species.

Federal agencies are the entities most likely to incur incremental costs associated with designating critical habitat, due to section 7 requirements. We do not anticipate any costs to State or local agencies, or impacts on property values related to the public's perception of additional regulation, because we do not expect the designation of critical habitat for the Peñasco least chipmunk to result in changes to New Mexico local regulations (IEc 2019, p. 16).

At most, no more than two Peñasco least chipmunk consultations (two informal) are anticipated in any given year (IEc 2019, p. 8). Most of the proposed critical habitat occurs within Lincoln National Forest Wilderness Area, where little work and no commercial activities occur; it is also existing Mexican spotted owl critical habitat. In the past 3 years there have not been any section 7 consultations in this area. The estimated incremental costs of the total critical habitat designation for the Peñasco least chipmunk in the first year are unlikely to exceed $5,000 (2019 dollars) (IEc 2019, p. 9). Thus, the annual administrative burden would not reach $100 million.

As we stated earlier, we are soliciting data and comments from the public on the DEA and all aspects of the proposed rule and our required determinations. During the development of a final designation, we will consider the information presented in the DEA and any additional information on economic impacts received during the public comment period to determine whether any specific areas should be excluded from the final critical habitat designation under authority of section 4(b)(2) and our implementing regulations at 50 CFR 17.90. If we receive credible information regarding the existence of a meaningful economic impact or other relevant impact supporting a benefit of exclusion, we will conduct an exclusion analysis for the relevant area or areas. We may also otherwise decide to exercise the discretion to evaluate any other areas for possible exclusion. In addition, if we do conduct an exclusion analysis and we have received any information from experts in, or sources with firsthand knowledge about, impacts that are outside the scope of the Service's expertise, for purposes of the exclusion analysis we will assign weights to those impacts consistent with the information from experts in, or sources with firsthand knowledge about, those impacts, unless we have rebutting information. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

Consideration of National Security Impacts or Homeland Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands where a national security impact might exist. In preparing this proposal, we have determined that the lands adjacent to the proposed designation of critical habitat for Peñasco least chipmunk are not owned or managed by the Department of Defense or Department of Homeland Security. We anticipate no impact on national security. However, during the development of a final designation we will consider any additional information received through the public comment period on the impacts of the proposed designation on national security or homeland security to determine whether any specific areas should be excluded from the final critical habitat designation under authority of section 4(b)(2) and our implementing regulations at 50 CFR 17.90.

Consideration of Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors including whether there are permitted conservation plans covering the species in the area such as HCPs, safe harbor agreements, or candidate conservation agreements with assurances, or whether there are nonpermitted conservation agreements and partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at the existence of Tribal conservation plans and partnerships and consider the government-to-government relationship of the United States with Tribal entities. We also consider any social impacts that might occur because of the designation.

There are currently no active HCPs or other management plans for the Peñasco least chipmunk. We anticipate no impact on current partnerships or HCPs from this proposed critical habitat designation.

Tribal Lands

Several Executive Orders, Secretarial Orders, and policies concern working with Tribes. These guidance documents generally confirm our trust responsibilities to Tribes, recognize that Tribes have sovereign authority to control Tribal lands, emphasize the importance of developing partnerships with Tribal governments, and direct the Service to consult with Tribes on a government-to-government basis.

A joint Secretarial Order that applies to both the Service and the National Marine Fisheries Service (NMFS), Secretarial Order 3206, *American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* (June 5, 1997) (S.O. 3206), is the most comprehensive of the various guidance documents related to Tribal relationships and Act implementation, and it provides the most detail directly relevant to the designation of critical habitat. In addition to the general direction discussed above, S.O. 3206 explicitly recognizes the right of Tribes to participate fully in the listing process, including designation of critical habitat. The Order also states: ''Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.'' In light of this instruction, when we undertake a discretionary section 4(b)(2) exclusion analysis, we will always consider exclusions of Tribal lands under section 4(b)(2) of the Act prior to finalizing a designation of critical habitat, and will give great weight to Tribal concerns in analyzing the benefits of exclusion.

However, S.O. 3206 does not preclude us from designating Tribal lands or waters as critical habitat, nor does it state that Tribal lands or waters cannot meet the Act's definition of ''critical habitat.'' We are directed by the Act to identify areas that meet the definition of ''critical habitat'' (*i.e.,* areas occupied at the time of listing that contain the essential physical or biological features that may require special management or protection and unoccupied areas that are essential to the conservation of a species), without regard to landownership. While S.O. 3206 provides important direction, it expressly states that it does not modify the Secretaries' statutory authority.

Mescalero Apache Tribal lands are included in the proposed designation of critical habitat for the Peñasco least chipmunk. Approximately 581 hectares (1,435 acres) of Tribal lands occupied by the Peñasco least chipmunk meet the definition of critical habitat. We will consider these areas for exclusion from the final critical habitat designation to the extent consistent with the requirements of section 4(b)(2) of the Act. We have notified the Mescalero Apache Tribe and requested their feedback. We will continue to coordinate with the Mescalero Apache Tribe, as well as any other Tribal entity who wishes to provide information to the Service regarding this proposed listing and critical habitat designation. A final determination on whether the Secretary will exercise the discretion to exclude any of these areas from critical habitat for the Peñasco least chipmunk will be made when we publish the final rule designating critical habitat. During the development of a final designation, we will consider all information currently available or received during the public comment period. If we receive credible information regarding the existence of a meaningful impact supporting a benefit of excluding any area, we will undertake an exclusion analysis and determine whether those areas should be excluded from the final critical habitat designation under authority of section 4(b)(2) and our implementing regulations at 50 CFR 17.90. We may also exercise the discretion to undertake exclusion analyses for other areas as well.

Required Determinations

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is not 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.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), 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 entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500

employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

Under the RFA, as amended, and as understood in light of recent court decisions, Federal agencies are required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself; in other words, the RFA does not require agencies to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies would be directly regulated if we adopt the proposed critical habitat designation. There is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities would be directly regulated by this rulemaking, the Service certifies that, if made final as proposed, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if made final, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. In our draft economic analysis, we did not find that the designation of this proposed critical habitat would significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following finding:

(1) This proposed rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or Tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule would significantly or uniquely affect small governments because it will not produce a Federal mandate of $100 million or greater in any year; that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments. By definition, Federal agencies are not considered small entities, although the activities they fund or permit may be proposed or carried out by small entities. Consequently, we do not believe that the proposed critical habitat designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for Peñasco least chipmunk in a takings implications assessment. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures or restrictions on use of or access to the designated areas. Furthermore, the

designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed for the proposed designation of critical habitat for the Peñasco least chipmunk, and it concludes that, if adopted, this designation of critical habitat does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this proposed critical habitat designation with, appropriate State resource agencies. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the proposed rule does not have substantial direct effects either on the States, or on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government. The proposed designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical or biological features of the habitat necessary for the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist State and local governments in long-range planning because they no longer have to wait for case-by-case section 7 consultations to occur.

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) of the Act would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, this proposed rule identifies the elements of physical or biological features essential to the conservation of the species. The proposed areas of designated critical habitat are presented on maps, and the proposed rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

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 (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) in connection with listing species and designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)). However, when the range of the species includes States within the Tenth Circuit, such as that of the Peñasco least chipmunk, under the Tenth Circuit ruling in *Catron County Board of Commissioners* v. *U.S. Fish and Wildlife Service,* 75 F.3d 1429 (10th Cir. 1996), we undertake a NEPA analysis for critical habitat designation. We invite the public to comment on the extent to which this proposed regulation may have a significant impact on the human environment, or fall within one of the categorical exclusions for actions that have no individual or cumulative effect on the quality of the human environment. We will complete our analysis, in compliance with NEPA, before finalizing this proposed rule.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. In a letter dated November 27, 2017, we informed the Mescalero Apache Tribe of our intent to conduct a status assessment for the Peñasco least chipmunk. On July 5, 2018, we shared the draft of the SSA report with the Mescalero Apache Tribe for their partner review. We will continue to work with Tribal entities during the development of a final rule for the designation of critical habitat for the Peñasco least chipmunk.

References Cited

A complete list of references cited in this proposed rule is available on the internet at *https://www.regulations.gov* and upon request from the New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the Fish and Wildlife Service's Species Assessment Team and the New Mexico Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. Amend § 17.11(h), the List of Endangered and Threatened Wildlife, by adding an entry for ''Chipmunk, Peñasco least'' in alphabetical order under MAMMALS to read as set forth below:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
MAMMALS				
*	*	*	*	*
Chipmunk, Peñasco least	*Neotamias minimus atristriatus*.	Wherever found	E	[**Federal Register** citation when published as a final rule]; 50 CFR 17.95(a).[CH]
*	*	*	*	*

■ 3. Amend § 17.95(a) by adding an entry for ''Peñasco Least Chipmunk (*Neotamias minimus atristriatus*)'' after the entry for ''Woodland Caribou (*Rangifer tarandus caribou*), Southern Mountain Distinct Population Segment (DPS),'' to read as set forth below:

§ 17.95 Critical habitat—fish and wildlife.

(a) * * *

Peñasco Least Chipmunk (Neotamias Minimus Atristriatus)

(1) Critical habitat units are depicted for Lincoln and Otero Counties, New Mexico, on the maps in this entry.

(2) Within these areas, the physical or biological features essential to the conservation of Peñasco least chipmunk consist of the following components:

(i) Areas within the White Mountains:

(A) Between elevations of 2,500–3,597 meters (8,200–11,800 feet);

(B) That contain rock outcrops or talus; and

(C) That are subalpine Thurber's fescue meadow/grassland communities found within openings of spruce-fir forest, above tree line in the glacial cirque, containing tall bunchgrasses, including Thurber's fescue, sedges, flowering forbs, and shrubs.

(ii) Forage, including species of Asteraceae, flowers and fruits of gooseberry (*Ribes* spp), wild strawberry (*Fragaria* spp.), pinyon (*Pinus edulis*) nuts, Gambel oak (*Quercus gambelii*) acorns, and insects.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on [EFFECTIVE DATE OF THE FINAL RULE].

(4) *Critical habitat map units.* Data layers defining map units were created using publicly available geospatial vegetation data for the Lincoln National Forest, 30-meter digital elevation models from the National Elevation Dataset, and 3-band county mosaics obtained from the National Agricultural Imagery Program. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at *https://www.regulations.gov* at Docket No. FWS–R2–ES–2020–0042 and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) *Note:* Index map follows:

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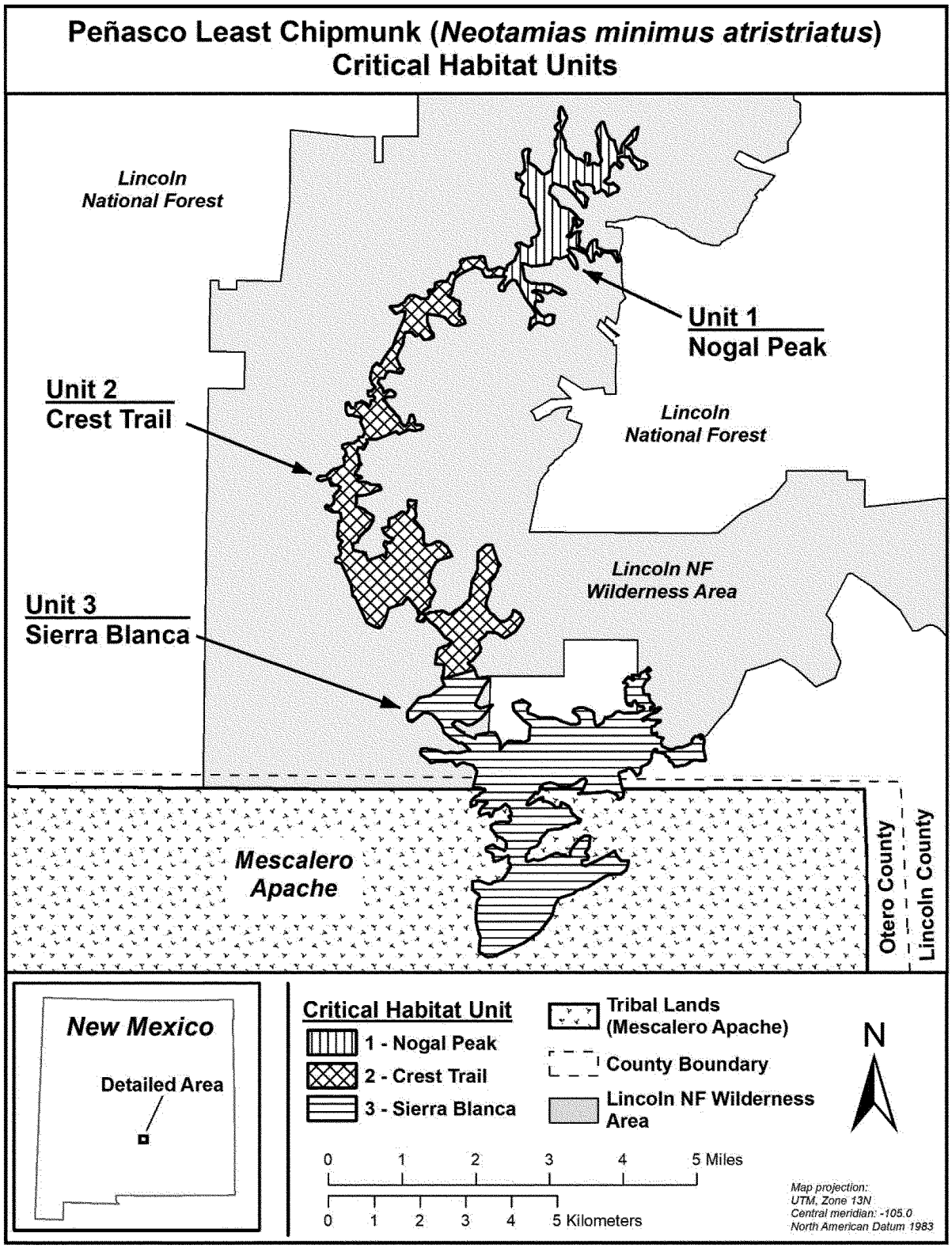
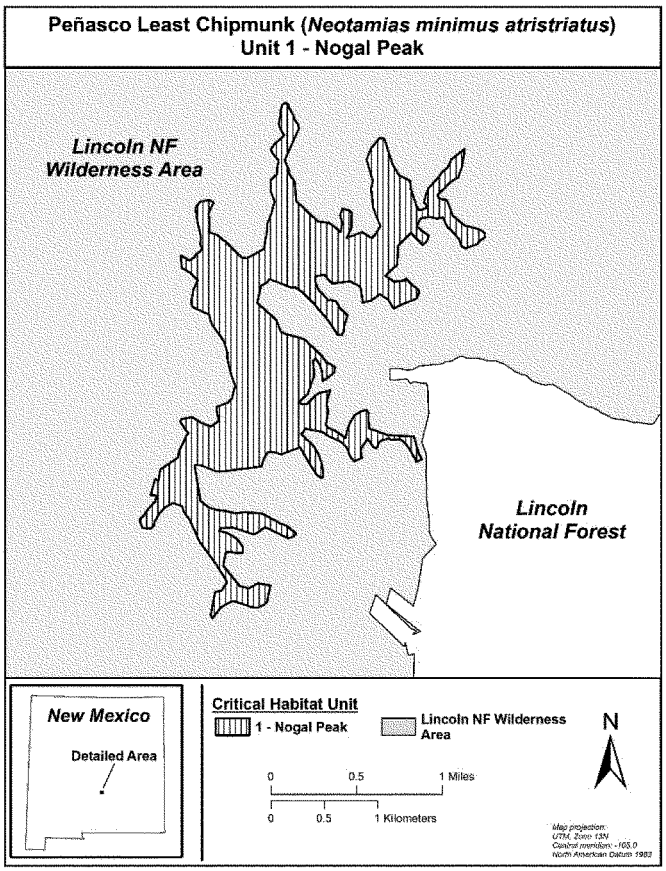


(6) Unit 1: Nogal Peak.

(i) Unit 1 consists of approximately 393 hectares (972 acres) of subalpine habitat within the Lincoln National Forest Wilderness Area and is considered occupied. Elevation ranges approximately 2,570–3,031 meters (8,432–9,944 feet) above mean sea level.

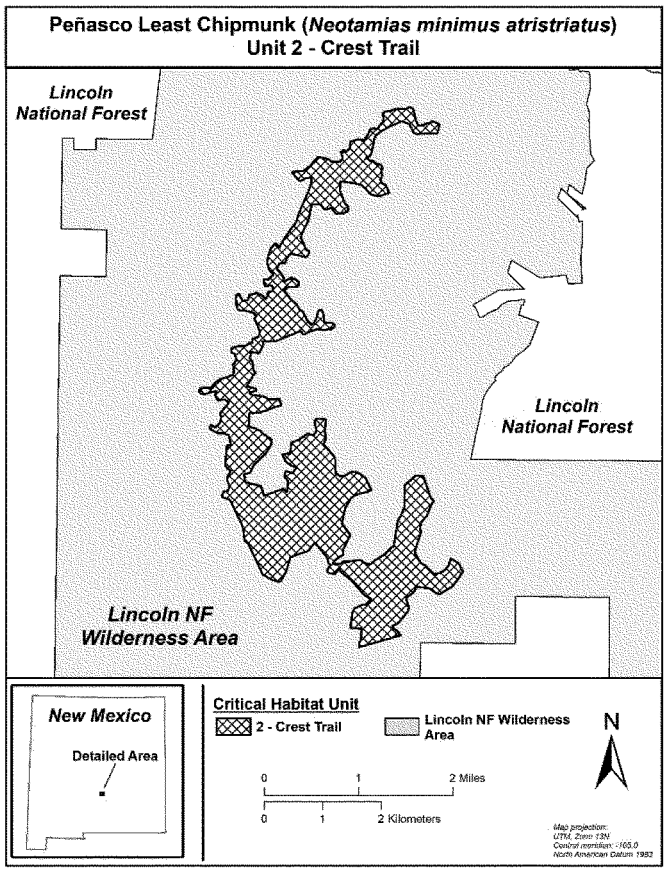
(ii) Map of Unit 1 follows:



(7) Unit 2: Crest Trail.

(i) Unit 2 consists of approximately 910 hectares (2,249 acres) of subalpine habitat located within the Lincoln National Forest Wilderness Area and is considered unoccupied. Elevation ranges approximately 2,621–3,292 meters (8,599–10,800 feet) above mean sea level.

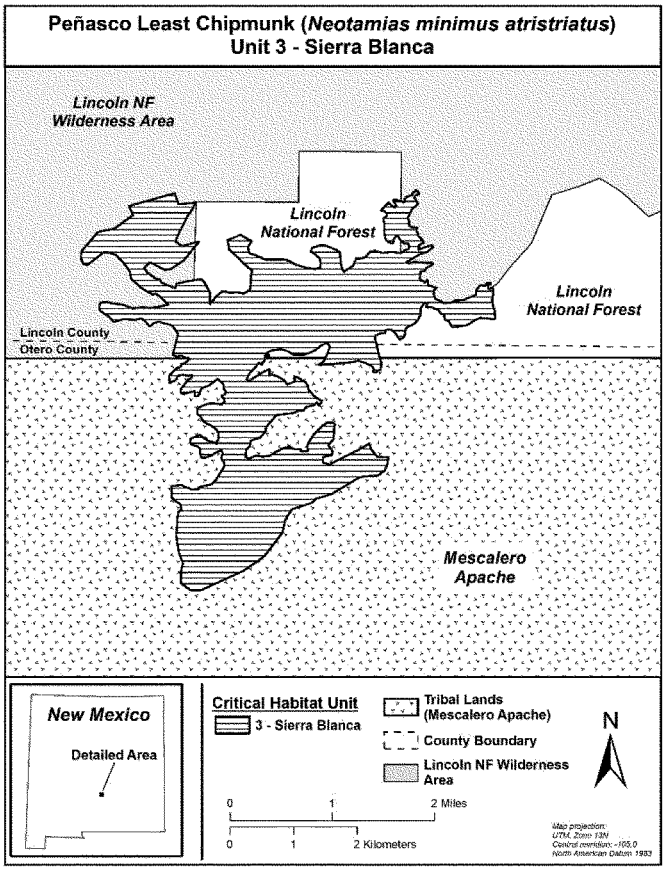
(ii) Map of Unit 2 follows:



(8) Unit 3: Sierra Blanca.

(i) Unit 3 includes approximately 1,357 hectares (3,353 acres) of subalpine habitat located within the Lincoln National Forest, the Lincoln National Forest Wilderness Area, and Mescalero Apache Tribal lands and is considered occupied. The portion of Unit 3 located on Mescalero Tribal lands is approximately 581 hectares (1,435 acres). Elevation ranges approximately 2,763–3,638 meters (9,065–11,936 feet) above mean sea level.

(ii) Map of Unit 3 follows:



* * * * *

Martha Williams,

Principal Deputy Director, Exercising the Delegated Authority of the Director, U.S. Fish and Wildlife Service.

[FR Doc. 2021–20934 Filed 9–27–21; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2020–0015; FF09E21000 FXES11110900000 212]

RIN 1018–BD20

Endangered and Threatened Wildlife and Plants; Endangered Status for South Llano Springs Moss and Designation of Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to list the South Llano Springs moss (*Donrichardsia macroneuron*), an aquatic moss species from Texas, as an endangered species and to designate critical habitat under the Endangered Species Act of 1973, as amended (Act). After a review of the best available scientific and commercial information, we find that listing the species is warranted. This determination also serves as our 12-month finding on a petition to list the South Llano Springs moss. Accordingly, we propose to list the South Llano Springs moss as an endangered species. If we finalize this rule as proposed, it would add this species to the list of Endangered and Threatened Plants and extend the Act's protections to the species. We also propose to designate critical habitat for the South Llano Springs moss under the Act. In total, approximately 0.19 hectares (0.48 acres) in Edwards County, Texas, fall within the boundaries of the proposed critical habitat designation. We also announce the availability of a draft economic analysis (DEA) of the proposed designation of critical habitat for the South Llano Springs moss.

DATES: We will accept comments received or postmarked on or before November 29, 2021. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for a public hearing, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by November 12, 2021.

ADDRESSES: *Written comments:* You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter the docket number or RIN for this rulemaking (presented above in the document headings). For best results, do not copy and paste either number; instead, type the docket number or RIN into the Search box using hyphens. Then, click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on ''Comment.''

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS–R2–ES–2020–0015, U.S. Fish and Wildlife Service, MS: JAO/1N, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see

Information Requested, below, for more information).

Availability of supporting materials: For the critical habitat designation, the draft economic analysis and the coordinates or plot points or both from which the maps are generated are included in the administrative record and are available at the Service's internet site at *https://www.fws.gov/southwest/es/AustinTexas/* and at *http://www.regulations.gov* under Docket No. FWS–R2–ES–2020–0015. Any additional tools or supporting information that we may develop for the critical habitat designation will also be available at the Service website and field office set out above, and may also be included in the preamble and/or at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Adam Zerrenner, Field Supervisor, U.S. Fish and Wildlife Service, Austin Ecological Services Field Office, 10711 Burnet Road, Suite 200, Austin, TX 78758; telephone 512–490–0057. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act, if we determine that a species may be an endangered or threatened species throughout all or a significant portion of its range, we are required to promptly publish a proposal in the **Federal Register** and make a determination on our proposal within 1 year. To the maximum extent prudent and determinable, we must designate critical habitat for any species that we determine to be an endangered or threatened species under the Act. Listing a species as an endangered or threatened species and designation of critical habitat can only be completed by issuing a rule.

What this document does. We propose to list the South Llano Springs moss as an endangered species under the Act, and we propose to designate critical habitat for the species on approximately 0.19 hectares (ha) (0.48 acres (ac)) in Edwards County, Texas.

The basis for our action. Under the Act, we may determine that a species is an endangered or threatened species because of any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We have determined that increased groundwater pumping from the Edwards-Trinity aquifer that supplies water for the springs that the South Llano Springs moss is dependent on, as well as flash floods, sedimentation, invasive plant species, small population size, a single population, and lack of genetic diversity, and cumulative impacts from these threats, threaten this plant species to the degree that listing it as an endangered species under the Act is warranted.

Section 4(a)(3) of the Act requires the Secretary of the Interior (Secretary) to designate critical habitat concurrent with listing to the maximum extent prudent and determinable. Section 3(5)(A) of the Act defines critical habitat as (i) the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. Section 4(b)(2) of the Act states that the Secretary must make the designation on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impacts of specifying any particular area as critical habitat.

We prepared a draft economic analysis of the proposed designation of critical habitat. In order to consider economic impacts, we prepared an analysis of the economic impacts of the proposed critical habitat designation. We hereby announce the availability of the draft economic analysis and seek public review and comment.

Peer review. In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we sought the expert opinions of four appropriate specialists regarding the species status assessment report. We received a response from one specialist, which informed this proposed rule. The purpose of peer review is to ensure that our listing determination and critical habitat designation are based on scientifically sound data, assumptions, and analyses. The peer reviewers we contacted have expertise in the biology, habitat, and threats to the species.

Because we will consider all comments and information we receive during the comment period, our final determinations may differ from this proposal. Based on the new information we receive (and any comments on that new information), we may conclude that the species is threatened instead of endangered, or we may conclude that the species does not warrant listing as either an endangered species or a threatened species. Such final decisions would be a logical outgrowth of this proposal, as long as we: (a) Base the decisions on the best scientific and commercial data available after considering all of the relevant factors; (2) do not rely on factors Congress has not intended us to consider; and (3) articulate a rational connection between the facts found and the conclusions made, including why we changed our conclusion.

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned governmental agencies, Native American tribes, the scientific community, industry, or any other interested parties concerning this proposed rule.

We particularly seek comments concerning:

(1) The species' biology, range, and population trends, including:

(a) Biological or ecological requirements of the species, including habitat requirements for feeding, breeding, and sheltering;

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution patterns;

(d) Historical and current population levels, and current and projected trends; and

(e) Past and ongoing conservation measures for the species, its habitat, or both.

(2) Factors that may affect the continued existence of the species, which may include habitat modification or destruction, overutilization, disease, predation, the inadequacy of existing regulatory mechanisms, or other natural or manmade factors.

(3) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to this species and existing regulations that may be addressing those threats.

(4) Additional information concerning the historical and current status, range, distribution, and population size of this

species, including the locations of any additional populations of this species.

(5) The reasons why we should or should not designate habitat as ''critical habitat'' under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including information to inform the following factors that the regulations identify as reasons why designation of critical habitat may be not prudent:

(a) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(b) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

(c) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States; or

(d) No areas meet the definition of critical habitat.

(6) Specific information on:

(a) The amount and distribution of the South Llano Springs moss habitat;

(b) What areas, that were occupied at the time of listing and that contain the physical or biological features essential to the conservation of the species, should be included in the designation and why;

(c) Special management considerations or protection that may be needed in the critical habitat area we are proposing, including managing for the potential effects of climate change; and

(d) What areas not occupied at the time of listing are essential for the conservation of the species. We particularly seek comments:

(i) Regarding whether occupied areas are adequate for the conservation of the species; and

(ii) Providing specific information regarding whether or not unoccupied areas would, with reasonable certainty, contribute to the conservation of the species and contain at least one physical or biological feature essential to the conservation of the species.

(7) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(8) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation, and the related benefits of including or excluding specific areas.

(9) Information on the extent to which the description of probable economic impacts in the draft economic analysis is a reasonable estimate of the likely economic impacts.

(10) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(11) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or a threatened species must be made ''solely on the basis of the best scientific and commercial data available.''

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Public Hearing

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received by the date specified in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing. For the immediate future, we will provide these public hearings using webinars that will be announced on the Service's website, in addition to the **Federal Register**. The use of these virtual public hearings is consistent with our regulation at 50 CFR 424.16(c)(3).

Previous Federal Actions

On June 18, 2007, we received a formal petition from Forest Guardians (later named WildEarth Guardians) to list 475 species in the southwestern United States, including the South Llano Springs moss, as endangered or threatened species under the Act. On March 19, 2008, WildEarth Guardians filed a complaint that the Service failed to comply with the mandatory duty to make a preliminary 90-day finding. On January 6, 2009, we published in the **Federal Register** (74 FR 419) a 90-day finding that the petition did not present sufficient information to indicate that listing the South Llano Springs moss may be warranted. On December 16, 2009, we published a new 90-day finding, based on a re-evaluation of the information presented in the petition and readily available in our files, that the petition provided substantial information indicating that listing of the South Llano Springs moss may be warranted based on the present or threatened destruction, modification, or curtailment of habitat or range as a result of drought or changes in hydrology (74 FR 66866).

Supporting Documents

A species status assessment (SSA) team prepared an SSA report for the South Llano Springs moss. The SSA team was composed of Service biologists, in consultation with other species experts. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species. The Service sent the SSA report to four independent peer reviewers and

received one response. The Service also sent the SSA report to partners, including scientists with expertise with this species, for review. We received one review from the Texas Parks and Wildlife Department.

I. Proposed Listing Determination

Background

The South Llano Springs moss is an aquatic moss that grows on submerged or partially submerged rocks. The deep, loosely interwoven mats are blue-green to blackish-brown when shaded and yellow-green when exposed to full sun. Like all mosses, the South Llano Springs moss forms clonal colonies of leaf-bearing stems.

The South Llano Springs moss has an extremely limited range: It has only been documented in two locations and is thought to be extirpated from one of those. The remaining extant site is from Seven Hundred Springs, on the South Llano River in Edwards County, Texas. The extirpated site, referred to as the Redfearn site, was about 5 kilometers (km) (3.1 miles (mi)) downstream from Seven Hundred Springs in Kimble County, Texas, though the exact location is unknown. Both sites occur within the Edwards Plateau. Wyatt and Stoneburner (1980, pp. 514, 516) visited 10 other springs in the Llano and South Llano River watersheds in 1978 and 1979, but found no additional populations.

The South Llano Springs moss was discovered at Seven Hundred Springs in 1932, and was most recently confirmed there in 1979 (Wyatt and Stoneburner 1980, entire). When last observed, the South Llano Springs moss was abundantly dispersed in the spring outflow, partially submerged in shaded areas within an area of about 10 by 100 meters (m) (33 by 328 feet (ft)) between the springs and the river below on privately owned land (Wyatt and Stoneburner 1980, p. 516). Observation of the habitat from the opposite side of the river in 2017 indicated that the habitat appears to be in excellent condition (Service 2017, entire). This is the best available information we have for this site; consequently, we consider the Seven Hundred Springs population to be extant. The South Llano Springs moss was last documented at the Redfearn site in 1971. The two specimen labels from these collections state that they were collected ''1 mile south of Telegraph'' with one specimen collected on a dam and the other from limestone at the edge of the creek. On topographic maps, Telegraph is a location consisting of a single store that is not directly along the river; however, there is a road connecting Telegraph to the South Llano River with a bridge, and this may be the location from which Redfearn was measuring. Due to the vague location description, there is uncertainty around the exact location of the Redfearn site. In 2017, we conducted surveys along 5.7 km of the South Llano River, including the 2.25 km in which we believe Redfearn collected his specimens. All aquatic moss species encountered were collected and a sample of each of the four species encountered was sent to a bryologist at the Missouri Botanical Garden for identification. None of the species collected were found to be the South Llano Springs moss. This is the best available information we have for this site; consequently, we consider the Redfearn population to be extirpated. It is possible that the species does not occur anywhere else. However, few surveys for this species have been conducted. Consequently, it is possible that this species occurs elsewhere along Paint Creek or the South Llano River. The best available data indicate that only the Seven Hundred Springs population persists.

A thorough review of the taxonomy, life history, and ecology of the South Llano Springs moss is presented in the SSA report (version 1.1; Service 2018, entire).

Regulatory and Analytical Framework

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species is an ''endangered species'' or a ''threatened species.'' The Act defines an endangered species as a species that is ''in danger of extinction throughout all or a significant portion of its range,'' and a threatened species as a species that is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The Act requires that we determine whether any species is an ''endangered species'' or a ''threatened species'' because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the expected response by the species, and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term ''foreseeable future'' extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to

provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

Analytical Framework

The SSA report documents the results of our comprehensive biological status review for the species, including an assessment of the potential threats to the species. The SSA report does not represent a decision by the Service on whether the species should be proposed for listing as an endangered or threatened species under the Act. It does, however, provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies. The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found on *http://www.regulations.gov* under Docket FWS–R2–ES–2020–0015.

To assess the viability of the South Llano Springs moss, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency supports the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years), redundancy supports the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation supports the ability of the species to adapt over time to long-term changes in the environment (for example, climate changes). In general, the more resilient and redundant a species is and the more representation it has, the more likely it is to sustain populations over time, even under changing environmental conditions. Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated individual species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. This process used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We use this information to inform our regulatory decision.

Summary of Biological Status and Threats

In this section, we review the biological condition of the species and its resources, and the threats that influence the species' current and future condition, in order to assess the species' overall viability and the risks to that viability.

Based on the conditions of the only known current and historical populations, the South Llano Springs moss requires a constant flow of mineral-rich spring water or spring-fed river water over shallow limestone rocks. Seven Hundred Springs and the areas thought to contain the Redfearn sites are supported by spring flows within the Edwards-Trinity aquifer and the South Llano River watershed (Seven Hundred Springs and Big Paint Springs). These springs have never ceased flowing in recorded history. Water from these springs emerges at a very consistent temperature and is rich in travertine minerals. Rocks and plants immersed in the upper South Llano River quickly become encrusted with travertine- or tufa-like mineral deposits, to an unusual degree not seen in most springs in the Edwards-Trinity aquifer (Service 2017, p. 2). Thus, it is possible that high mineral concentrations, or the precipitation of minerals from solution, could be requirements for the establishment and growth of South Llano Springs moss individuals.

The water temperature of Seven Hundred Springs was consistently 21.5 degrees Celsius (°C) (70.7 degrees Fahrenheit (°F)) in June, and the pH ranged from 7.0 to 7.2 (Wyatt and Stoneburner 1980, p. 516). The species occurred in both shaded and exposed niches at Seven Hundred Springs (Wyatt and Stoneburner 1980, p. 516). Associated vascular plant species included maidenhair fern (*Adiantum capillus-veneris*), southern shield fern (*Thelypteris kunthii*), watercress (*Nasturtium officinale*), and members of the mint family (Lamiaceae) and composite family (Asteraceae) (Wyatt and Stoneburner 1980, p. 516). Associated moss species included *Hygroamblystegium tenax* and *Eucladium verticillatum* (Wyatt and Stoneburner 1980, p. 517).

Mosses closely related to the South Llano Springs moss reproduce both sexually and asexually. However, there is no evidence that sexual reproduction is occurring in the single remaining known site of occurrence, as no plants with female reproductive structures were observed in the wild population or during a 16-month propagation study in 1978 and 1979 (Wyatt and Stoneburner 1980, p. 517). The plants cultivated in captivity produced only male reproductive structures. It is possible that the known population may be a clone of a single or a few male individuals and that sexual reproduction is no longer possible for the species.

In addition to the habitat requirements described above, resilient populations of South Llano Springs moss need to be large enough that local stochastic events do not eliminate all individuals, allowing the overall population to recover from any one event. The larger a population is, the greater the chances that a portion of the population will survive. The minimum viable population size is not known for this species. However, the geographic extent is provided from the observations of Wyatt and Stoneburner (1980, p. 516). When last observed, the South Llano Springs moss grew in the spring outflow partially submerged in shaded areas within a 10 m (33 ft) zone between the springs and the river below (Wyatt and Stoneburner 1980, p. 516). We assume that the population could be as large as the spring flow and substrate allow in this zone. The area occupied by a moss population is a practical surrogate for abundance, provided that it is understood that this does not address the number of genetically unique individuals.

Recruitment is also needed for populations to be resilient. The colony at Seven Hundred Springs may be a clone of a single individual, or only male individuals, and is presumed incapable of sexual reproduction (Wyatt and Stoneburner 1980, p. 520). Unless female individuals are present, the colony of South Llano Springs moss at Seven Hundred Springs can persist and grow only through vegetative budding or through the establishment of

fragments that happen to lodge in suitable niches. These mats can expand to occupy new habitats while the portion that established earlier dies. An individual remains alive as long as old stems die no faster than new stems develop. The same individual could migrate back and forth through available habitats for an unlimited period of time, and it is not inconceivable that the individuals we see today arose from spores that germinated many thousands of years ago. For the species to persist, the recruitment of new individuals must equal or exceed mortality.

Wyatt and Stoneburner (1980, pp. 519–520) estimated that the species' range may have been more extensive 10,000 years ago, and subsequently became restricted to this single location as the climate warmed and other springs periodically stopped flowing. To assess the climate changes that could affect this species into the future, we examined the climate parameters using both the representative concentration pathway (RCP) 4.5 and RCP 8.5 scenarios to provide a range of projected values. These models predict that by 2074 climate changes could result in a reduction of aquifer recharge and an increased duration and severity of droughts and heavy rainfall, thereby increasing the threats of interrupted spring flows and flash floods. Annual precipitation is highly variable in central Texas, and severe, multi-year droughts occurred during the 1950s and from 2006 through 2012. During these historical periods of drought, only the largest springs along the South Llano River, including Seven Hundred Springs, continued flowing, but at lower rates. Prolonged drought in combination with increased pumping from the Edwards-Trinity aquifer could increase the probability of interrupted flows of these springs and, consequently, the extirpation or extinction of the South Llano Springs moss. Despite the frequency of prolonged drought, the region is also subject to extremely heavy rainfall, often resulting from tropical storms in the Gulf of Mexico as well as the Pacific Ocean. All of these factors contribute to flash floods (high intensity, low duration floods) that can drastically change stream beds and the surrounding vegetation, potentially scouring the South Llano Springs moss from its rock substrate along the edge of the stream, or burying it beneath deposits of silt, sand, and gravel.

The amount of pumping from the Edwards-Trinity aquifer is one of the most important factors influencing storage in the aquifer and spring flows. Aquifer water levels are stable or have declined slightly over most of the Edwards-Trinity aquifer, but in some areas, heavy pumping has led to long-term declines in aquifer levels and diminished or interrupted spring flows (George *et al.* 2011, p. 35; Region F Water Planning Group 2015, pp. 1–34, 3–15; Plateau Region Water Planning Group 2016, pp. 7–11). These sources project relatively little growth in the human population in Edwards and Kimble Counties during the next 50 years. Conversely, population growth is projected to increase for five central Texas counties, which include the metropolitan areas of San Antonio, New Braunfels, San Marcos, Austin, Round Rock, and Georgetown, by 32 percent between 2017 and 2037, and by 53 percent between 2017 and 2050 (Texas Demographic Center 2017, p. 1). It is reasonably foreseeable that increased pumping may occur from the Edwards-Trinity aquifer for transfer to other regions to supply increased municipal water demands. This increased pumping could reduce water storage in the Edwards-Trinity aquifer and spring flows in the South Llano River. Loss of spring flows, even for a short time, would likely reduce or extirpate the only known remaining population of the South Llano Springs moss because the species requires constant immersion in flowing spring water to persist.

The Upper Llano River Watershed Protection Plan (Broad *et al.* 2016, pp. 51, 64–66, 86) identifies increased runoff, evapotranspiration, and sediment loading as impacts to the upper Llano River watersheds due to the encroachment of woody species. Recharge into the Edwards-Trinity aquifer in Edwards County has been reduced during prior periods of vegetation loss from overgrazing, resulting in increased runoff and the drying of some smaller springs (Brune 1981, p. 173). Aquifer recharge may also have been reduced by the encroachment of brush into formerly grass-dominated uplands (South Llano Watershed Alliance 2012, p. 9; Broad *et al.* 2016, pp. 40–41, 51). Aquifer recharge would also be reduced by an increase in evapotranspiration, due to increased temperatures.

Small populations are less able to recover from losses caused by random fluctuations in recruitment (demographic stochasticity) or variations in spring outflow (environmental stochasticity) (Service 2015, p. 12). In addition to population size, it is likely that population density also influences population viability, as sexual reproduction, if it occurs at all in the species' current situation, requires male and female mosses to be in close proximity. Small, reproductively isolated populations are also susceptible to the loss of genetic diversity, to genetic drift, and to inbreeding (Barrett and Kohn 1991, pp. 3–30). The loss of genetic diversity may reduce the ability of a species or population to resist pathogens and parasites, to adapt to changing environmental conditions, or to colonize new habitats. The combined demographic and genetic consequences of small population sizes may reduce population recruitment, leading to even smaller populations and greater isolation, and further decreasing the viability of the species. These factors may already have contributed to the decline of the South Llano Springs moss to its current state of extreme endemism in the upper South Llano River. All of the above stressors are exacerbated by the fact that the South Llano Springs moss likely consists of only one, small population.

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have not only analyzed individual effects on the species, but we have also analyzed their potential cumulative effects. We incorporate the cumulative effects into our SSA analysis when we characterize the current and future condition of the species. Our assessment of the current and future conditions encompasses and incorporates the threats individually and cumulatively. Our current and future condition assessment is iterative because it accumulates and evaluates the effects of all the factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative effects analysis.

Determination of Status for the South Llano Springs Moss

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of ''endangered species'' or ''threatened species.'' The Act defines an ''endangered species'' as a species that is ''in danger of extinction throughout all or a significant portion of its range,'' and a ''threatened species'' as a species that is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The Act requires that we determine whether a species meets the definition of ''endangered species'' or ''threatened

species'' because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) Overutilization for commercial, recreational, scientific, or educational purposes; (C) Disease or predation; (D) The inadequacy of existing regulatory mechanisms; or (E) Other natural or manmade factors affecting its continued existence.

Status Throughout All of Its Range

After evaluating threats to the species and assessing the cumulative effect of the threats under the section 4(a)(1) factors, we propose listing the South Llano Springs moss as an endangered species throughout all of its range. Only two very small populations of South Llano Springs moss have been documented, which were last observed in 1971 and 1979. One is now extirpated and the other is restricted to a 10 by 100 m (33 by 328 ft) zone between Seven Hundred Springs and the South Llano River (Wyatt and Stoneburner 1980, p. 516). Therefore, the species has an extremely low level of representation, and no redundancy, making it vulnerable to catastrophic events such as flash floods and droughts. During historic droughts, such as in the 1950s and 2006–2012, many regional springs ceased flowing and the flow of Seven Hundred Springs was greatly reduced. Projected climate changes include an increased frequency, duration, and severity of droughts (Factor E), thereby increasing the risk of interrupting the flow of Seven Hundred Springs and the desiccation and mortality of this obligately aquatic moss (Factor A). The amount of pumping from the Edwards-Trinity aquifer is one of the most important factors influencing storage in the aquifer and the spring flows on which the South Llano Springs moss relies. Groundwater pumping is likely to increase as the human population grows and as the severity and duration of droughts increases. Prolonged drought (Factor E), in combination with increased pumping from the Edwards-Trinity aquifer (Factor E), further increase the probability of interrupting the flow of Seven Hundred Springs (Factor A) and, consequently, the probability of extinction of the South Llano Springs moss.

The South Llano Springs moss has little or no genetic diversity (Factor E) because this species likely consists of clones of one or a few male individuals and is no longer capable of sexual reproduction (Factor E). Consequently, the species has very low representation and likely has very little ability to adapt to environmental changes. In addition the South Llano Springs moss has poor redundancy because there is only one small population remaining. One drought event that reduced the flow of Seven Hundred Springs could result in the extirpation of this species.

We find that the South Llano Springs moss is presently in danger of extinction throughout its entire range based on the small remaining single population that is likely genetically compromised. This status puts the species on the brink of extinction where normal stochastic events, such as drought, flooding, or a human-caused drop in the aquifer level could lead to further decline or loss of the species entirely. The only other known population has not been observed since 1971 and is considered likely extirpated. This one remaining population could be affected by a variety of threats acting in combination to reduce the overall viability of the species. The risk of extinction is high because the remaining population is small, with no known potential for natural recolonization. We find that a threatened species status is not appropriate for the South Llano Springs moss because of the species' current precarious condition due to its contracted range, small population size, and likely compromised genetics, because these stressors are severe, ongoing, and expected to continue into the future.

Therefore, after assessing the best available information, we determine that the South Llano Springs moss is in danger of extinction throughout all of its range.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. We have determined that the South Llano Springs moss is in danger of extinction throughout all of its range, and accordingly, did not undertake an analysis of any significant portion of its range. Because we have determined that the South Llano Springs moss warrants listing as an endangered species throughout all of its range, our determination is consistent with the decision in *Center for Biological Diversity* v. *Everson,* 2020 WL 437289 (D.D.C. Jan. 28, 2020), in which the court vacated the aspect of the 2014 Significant Portion of its Range Policy that provided the Services do not undertake an analysis of significant portions of a species' range if the species warrants listing as threatened throughout all of its range.

Determination of Status

Our review of the best available scientific and commercial information indicates that the South Llano Springs moss meets the definition of an endangered species. Therefore, we propose to list the South Llano Springs moss as an endangered species in accordance with sections 3(6) and 4(a)(1) of the Act.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and conservation by Federal, State, tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species. The protection required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Section 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning consists of preparing draft and final recovery plans, beginning with the development of a recovery outline and making it available to the public within 30 days of a final listing determination. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan also identifies recovery criteria for review of when a species may be ready

for reclassification from endangered to threatened (''downlisting'') or removal from protected status (''delisting''), and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our website (*http://www.fws.gov/endangered*), or from our Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.,* restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and tribal lands.

If this species is listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the State of Texas would be eligible for Federal funds to implement management actions that promote the protection or recovery of the South Llano Springs moss. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants.*

Although the South Llano Springs moss is only proposed for listing under the Act at this time, please let us know if you are interested in participating in recovery efforts for this species. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as an endangered or threatened species and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service.

Federal agency actions within the species' habitat that may require conference or consultation or both as described in the preceding paragraph include management and any other landscape-altering activities on Federal lands, management and conservation projects conducted on private lands with support from the U.S. Fish and Wildlife Service Partners for Fish and Wildlife Program; issuance of section 404 Clean Water Act (33 U.S.C. 1251 *et seq.*) permits by the U.S. Army Corps of Engineers; construction and maintenance of roads or highways by the Federal Highway Administration; construction and maintenance of railways by the Federal Railroad Administration; and discharge permits from the Environmental Protection Agency.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered plants. The prohibitions of section 9(a)(2) of the Act, codified at 50 CFR 17.61, make it illegal for any person subject to the jurisdiction of the United States to: Import or export; remove and reduce to possession from areas under Federal jurisdiction; maliciously damage or destroy on any such area; remove, cut, dig up, or damage or destroy on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law; deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce an endangered plant. Certain exceptions apply to employees of the Service, the National Marine Fisheries Service, other Federal land management agencies, and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered plants under certain circumstances. Regulations governing permits are codified at 50 CFR 17.62. With regard to endangered plants, a permit may be issued for scientific purposes or for enhancing the propagation or survival of the species. There are also certain statutory exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a proposed listing on proposed and ongoing activities within the range of the species proposed for listing. Based on the best available information, the following actions are unlikely to result in a violation of section 9, if these activities are carried out in accordance with existing regulations and permit requirements; this list is not comprehensive:

(1) Recreational use of the streams, such as fishing, swimming, and canoeing, as these activities normally take place in the river or on the river bank and not in the spring itself, and;

(2) Normal residential landscaping activities as these activities do not take place in the spring, nor do they affect the quantity or quality of water in the spring.

Based on the best available information, the following activities may potentially result in a violation of section 9 of the Act if they are not authorized in accordance with applicable law; this list is not comprehensive:

(1) Removing, cutting, digging up, or damaging or destroying the South Llano Springs moss in knowing violation of any law or regulation of the state of Texas or in the course of any violation of a State criminal trespass law;

(2) Importing the South Llano Springs moss into, or exporting from, the United States;

(3) Delivering, receiving, carrying, transporting, or shipping the South Llano Springs moss in interstate or foreign commerce, by any means and in the course of a commercial activity, and;

(4) Selling or offering the South Llano Springs moss for sale in interstate or foreign commerce.

Questions regarding whether specific activities would constitute a violation of

section 9 of the Act should be directed to the Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

II. Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.,* range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Designation also does not allow the government or public to access private lands, nor does designation require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the Federal agency would be required to consult with the Service under section 7(a)(2) of the Act. However, even if the Service were to conclude that the proposed activity would result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement ''reasonable and prudent alternatives'' to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features that occur in specific occupied areas, we focus on the specific features that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more-complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied by the species would be inadequate to ensure the conservation of the species. In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the SSA report and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the

species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in section 9 of the Act. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, the Secretary shall designate critical habitat at the time the species is determined to be an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that the Secretary may, but is not required to, determine that a designation would not be prudent in the following circumstances:

(i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

(iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States;

(iv) No areas meet the definition of critical habitat; or

(v) The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.

As discussed above under Proposed Listing Determination, there is currently no imminent threat of collection or vandalism identified under Factor B for this species, and identification and mapping of critical habitat is not expected to initiate any such threat. In our SSA and this proposed listing determination, we determined that the present or threatened destruction, modification, or curtailment of habitat or range is a threat to the South Llano Springs moss and that those threats in some way can be addressed by section 7(a)(2) consultation measures. The species occurs wholly in the jurisdiction of the United States, and we are able to identify an area that meets the definition of critical habitat. Therefore, because none of the circumstances enumerated in our regulations at 50 CFR 424.12(a)(1) have been met, and because there are no other circumstances the Secretary has identified for which this designation of critical habitat would be not prudent, we have determined that the designation of critical habitat is prudent for the South Llano Springs moss.

Critical Habitat Determinability

Having determined that designation is prudent, under section 4(a)(3) of the Act we must find whether critical habitat for the South Llano Springs moss is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Data sufficient to perform required analyses are lacking, or

(ii) The biological needs of the species are not sufficiently well known to identify any area that meets the definition of ''critical habitat.''

When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

We reviewed the available information pertaining to the biological needs of the species and habitat characteristics where this species is located. This and other information represent the best scientific data available and led us to conclude that the designation of critical habitat is determinable for the South Llano Springs moss.

Physical or Biological Features Essential to the Conservation of the Species

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas we will designate as critical habitat from within the geographical area occupied by the species at the time of listing, we consider the physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection. The regulations at 50 CFR 424.02 define ''physical or biological features essential to the conservation of the species'' as the features that occur in specific areas and that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity. For example, physical features essential to the conservation of the species might include gravel of a particular size required for spawning, alkali soil for seed germination, protective cover for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic essential to support the life history of the species.

In considering whether features are essential to the conservation of the species, the Service may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance.

Summary of Essential Physical or Biological Features

We derive the specific physical or biological features essential to the

conservation of the South Llano Springs moss from studies of the species' habitat, ecology, and life history as described below. Additional information can be found in the SSA report available at *http://www.regulations.gov* under Docket No. FWS–R2–ES–2020–0015. We have determined that the following physical or biological features are essential to the conservation of the South Llano Springs moss:

(1) The uninterrupted flow of spring water supplied by the Edwards-Trinity aquifer within the South Llano watershed.

(2) Relatively constant water temperature due to proximity to the point of spring outflow.

(3) A substrate of calcareous or travertine rock not more than 15 centimeters (cm) (6 inches (in)) below the surface of the water.

(4) Contaminant and sediment levels that do not exceed the tolerance limits of South Llano Springs moss and associated plant and animal species.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection.

The features essential to the conservation of this species may require special management considerations or protection to reduce the following stressors: Reduction or loss of spring flow, erosion, and sedimentation. Management activities that could ameliorate these stressors include (but are not limited to): Prescribed fire, brush management, and grazing management to increase infiltration into the Edwards-Trinity aquifer and reduce runoff and subsequent flooding.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat. We are not currently proposing to designate any areas outside the geographical area occupied by the species because we have not identified any unoccupied areas that meet the definition of critical habitat. While we acknowledge that the conservation of the species will depend on increasing the number of sites, we are unable at this time to delineate any specific unoccupied areas that are essential to the species' conservation. For an area to be considered essential unoccupied habitat, we must have reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one of more of the physical or biological features essential to the conservation of the species. The exact location of the Redfearn site is unknown and, although there are a number of other large springs emerging from the Edwards-Trinity aquifer, it is unknown if these sites would be biologically suitable for the species. In addition, there is uncertainty that the species could be transplanted successfully if suitable sites existed for reintroduction. Finally, the specific areas needed for conservation may depend in part on landowner willingness to restore and maintain the species' habitat in these areas.

In summary, for areas within the geographic area occupied by the species at the time of listing, we delineated critical habitat unit boundaries by evaluating the area of spring flow and submerged limestone within the geographic area occupied at the time of listing.

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical or biological features necessary for the South Llano Springs moss. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

We propose to designate as critical habitat lands that we have determined are occupied at the time of listing (*i.e.,* currently occupied) and contain one or more of the physical or biological features that are essential to support life-history processes of the species.

We propose one unit for designation based on one or more of the physical or biological features being present to support the South Llano Springs moss' life-history processes. This unit contains all of the identified physical or biological features and supports multiple life-history processes.

The critical habitat designation is defined by the map, as modified by any accompanying regulatory text, presented at the end of this document under Proposed Regulation Promulgation. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which the map is based available to the public at *http://www.regulations.gov* under Docket No. FWS–R2–ES–2020–0015, on our internet site at *https://www.fws.gov/southwest/es/AustinTexas/,* and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT**).

Proposed Critical Habitat Designation

We propose to designate one unit of approximately 0.19 ha (0.48 ac) as critical habitat for the South Llano Springs moss, labeled Upper South Llano River Unit in Table 1 (below). The critical habitat area we describe below constitutes our current best assessment of areas that meet the definition of critical habitat for the South Llano Springs moss.

TABLE 1—PROPOSED CRITICAL HABITAT UNIT FOR THE SOUTH LLANO SPRINGS MOSS

[Area estimates reflect all land within critical habitat unit boundaries]

Unit	Land ownership by type	Size of unit in hectares (acres)	Occupied?
Upper South Llano River	Private	0.19 (0.48)	Yes.

We present a brief description of the proposed unit, and the reasons why it meets the definition of critical habitat for the South Llano Springs moss, below.

Upper South Llano River Unit

The Upper South Llano River Unit consists of 0.19 ha (0.48 ac) within the outflow area of Seven Hundred Springs, in northeastern Edwards County, Texas. This unit extends from the points of discharge about 10 m (33 ft) downslope to the South Llano River, and spans a length of about 100 m (328 ft) along the river. The species was last documented at this site in 1979, and the unit is considered occupied. This entire unit is on privately owned land. This unit contains all of the physical or biological features essential to the conservation of the species. The physical or biological features in this unit may require special management consideration due to groundwater pumping causing loss or reduction of springflow flood-control projects; and development of areas adjacent to or within proposed critical habitat.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

We published a final rule with a revised definition of destruction or adverse modification on August 27, 2019 (84 FR 44976). Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat—and actions on State, tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation.

Compliance with the requirements of section 7(a)(2) is documented through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Service Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 set forth requirements for Federal agencies to reinitiate formal consultation on previously reviewed actions. These requirements apply when the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law) and, subsequent to the previous consultation, we have listed a new species or designated critical habitat that may be affected by the Federal action, or the action has been modified in a manner that affects the species or critical habitat in a way not considered in the previous consultation. In such situations, Federal agencies sometimes may need to request reinitiation of consultation with us, but the regulations also specify some exceptions to the requirement to reinitiate consultation on specific land management plans after subsequently listing a new species or designating new critical habitat. See the regulations for a description of those exceptions.

Application of the ''Destruction or Adverse Modification'' Standard

The key factor related to the destruction or adverse modification determination is whether implementation of the proposed Federal action directly or indirectly alters the designated critical habitat in a way that appreciably diminishes the value of the critical habitat as a whole for the conservation of the listed species. As discussed above, the role of critical habitat is to support physical or biological features essential to the conservation of a listed species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may violate 7(a)(2) of the Act by destroying or adversely modifying such habitat, or that may be affected by such designation.

Activities that the Services may, during a consultation under section 7(a)(2) of the Act, find are likely to destroy or adversely modify critical habitat include, but are not limited to, actions that would impact the Edwards-Trinity aquifer and the springs and streams within the Hydrologic Unit Code (HUC)-12 watersheds of Paint Creek, Bluff Creek, and Little Paint Creek or within the upper South Llano River HUC–8 watershed. Depending on the activity and location, these actions could include, but are not limited to, groundwater pumping; discharge of contaminants; discharge of dredge or fill material; construction and maintenance of roads, railroads, and pipelines; and conservation and habitat management, which may include thinning of ashe juniper (*Juniperus ashei*), prescribed burning, and control of invasive aquatic plants, such as elephant ear (*Colocassia esculenta*). Potential effects of these activities include reduced spring flow at Seven Hundred Springs, increased runoff, flash flooding and scouring along the South Llano River, and contamination of the aquifer with toxic substances or excessive nutrient levels.

Exemptions

Application of Section 4(a)(3) of the Act

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan [INRMP] prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.'' There are no Department of Defense (DoD) lands with a completed INRMP within the proposed critical habitat designation.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making the determination to exclude a particular area, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

The first sentence in section 4(b)(2) of the Act requires that we take into consideration the economic, national security, or other relevant impacts of designating any particular area as critical habitat. We describe below the process that we undertook for taking into consideration each category of impacts and our analyses of the relevant impacts.

Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. Accordingly, we have prepared a draft economic analysis concerning the proposed critical habitat designation, which is available for review and comment (see **ADDRESSES**, above). To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific critical habitat designation may have on restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species. The probable economic impact of a proposed critical habitat designation is analyzed by comparing scenarios both ''with critical habitat'' and ''without critical habitat.''

The ''without critical habitat'' scenario represents the baseline for the analysis, which includes the existing regulatory and socio-economic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat (*e.g.,* under the Federal listing as well as other Federal, State, and local regulations). The baseline, therefore, represents the costs of all efforts attributable to the listing of the species under the Act (*i.e.,* conservation of the species and its habitat incurred regardless of whether critical habitat is designated). The ''with critical habitat'' scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts would not be expected without the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs. These are the costs we use when evaluating the benefits of inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct a discretionary 4(b)(2) exclusion analysis.

For this particular designation, we developed an incremental effects memorandum (IEM) considering the probable incremental economic impacts that may result from this proposed designation of critical habitat. The information contained in our IEM was then used to develop a screening analysis of the probable effects of the designation of critical habitat for the South Llano Springs moss (IEc. 2020, entire).

We began by conducting a screening analysis of the proposed designation of critical habitat in order to focus our analysis on the key factors that are likely to result in incremental economic impacts. The purpose of the screening analysis is to filter out particular geographic areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur incremental economic impacts. In particular, the screening analysis considers baseline costs (*i.e.,* absent critical habitat designation) and includes probable economic impacts where land and water use may be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species. Ultimately, the screening analysis allows us to focus our analysis on evaluating the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation. The screening analysis also assesses whether units are unoccupied by the species and may require additional management or conservation efforts as a result of the critical habitat designation for the species; these additional efforts may incur incremental economic impacts.

This screening analysis combined with the information contained in our IEM are what we consider our draft economic analysis (DEA) of the proposed critical habitat designation for the South Llano Springs moss; our DEA is summarized in the narrative below.

Executive Orders (E.O.s) 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consistent with the E.O. regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly affected entities, where practicable and reasonable. If sufficient data are available, we assess to the extent practicable the probable impacts to both directly and indirectly affected entities. As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely affected by the critical habitat designation. In our evaluation of the probable incremental economic impacts that may result from the proposed designation of critical habitat for the South Llano Springs moss, first we identified, in the IEM dated January 7, 2020, probable incremental economic impacts associated with the following categories of activities: (1) Discharge permits (Environmental Protection Agency and U.S. Army Corps of Engineers); (2) stream dams and diversions, and dredge and fill of waterways (Environmental Protection Agency and U.S. Army Corps of Engineers); (3) transportation (U.S. Department of Transporation, Federal Highway Administration, and Federal Railroad Administration); and (4) conservation and habitat management (U.S. Fish and Wildlfie Service). We considered each industry or category individually. Additionally, we considered whether their activities have any Federal involvement. Critical habitat designation generally will not affect activities that do not have any Federal involvement; under the Act, designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. If we list this species, in areas where the South Llano Springs moss is present, Federal agencies would be required to consult with the Service under section 7 of the Act on activities they fund, permit, or implement that may affect the species. If, when we list this species, we also finalize this proposed critical habitat designation, consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In our IEM, we attempted to clarify the distinction between the effects that will result from the species being listed and those attributable to the critical habitat designation (*i.e.,* difference between the jeopardy and adverse modification standards) for the South Llano Springs moss' critical habitat. Because the designation of critical habitat for the South Llano Springs moss is proposed concurrently with the listing, it has been our experience that it is more difficult to discern which conservation efforts are attributable to the species being listed and those which will result solely from the designation of critical habitat. However, the following specific circumstances in this case help to inform our evaluation: (1) The essential physical or biological features identified for critical habitat are the same features essential for the life requisites of the species, and (2) any actions that would result in sufficient harm or harassment to constitute jeopardy to the South Llano Springs moss would also likely adversely affect the essential physical or biological features of critical habitat. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this proposed designation of critical habitat.

The proposed critical habitat designation for the South Llano Springs moss includes one unit of occupied critical habitat, totaling 0.19 ha (0.48 ac), on private land. Because this area is occupied, any actions that may affect the species or its habitat would also affect designated critical habitat. As such, all activities with a Federal nexus occurring within the proposed critical habitat would be subject to section 7 consultation requirements regardless of critical habitat designation due to the presence of the listed species. Project modifications requested to avoid adverse modification are also likely to be the same as those needed to avoid jeopardy to the South Llano Springs moss. Therefore, only administrative costs are expected when considering adverse modification in section 7 consultations due to the proposed critical habitat designation. While this additional analysis would require time and resources by both the Federal action agency and the Service, we believe that these costs would be administrative in nature and would not be significant. Based upon past consultations in the area, it is conservatively estimated that three or fewer section 7 consultation actions (approximately one formal consultation, one informal consultation, and one technical assistance request) will occur annually in the proposed critical habitat area. These may include consultations with the U.S. Army Corps of Engineers, U.S. Department of Transportation, U.S. Environmental Protection Agency, and the U.S. Fish and Wildlife Service for fish passage projects, riparian restoration, upland habitat restoration, prescribed fire, and brush management. The total annual incremental costs of critical habitat designation for the South Llano Springs moss are anticipated to be approximately $8,100 per year. Current development or other projects are not planned in the proposed critical habitat area. Therefore, future probable incremental economic impacts are not likely to exceed $100 million in any single year, and impacts that are concentrated in any geographic area or sector are not likely as a result of this critical habitat designation.

As we stated earlier, we are soliciting data and comments from the public on the DEA, as well as all aspects of this proposed rule and our required determinations. During the development of a final designation, we will consider the information presented in the DEA and any additional information on economic impacts received during the public comment period to determine whether any specific areas should be excluded from the final critical habitat designation on the basis of economic impacts under authority of section 4(b)(2) and our implementing regulations at 50 CFR 424.19. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

Consideration of National Security Impacts

Section 4(a)(3)(B)(i) of the Act may not cover all DoD lands or areas that pose potential national-security concerns (*e.g.,* a DoD installation that is in the process of revising its INRMP for a newly listed species or a species previously not covered). If a particular area is not covered under section 4(a)(3)(B)(i), national-security or homeland-security concerns are not a factor in the process of determining what areas meet the definition of ''critical habitat.'' Nevertheless, when designating critical habitat under section 4(b)(2), the Service must consider impacts on national security,

including homeland security, on lands or areas not covered by section 4(a)(3)(B)(i). Accordingly, we will always consider for exclusion from the designation areas for which DoD, Department of Homeland Security (DHS), or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns.

We cannot, however, automatically exclude requested areas. When DoD, DHS, or another Federal agency requests exclusion from critical habitat on the basis of national-security or homeland-security impacts, it must provide a reasonably specific justification of an incremental impact on national security that would result from the designation of that specific area as critical habitat. That justification could include demonstration of probable impacts, such as impacts to ongoing border-security patrols and surveillance activities, or a delay in training or facility construction, as a result of compliance with section 7(a)(2) of the Act. If the agency requesting the exclusion does not provide us with a reasonably specific justification, we will contact the agency to recommend that it provide a specific justification or clarification of its concerns relative to the probable incremental impact that could result from the designation. If the agency provides a reasonably specific justification, we will defer to the expert judgment of DoD, DHS, or another Federal agency as to: (1) Whether activities on its lands or waters, or its activities on other lands or waters, have national-security or homeland-security implications; (2) the importance of those implications; and (3) the degree to which the cited implications would be adversely affected in the absence of an exclusion. In that circumstance, in conducting a discretionary 4(b)(2) exclusion analysis, we will give great weight to national-security and homeland-security concerns in analyzing the benefits of exclusion.

In preparing this proposal, we have determined that the land within the proposed designation of critical habitat for the South Llano Springs moss is not owned, managed, or used by DoD or DHS, and, therefore, we anticipate no impact on national security or homeland security. However, during the development of a final designation we will consider any additional information received through the public comment period on the impacts of the proposed designation on national security or homeland security to determine whether any specific areas should be excluded from the final critical habitat designation under authority of section 4(b)(2) and our implementing regulations at 50 CFR 424.19.

Consideration of Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security discussed above. We consider a number of factors including whether there are permitted conservation plans covering the species in the area such as HCPs, safe harbor agreements (SHAs), or candidate conservation agreements with assurances (CCAAs), or whether there are non-permitted conservation agreements and partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at the existence of tribal conservation plans and partnerships and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this proposal, we have determined that there are currently no HCPs or other management plans for the South Llano Springs moss, and the proposed designation does not include any tribal lands or trust resources. We anticipate no impact on tribal lands, partnerships, or HCPs from this proposed critical habitat designation. Additionally, as described above, we are not proposing to exclude any particular areas on the basis of impacts to national security or economic impacts.

During the development of a final designation, we will consider any additional information received through the public comment period regarding other relevant impacts to determine whether any specific areas should be excluded from the final critical habitat designation under authority of section 4(b)(2) and our implementing regulations at 50 CFR 424.19.

Required Determinations

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is not 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.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), 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 entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine whether potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

Under the RFA, as amended, and as understood in the light of recent court decisions, Federal agencies are required to evaluate the potential incremental impacts of rulemaking only on those entities directly regulated by the rulemaking itself and, therefore, are not required to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies would be directly regulated if we adopt the proposed critical habitat designation. There is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities would be directly regulated by this rulemaking, the Service certifies that, if made final as proposed, this critical habitat designation will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if made final, this critical habitat designation will not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. In our economic analysis, we did not find that the designation of this proposed critical habitat would significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following finding:

(1) This proposed rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule would significantly or uniquely affect small governments because the unit is very small and is entirely on private land. Small governments would be affected only to the extent that any programs having Federal funds, permits, or other authorized activities must ensure that their actions would not adversely affect the designated critical habitat. The designation of critical habitat imposes no obligations on State or local governments. Therefore, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the South Llano Springs moss in a takings implications assessment. The Act does not authorize the Service to regulate private actions on private lands or

confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed for the proposed designation of critical habitat for the South Llano Springs moss, and it concludes that, if adopted, this designation of critical habitat does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this proposed critical habitat designation with, appropriate State resource agencies. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the proposed rule does not have substantial direct effects either on the States, or on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government. The proposed designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical or biological features of the habitat necessary for the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist State and local governments in long-range planning because they no longer have to wait for case-by-case section 7 consultations to occur.

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) of the Act would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, this proposed rule identifies the elements of physical or biological features essential to the conservation of the species. The proposed area of designated critical habitat is presented on a map, and the proposed rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

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 (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. We have determined that no tribal lands fall within the boundaries of the proposed designation of critical habitat for the South Llano Springs moss, so no tribal lands would be affected by the proposed designation.

References Cited

A complete list of references cited in this rulemaking is available on the internet at *http://www.regulations.gov* and upon request from the Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the Fish and Wildlife Service's Species Assessment Team and the Austin Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. Amend § 17.12, in paragraph (h), the List of Endangered and Threatened Plants, by:

■ a. Adding the heading ''**MOSSES**'' to the end of the table; and

■ b. Adding an entry for ''*Donrichardsia macroneuron*'' under the new heading ''**MOSSES**''.

The additions read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Scientific name	Common name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	*
MOSSES				
Donrichardsia macroneuron.	South Llano Springs moss.	Wherever found	E	[**Federal Register** citation when published as a final rule]; 50 CFR 17.96(c).CH

■ 3. Amend § 17.96 by adding paragraph (c) to read as follows:

§ 17.96 Critical habitat—plants.

* * * * *

(c) *Mosses.* Family Brachytheciaceae: *Donrichardsia macroneuron.*

(1) Critical habitat is depicted for Edwards County, Texas, on the map in this entry.

(2) Within this area, the physical or biological features essential to the conservation of the South Llano Springs moss consist of the following components:

(i) The uninterrupted flow of spring water supplied by the Edwards-Trinity aquifer within the South Llano watershed;

(ii) Relatively constant water temperature due to proximity to the point of spring outflow;

(iii) A substrate of calcareous or travertine rock not more than 15 cm (6 in) below the surface of the water; and

(iv) Contaminant and sediment levels that do not exceed the tolerance limits of South Llano Springs moss and associated plant and animal species.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located within the legal boundaries on [EFFECTIVE DATE OF FINAL RULE].

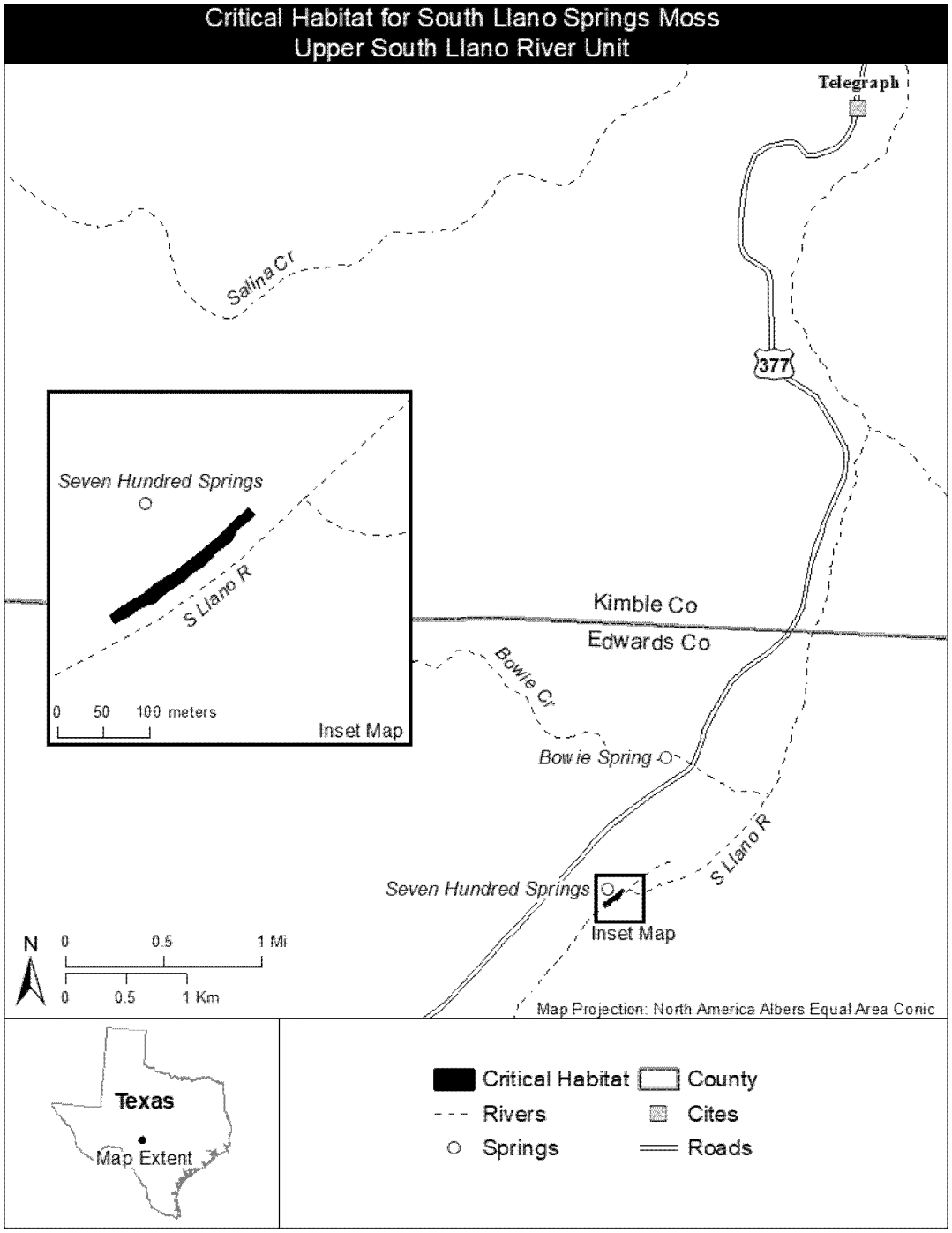
(4) *Critical habitat map units.* Data layers defining the map unit were created on a base of U.S. Geological Survey digital ortho-photo quarter-quadrangles, and the critical habitat unit was then mapped using Geographic Information System (GIS) mapping. The map in this entry, as modified by any accompanying regulatory text, establishes the boundaries of the critical habitat designation. The coordinates or plot points or both on which the map is based are available to the public at the Service's internet site at *https://www.fws.gov/southwest/es/AustinTexas/,* at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2020–0015, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Upper South Llano River Unit, Edwards County, Texas.

(i) *General description:* The Upper South Llano River Unit consists of 0.19 hectares (0.48 acres) in Edwards County and is located on private land along the upper South Llano River.

(ii) Map of Upper South Llano River Unit follows:

BILLING CODE 4333–15–P



BILLING CODE 4333–15–C

Martha Williams,

Principal Deputy Director, Exercising the Delegated Authority of the Director, U.S. Fish and Wildlife Service.

[FR Doc. 2021–20924 Filed 9–27–21; 8:45 am]

BILLING CODE 4333–15–C

Notices

Federal Register
Vol. 86, No. 185
Tuesday, September 28, 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.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Submission for Review

AGENCY: U.S. Agency for International Development.

ACTION: 30-Day notice

SUMMARY: U.S. Agency for International Development (USAID), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on the following new information collection, as required by the Paperwork Reduction Act of 1995. Comments are requested concerning whether the proposed collection of information is necessary for sustaining USAID-funded programming beyond USAID funding; the accuracy of USAID's estimate of the burden of the proposed collection of information; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents.

DATES: All comments should be submitted within 30 calendar days from the date of this publication.

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. Interested persons are invited to solicit additional information from Elena Walls, USAID, Bureau of Development, Democracy, and Innovation, Center for Education, at *ewalls@usaid.gov.*

FOR FURTHER INFORMATION CONTACT: Elena Walls, USAID, Bureau of Development, Democracy, and Innovation, Center for Education, at *ewalls@usaid.gov* or 202–468–3810.

SUPPLEMENTARY INFORMATION:

Agency Form No.: N/A, new data collection.

Title: Forms for reporting on contributions to USAID-funded education activities by host country governments, non-governmental entities and implementing partners, and details of implementation.

Analysis: Data from these forms are required for measuring costs of USAID-funded education interventions. The results of the cost analysis will be used to inform the scale and sustainability of USAID-funded interventions, for improving planning, budgeting and management of activities, and for reporting to Congress and other stakeholders.

OMB Number: N/A, new data collection.

Agency Form No.: N/A, new data collection.

Agency: U.S. Agency for International Development.

Federal Register: This information was previously published in the **Federal Register** on July 18, 2019 allowing for a 60-day public comment period, under Document #2019–15228.

Affected Public: Organizations that are awarded USAID awards (contracts and cooperative agreements) to implement education activities.

Number of Respondents: 120.

Frequency: Once per year.

Estimated number of hours: 960 hours.

Christine Pagen,

Deputy Director, Center for Education, Bureau for Development, Democracy and Innovation, U.S. Agency for International Development.

[FR Doc. 2021–20975 Filed 9–27–21; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by October 28, 2021 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food and Nutrition Service

Title: Food Delivery Portal (FDP) Data Collection.

OMB Control Number: 0584–0401.

Summary of Collection: This is a revision of a currently approved information collection that was formerly titled ''The Integrity Profile (TIP) Data Collection.'' Under the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) program regulations at 7 CFR 246.12(j)(5), WIC State agencies are required to report annually on their vendor monitoring efforts. The data is used at the State agency level as a management tool and at the national level to provide Congress, the Office of the Inspector General, senior program managers, as well as the general public,

assurances that program funds are being spent appropriately and that every reasonable effort is being made by State agencies to prevent, detect and eliminate fraud, waste, and abuse. This information was originally collected through The Integrity Profile (TIP) system via three automated forms: FNS–698 Profile of Integrity Practices and Procedures (PIPP) Report, FNS–699 The Integrity Profile (TIP) Report, and FNS–700 Vendor Record. The Food and Nutrition Service (FNS) is replacing TIP with an upgraded, web-based system called the Food Delivery Portal (FDP), which uses screens to collect the necessary data. FNS expects that WIC State agencies will start using the upgraded, web-based system in FY 2022.

Need and Use of the Information: This is a mandatory collection, and the respondents are WIC State agencies. The WIC State agencies provide information on their vendor training, compliance investigations, routine monitoring, and sanctions, which is reported annually to FNS. These reports will be generated through the new web-based FDP system (originally, they were generated through TIP). WIC State agencies review the reports to track and confirm that the data was reported accurately and to ensure compliance with Federal requirements, while FNS reviews the reports to ensure that WIC State agencies are in compliance with vendor regulations. FNS uses the data for Federal oversight of the WIC Program and to provide information on WIC State agency vendor management and vendor compliance to stakeholders, including Congress, USDA's Office of the Inspector General, outside auditors, researchers, and the general public.

Description of Respondents: State, Local, or Tribal Government.

Number of Respondents: 194.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 1,189.

Dated: September 23, 2021.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2021–21051 Filed 9–27–21; 8:45 am]

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DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–44–2021]

Foreign-Trade Zone (FTZ) 136—Brevard County, Florida, Authorization of Production Activity, Airbus OneWeb Satellites North America LLC, (Satellites and Satellite Systems), Merritt Island, Florida

On May 26, 2021, Airbus OneWeb Satellites North America LLC submitted a notification of proposed production activity to the FTZ Board for its facility within FTZ 136, in Merritt Island, Florida.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (86 FR 30252, June 7, 2021). On September 23, 2021, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification was authorized, subject to the FTZ Act and the FTZ Board's regulations, including section 400.14.

Dated: September 23, 2021.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2021–21039 Filed 9–27–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–067]

Forged Steel Fittings From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2018–2019

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that Both-Well (Taizhou) Steel Fittings Co., Ltd. (Both-Well), an exporter of forged steel fittings from the People's Republic of China (China), did not sell subject merchandise in the United States at prices below normal value (NV) during the period of review (POR) May 17, 2018, through October 31, 2019. We also find that 15 companies, including Ningbo Zhongan Forging Co., Ltd. (Ningbo Zhongan), are not eligible for a separate rate and, therefore, are part of the China-wide entity. Further, we have found that four companies had no shipments of subject merchandise during the POR.

DATES: Applicable September 28, 2021.

FOR FURTHER INFORMATION CONTACT: Jinny Ahn, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0339.

SUPPLEMENTARY INFORMATION:

Background

Commerce published the *Preliminary Results* [1] on March 26, 2021. For events subsequent to the *Preliminary Results, see* the Issues and Decision Memorandum.[2]

On July 1, 2021, Commerce extended the deadline of the final results of this administrative review by 60 days, until September 22, 2021.[3]

Scope of the Order [4]

The merchandise covered by the *Order* is forged steel fittings from China. For a complete description of the scope of the *Order, see* the Issues and Decision Memorandum.

Analysis of Comments Received

In the Issues and Decision Memorandum, we addressed all issues raised in the interested parties' case and rebuttal briefs. In Appendix I to this notice, we provided a list of the issues raised by the parties. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum is available to parties at *http://enforcement.trade.gov/frn/index.html.*

[1] *See Forged Steel Fittings from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2018–2019,* 86 FR 16186 (March 26, 2021) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See* Memorandum, ''Decision Memorandum for the Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments: Forged Steel Fittings from the People's Republic of China; 2018–2019,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See* Memorandum, ''Forged Steel Fittings from the People's Republic of China (China): Extension of Deadline for Final Results of First Antidumping Duty Administrative Review,'' dated July 1, 2021.

[4] *See Forged Steel Fittings from Italy and the People's Republic of China: Antidumping Duty Orders,* 83 FR 60397, dated November 26, 2018 (*Order*).

Changes Since the Preliminary Results

Based on our review of the record and comments received from interested parties regarding our *Preliminary Results,* we made certain revisions to the margin calculations for Both-Well.[5] However, these revisions did not change the weighted-average dumping margin for Both-Well[6] and, consequently, did not change the rate assigned to the non-individually examined, separate rate respondents. *See* ''Dumping Margin for Non-Individually Examined Companies Granted a Separate Rate'' below.

Final Determination of No Shipments

In the *Preliminary Results,* we preliminarily determined that Dalian Guangming Pipe Fittings Co., Ltd.; Jiangsu Forged Pipe Fittings Co., Ltd.; Lianfa Stainless Steel Pipes & Valves (Qingyun) Co., Ltd.; and Qingdao Bestflow Industrial Co., Ltd. had no shipments of subject merchandise during the POR.[7] We received no arguments identifying information that contradicts this determination. Therefore, we continue to find that these companies had no shipments of subject merchandise to the United States during the POR and will issue appropriate liquidation instructions that are consistent with our ''automatic assessment'' clarification for these final results.[8]

Separate Rate Respondents

In the *Preliminary Results,* Commerce determined that Both-Well and six other companies demonstrated their eligibility for a separate rate.[9] We received no comments or arguments since the issuance of the *Preliminary Results* that provide a basis for reconsideration of these separate rate determinations. Therefore, for these final results, we continue to find that the six companies listed in the table under ''Review-Specific Rate Applicable to the Following Non-Selected Companies'' in the ''Final Results of the Review'' section of this notice are eligible for a separate rate.

Dumping Margin for Non-Individually Examined Companies Granted a Separate Rate

In the *Preliminary Results,*[10] because the only participating mandatory respondent (*i.e.,* Both-Well) eligible for a separate rate received a weighted-average dumping margin of zero percent, we looked for guidance to section 735(c)(5)(B) of the Act, which instructs Commerce to use any ''reasonable method'' to determine the rate for exporters that are not being individually examined and found to be entitled to a separate rate. Accordingly, in the *Preliminary Results,* we assigned the calculated weighted-average dumping margin of the sole participating mandatory respondent, Both-Well (*i.e.,* zero percent), as the weighted-average dumping margin for the non-individually examined, separate rate respondents. No parties commented on the methodology for calculating this separate rate. For the final results, as the revisions we made to the margin calculations for Both-Well did not change the weighted-average dumping margin for Both-Well (*i.e.,* zero percent), we continue to find it appropriate to assign the calculated weighted-average dumping margin of the sole participating mandatory respondent, Both-Well (*i.e.,* zero percent), as the weighted-average dumping margin for the non-individually examined, separate rate respondents.

The China-Wide Entity

In the *Preliminary Results,* Commerce preliminarily determined that Ningbo Zhongan, a company selected for individual examination, had not established its eligibility for a separate rate.[11] Moreover, Commerce preliminarily determined that 14 other companies for which a review was initiated did not establish their eligibility for a separate rate because they failed to provide a separate rate application, a separate rate certification, or a no-shipment certification if they were already eligible for a separate rate.[12] As such, we preliminarily determined that Ningbo Zhongan and these additional 14 companies are part of the China-wide entity.[13] We received no comments or arguments since the issuance of the *Preliminary Results* that provide a basis for reconsideration of these determinations. Therefore, for these final results, we continue to find that the fifteen companies identified at Appendix II to this notice are a part of the China-wide entity.

Commerce's policy regarding conditional review of the China-wide entity applies to this administrative review.[14] Under this policy, the China-wide entity will not be under review unless a party specifically requests, or Commerce self-initiates, a review of the China-wide entity.[15] Because no party requested a review of the China-wide entity in this review, the China-wide entity is not under review and the China-wide entity's rate (*i.e.,* 142.72 percent) is not subject to change as a result of this review.[16]

Final Results of the Review

For the companies subject to this review, which established their eligibility for a separate rate, Commerce determines that the following weighted-average dumping margins exist for the POR:

Exporter	Weighted-average dumping margin (percent)
Both-Well (Taizhou) Steel Fittings Co., Ltd	0.00
Review-Specific Rate Applicable to the Following Companies	
Ningbo Long Teng Metal Manufacturing Co., Ltd	0.00
Ningbo Save Technology Co., Ltd	0.00
Q.C. Witness International Co., Ltd	0.00
Yingkou Guangming Pipeline Industry Co., Ltd	0.00
Yuyao Wanlei Pipe Fitting Manufacturing Co., Ltd	0.00
Xin Yi International Trade Co., Limited	0.00

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.212(b), Commerce has determined, and U.S Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review. Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International

[5] *See* Memorandum, ''Antidumping Duty Administrative Review of Forged Steel Fittings from the People's Republic of China: Final Results Calculation Memorandum for Both-Well,'' dated concurrently with this notice.

[6] *Id.*

[7] *See Preliminary Results,* 86 FR at 16187.

[8] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011) (*Assessment Practice Refinement*).

[9] *See Preliminary Results,* 86 FR at 16187.

[10] *See Preliminary Results* PDM at 8.

[11] *Id.* at 4–5.

[12] *See* Appendix II of this notice which identifies these 14 companies along with Ningbo Zhongan.

[13] *See Preliminary Results* PDM at 4–5.

[14] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963 (November 4, 2013).

[15] *Id.*

[16] *See Order,* 83 FR at 60397.

Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Because the weighted-average dumping margin for Both-Well and the respondents that were not selected for individual examination in this administrative review but qualified for a separate rate is zero, Commerce will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.[17] For the companies listed in Appendix II, identified as part of the China-wide entity, we will instruct CBP to apply an antidumping duty assessment rate of 142.72 percent (the rate applicable to the China-wide entity) to all entries of subject merchandise during the POR exported by those companies.

For entries that were not reported in the U.S. sales data submitted by Both-Well during this review, Commerce will instruct CBP to liquidate such entries at the rate for the China-wide entity.[18] Additionally, if Commerce determines that an exporter under review had no shipments of the subject merchandise, any suspended entries that entered under that exporter's case number (*i.e.,* at that exporter's cash deposit rate) will be liquidated at the rate for the China-wide entity (*i.e.,* 142.72 percent).

We intend to instruct CBP to take into account the ''provisional measures deposit cap'' in accordance with 19 CFR 351.212(d).

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for shipments of the subject merchandise from China entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) For each company listed in the final results of this review, the cash deposit rate will be equal to the weighted-average dumping margin listed for the exporter in the table; (2) for a previously examined Chinese and non-Chinese exporter not listed above that received a separate rate in a prior completed segment of this proceeding, the cash deposit rate will continue to be the existing exporter-specific cash deposit rate; (3) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the rate for the China-wide entity (*i.e.,* 142.72 percent); and (4) for all non-Chinese exporters of subject merchandise which have not received their own separate rate, the cash deposit rate will be the rate applicable to the Chinese exporter that supplied that non-Chinese exporter.

These cash deposit requirements, when imposed, shall remain in effect until further notice.

Disclosure

We intend to disclose the calculations performed to parties in this proceeding within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Notification to Importers Regarding the Reimbursement of Duties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties has occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Order (APO)

This notice also serves as a reminder to parties subject to APO of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation subject to sanction.

Notification to Interested Parties

This administrative review and notice are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213 and 19 CFR 351.221(b)(5).

Dated: September 21, 2021.

Christian Marsh,

Acting Assistant Secretary for Enforcement and Compliance.

Appendix I

Issues and Decision Memorandum

Appendix II

Companies Not Eligible for Separate Rate and Treated as Part of China-Wide Entity

1. Cixi Baicheng Hardware Tools, Ltd.
2. Eaton Hydraulics (Luzhou) Co., Ltd.
3. Eaton Hydraulics (Ningbo) Co., Ltd.
4. Jiangsu Haida Pipe Fittings Group Co.
5. Jinan Mech Piping Technology Co., Ltd.
6. Jining Dingguan Precision Parts Manufacturing Co., Ltd.
7. Luzhou City Chengrun Mechanics Co., Ltd.
8. Ningbo HongTe Industrial Co., Ltd.
9. Ningbo Zhongan Forging Co., Ltd.
10. Shanghai Lon Au Stainless Steel Materials Co., Ltd.
11. Witness International Co., Ltd.
12. Yancheng Boyue Tube Co., Ltd.
13. Yancheng Haohui Pipe Fittings Co., Ltd.
14. Yancheng Jiuwei Pipe Fittings Co., Ltd.
15. Yancheng Manda Pipe Industry Co., Ltd.

[FR Doc. 2021–21045 Filed 9–27–21; 8:45 am]

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[17] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 FR 8101, 8103 (February 14, 2012).

[18] *See Assessment Practice Refinement,* 76 FR at 65694–95, for a full discussion of this practice.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–809]

Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2018–2019

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that the producers/exporters subject to this administrative review did not make sales of circular welded non-alloy steel pipe (CWP) from the Republic of Korea (Korea) at less than normal value during the period of review (POR), November 1, 2018, through October 31, 2019.

DATES: Applicable September 28, 2021.

FOR FURTHER INFORMATION CONTACT: Dusten Hom, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration,

U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington DC 20230; telephone: (202) 482–5075.

SUPPLEMENTARY INFORMATION:

Background

On March 25, 2021, Commerce published the *Preliminary Results* of this administrative review.[1] The review covers 24 producers and/or exporters of subject merchandise. We invited interested parties to comment on the *Preliminary Results.* On June 25, 2021, Commerce extended the deadline for issuing these final results until September 21, 2021.[2] A summary of the events that occurred since Commerce published the *Preliminary Results,* as well as a full discussion of the issues raised by parties for these final results, are discussed in the Issues and Decision Memorandum.[3] Commerce conducted this review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).

Scope of the Order

The merchandise subject to the order is circular welded non-alloy steel pipe and tube. Imports of the product are currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 7306.30.1000, 7306.30.5025, 7306.30.5032, 7306.30.5040, 7306.30.5055, 7306.30.5085, and 7306.30.5090. While the HTSUS subheadings are provided for convenience and customs purposes, the written description is dispositive. For a complete description of the scope of the order, *see* the Issues and Decision Memorandum.[4]

Analysis of Comments Received

All issues raised in the case and rebuttal briefs filed by parties in this review are listed in Appendix I to this notice and addressed in the Issues and Decision Memorandum. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed at *htttp://enforcement.trade.gov/frn/index.html.*

Changes Since the Preliminary Results

Based on a review of the record and comments received from interested parties regarding our *Preliminary Results,* and for the reasons explained in the Issues and Decision Memorandum, we made certain changes for these final results of review.

Final Determination of No Shipments

In the *Preliminary Results,* Commerce determined that HiSteel had no shipments of subject merchandise during the POR. No party commented on this issue and because we have not received any information to contradict our preliminary finding, we continue to find that HiSteel did not have any shipments of subject merchandise during the POR and intend to issue appropriate instructions to U.S. Customs and Border Protection (CBP) based on the final results of this review.

Rate for Non-Examined Companies

The statute and Commerce's regulations do not address the establishment of a rate to be applied to companies not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in a market economy investigation, for guidance when calculating the rate for companies which were not selected for individual examination in an administrative review. Under section 735(c)(5)(A) of the Act, the all-others rate is normally ''an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero or *de minimis* margins, and any margins determined entirely {on the basis of facts available}.'' Section 735(c)(5)(B) of the Act also provides that, where all rates for individually examined companies are zero, *de minimis,* or based entirely on facts available, Commerce may use ''any reasonable method'' for assigning the rate to all other respondents. The SAA states that one such reasonable method is to weight-average the rates that are zero, *de minimis,* and based entirely on facts available.[5]

In this review, we calculated weighted-average dumping margins for Husteel Co., Ltd. (Husteel) and Hyundai Steel Company (Hyundai Steel) that are zero percent, and we have assigned this zero percent rate to the 21 firms not selected for individual review under section 735(c)(5)(B) of the Act.[6]

Final Results of Review

We determine that the following weighted-average dumping margins exists for the period November 1, 2018 through October 31, 2019:

Producer/exporter	Weighted-average dumping margin (percent)
Husteel Co., Ltd	0.00
Hyundai Steel Company[7]	0.00
Review-Specific Average Rate Applicable to the Following Companies	
Other Respondents[8]	0.00

Disclosure

We intend to disclose the calculations performed in connection with these final results to parties in this proceeding within five days of the date of publication of this notice, in accordance with 19 CFR 351.224(b).

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b), Commerce shall determine, and CBP shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. Because all respondents weighted-average dumping margins are zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

For entries of subject merchandise during the POR produced by Husteel or Hyundai Steel for which they did not know that the merchandise was destined to the United States and for all entries attributed to HiSteel, for which we found no shipments during the POR, we will instruct CBP to liquidate those

[1] *See Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2018–2019,* 86 FR 15912 (March 25, 2021) (*Preliminary Results*) and accompanying Preliminary Decision Memorandum (PDM).

[2] *See* Memorandum, ''Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Extension of Deadline for Final Results of Antidumping Duty Administrative Review; 2018–2019,'' dated June 25, 2021.

[3] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the 2017–2018 Administrative Review of the Antidumping Duty Order on Circular Welded Non-Alloy Steel Pipe from the Republic of Korea,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[4] *Id.*

[5] *See* Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103–316, vol. 1 (1994) (SAA) at 873.

[6] *See Albemarle Corp.* v. *United States,* 821 F.3d 1345 (Fed. Cir. 2016).

[7] This company is also known as Hyundai Steel Corporation; Hyundai Steel; and Hyundai Steel (Pipe Division).

[8] *See* Appendix II for a full list of these companies.

entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[9]

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review in the **Federal Register**, as provided for by section 751(a)(2) of the Act: (1) The cash deposit rate for companies subject to this review will be the rates established in these final results of the review; (2) for merchandise exported by producers or exporters not covered in this review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation but the producer is, then the cash deposit rate will be the rate established for the most recent period for the producer of the merchandise; (4) the cash deposit rate for all other producers or exporters will continue to be 4.80 percent,[10] the all-others rate established in the investigation. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties has occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(5).

Dated: September 21, 2021.

Christian Marsh,

Acting Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Issues and Decision Memorandum

Appendix II

List of Companies Not Individually Examined

1. Aju Besteel
2. Bookook Steel
3. Chang Won Bending
4. Dae Ryung
5. Daewoo Shipbuilding & Marine Engineering (Dsme)
6. Daiduck Piping
7. Dong Yang Steel Pipe
8. Dongbu Steel[11]
9. Eew Korea Company
10. Hyundai Rb
11. Kiduck Industries
12. Kum Kang Kind
13. Kumsoo Connecting
14. Miju Steel Mfg.[12]
15. Nexteel Co., Ltd.[13]
16. Samkang M&T
17. Seah Fs
18. Seah Steel[14]
19. Steel Flower
20. Vesta Co., Ltd.
21. Ycp Co.

[FR Doc. 2021–21044 Filed 9–27–21; 8:45 am]

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[9] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[10] *See Notice of Antidumping Duty Orders: Certain Circular Welded Non-Alloy Steel Pipe from Brazil, the Republic of Korea (Korea), Mexico, and Venezuela, and Amendment to Final Determination of Sales at Less Than Fair Value: Certain Circular Welded Non-Alloy Steel Pipe from Korea,* 57 FR 49453 (November 2, 1992).

[11] This company is also known as Dongbu Steel Co., Ltd.

[12] This company is also known as Miju Steel Manufacturing.

[13] This company is also known as Nexteel.

[14] This company is also known as Seah Steel Corporation.

DEPARTMENT OF COMMERCE

International Trade Administration

Renewable Energy and Energy Efficiency Advisory Committee

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice of an open meeting.

SUMMARY: The Renewable Energy and Energy Efficiency Advisory Committee (REEEAC or the Committee) will hold a virtual meeting via WebEx on Thursday October 14, 2021, hosted by the U.S. Department of Commerce. The meeting is open to the public with registration instructions provided below.

DATES: October 14, 2021, from 1:00 p.m. to 4:00 p.m. Eastern Daylight Time EDT. Members of the public wishing to participate must register in advance with the REEEAC Designated Federal Officer (DFO) Cora Dickson at the contact information below by 5:00 p.m. EDT on Friday, October 8, 2021, in order to pre-register, including any requests to make comments during the meeting or for accommodations or auxiliary aids.

ADDRESSES: To register, please contact Cora Dickson, REEEAC DFO, Office of Energy and Environmental Industries (OEEI), Industry and Analysis, International Trade Administration, U.S. Department of Commerce at (202) 482–6083; email: *Cora.Dickson@trade.gov.* Registered participants will be emailed the login information for the meeting, which will be conducted via WebEx.

FOR FURTHER INFORMATION CONTACT: Cora Dickson, REEEAC DFO, Office of Energy and Environmental Industries (OEEI), Industry and Analysis, International Trade Administration, U.S. Department of Commerce at (202) 482–6083; email: *Cora.Dickson@trade.gov.*

SUPPLEMENTARY INFORMATION: *Background:* The Secretary of Commerce established the REEEAC pursuant to discretionary authority and in accordance with the Federal

Advisory Committee Act, as amended (5 U.S.C. app.), on July 14, 2010. The REEEAC was re-chartered most recently on June 5, 2020. The REEEAC provides the Secretary of Commerce with advice from the private sector on the development and administration of programs and policies to expand the export competitiveness of U.S. renewable energy and energy efficiency products and services. More information about the Committee, including the list of appointed members for this charter, is published online at *http://trade.gov/reeeac.*

On October 14, 2021, the REEEAC will hold the third meeting of its current charter term. The Committee, with officials from the Department of Commerce and other agencies, will discuss major issues affecting the competitiveness of the U.S. renewable energy and energy efficiency industries, covering four broad themes: Trade promotion and market access, global decarbonization, clean energy supply chains, and technology and innovation. To receive an agenda please make a request to REEEAC DFO Cora Dickson per above. The agenda will be made available no later than October 8, 2021.

The Committee meeting will be open to the public and will be accessible to people with disabilities. All guests are required to register in advance by the deadline identified under the **DATES** caption. Requests for auxiliary aids must be submitted by the registration deadline. Last minute requests will be accepted but may not be possible to fill.

A limited amount of time before the close of the meeting will be available for oral comments from members of the public attending the meeting. To accommodate as many speakers as possible, the time for public comments will be limited to two to five minutes per person (depending on number of public participants). Individuals wishing to reserve speaking time during the meeting must contact REEEAC DFO Cora Dickson using the contact information above and submit a brief statement of the general nature of the comments, as well as the name and address of the proposed participant, by 5:00 p.m. EDT on Friday, October 8, 2021. If the number of registrants requesting to make statements is greater than can be reasonably accommodated during the meeting, the International Trade Administration may conduct a lottery to determine the speakers. Speakers are requested to submit a copy of their oral comments by email to Cora Dickson for distribution to the participants in advance of the meeting.

Any member of the public may submit written comments concerning the REEEAC's affairs at any time before or after the meeting. Comments may be submitted via email to the Renewable Energy and Energy Efficiency Advisory Committee, c/o: Cora Dickson, DFO, Office of Energy and Environmental Industries, U.S. Department of Commerce; *Cora.Dickson@trade.gov.* To be considered during the meeting, public comments must be transmitted to the REEEAC prior to the meeting. As such, written comments must be received no later than 5:00 p.m. EDT on Friday, October 8, 2021. Comments received after that date will be distributed to the members but may not be considered at the meeting.

Copies of REEEAC meeting minutes will be available within 30 days following the meeting.

Man Cho,

Deputy Director, Office of Energy and Environmental Industries.

[FR Doc. 2021–21084 Filed 9–27–21; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

United States-Mexico-Canada Agreement (USMCA), Article 10.12: Binational Panel Review: Notice of Request for Panel Review

AGENCY: United States Section, USMCA Secretariat, International Trade Administration, Department of Commerce.

ACTION: Notice of USMCA Request for Panel Review.

SUMMARY: A Request for Panel Review was filed on behalf of Deacero S.A.P.I. de C.V. and Deacero USA, Inc. with the United States Section of the USMCA Secretariat on September 17, 2021, pursuant to USMCA Article 10.12. Panel Review was requested of the U.S. International Trade Administration's Final Results of the Antidumping Duty Administrative Review (2018–2019) of Carbon and Certain Alloy Steel Wire Rod from Mexico. The final determination was published in the **Federal Register** on August 18, 2021 and amended on September 14, 2021.The USMCA Secretariat has assigned case number USA–MEX–2021–10.12–01 to this request.

FOR FURTHER INFORMATION CONTACT: Vidya Desai, Acting United States Secretary, USMCA Secretariat, Room 2061, 1401 Constitution Avenue NW, Washington, DC 20230, 202–482–5438.

SUPPLEMENTARY INFORMATION: Article 10.12 of Chapter 10 of USMCA provides a dispute settlement mechanism involving trade remedy determinations issued by the Government of the United States, the Government of Canada, and the Government of Mexico. Following a Request for Panel Review, a Binational Panel is composed to review the trade remedy determination being challenged and issue a binding Panel Decision. There are established USMCA *Rules of Procedure for Article 10.12 (Binational Panel Reviews),* which were adopted by the three governments for panels requested pursuant to Article 10.12(2) of USMCA which requires Requests for Panel Review to be published in accordance with Rule 40. For the complete Rules, please see *https://can-mex-usa-sec.org/secretariat/agreement-accord-acuerdo/usmca-aceum-tmec/rules-regles-reglas/article-article-articulo_10_12.aspx?lang=eng.* The Rules provide that:

(a) A Party or interested person may challenge the final determination in whole or in part by filing a Complaint in accordance with Rule 44 no later than 30 days after the filing of the first Request for Panel Review (the deadline for filing a Complaint is October 18, 2021);

(b) A Party, an investigating authority or other interested person who does not file a Complaint but who intends to participate in the panel review shall file a Notice of Appearance in accordance with Rule 45 no later than 45 days after the filing of the first Request for Panel Review (the deadline for filing a Notice of Appearance is November 1, 2021);

(c) The panel review will be limited to the allegations of error of fact or law, including challenges to the jurisdiction of the investigating authority, that are set out in the Complaints filed in the panel review and to the procedural and substantive defenses raised in the panel review.

Dated: September 22, 2021.

Vidya Desai,

Acting U.S. Secretary, USMCA Secretariat.

[FR Doc. 2021–20929 Filed 9–27–21; 8:45 am]

BILLING CODE 3510–GT–P

DEPARTMENT OF COMMERCE

International Trade Administration

Rice University, et. al; Application(s) for Duty-Free Entry of Scientific Instruments

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, asamended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether instruments of equivalent

scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States.

Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be postmarked on or before October 18, 2021. Address written comments to Statutory Import Programs Staff, Room 3720, U.S. Department of Commerce, Washington, DC 20230. Please also email a copy of those comments to *Dianne.Hanshaw@trade.gov.*

Docket Number: 21–001. *Applicant:* Rice University, 6100 Main Street, Houston, TX 77005. *Instrument:* Light Crafter 4500 EVM. *Manufacturer:* Digi-Key Electronics, China. *Intended Use:* The LightCrafter 4500 will be used in an ongoing research study to develop a compact optical mapping scope that uses Digital Light Processing (DLP) technology to capture white light and auto-fluorescence images and actively project onto the oral mucosa a map highlighting areas at high risk for oral dysplasia and cancer, based on: Loss of collagen fluorescence (a signal of invasion & metastasis) and alterations in epithelial NAD(P)H and FAD fluorescence (a signal of de-regulated cellular energetics). With this device, we will design and assemble an optical system that allows for wide field imaging of the oral cavity, where the LightCrafter 4500 is aligned with the camera such that any area that can be imaged can also be projected upon. We will develop tracking algorithms to adjust the projected map as needed to ensure accurate positioning despite patient movement. The objective is to develop an optical imaging system that will detect high-risk areas of the oral mucosa and project high-risk maps onto the oral mucosa to guide clinicians on where to take a biopsy. *Justification for Duty-Free Entry:* According to the applicant, there are no instruments of the same general category manufactured in the United States. *Application accepted by Commissioner of Customs:* June 9, 2020.

Docket Number: 21–002. *Applicant:* Drexel University, 3401 Market Street, Philadelphia, PA 19104. *Instrument:* Light Microscope with motorized stage, attached camera and image—capturing hardware and software. *Manufacturer:* Info in Images Ltd., United Kingdom. *Intended Use:* To develop a novel research tool for scientists studying microscopic algae and to facilitate access to the holdings of the Diatom Herbarium at the Academy of Natural Sciences of Drexel University, a non-profit public museum with a mission of research in environmental conservation and public education. This customized automated microscope side-scanning system will be used to create high-resolution images of microscopic organisms on permanent slides that could be viewed and studied online using a virtual microscopy application. Digital images of the slides, containing millions of individual specimens of microorganisms and representing snapshots of their assemblages, will be served online to support research programs focused on environmental change and its effects on aquatic biota. The applications based on images acquired with this slide-scanning system will be used to increase the efficiency of water quality and ecosystem health monitoring in rivers, lakes, and coastal areas of the ocean. *Justification for Duty-Free Entry:* According to the applicant, there are no instruments of the same general category manufactured in the United States. *Application accepted by Commissioner of Customs:* June 9, 2020.

Docket Number: 21–003. *Applicant:*UChicago Argonne LLC, Operator of Argonne National Laboratory, 9700 South Cass Avenue, Lemont, IL 60439–4873. *Instrument:* A:VC 19 Photon Extraction Vacuum Chambers. *Manufacturer:* Strumenti Scientific CINEL S.R.L., Italy. *Intended Use:* These components are required to complete the assembly of the Advanced Photon Source upgrade storage ring vacuum system. The APS–U storage ring vacuum system is approximately 1.1-km in circumference and will store the electron and photon beams in an ultra-high vacuum (UHV) environment. The materials/phenomena that are studied vary widely from material properties analysis, protein mapping for pharmaceutical companies, X-ray imaging and chemical composition determination, to name a few. These components will be used exclusively for scientific research for a minimum of 5 years at Argonne National Laboratory. The properties of the materials studied include but are not limited to grain structure, grain boundary and interstitial defects, and morphology. These properties are not only studied at ambient environments but also under high pressure, temperature, stress and strain. The objective is to further the understanding of different materials and material properties. *Justification for Duty-Free Entry:* According to the applicant, there are no instruments of the same general category manufactured in the United States. *Application accepted by Commissioner of Customs:* April 26, 2021.

Docket Number: 21–004. *Applicant:* William Marsh Rice University, 6100 Main Street, Houston, TX 77005. *Instrument:* Angle-Resolved Photoemission Spectroscopy System. *Manufacturer:* Fermion Instruments, China. *Intended Use:* The technique of angle-resolved photoemission spectroscopy is a very specialized technique used to directly image the electronic structure of synthesized single crystalline materials or thin film materials. This technique is mainly used to study fundamental physical and electrical properties of materials, how electrons interact with each other leading to the insulating, metallic, or superconducting properties of materials for fundamental research. The measurement of electronic structure will provide important information on the fundamental physical origin of why a material is a good conductor or insulator or a superconductor. This will be beneficial towards new physics theories about solid state materials for academic purposes. *Justification for Duty-Free Entry:* According to the applicant, there are no instruments of the same general category manufactured in the United States. *Application accepted by Commissioner of Customs:* July 25, 2021.

Docket Number: 21–005. *Applicant:* UChicago Argonne LLC, Operator of Argonne National Laboratory, 9700 South Cass Avenue, Lemont, IL 60439–4873. *Instrument:* POLAR Vertical Double Crystal Monochromator. *Manufacturer:* Strumenti Scientific CINEL, S.R.L., Italy. *Intended Use:* The instrument will be used as a monochromator for the Polar beamline at the Advanced Photon Source upgrade. The Polar beamline makes use of polarized synchrotron radiation to investigate magnetic properties of materials using a variety of spectroscopic and scattering methods. Materials investigated are scientific samples especially grown to answer specific scientific questions and to study basic magnetic and electric material properties. The device will be used exclusively for scientific research for a minimum of 5 years at Argonne National Laboratory. The objective is to further the understanding of material properties and to be able to tailor material properties to achieve specific magnetic and electron behavior. *Justification for Duty-Free Entry:* According to the applicant, there are no instruments of the same general category manufactured in the United States. *Application accepted by Commissioner of Customs:* July 12, 2021.

Docket Number: 21–006. *Applicant:* Rutgers, The State University, 65 Davidson Road, Piscataway, NJ 00854. *Instrument:* SIPAT Crystal Grower JGD–500–1 System. *Manufacturer:* Sipat Co., Ltd., Canada. *Intended Use:* The instruments will only be used for the study and basic understanding of the physical properties of oxide and/or metallic materials, various physical phenomena based on strongly correlated materials such as high temperature superconductors, Topological insulators, or Multiferroics. The growth of new materials will be conducted which have unique electric and magnetic properties using purchased crystal grower. To identify grown materials, we will employ x-ray diffraction and Laue. The high-quality crystals will be further investigated with a physical property measurement system and Magnetic property measurement system to obtain its electric and magnetic properties in varying conditions of temperature, electric and magnetic fields. *Justification for Duty-Free Entry:* According to the applicant, there are no instruments of the same general category manufactured in the United States. *Application accepted by Commissioner of Customs:* July 22, 2021.

Docket Number: 21 –007. *Applicant:* Oregon State University, 100 Wiegand Hall, 3051 SW Campus Way, Corvallis, OR 97331. *Instrument:* Radio Frequency Heating System. *Manufacturer:* FOSHAN JIYAN HIGH FREQUENCY EQUIP CO., LTD., China. *Intended Use:* The instrument will be used for studying the phenomena of radio frequency (FR) drying of food materials and understanding the effectiveness in comparison with conventional hot-air drying method. The objectives to be studied: (a) To investigate drying efficiency of radio frequency at various operation conditions and compare with conventional hot-air drying to reduce drying time/cost and improve product quality, (b) to evaluate radio frequency heating for other application in food processing, such as pasteurization, deshelling and roasting of nuts, and drying food processing byproducts. Analytical techniques will be used to obtain quantitative data from the experiments and analyzed statistically to draw valuable conclusions. *Justification for Duty-Free Entry:* According to the applicant, there are no instruments of the same general category manufactured in the United States. *Application accepted by Commissioner of Customs:* March 10, 2021.

Docket Number: 21–008. *Applicant:* University of North Dakota, 266 Upson Hall II, 243 Centennial Drive, Grand Forks, ND 58202–8359. *Instrument:* Laser metal deposition system. *Manufacturer:* InssTek, South Korea. *Intended Use:* Materials to be used are elemental pure metal powders or alloyed metal powders, the research goal will be in-situ alloying of multiple different types of elemental powders (up to six) in the laser melting pool. The primary interest of materials is Inconel 625 alloy, which will be built using the in-situ alloying of commercially pure elemental powders, they are Cr, Mo, Nb, Fe, and Ni powders, and have the diameter ranging from 45 um to 150 um. After material is prepared, the energy-dispersive X-ray spectroscopy (EDS) will be used to analyze the chemical composition and elemental distribution, and the electron backscatter diffraction (EBSD) will be applied to observe the crystal orientation and grain structure. The objective is to broaden the material availability for AM and to explore its full potential. *Justification for Duty-Free Entry:* According to the applicant, there are no instruments of the same general category manufactured in the United States. *Application accepted by Commissioner of Customs:* July 8, 2021.

Docket Number: 21–009. *Applicant:* Yale University, BCT326, 15 Prospect Street, New Haven, CT 06511. *Instrument:* 1.25W@4K G–M Cryocooler. *Manufacturer:* CSIC PRIDE (NANJING) CRYOGENIC TECHNOLOGY CO., China. *Intended Use:* The instrument will be used to research on superconducting films synthesized in our lab. These phenomena can only be brought to life when cooled to cryogenic temperatures created with liquid helium. The transition temperature (Tc) and magnetic susceptibility of our superconductor samples from the resistive normal state to the zero-resistance superconducting states will be measured. The instrument would slowly cool the sample to low temperature (4 K = − 269 °C) and measure its resistance and magnetic susceptibility at the same time to find the transition temperature Tc. This cryocooler will help to cool our sample from room temperature to 4 K, which is 269 °C below the freezing point in a controlled way. The cooling power required here is essential to ensure that we can reach and maintain at 4 K temperature. The small formfactor and vacuum-compatible design is also required for compatibility reasons. *Justification for Duty-Free Entry:* According to the applicant, there are no instruments of the same general category manufactured in the United States. *Application accepted by Commissioner of Customs:* July 8, 2021.

Dated: September 22, 2021.

Richard Herring,

Director, Subsidies Enforcement, Enforcement and Compliance.

[FR Doc. 2021–21043 Filed 9–27–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–351–844]

Certain Cold-Rolled Steel Flat Products of Brazil: Postponement of the Expedited Sunset Review of the Countervailing Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable September 28, 2021.

FOR FURTHER INFORMATION CONTACT: Alex Wood, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1959.

SUPPLEMENTARY INFORMATION:

Background

On June 1, 2021, the Department of Commerce (Commerce) initiated the first sunset review of the countervailing duty (CVD) order on certain cold-rolled steel products (CRS) from Brazil, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[1] Within the deadline specified in 19 CFR 351.218(d)(1)(i), Commerce received notices of intent to participate in the sunset review on behalf of Cleveland-Cliffs Inc., Nucor Corporation, Steel Dynamics Inc., and United States Steel Corporation (collectively, domestic interested parties).[2] Each claimed interested party status under section 771(9)(C) of the Act as a producer of a domestic like product. Commerce received a timely substantive response from these domestic interested parties.[3] We also received a substantive response

[1] *See Initiation of Five-Year (Sunset) Reviews,* 86 FR 29239 (June 1, 2021).

[2] *See* Cleveland-Cliffs Inc.'s Letter, ''Notice of Intent to Participate in Sunset Review,'' dated June 14, 2021; Nucor Corporation's Letter, ''Notice of Intent to Participate in Sunset Review,'' dated June 16, 2021; United States Steel Corporation's Letter, ''Notice of Intent to Participate,'' dated June 16, 2021; and Steel Dynamic Inc.'s Letter, ''Notice of Intent to Participate,'' dated June 16, 2021.

[3] *See* Domestic Interested Parties' Letter, ''Domestic Industry's Substantive Response to Notice of Initiation,'' dated July 1, 2021.

from the Government of Brazil (GOB), but we did not receive a substantive response from any other interested party in this proceeding.[4] On July 22, 2021, Commerce notified the U.S. International Trade Commission that it did not receive an adequate substantive response from respondent interested parties and that Commerce would conduct an expedited (120-day) sunset review of the order on CRS from Brazil, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2).[5] The final results of the expedited sunset review are currently due September 29, 2021.

Postponement of Expedited Sunset Review

Section 751(c)(3)(B) of the Act provides that Commerce may issue, without further investigation, a final determination based on the facts available, in accordance with section 776 of the Act within 120 days after the initiation of the review if interested parties provide inadequate responses. However, if Commerce determines that the review is extraordinarily complicated, section 751(c)(5)(B) of the Act allows Commerce to extend the time period for making its determination by not more than 90 days.

Commerce has determined that this CVD sunset review is extraordinarily complicated pursuant to sections 751(c)(5)(C)(i) and (ii) of the Act. Specifically, due to the number and complexity of the alleged countervailable subsidy programs being reviewed, in addition to the numerous arguments made by parties in their substantive responses, it is not practicable to complete the determination of this CVD sunset review within the original time limit (*i.e.,* by September 29, 2021). Therefore, in accordance with section 751(c)(5)(B) of the Act, Commerce is postponing the deadline of the determination in this sunset review to no later than 210 days after the day on which this sunset review was initiated, *i.e.,* December 28, 2021.

This notice is issued and published in accordance with sections 751(c)(5)(B) and (C) of the Act.

[4] *See* GOB's Letter, ''Initial Comments,'' dated August 31, 2021; *see also* Commerce's Letter, ''Rejection of Response to Notice of Initiation,'' dated August 25, 2021; and Commerce's Letter, ''Extension for Resubmission of Comments on the Initiation,'' dated August 27, 2021. We note that the GOB had timely submitted its response on June 30, 2021 but failed to identify and properly bracket certain proprietary information. Therefore, after notifying the GOB of the deficiency, we provided the GOB additional time to refile its response.

[5] *See* Commerce's Letter, ''Sunset Reviews Initiated on June 1, 2021,'' dated July 22, 2021.

Dated: September 22, 2021.

Christian Marsh,

Acting Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2021–21041 Filed 9–27–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–475–833]

Certain Corrosion-Resistant Steel Products From Italy: Final Results of the Expedited First Sunset Review of the Countervailing Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) finds that revocation of the countervailing duty (CVD) order on certain corrosion-resistant steel products (corrosion-resistant steel) from Italy would be likely to lead to continuation or recurrence of countervailing subsidies at the levels indicated in the ''Final Results of Sunset Review'' section of this notice.

DATES: Applicable September 28, 2021.

FOR FURTHER INFORMATION CONTACT: Robert Scully, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0572.

SUPPLEMENTARY INFORMATION:

Background

On July 25, 2016, Commerce published in the **Federal Register** the CVD order on corrosion-resistant steel from Italy.[1] On June 1, 2021, Commerce published the notice of initiation of the first sunset review of the *Order,* pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[2] On June 14 and 16, 2021, Commerce received timely filed notices of intent to participate from Cleveland-Cliffs, Inc., Nucor Corporation, Steel Dynamics Inc., California Steel Industries, and U.S. Steel Corporation (collectively, the domestic interested parties), within the deadline specified in 19 CFR 351.218(d)(1)(i).[3] The domestic interested parties claimed interested party status under section 771(9)(C) of the Act as producers of the domestic like product in the United States.

On July 1, 2021, Commerce received an adequate substantive response from the domestic interested parties within the 30-day deadline specified in 19 CFR 351.218(d)(3)(i).[4] We received no substantive responses from any other interested party, including the Government of Italy, nor was a hearing requested. On July 22, 2021, Commerce notified the U.S. International Trade Commission that it did not receive an adequate substantive response from respondent interested parties.[5] As a result, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(B)–(C), Commerce conducted an expedited (120-day) sunset review of the *Order.*

Scope of the Order

The products covered by this order are certain corrosion-resistant steel products. For a complete description of the scope of the *Order, see* Appendix I.

Analysis of Comments Received

All issues raised in this sunset review are addressed in the accompanying Issues and Decision Memorandum,[6] which is hereby adopted by this notice. The issues discussed in the Issues and Decision Memorandum are listed in Appendix II. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed

[1] *See Certain Corrosion-Resistant Steel Products from India, Italy, Republic of Korea and the People's Republic of China: Countervailing Duty Order,* 81 FR 48387 (July 25, 2016) (*Order*).

[2] *See Initiation of Five-Year (Sunset) Reviews,* 86 FR 29239 (June 1, 2021) (*Initiation Notice*).

[3] *See* Domestic Interested Parties' Letter, ''Five Year ('Sunset') Review of the Countervailing Duty Order on Corrosion-Resistant Steel Products from Italy: Notice of Intent to Participate in Sunset Review,'' dated June 14, 2021; *see also* Domestic Interested Parties' Letter, ''Five Year ('Sunset') Review of the Countervailing Duty Order on Corrosion-Resistant Steel Products from Italy: Notice of Intent to Participate,'' dated June 16, 2021; Domestic Interested Parties' Letter, ''Notice of Intent to Participate in the First Five-Year Review of the Countervailing Duty Order on Corrosion-Resistant Steel Products from Italy,'' dated June 16, 2021; and Domestic Interested Parties' Letter, ''Certain Corrosion-Resistant Steel Products from Italy: Notice of Intent to Participate in Sunset Review,'' dated June 16, 2021.

[4] *See* Domestic Interested Parties' Letter, ''Domestic Industry Substantive Response,'' dated July 1, 2021.

[5] *See* Commerce's Letter, ''Sunset Reviews Initiated on June 1, 2021,'' dated July 22, 2021.

[6] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Expedited First Sunset Review of the Countervailing Duty Order on Certain Corrosion-Resistant Steel Products from Italy,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

directly at *http://enforcement.trade.gov/frn/.*

Final Results of Sunset Review

Pursuant to sections 751(c)(1) and 752(b) of the Act, Commerce determines that revocation of the *Order* would likely lead to continuation or recurrence of countervailable subsidies at the rates listed below.

Exporter/producer	Net subsidy rate (percent)
Acciaieria Arvedi S.p.A., Finarvedi S.p.A., Arvedi Tubi Acciaio S.p.A., Euro-Trade S.p.A., and Siderurgica Triestina Srl., (collectively, the Arvedi Group) [7]	0.48
Marcegaglia S.p.A. and Marfin S.p.A., (collectively, the Marcegaglia Group) [8]	0.07
Ilva S.p.A	38.51
All Others	13.02

Administrative Protective Order (APO)

This notice serves as the only reminder to interested parties subject to an APO of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

We are issuing and publishing these final results and notice in accordance with sections 751(c), 752(b), and 777(i)(1) of the Act and 19 CFR 351.218.

Dated: September 22, 2021.

Christian Marsh,

Acting Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Order

The products covered by this order are certain flat-rolled steel products, either clad, plated, or coated with corrosion-resistant metals such as zinc, aluminum, or zinc-, aluminum-, nickel- or iron-based alloys, whether or not corrugated or painted, varnished, laminated, or coated with plastics or other non-metallic substances in addition to the metallic coating. The products covered include coils that have a width of 12.7 mm or greater, regardless of form of coil (*e.g.,* in successively superimposed layers, spirally oscillating, etc.). The products covered also include products not in coils (*e.g.,* in straight lengths) of a thickness less than 4.75 mm and a width that is 12.7 mm or greater and that measures at least 10 times the thickness. The products covered also include products not in coils (*e.g.,* in straight lengths) of a thickness of 4.75 mm or more and a width exceeding 150 mm and measuring at least twice the thickness. The products described above may be rectangular, square, circular, or other shape and include products of either rectangular or non-rectangular cross-section where such cross-section is achieved subsequent to the rolling process, *i.e.,* products which have been ''worked after rolling'' (*e.g.,* products which have been beveled or rounded at the edges). For purposes of the width and thickness requirements referenced above:

(1) Where the nominal and actual measurements vary, a product is within the scope if application of either the nominal or actual measurement would place it within the scope based on the definitions set forth above, and

(2) where the width and thickness vary for a specific product (*e.g.,* the thickness of certain products with non-rectangular cross-section, the width of certain products with non-rectangular shape, etc.), the measurement at its greatest width or thickness applies.

Steel products included in the scope of this order are products in which: (1) Iron predominates, by weight, over each of the other contained elements; (2) the carbon content is 2 percent or less, by weight; and (3) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

- 2.50 percent of manganese, or
- 3.30 percent of silicon, or
- 1.50 percent of copper, or
- 1.50 percent of aluminum, or
- 1.25 percent of chromium, or
- 0.30 percent of cobalt, or
- 0.40 percent of lead, or
- 2.00 percent of nickel, or
- 0.30 percent of tungsten (also called wolfram), or
- 0.80 percent of molybdenum, or
- 0.10 percent of niobium (also called columbium), or
- 0.30 percent of vanadium, or
- 0.30 percent of zirconium

Unless specifically excluded, products are included in this scope regardless of levels of boron and titanium.

For example, specifically included in this scope are vacuum degassed, fully stabilized (commonly referred to as interstitial-free (IF)) steels and high strength low alloy (HSLA) steels. IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium and/or niobium added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, titanium, vanadium, and molybdenum.

Furthermore, this scope also includes Advanced High Strength Steels (AHSS) and Ultra High Strength Steels (UHSS), both of which are considered high tensile strength and high elongation steels.

Subject merchandise also includes corrosion-resistant steel that has been further processed in a third country, including but not limited to annealing, tempering painting, varnishing, trimming, cutting, punching and/or slitting or any other processing that would not otherwise remove the merchandise from the scope of the *Order* if performed in the country of manufacture of the in-scope corrosion resistant steel.

All products that meet the written physical description, and in which the chemistry quantities do not exceed any one of the noted element levels listed above, are within the scope of this order unless specifically excluded. The following products are outside of and/or specifically excluded from the scope of this order:

- Flat-rolled steel products either plated or coated with tin, lead, chromium, chromium oxides, both tin and lead (''terne plate''), or both chromium and chromium oxides (''tin free steel''), whether or not painted, varnished or coated with plastics or other non-metallic substances in addition to the metallic coating;
- Clad products in straight lengths of 4.7625 mm or more in composite thickness and of a width which exceeds 150 mm and measures at least twice the thickness; and
- Certain clad stainless flat-rolled products, which are three-layered corrosion-resistant flat-rolled steel products less than 4.75 mm in composite thickness that consist of a flat-rolled steel product clad on both sides with stainless steel in a 20%-60%-20% ratio.

The products subject to the *Order* are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers: 7210.30.0030, 7210.30.0060, 7210.41.0000, 7210.49.0030, 7210.49.0091, 7210.49.0095, 7210.61.0000, 7210.69.0000, 7210.70.6030, 7210.70.6060, 7210.70.6090, 7210.90.6000, 7210.90.9000, 7212.20.0000, 7212.30.1030, 7212.30.1090, 7212.30.3000, 7212.30.5000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7212.60.0000, 7210.49.0040, and 7210.49.0045.

The products subject to the *Order* may also enter under the following HTSUS item numbers: 7210.90.1000, 7215.90.1000, 7215.90.3000, 7215.90.5000, 7217.20.1500, 7217.30.1530, 7217.30.1560, 7217.90.1000, 7217.90.5030, 7217.90.5060, 7217.90.5090, 7225.91.0000, 7225.92.0000, 7225.99.0090, 7226.99.0110, 7226.99.0130, 7226.99.0180, 7228.60.6000, 7228.60.8000, and 7229.90.1000.

The HTSUS subheadings above are provided for convenience and customs purposes only. The written description of the scope of the *Order* is dispositive.

Appendix II

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary

[7] Because the net subsidy rate was *de minimis* for Acciaieria Arvedi S.p.A., Finarvedi S.p.A., Arvedi Tubi Acciaio S.p.A., Euro-Trade S.p.A., and Siderurgica Triestina Srl., merchandise both produced and exported by Acciaieria Arvedi S.p.A., Finarvedi S.p.A., Arvedi Tubi Acciaio S.p.A., Euro-Trade S.p.A., and Siderurgica Triestina Srl. is excluded from the *Order.*

[8] Because the net subsidy rate was *de minimis* for Marcegaglia S.p.A. and Marfin S.p.A., merchandise both produced and exported by Marcegaglia S.p.A. and Marfin S.p.A. is excluded from the *Order.*

[FR Doc. 2021–21042 Filed 9–27–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Aleutian Islands Pollock Fishery Requirements

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite 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. Public comments were previously requested via the **Federal Register** on June 8, 2021 (*86 FR 30443*), during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: National Oceanic and Atmospheric Administration (NOAA), Commerce.

Title: Aleutian Islands Pollock Fishery Requirements.

OMB Control Number: 0648–0513.

Form Number(s): None.

Type of Request: Regular submission (extension of a current information collection).

Number of Respondents: 1.

Average Hours per Response: 16 hrs.

Total Annual Burden Hours: 16 hrs.

Needs and Uses: The National Marine Fisheries Service (NMFS), Alaska Regional Office, is requesting renewal of a currently approved information collection that contains the requirements for the annual participant letter for the Aleutian Islands pollock fishery.

Amendment 82 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) established a framework for the management of the Aleutian Islands subarea (AI) directed pollock fishery. The Aleut Corporation receives an annual AI pollock allocation for the purpose of economic development in Adak, Alaska. The Aleut Corporation is identified in Public Law 108–199 as a business incorporated pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*). Regulations implementing the FMP appear at 50 CFR part 679.

The Aleut Corporation's AI pollock fishery is set up so that harvesting pollock in the AI directed pollock fishery and processing pollock taken in the AI directed pollock fishery are authorized only for those harvesters and processors that are selected by The Aleut Corporation and approved by the NMFS Regional Administrator.

Each year and at least 14 days before harvesting pollock or processing pollock in the AI directed pollock fishery, The Aleut Corporation must submit its selections to NMFS. The information submitted by The Aleut Corporation consists of the names of the harvesting vessels and processors it has selected, the Federal fisheries permit numbers or Federal processor permit numbers of the participants, and the fishing year for which approval is requested.

On approval, NMFS sends The Aleut Corporation a letter that includes a list of the approved participants. A copy of this letter must be retained on board each participating vessel and on site each shoreside processor at all times.

This information collection is necessary for NMFS to obtain the list of vessels and processors selected by The Aleut Corporation to harvest and process its annual AI pollock allocation. The Aleut Corporation is required by Federal regulations at 50 CFR 679.4(m)(2) to provide its selected harvesters and processors to NMFS for approval. Without this information, NMFS would not know the participants selected by The Aleut Corporation and harvest rates could not be determined, which may result in allocations being exceeded.

Affected Public: Business or other for-profit organizations.

Frequency: Annually.

Respondent's Obligation: Required to Obtain or Retain Benefits.

Legal Authority: Consolidated Appropriations Act of 2004; Magnuson-Stevens Fishery Conservation and Management Act.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0648–0513.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2021–20991 Filed 9–27–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Application for Commercial Fisheries Authorization Under Section 118 of the Marine Mammal Protection Act (MMPA)

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

SUMMARY: The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite 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. Public comments were previously requested via the **Federal Register** on June 8, 2021 (86 FR 30442) during a 60-day comment period. This notice allows for an additional 30 days for public comments.

SUPPLEMENTARY INFORMATION:

Agency: National Oceanic and Atmospheric Administration, Commerce.

Title: Application for Commercial Fisheries Authorization under Section 118 of the Marine Mammal Protection Act.

OMB Control Number: 0648–0293.

Form Number(s): None.

Type of Request: Regular submission (extension of currently approved collection).

Number of Respondents: 100.

Average Hours per Response: Initial registration—15 minutes.

Total Annual Burden Hours: 25 hours.

Needs and Uses: Section 118 of the Marine Mammal Protection Act requires any commercial fisherman operating in Category I and II fisheries to register for a certificate of authorization that will allow the fisherman to take marine mammals incidental to commercial fishing operations. The information requested in the form needed to register or update a commercial fishery authorization is found at 50 C.F.R 229.4.

Affected Public: Individuals or households; Business or other for-profit organizations.

Frequency: One time for initial registration. Then only on an as needed if vessel owners' contact or vessel information changes after initial registration.

Respondent's Obligation: Required to lawfully take marine mammals' incidental to fishing operations.

Legal Authority: 16 U.S.C. 1361 *et seq.;* MMPA.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0648–0293.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2021–20990 Filed 9–27–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Economic Surveys of Specific U.S. Commercial Fisheries

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before November 29, 2021.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at *Adrienne.thomas@noaa.gov.* Please reference OMB Control Number 0648–0773 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 Dr. Joe Terry, Office of Science and Technology, 1315 East-West Hwy., Bldg. SSMC3, Silver Spring, MD 20910–3282, (858) 454 –2547, *joe.terry@noaa.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for a revision and extension of a currently approved collection.

The Office of Science and Technology is sponsoring the collection. Economic surveys will be conducted in selected commercial fisheries for the East Coast, Gulf of Mexico, Caribbean, West Coast, Hawaii, and the U.S. Pacific Islands territories.

The requested information will include different components of operating costs/expenditures, earnings, employment, ownership, vessel characteristics, effort/gear descriptors, employment, and demographic information for the various types of fishing vessels operating in the 16 U.S. commercial fisheries or groups of fisheries listed below.

1. West Coast Limited Entry Groundfish Fixed Gear Fisheries
2. West Coast Open Access Groundfish, Non-tribal Salmon, Crab, and Shrimp Fisheries
3. American Samoa Longline Fishery
4. Hawaii Pelagic Longline Fishery
5. Hawaii Small Boat Fishery
6. American Samoa Small Boat Fishery
7. American Samoa, Guam, and The Commonwealth of The Northern Mariana Islands Small Boat-Based Fisheries
8. Mariana Archipelago Small Boat Fleet
9. USVI F Small-Scale Commercial Fisheries
10. Puerto Rico Small-Scale Commercial Fisheries
11. Gulf of Mexico Inshore Shrimp Fishery
12. U.S. South Atlantic Region Golden Crab Fishery
13. West Coast Coastal Pelagic Fishery
14. West Coast Swordfish Fishery
15. West Coast North Pacific Albacore Fishery
16. Northeast and Mid-Atlantic Fisheries

A variety of laws, Executive Orders (EOs), and NOAA Fisheries strategies and policies include requirements for economic data and the analyses they support. When met adequately, those requirements allow better-informed conservation and management decisions on the use of living marine resources and marine habitat in federally managed fisheries. Obtaining these data improves the ability of NOAA Fisheries and the Regional Fishery Management Councils (Councils) to monitor, explain and predict changes in the economic performance and impacts of federally managed commercial fisheries. Measures of economic performance include costs, earnings, and profitability (net revenue); productivity and economic efficiency; capacity; economic stability; the level and distribution of net economic benefits to society; and market power. The economic impacts include sector, community or region-specific, and national employment, sales, value-added, and income impacts. Economic data are required to support more than a cursory effort to comply with or support the following laws, EOs, and NOAA Fisheries strategies and policies:

1. The Magnuson-Stevens Fishery Conservation and Management Act (MSA)

2. The Marine Mammal Protection Act (MMPA)
3. The Endangered Species Act (ESA)
4. The National Environmental Policy Act (NEPA)
5. The Regulatory Flexibility Act (RFA)
6. E.O. 12866 (Regulatory Planning and Review)
7. E.O. 13771 (Reducing Regulation and Controlling Regulatory Costs)
8. E.O. 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations)
9. E.O. 13840 (Ocean Policy to Advance the Economic, Security, and Environmental Interests of the United States).
10. The NOAA Fisheries Guidelines for Economic Reviews of Regulatory Actions
11. The NOAA Fisheries Strategic Plan 2019–2022 (Strategic Plan)
12. The NOAA Fisheries Ecosystem-Based Fishery Management (EBFM) Road Map
13. The NOAA Fisheries National Bycatch Reduction Strategy
14. NOAA's Catch Share Policy

Data collections will focus each year on a different set of the 16 commercial fisheries or groups of fisheries. This cycle of data collection will facilitate economic data being available and updated for all those commercial fisheries.

There will be an effort to coordinate the data collections in order to reduce the additional burden for those who participate in multiple fisheries. To further reduce the burden, the requested information for a specific fishery will be limited to that which is not available from other sources. Participation in these data collections will be voluntary.

The proposed revisions to the information collection will: (a) Add an information collection for Northeast and Mid-Atlantic fisheries; (b) increase the burden hours to account for that addition information collection: (c) make minor changes to the survey forms that primarily provide flexibility with respect to when NMFS will conduct each of the 16 information collections; and (d) extend it for three years. Though the information collection was recently renewed, an extension is requested at this time as no additional changes to the collection are anticipated before the current expiration date.

II. Method of Collection

The information will be collected by mail, internet, phone, and in-person interviews. In general, respondents will receive a mailed copy of the survey instrument in advance of a phone or in-person interview. Where feasible, survey respondents will have the option to respond to an on-line survey. If phone and in-person interviews are not feasible or not desired by the potential respondents, the information will be collected by mail or internet.

III. Data

OMB Control Number: 0648–0773.

Form Number(s): None.

Type of Review: Regular submission (extension and revision of a currently approved collection).

Affected Public: Individuals or households and business or other for-profit organizations.

Estimated Number of Respondents: 1,655.

Estimated Time per Response: NWFSC: West Coast Limited Entry Groundfish Fixed Gear Fisheries Economic Data Collection: 3 hours.

NWFSC: West Coast Open Access Groundfish, Non-tribal Salmon, Crab, and Shrimp Fisheries Economic Data Collection: 3 hours.

PIFSC: American Samoa Longline Fishery Economic Data Collection: 1 hour.

PIFSC: Hawaii Pelagic Longline Fishery Economic Data Collection: 1 hour.

PIFSC: Hawaii Small Boat Fishery Economic Data Collection: 45 minutes.

PIFSC: American Samoa Small Boat Fishery Economic Data Collection: 45 minutes.

PIFSC: American Samoa, Guam, and The Commonwealth of The Northern Mariana Islands Small Boat-Based Fisheries Economic Data Collection (an add-on to a creel survey): 10 minutes.

PIFSC: Mariana Archipelago Small Boat Fleet Economic Data Collection: 45 minutes.

SEFSC: USVI F Small-Scale Commercial Fisheries Economic Data Collection: 15 minutes.

SEFSC: Puerto Rico Small-Scale Commercial Fisheries Economic Data Collection: 1 hour.

SEFSC: Gulf of Mexico Inshore Shrimp Fishery Economic Data Collection: 28 minutes.

SEFSC: U.S. South Atlantic Region Golden Crab Fishery Economic Data Collection: 30 minutes.

SWFSC: West Coast Coastal Pelagic Fishery Economic Data Collection: 3 hours.

SWFSC: West Coast Swordfish Fishery Economic Data Collection: 30 minutes.

SWFSC: West Coast North Pacific Albacore Fishery Economic Data Collection: 1 hour.

NEFSC: Northeast Commercial Fishing Business Economic Data Collection: 1 hour.

Estimated Total Annual Burden Hours: 1,756.

Estimated Total Annual Cost to Public: 0.

Respondent's Obligation: Voluntary.

Legal Authority: Magnuson-Stevens Fishery Conservation and Management Act.

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. 2021–20989 Filed 9–27–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RTID 0648–XB431

Meeting on the Stock Status of Western Atlantic Bluefin Tuna

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

ACTION: Notice of virtual public meeting.

SUMMARY: NMFS is holding a public webinar for the Advisory Committee to the U.S. Section to the International Commission for the Conservation of Atlantic Tunas (ICCAT) and other interested stakeholders to provide an update on recent work by ICCAT's Standing Committee on Research and Statistics (SCRS) Bluefin Tuna Species Group to assess the western Atlantic stock of bluefin tuna.

DATES: A webinar information session that is open to the public will be held on September 30, 2021, from 1:30 p.m. to 3 p.m. EDT.

ADDRESSES: Please register to attend the webinar at: *https://forms.gle/zYfNx5gd3dud4Hfm8.* Registration will close on September 29, 2021 at 5 p.m. EDT. Instructions will be emailed to registered participants.

FOR FURTHER INFORMATION CONTACT: Rachel O'Malley, Office of International Affairs and Seafood Inspection, (301) 427–8373 or at *Rachel.O'Malley@noaa.gov*.

SUPPLEMENTARY INFORMATION: ICCAT's SCRS held a virtual stock assessment meeting for the western stock of Atlantic bluefin tuna from August 31 to September 1, 2021; it was immediately followed by a virtual meeting of the SCRS' Bluefin Tuna Species Group to consider the results. The assessment work is considered preliminary until adopted by the SCRS during its plenary meeting starting in late September. At that time, the SCRS will also adopt management advice for western Atlantic bluefin tuna to provide to the Commission. NMFS scientists will provide the Advisory Committee and other interested stakeholders with an update on the assessment work at the September 30, 2021, webinar, where participants will have an opportunity to ask questions. NMFS will announce the timing and format for the question and answer period at the beginning of the webinar.

The webinar is specifically an update on the stock assessment progress and not on development of U.S. positions for ICCAT. A Fall meeting of the Advisory Committee to the U.S. Section to ICCAT will be held in October after the stock assessment results and SCRS management advice have been finalized and published. The October meeting is for the express purpose of providing information relevant to the development of possible positions to be taken by the United States at ICCAT regarding bluefin tuna conservation and management and other important topics.

Authority: 16 U.S.C. 971 *et seq.;* 16 U.S.C. 1801 *et seq.*

Dated: September 23, 2021.

Alexa Cole,

Director, Office of International Affairs and Seafood Inspection, National Marine Fisheries Service.

[FR Doc. 2021–21057 Filed 9–23–21; 4:15 pm]

BILLING CODE 3510–22–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 2:00 p.m. EDT, Thursday, October 7, 2021.

PLACE: Virtual meeting.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Enforcement matters. In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's website at *https://www.cftc.gov/.*

CONTACT PERSON FOR MORE INFORMATION: Christopher Kirkpatrick, 202–418–5964.

(Authority: 5 U.S.C. 552b)

Dated: September 24, 2021.

Christopher Kirkpatrick,

Secretary of the Commission.

[FR Doc. 2021–21160 Filed 9–24–21; 4:15 pm]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 2:00 p.m. EDT, Tuesday, October 5, 2021.

PLACE: Virtual meeting.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Examinations matters. In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's website at *https://www.cftc.gov/.*

CONTACT PERSON FOR MORE INFORMATION: Christopher Kirkpatrick, 202–418–5964.

(Authority: 5 U.S.C. 552b)

Dated: September 24, 2021.

Christopher Kirkpatrick,

Secretary of the Commission.

[FR Doc. 2021–21162 Filed 9–24–21; 4:15 pm]

BILLING CODE 6351–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2021–OS–0100]

Federal Register Notice of Request for Written Comments in Support of the Department of Defense's One-Year Response to Executive Order 14017, "America's Supply Chains"

AGENCY: Office of the Deputy Assistant Secretary of Defense for Industrial Policy (IndPol), Department of Defense (DoD).

ACTION: Notice of request for public comments.

SUMMARY: On February 24, 2021, President Biden issued an Executive Order (E.O.) titled *America's Supply Chains,* which directs six Federal agencies to conduct a review of their respective industrial bases, with the objective to use this assessment to secure and strengthen America's supply chains. One of these directives is for the Secretary of Defense, in consultation with the heads of appropriate agencies, to submit a report on supply chains for the defense industrial base, including key vulnerabilities and potential courses of action to strengthen the defense industrial base. The effort will build on the E.O. report, *Assessing and Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency of the United States* (released October 2018) and the Annual Industrial Capabilities Report, which is mandated by the Congress.

DATES: The due date for filing comments is October 13, 2021.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: DoD cannot receive written comments at this time due to the COVID–19 pandemic. Comments should be sent electronically to the docket listed above.

Instructions: All submissions received must include the agency name, docket number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Brennan Grignon, Office of the Under

Secretary of Defense for Acquisition and Sustainment at (703) 692–4422 or *osd.pentagon.ousd-a-s.mbx.industrial-policy@mail.mil.*

SUPPLEMENTARY INFORMATION:

Background

On February 24, 2021, President Biden issued E.O. 14017, *America's Supply Chains* and it was published in the **Federal Register** on March 1, 2021 (86 FR 11849–11854) (available at *https://www.govinfo.gov/content/pkg/FR-2021-03-01/pdf/2021-04280.pdf*). E.O. 14017 focuses on the need for resilient, diverse, and secure supply chains to ensure U.S. economic prosperity and national security across six sectors of the economy. One of the E.O. 14017 directives is for the Secretary of Defense, in consultation with the heads of appropriate agencies, to submit a report within one year on supply chains for the defense industrial base. This report will provide an assessment of key supply chains, including their vulnerabilities and potential courses of action to strengthen the defense industrial base. The E.O. 14017 effort will build on the E.O. 13806 report, *Assessing and Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency of the United State* (released October 2018) and the Annual Industrial Capabilities Report, which is mandated by the Congress pursuant to 10 U.S.C. 2504.

This notice requests comments and information from the public to assist the DoD's assessment of defense industrial base supply chains. While conducting the assessment, the Secretary will consult with the heads of appropriate agencies, and be advised by all relevant DoD Components.

Written Comments

The DoD is interested in comments (both general inputs and specific responses to the questions at the end of this section) that will help the Department respond to E.O. 14017 by providing information about key supply chain vulnerabilities and opportunities to address these vulnerabilities. In particular, the Department selected the following four (4) topics to focus on in the one-year report, and seeks comments about supply chain vulnerabilities and opportunities in these areas. These topics were selected based on critical vulnerabilities identified through ongoing supply chain analysis efforts, including inputs from the Armed Services, and are in alignment with the operational priorities outlined in the Defense Planning Guidance for FY 2023–FY 2027:

i. Select kinetic capabilities: Includes Precision Guided Munitions (PGMs), Hypersonics, and Directed Energy (DE). Key components (*e.g.,* critical energetics, microelectronics) are almost exclusively produced by foreign entities, including adversarial nations.

ii. Energy storage/batteries: Energy storage is critical to all kinetic capabilities, and is an evolving requirement. Defense-unique requirements with low domestic production volumes create supply chain risk and high local costs.

iii. Microelectronics: Similar to energy storage, microelectronics are vital components used in nearly all defense systems. Defense-specific challenges arise from acquisition processes, obsolescence, and the need for secure suppliers. The one-year effort will focus on military-specific microelectronics requirements and the ongoing challenges between commercial and defense requirements.

iv. Castings and forgings: Manufacturing is dependent on casting and forging capabilities and capacity. An overall decrease in domestic capability and capacity limits the industrial base's ability to develop, sustain, or expand production. Expanding our domestic capabilities will reinforce efforts to onshore commercial manufacturing.

In addition to the topics listed above, the DoD requests input on the following five (5) systemic enablers, as they relate to the topics above. These enablers span all four (4) topic areas; they are critical to mission success, and gaps or fragility in each can create operational and strategic risk.

i. Workforce: Includes all persons needed for a focus area, from skilled trades to specialty engineering degrees;

ii. Cyber posture: Includes cybersecurity, industrial security, and counterintelligence;

iii. Interoperability: Requirements needed to support operations with our allies, as well as the requirements to further enhance our interoperability between and among DoD's systems and platforms;

iv. Small business: Focuses on addressing the barriers and challenges to small businesses to enter, and stay in, the defense ecosystem (both as primes and sub-contractors); and

v. Manufacturing: Includes core/traditional manufacturing modes and new manufacturing technology, such as additive manufacturing.

In regards to the four (4) topics and five (5) systemic enablers above, the DoD is particularly interested in soliciting information in response to the following questions:

Question 1. From your perspective, how has the globalization of the supply chain improved or complicated your ability to source DoD's requirements?

Question 2. What are the one or two greatest challenges your firm/association/industry faces operating in a distributed environment?

Question 3. Are there ways DoD can better support your efforts to mitigate such challenges?

Question 3. How does the federal government effectively mitigate supply chain risks?

Question 4. What can the government do differently to better address supply chain risks and vulnerabilities in our major weapon systems/platforms (*e.g.,* PGMs) and critical components (*e.g.,* microelectronics)?

Question 5. What can the government do differently to successfully implement industrial base cybersecurity processes or protocols, attract skilled labor, implement standards, and incentivize the adoption of manufacturing technology?

To assist the DoD in more easily reviewing and summarizing the comments received, the DoD encourages commenters to use the same text as above to identify the areas of inquiry to which their comments respond. For example, a commenter responding specifically to question 1 above would use ''Question 1'' as a heading followed by the commenter's response. Alternatively, a commenter submitting comments more broadly responsive to focus topic (i), ''Select kinetic capabilities,'' would use that same text as a heading in the public comment followed by the commenter's specific response in this area. The Department encourages the use of an Executive Summary at the beginning of all comments to enable a more efficient review of the submitted documents. The DoD will review all comments but may not provide a formal response back to all commenters.

Requirements for Written Comments

The *http://www.regulations.gov* website allows users to provide comments by filling in a ''Type Comment'' field, or by attaching a document using an ''Upload File'' field. The DoD prefers that comments be provided in an attached document, preferably in Microsoft Word (.doc files) or Adobe Acrobat (.pdf files). If the submission is in a format other than Microsoft Word or Adobe Acrobat, please indicate the name of the application in the ''Type Comment'' field. Please do not attach separate cover letters to electronic submissions; rather, include any information that might

appear in a cover letter within the comments or executive summary. Similarly, to the extent possible, please include any exhibits, annexes, or other attachments in the same file, so that the submission consists of one file instead of multiple files. Comments (both public comments and non-confidential versions of comments containing business confidential information) will be placed in the docket and open to public inspection. Comments may be viewed on *http://www.regulations.gov* by entering docket number DoD–2021–OS–0100 in the search field on the home page.

All filers should name their files using the name of the person or entity submitting the comments. Anonymous comments are also accepted. Communications from agencies of the United States Government will not be made available for public inspection.

Anyone submitting business confidential information should clearly identify the business confidential portion at the time of submission, file a statement justifying nondisclosure and referring to the specific legal authority claimed, and provide a non-confidential version of the submission. The non-confidential version of the submission will be placed in the public file on *http://www.regulations.gov.* For comments submitted electronically containing business confidential information, the file name of the business confidential version should begin with the characters ''BC''. Any page containing business confidential information must be clearly marked ''BUSINESS CONFIDENTIAL'' on the top of that page. The non-confidential version must be clearly marked ''PUBLIC''. The file name of the non-confidential version should begin with the character ''P''. The ''BC'' and ''P'' should be followed by the name of the person or entity submitting the comments or rebuttal comments. If a public hearing is held in support of this assessment, a separate **Federal Register** notice will be published providing the date and information about the hearing. The Office of the Deputy Assistant Secretary of Defense (Industrial Policy) does not maintain a separate public inspection facility. Requesters should first view the Departments' web page, which can be found at *https://open.defense.gov/* (see ''Electronic FOIA'' heading). The records related to this assessment are made accessible in accordance with the regulations published in part 4 of title 15 of the Code of Federal Regulations (15 CFR 4.1 through 4.11).

Dated: September 23, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2021–21046 Filed 9–27–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Department of Defense Wage Committee (DoDWC); Notice of Federal Advisory Committee Meeting

AGENCY: Under Secretary of Defense for Personnel and Readiness, Department of Defense (DoD).

ACTION: Notice of closed Federal Advisory Committee meeting.

SUMMARY: The Department of Defense is publishing this notice to announce that the following Federal Advisory Committee meeting of the DoDWC will take place.

DATES: Tuesday, October 5, 2021 from 10:00 a.m. to 12:00 p.m. and will be closed to the public.

ADDRESSES: The closed meeting will be held by teleconference.

FOR FURTHER INFORMATION CONTACT: Mr. Karl Fendt, (571) 372–1618 (voice), *karl.h.fendt.civ@mail.mil* (email), 4800 Mark Center Drive, Suite 05G21, Alexandria, Virginia 22350 (mailing address).

SUPPLEMENTARY INFORMATION:

Meeting Announcement: Due to circumstances beyond the control of the Department of Defense and the Designated Federal Officer for the DoDWC, the DoDWC was unable to provide public notification required by 41 CFR 102–3.450(a) concerning its October 5, 2021 meeting. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) (5 U.S.C., appendix), the Government in the Sunshine Act (5 U.S.C. 552b), and 41 CFR 102–3.140 and 102–3.150.

Purpose of the Meeting: The purpose of this meeting is to provide independent advice and recommendations on matters relating to the conduct of wage surveys and the establishment of wage schedules for all appropriated fund and non-appropriated fund areas of blue-collar employees within the Department of Defense.

Agenda

Reviewing survey results and/or survey specifications for the following Nonappropriated Fund areas:

1. Any items needing further clarification or action from the previous agenda.
2. Wage Schedule (Full Scale) for the Burlington, Vermont wage area (AC–071).
3. Wage Schedule (Full Scale) for the Kent, Delaware wage area (AC–076).
4. Wage Schedule (Full Scale) for the Richmond-Chesterfield, Virginia wage area (AC–082).
5. Wage Schedule (Full Scale) for the Morris, New Jersey wage area (AC–090).
6. Wage Schedule (Wage Change) for the Frederick, Maryland wage area (AC–088).
7. Wage Schedule (Wage Change) for the Alexandria-Arlington-Fairfax, Virginia wage area (AC–125).
8. Wage Schedule (Wage Change) for the Prince George's-Montgomery, Maryland wage area (AC–127).
9. Survey Specifications for the Washoe-Churchill, Nevada wage area (AC–011).
10. Survey Specifications for the Orange, Florida wage area (AC–062).
11. Survey Specifications for the Bay, Florida wage area (AC–063).
12. Survey Specifications for the Escambia, Florida wage area (AC–064).
13. Survey Specifications for the Okaloosa, Florida wage area (AC–065).
14. Survey Specifications for the Onslow, North Carolina wage area (AC–097).
15. Survey Specifications for the Shelby, Tennessee wage area (AC–098).
16. Survey Specifications for the Christian, Kentucky/Montgomery, Tennessee wage area (AC–099).
17. Survey Specifications for the Charleston, South Carolina wage area (AC–120).
18. Survey Specifications for the Middlesex, Massachusetts wage area (AC–138).
19. Survey Specifications for the York, Maine wage area (AC–139).
20. Survey Specifications for the Clark, Nevada wage area (AC–140).
21. Survey Specifications for the San Juan-Guaynabo, Puerto Rico wage area (AC–155).

Reviewing survey results and/or survey specifications for the following Appropriated Fund areas:

22. Wage Schedule (Full Scale) for the Dothan, Alabama wage area (AC–003).
23. Wage Schedule (Full Scale) for the Washington, District of Columbia wage area (AC–027).
24. Wage Schedule (Full Scale) for the Columbus, Georgia wage area (AC–040).

25. Wage Schedule (Full Scale) for the Charlotte, North Carolina wage area (AC–100).

26. Wage Schedule (Full Scale) for the Oklahoma City, Oklahoma wage area (AC–109).

27. Wage Schedule (Full Scale) for the Tulsa, Oklahoma wage area (AC–111).

28. Wage Schedule (Full Scale) for the Pittsburgh, Pennsylvania wage area (AC–116).

29. Wage Schedule (Wage Change) for the Cedar Rapids-Iowa City, Iowa wage area (AC–052).

30. Wage Schedule (Wage Change) for the Portland, Oregon wage area (AC–112).

31. Wage Schedule (Wage Change) for the Wichita Falls, Texas-Southwestern Oklahoma wage area (AC–138).

32. Wage Schedule (Wage Change) for the Madison, Wisconsin wage area (AC–147).

33. Survey Specifications for the Columbus, Georgia wage area (AC–040).

34. Survey Specifications for the Charlotte, North Carolina wage area (AC–100).

35. Special Pay Missouri River Power Rate Schedule.

36. Any items needing further clarification from this agenda may be discussed during future scheduled meetings.

Meeting Accessibility: Pursuant to 5 U.S.C. 552b(c)(4), the Department of Defense has determined that the meeting shall be closed to the public. The Under Secretary of Defense for Personnel and Readiness, in consultation with the Department of Defense Office of General Counsel, has determined in writing that this meeting may disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential.

Written Statements: Pursuant to section 10(a)(3) of the Federal Advisory Committee Act and 41 CFR 102–3.140, interested persons may submit written statements to the Designated Federal Officer for the DoDWC at any time. Written statements should be submitted to the Designated Federal Officer at the email or mailing address listed above in **FOR FURTHER INFORMATION CONTACT**. If statements pertain to a specific topic being discussed at a planned meeting, then these statements must be submitted no later than five (5) business days prior to the meeting in question. Written statements received after this date may not be provided to or considered by the DoDWC until its next meeting. The Designated Federal Officer will review all timely submitted written statements and provide copies to all the committee members before the meeting that is the subject of this notice.

Dated: September 22, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 2021–21038 Filed 9–27–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2021–SCC–0143]

Agency Information Collection Activities; Comment Request; International Resource Information System (IRIS)

AGENCY: Office of Postsecondary Education (OPE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension without change of a currently approved collection.

DATES: Interested persons are invited to submit comments on or before November 29, 2021.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2021–SCC–0143. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the PRA Coordinator of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W208D, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Sara Starke, 202–453–7681.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: International Resource Information System (IRIS).

OMB Control Number: 1840–0759.

Type of Review: An extension without change of a currently approved collection.

Respondents/Affected Public: Private Sector; Individuals and Households; Federal Government.

Total Estimated Number of Annual Responses: 6,596.

Total Estimated Number of Annual Burden Hours: 35,712.

Abstract: Information Resource Information System (IRIS) is an online performance reporting system for grantees of International and Foreign Language Education (IFLE) programs. The site also allows for IFLE program officers to process overseas language requests, travel authorization requests, and grant activation requests. IRIS keeps a record of these requests and also of Foreign Language and Area Studies (FLAS) Fellowship recipients and grantee performance reports.

Dated: September 23, 2021.

Kate Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2021–21008 Filed 9–27–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[OE Docket No. EA–490]

Application To Export Electric Energy; Trafigura Trading LLC

AGENCY: Office of Electricity, Department of Energy.

ACTION: Notice of application.

SUMMARY: Trafigura Trading LLC (Applicant or Trafigura) has applied for authorization to transmit electric energy from the United States to Canada pursuant to the Federal Power Act.

DATES: Comments, protests, or motions to intervene must be submitted on or before October 28, 2021.

ADDRESSES: Comments, protests, motions to intervene, or requests for more information should be addressed by electronic mail to *Electricity.Exports@hq.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Matt Aronoff, 202–586–5863, *matthew.aronoff@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: The Department of Energy (DOE) regulates exports of electricity from the United States to a foreign country, pursuant to sections 301(b) and 402(f) of the Department of Energy Organization Act (42 U.S.C. 7151(b) and 42 U.S.C. 7172(f)). Such exports require authorization under section 202(e) of the Federal Power Act (16 U.S.C. 824a(e)). On August 18, 2021, Trafigura filed an application with DOE (Application or App.) to transmit electric energy from the United States to Canada for a period of five years (or such longer period as may be permitted by the Department.)'' App. at 1. Trafigura states that it ''is a Delaware limited liability company with its principal place of business in Houston, Texas.'' *Id.* Trafigura adds that it ''is a direct wholly-owned subsidiary of Trafigura US Inc. ('TUSI'), a Delaware corporation, which itself is a wholly-owned indirect subsidiary of the Singapore-registered company Trafigura Group Pte. Ltd. ('TGPL') which is the main holding company for the Trafigura group.'' *Id.* at 1.

Trafigura represents that it ''does not directly or indirectly own, operate or control any electric generation facilities, electric transmission facilities, distribution facilities, or inputs to electric power production.'' App. at 3. Trafigura states that it would ''purchase the power to be from the markets which it participates,'' including ''purchases from electric utilities, federal power marketing agencies, qualifying cogeneration, small power production facilities and exempt wholesale generators (as those terms are defined in the FPA), independent system operators, regional transmission organizations, and other public utilities.'' *Id.* at 4.

Trafigura contends that its proposed exports therefor would ''not impair or tend to impede the sufficiency of electric power supplies in the United States or the regional coordination of electric utility planning or operations.'' *Id.*

Procedural Matters: Any person desiring to be heard in this proceeding should file a comment or protest to the Application at the address provided above. Protests should be filed in accordance with Rule 211 of the Federal Energy Regulatory Commission's (FERC) Rules of Practice and Procedure (18 CFR 385.211). Any person desiring to become a party to this proceeding should file a motion to intervene at the above address in accordance with FERC Rule 214 (18 CFR 385.214).

Comments and other filings concerning Trafigura's application to export electric energy to Canada should be clearly marked with OE Docket No. EA–490. Additional copies are to be provided directly to Eduardo Pigretti, 1401 McKinney Street, Suite 1500, Houston, TX 77010, *eduardo.pigretti@trafigura.com;* Terence T. Healey, 60 State Street, 34th Floor, Boston, MA 02109, *thealey@sidley.com;* Sarah A. Tucker, 1501 K Street NW, Washington DC 20005, *stucker@sidley.com;* Radhika Kannan, 1501 K Street NW, Washington DC 20005, *rkannan@sidley.com.*

A final decision will be made on the requested authorization after the environmental impacts have been evaluated pursuant to DOE's National Environmental Policy Act Implementing Procedures (10 CFR part 1021) and after DOE evaluates whether the proposed action will have an adverse impact on the sufficiency of supply or reliability of the U.S. electric power supply system.

Copies of the Application will be made available, upon request, by accessing the program website at *https://energy.gov/node/11845,* or by emailing Matt Aronoff at *matthew.aronoff@hq.doe.gov.*

Signed in Washington, DC, on September 23, 2021.

Christopher Lawrence,

Management and Program Analyst, Energy Resilience Division, Office of Electricity.

[FR Doc. 2021–21052 Filed 9–27–21; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[OE Docket No. EA–491]

Application To Export Electric Energy; Trafigura Trading LLC

AGENCY: Office of Electricity, Department of Energy.

ACTION: Notice of application.

SUMMARY: Trafigura Trading LLC (Applicant or Trafigura) has applied for authorization to transmit electric energy from the United States to Mexico pursuant to the Federal Power Act.

DATES: Comments, protests, or motions to intervene must be submitted on or before October 28, 2021.

ADDRESSES: Comments, protests, motions to intervene, or requests for more information should be addressed by electronic mail to *Electricity.Exports@hq.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Matt Aronoff, 202–586–5863, *matthew.aronoff@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: The Department of Energy (DOE) regulates exports of electricity from the United States to a foreign country, pursuant to sections 301(b) and 402(f) of the Department of Energy Organization Act (42 U.S.C. 7151(b) and 42 U.S.C. 7172(f)). Such exports require authorization under section 202(e) of the Federal Power Act (16 U.S.C. 824a(e)).

On August 18, 2021, Trafigura filed an application with DOE (Application or App.) to transmit electric energy from the United States to Mexico for a period of five years (or such longer period as may be permitted by the Department.)'' App. at 1. Trafigura states that it ''is a Delaware limited liability company with its principal place of business in Houston, Texas.'' *Id.* Trafigura adds that it ''is a direct wholly-owned subsidiary of Trafigura US Inc. ('TUSI'), a Delaware corporation, which itself is a wholly-owned indirect subsidiary of the Singapore-registered company Trafigura Group Pte. Ltd. ('TGPL') which is the main holding company for the Trafigura group.'' *Id.* at 1.

Trafigura represents that it ''does not directly or indirectly own, operate or control any electric generation facilities, electric transmission facilities, distribution facilities, or inputs to electric power production.'' App. at 3. Trafigura states that it would ''purchase the power to be from the markets which it participates,'' including ''purchases from electric utilities, federal power marketing agencies, qualifying cogeneration, small power production facilities and exempt wholesale

generators (as those terms are defined in the FPA), independent system operators, regional transmission organizations, and other public utilities.'' *Id.* at 4.

Trafigura contends that its proposed exports therefor would ''not impair or tend to impede the sufficiency of electric power supplies in the United States or the regional coordination of electric utility planning or operations.'' *Id.*

Procedural Matters: Any person desiring to be heard in this proceeding should file a comment or protest to the Application at the address provided above. Protests should be filed in accordance with Rule 211 of the Federal Energy Regulatory Commission's (FERC) Rules of Practice and Procedure (18 CFR 385.211). Any person desiring to become a party to this proceeding should file a motion to intervene at the above address in accordance with FERC Rule 214 (18 CFR 385.214).

Comments and other filings concerning Trafigura's application to export electric energy to Mexico should be clearly marked with OE Docket No. EA–491. Additional copies are to be provided directly to Eduardo Pigretti, 1401 McKinney Street, Suite 1500, Houston, TX 77010, *eduardo.pigretti@trafigura.com;* Terence T. Healey, 60 State Street, 34th Floor, Boston, MA 02109, *thealey@sidley.com;* Sarah A. Tucker, 1501 K Street NW, Washington DC 20005, *stucker@sidley.com;* Radhika Kannan, 1501 K Street NW, Washington DC 20005, *rkannan@sidley.com.*

A final decision will be made on the requested authorization after the environmental impacts have been evaluated pursuant to DOE's National Environmental Policy Act Implementing Procedures (10 CFR part 1021) and after DOE evaluates whether the proposed action will have an adverse impact on the sufficiency of supply or reliability of the U.S. electric power supply system.

Copies of the Application will be made available, upon request, by accessing the program website at *https://energy.gov/node/11845,* or by emailing Matt Aronoff at *matthew.aronoff@hq.doe.gov.*

Signed in Washington, DC, on September 23, 2021.

Christopher Lawrence,

Management and Program Analyst, Energy Resilience Division, Office of Electricity.

[FR Doc. 2021–21062 Filed 9–27–21; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[DOE Docket No. 202–21–2]

Emergency Order Issued to the California Independent System Operator Corporation (CAISO) To Operate Power Generating Facilities Under Limited Circumstances in California as a Result of Extreme Weather

AGENCY: Office of Electricity, Department of Energy.

ACTION: Notice of emergency action.

SUMMARY: The U.S. Department of Energy (DOE or Department) is issuing this Notice to document emergency actions that it has taken pursuant to the Federal Power Act (FPA).

ADDRESSES: Requests for more information should be addressed by electronic mail to *ceser@hq.doe.gov.*

FOR FURTHER INFORMATION CONTACT: For further information on this Notice, or for information on the emergency activities related to the Order, contact Kenneth Buell, 202–586–3362, *kenneth.buell@hq.doe.gov,* or by mail to the attention of Kenneth Buell, CR–20, 1000 Independence Ave. SW, Washington, DC 20585. Due to limited access to DOE facilities because of current COVID–19 restrictions, contact via phone or email is preferred.

The Order and all related information are available here: *https://www.energy.gov/oe/federal-power-act-section-202c-caiso-september-2021.*

SUPPLEMENTARY INFORMATION: Pursuant to 10 CFR 1021.343(a), the Department is issuing this Notice to document emergency actions taken. Under FPA section 202(c), ''[d]uring the continuance of a war in which the United States is engaged, or whenever the [Secretary of Energy] determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the [Secretary of Energy] shall have authority . . . to require by order such temporary connections of facilities and generation, delivery, interchange, or transmission of electric energy as in [the Secretary's] judgment will best meet the emergency and serve the public interest.'' 16 U.S.C. 824a(c)(1). The authority to issue such orders, which was originally vested in the defunct Federal Power Commission, was transferred to and vested in the Secretary of Energy by section 301(b) of the Department of Energy Organization Act, 42 U.S.C. 7151(b), and is non-exclusively delegated to the Deputy Secretary of Energy (Deputy Secretary) by paragraph 1.12(A) of Delegation Order No. 00–001.00H (Oct. 2, 2020).

On September 7, 2021, the CAISO filed a Request for Emergency Order Pursuant to section 202(c) of the Federal Power Act (Application) with the Department ''to preserve the reliability of [the] bulk electric power system in California.'' In its Application, the CAISO cited ''extremely challenging conditions including extreme heat waves, multiple fires, high winds, and various grid issues'' that could lead to electric demand outpacing available generation. The CAISO requested authority to dispatch several natural gas-fueled generation resources (''Covered Resources''). The CAISO stated that certain of the Covered Resources ''will not have completed federal environmental permitting requirements'' by the date it requested issuance of an emergency order, ''and [cannot] operate unless they are subject to a DOE emergency order.'' The CAISO also noted that other units included in the Covered Resources are subject to permit limitations preventing them from operating at their full capacity. Because ''[t]he emergency for which the CAISO seeks relief is ongoing and could have serious consequences regarding the CAISO's ability to serve load in California and meet its reserve obligations,'' the CAISO requested that the Department issue an order, effective no later than September 10, 2021, and for a period of 60 days, authorizing ''the generating units identified . . . that are subject to permit limits (or have yet to obtain permits) to operate at their maximum levels,'' along with authorization for ''testing of Covered Resources as necessary to ensure they can operate reliably and, in the case of new units, synchronize to the electric grid.'' The CAISO contended that the requested relief would ''help . . . meet the existing emergency and serve the public interest by preventing or mitigating power disruptions and the potential curtailment of electricity load within the CAISO balancing authority area.''

After review of the facts and CAISO policy and procedure, the Deputy Secretary issued Order No. 202–21–2 (the Order) on September 10, 2021, for a period of 60 days, directing the CAISO to dispatch the necessary electric generation units from the Covered Resources and to order their operation only as needed during (1) the issuance and continuation of an Energy Emergency Alert Level 2 condition or greater between the hours of 14:00 Pacific Daylight Time and 22:00 Pacific

Daylight Time after exhausting all reasonably and practically available resources; (2) a Transmission Emergency that requires operation of a Covered Resource to prevent or mitigate load curtailment during any operating hour; or (3) limited testing directed by the CAISO or synchronization of Midway Sunset Unit C, Greenleaf Unit 1, and Roseville Energy Park during periods of lowest electric demand for natural gas resources, as determined by the CAISO. For purposes of the Order, ''Energy Emergency Alert Level 2'' has the meaning set forth in section 3.6.4 of the CAISO System Emergency Operating Procedure Version 13.1 (Aug. 20, 2021) (CAISO Emergency Operating Procedure). Also for purposes of the Order, ''Transmission Emergency'' has the meaning set forth in section 3.5 of the CAISO Emergency Operating Procedure.

The Department has required the CAISO to report, by December 1, 2021, ''source specific data for all dates between September 10 and November 9, 2021, on which the Covered Resources were operated. The report must include, ''for each unit, (1) the hours of operation, as well as the hours in which any permit limit was exceeded and (2) a preliminary description of each permit term that was exceeded and the manner in which such exceedance occurred.'' The Department also required the CAISO to ''submit a final report by January 7, 2022, with any revisions to the information reported on December 1, 2021.'' After receiving the final data report from the CAISO, DOE will prepare a special environmental analysis of the potential impacts resulting from issuance of the Order, including impacts on air quality and environmental justice. The CAISO will be responsible for the reasonable third-party costs of the special environmental analysis.

Procedural Background: The Covered Resources to which this Order pertains were identified in the Order and can be found on the website identified above. Given the emergency nature of the expected load stress, the responsibility of the CAISO to ensure maximum reliability on its system, and the ability of the CAISO to identify and dispatch generation necessary to meet the additional load, the Deputy Secretary determined that additional dispatch of the Covered Resources would be necessary to best meet the emergency and serve the public interest for purposes of FPA section 202(c). Because the additional generation may result in a conflict with environmental standards and requirements, the Deputy Secretary authorized only the necessary additional generation, with reporting requirements as described below.

FPA section 202(c)(2) requires the Secretary of Energy to ensure that any FPA section 202(c) order that may result in a conflict with a requirement of any environmental law be limited to the ''hours necessary to meet the emergency and serve the public interest, and, to the maximum extent practicable,'' be consistent with any applicable environmental law and minimize any adverse environmental impacts. To minimize adverse environmental impacts, the Order ''limits operation of dispatched units to the times and within the parameters determined by the CAISO for reliability purposes.''

The Deputy Secretary conditioned the Order by requiring the CAISO to report on actions taken pursuant to the Order regarding the environmental impacts of the Order and its compliance with the conditions of the Order. As noted previously, the CAISO must submit a final report by January 7, 2022, with any revisions to the information reported through that time. The environmental data the CAISO submits must include (1) Emissions data in pounds per hour for each Covered Resource unit, for each hour of the operational scenario, for carbon monoxide, nitrous oxides, particulate matter (PM) 2.5, PM_{10}, volatile organic compounds, and sulfur dioxide, with details on the actual emissions in pounds per hour, permitted operating/emission limits, and the actual incremental emissions above the permit limits (except that for emissions units not equipped with continuous emission monitoring systems, actual emissions must be calculated using source test data); (2) stack parameters for each Covered Resource unit, including stack height, exit diameter, exit gas temperature, and exit velocity (or volumetric flow rate) (temperature and velocity must be the values applicable to the operations above permit limits); (3) the actual hours that each Covered Resource unit operated in excess of permit limits or operated without otherwise-required permits; (4) information provided to the California Air Resources Board (CARB) in response to the CARB's development and implementation of the plan to mitigate the effects of additional emissions authorized by Governor Newsom's July 30, 2021 emergency proclamation. The Department also noted that it may request additional information as it performs its special environmental analysis relating to the issuance of the Order.

The reports will be available on the DOE website for this docket here: *https://www.energy.gov/oe/federal-power-act-section-202c-caiso-september-2021.*

Signing Authority

This document of the Department of Energy was signed on September 22, 2021 by Patricia A. Hoffman, Acting Assistant Secretary for the Office of Electricity and for the Office of Cybersecurity, Energy Security, and Emergency Response, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on September 23, 2021.

Treena V. Garrett,

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

[FR Doc. 2021–21012 Filed 9–27–21; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2530–057]

Brookfield White Pine Hydro LLC; Notice of Availability of Draft Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR part 380, the Office of Energy Projects has reviewed the application for new license for the Hiram Hydroelectric Project, located on the Saco River in Oxford and Cumberland Counties, Maine, and has prepared a Draft Environmental Assessment (DEA) for the project. No federal land is occupied by project works or located within the project boundary.

The DEA contains staff's analysis of the potential environmental impacts of the project and concludes that licensing the project, with appropriate environmental protective measures, would not constitute a major federal action that would significantly affect the quality of the human environment.

The Commission provides all interested persons with an opportunity to view and/or print the EA 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 Online Support at *FERCOnlineSupport@ferc.gov,* or toll-free at (866) 208–3676, or for TTY, (202) 502–8659.

You may also register online at *https://ferconline.ferc.gov/eSubscription.aspx* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Any comments should be filed within 30 days from the date of this notice.

The Commission strongly encourages electronic filing. Please file comments using the Commission's eFiling system at *https://ferconline.ferc.gov/eFiling.aspx.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *https://ferconline.ferc.gov/QuickComment.aspx.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. 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. The first page of any filing should include docket number P–2530–057.

For further information, contact Dianne Rodman at (202) 502–6077, or by email at *dianne.rodman@ferc.gov.*

Dated: September 22, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–21014 Filed 9–27–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP21–1135–000.

Applicants: Texas Gas Transmission, LLC.

Description: § 4(d) Rate Filing: Amendments to Neg Rate Agmts (BP 37587, 37586) to be effective 9/21/2021.

Filed Date: 9/21/21.

Accession Number: 20210921–5118.

Comment Date: 5 p.m. ET 10/4/21.

Docket Numbers: RP21–1136–000.

Applicants: Iroquois Gas Transmission System, L.P.

Description: § 4(d) Rate Filing: 9.22.21 Negotiated Rates—Freepoint Commodities LLC R–7250–36 to be effective 11/1/2021.

Filed Date: 9/22/21.

Accession Number: 20210922–5028.

Comment Date: 5 p.m. ET 10/4/21.

Docket Numbers: RP21–1137–000.

Applicants: Iroquois Gas Transmission System, L.P.

Description: § 4(d) Rate Filing: 9.22.21 Negotiated Rates—Freepoint Commodities LLC R–7250–37 to be effective 11/1/2021.

Filed Date: 9/22/21.

Accession Number: 20210922–5029.

Comment Date: 5 p.m. ET 10/4/21.

Docket Numbers: RP21–1138–000.

Applicants: Iroquois Gas Transmission System, L.P.

Description: § 4(d) Rate Filing: 9.22.21 Negotiated Rates—Freepoint Commodities LLC R–7250–38 to be effective 11/1/2021.

Filed Date: 9/22/21.

Accession Number: 20210922–5030.

Comment Date: 5 p.m. ET 10/4/21.

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.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: September 22, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–21024 Filed 9–27–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 15021–000]

Bard College, New York; Notice of Intent To Prepare an Environmental Assessment

On December 23, 2019, Bard College, New York filed an application for an exemption from licensing for the 10-kilowatt Annandale Micro Hydropower Project (Annandale Project) (FERC No. 15021). The Annandale Project is located on the Saw Kill, a tributary of the Hudson River, in the Town of Red Hook, Dutchess County, New York. The project does not occupy federal land.

In accordance with the Commission's regulations, on July 9, 2021, Commission staff issued a notice that the project was ready for environmental analysis (REA notice). Based on the information in the record, including comments filed on the REA notice, staff does not anticipate that licensing the project would constitute a major federal action significantly affecting the quality of the human environment. Therefore, staff intends to prepare an Environmental Assessment (EA) on the application to exempt the Annandale Project from licensing.

The EA will be issued and circulated for review by all interested parties. All comments filed on the EA will be analyzed by staff and considered in the Commission's decision on whether to issue an exemption from licensing for the project.

The application will be processed according to the following schedule. Revisions to the schedule may be made as appropriate.

Milestone	Target date
Commission issues EA	January 2022.[1]

Milestone	Target date
Comments on EA	February 2022.

[1] The Council on Environmental Quality's (CEQ) regulations under 40 CFR 1501.10(b)(1) require that EAs be completed within 1 year of the federal action agency's decision to prepare an EA. This notice establishes the Commission's intent to prepare an EA for the Annandale Project. Therefore, in accordance with CEQ's regulations, the EA must be issued within 1 year of the issuance date of this notice.

Any questions regarding this notice may be directed to Monir Chowdhury at (202) 502–6736 or *monir.chowdhury@ferc.gov* or Laurie Bauer at (202) 502–6519 or Laurie *Bauer@ferc.gov.*

Dated: September 22, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–21015 Filed 9–27–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AC21–153–000]

Pacific Gas and Electric Company; Notice of Filing

Take notice that on August 25, 2021, Pacific Gas and Electric Company (PG&E) requested from the Chief Accountant of the Federal Energy Regulatory Commission (Commission or FERC) an interpretation of the Commission's Uniform System of Accounts (USoA) that would allow PG&E to capitalize costs related to its Tower Coating Program.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) 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 ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Comment Date: 5:00 p.m. Eastern Time on October 4, 2021.

Dated: September 22, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–21022 Filed 9–27–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP20–527–000]

Columbia Gulf Transmission, LLC; Notice of Availability of the Final Environmental Impact Statement for the Proposed East Lateral Xpress Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared a final environmental impact statement (EIS) for the East Lateral XPress Project (Project), proposed by Columbia Gulf Transmission, LLC (Columbia Gulf) in the above-referenced docket. Columbia Gulf requests authorization to construct and operate natural gas transmission facilities in Louisiana. The Project is designed to provide a total of 725 million standard cubic feet per day of firm transportation capacity, through a combination of incremental and existing capacity on Columbia Gulf's interstate natural gas pipeline system, to an interconnect with Venture Global Gator Express, LLC, for ultimate delivery as feed gas for Venture Global Plaquemines LNG, LLC's facility in Plaquemines Parish.

The final EIS responds to comments that were received on the Commission's March 16, 2021 Environmental Assessment (EA) and June 25, 2021 draft EIS [1] and discloses downstream greenhouse gas emissions for the Project. With the exception of climate change impacts, the FERC staff concludes that approval of the proposed Project, with the mitigation measures recommended in this EIS, would not result in significant environmental impacts. FERC staff continues to be unable to determine significance with regards to climate change impacts.

The final EIS incorporates the above referenced EA, which addressed the potential environmental effects of the construction and operation of the following Project facilities:

- 8.1 miles of 30-inch-diameter pipeline lateral within Barataria Bay in Jefferson and Plaquemines Parish, Louisiana;
- Centerville Compressor Station—a new 23,470-horsepower (hp) compressor station at an abandoned Columbia Gulf compressor station site in St. Mary Parish, Louisiana;
- Golden Meadow Compressor Station—a new 23,470-hp compressor station adjacent to an existing tie-in facility in Lafourche Parish, Louisiana;
- a point of delivery meter station in Plaquemines Parish, Louisiana; and
- a tie-in facility with two mainline valves and other appurtenances on a new platform in Barataria Bay, Jefferson Parish, Louisiana.

The Commission mailed a copy of the *Notice of Availability of the Final Environmental Impact Statement for the Proposed East Lateral Xpress Project* to federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American tribes; potentially affected landowners and other interested individuals and groups; and newspapers and libraries in the Project area. The final EIS is only available in electronic format. It may be viewed and downloaded from the FERC's website (*www.ferc.gov*), on the natural gas environmental documents page (*https://www.ferc.gov/industries-data/natural-gas/environment/*

[1] The Project's EA is available on eLibrary under accession no. 20210316–3010 and the draft EIS is available under accession no. 20210625–3010.

environmental-documents). In addition, the final EIS may be accessed by using the eLibrary link on the FERC's website. Click on the eLibrary link (*https://elibrary.ferc.gov/eLibrary/search*), select ''General Search'', and enter the docket number in the ''Docket Number'' field (*i.e.,* CP20–527). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website (*www.ferc.gov*) using the eLibrary link. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription that allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *https://www.ferc.gov/ferc-online/overview* to register for eSubscription.

Dated: September 21, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–20995 Filed 9–27–21; 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: ER21–2474–001.

Applicants: Pleinmont Solar 2, LLC.

Description: Compliance filing: Revised Rate Schedule FERC No. 1 to be effective 7/23/2021.

Filed Date: 9/22/21.

Accession Number: 20210922–5020.

Comment Date: 5 p.m. ET 10/13/21.

Docket Numbers: ER21–2568–001.

Applicants: Public Service Company of New Hampshire.

Description: Tariff Amendment: Suplmnt Great Lakes Hydro American LLC Large Generator Interconnection Agreement to be effective 7/31/2021.

Filed Date: 9/22/21.

Accession Number: 20210922–5054.

Comment Date: 5 p.m. ET 10/13/21.

Docket Numbers: ER21–2597–000.

Applicants: Rockhaven Wind Project, LLC.

Description: Supplement to August 3, 2021 Rockhaven Wind Project, LLC tariff filing.

Filed Date: 9/21/21.

Accession Number: 20210921–5132.

Comment Date: 5 p.m. ET 10/1/21.

Docket Numbers: ER21–2918–000.

Applicants: PacifiCorp.

Description: § 205(d) Rate Filing: OATT Revised Attach U (rev effective date 3.1.22) to be effective 3/1/2022.

Filed Date: 9/21/21.

Accession Number: 20210921–5123.

Comment Date: 5 p.m. ET 10/12/21.

Docket Numbers: ER21–2919–000.

Applicants: Camp Grove Wind Farm LLC.

Description: Camp Grove Wind Farm LLC submits tariff filing per 35.12: Reactive Power Compensation Filing to be effective 9/23/2021.

Filed Date: 9/22/21.

Accession Number: 20210922–5031.

Comment Date: 5 p.m. ET 10/13/21.

Docket Numbers: ER21–2920–000.

Applicants: Southwestern Electric Power Company.

Description: § 205(d) Rate Filing: SWEPCO–GSEC–LHEC TB Beard to Friendship Delivery Point Agreement to be effective 9/2/2021.

Filed Date: 9/22/21.

Accession Number: 20210922–5036.

Comment Date: 5 p.m. ET 10/13/21.

Docket Numbers: ER21–2921–000.

Applicants: California Independent System Operator Corporation.

Description: § 205(d) Rate Filing: 2021–09–22 Transferred Frequency Response—City of Seattle to be effective 12/1/2021.

Filed Date: 9/22/21.

Accession Number: 20210922–5064.

Comment Date: 5 p.m. ET 10/13/21.

Docket Numbers: ER21–2922–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2021–09–22_SA 2294 ATC–DTE Garden Wind 6th Rev GIA (J060 J061 J557 J928 J1183) to be effective 9/8/2021.

Filed Date: 9/22/21.

Accession Number: 20210922–5070.

Comment Date: 5 p.m. ET 10/13/21.

Docket Numbers: ER21–2923–000.

Applicants: PacifiCorp.

Description: § 205(d) Rate Filing: UAMPS Agmt Re SS of Ancillary Serv Sched 5 and/or 6 Errata filing to be effective 9/17/2021.

Filed Date: 9/22/21.

Accession Number: 20210922–5085.

Comment Date: 5 p.m. ET 10/13/21.

Docket Numbers: ER21–2924–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: Revisions to Attachment U—Compensation for Rescheduled Maintenance Costs to be effective 11/22/2021.

Filed Date: 9/22/21.

Accession Number: 20210922–5094.

Comment Date: 5 p.m. ET 10/13/21.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES21–82–000.

Applicants: Basin Electric Power Cooperative.

Description: Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of Basin Electric Power Cooperative.

Filed Date: 9/21/21.

Accession Number: 20210921–5133.

Comment Date: 5 p.m. ET 10/12/21.

Take notice that the Commission received the following public utility holding company filings:

Docket Numbers: PH21–17–000.

Applicants: Starwood Energy Group Global, L.L.C.

Description: Starwood Energy Group Global, L.L.C., submits FERC 65–B Notice of Change in Fact to Waiver Notification.

Filed Date: 9/22/21.

Accession Number: 20210922–5087.

Comment Date: 5 p.m. ET 10/13/21.

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: September 22, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–21023 Filed 9–27–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2299–088]

Turlock Irrigation District, Modesto Irrigation District; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-Capacity Amendment of License.

b. *Project No:* 2299–088.

c. *Date Filed:* August 27, 2021.

d. *Applicants:* Turlock Irrigation District, Modesto Irrigation District.

e. *Name of Project:* Don Pedro Hydroelectric Project.

f. *Location:* The project is located on the Tuolumne River, in Tuolumne County, California.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Michael Cooke, Turlock Irrigation District, P.O. Box 949, Turlock, California 95381, (209) 648–6819; and Chad Tienken, Modesto Irrigation District, P.O. Box 4060, Modesto, CA 95352, (209) 526–7459.

i. *FERC Contact:* Aneela Mousam, (202) 502–8357, *aneela.mousam@ferc.gov.*

j. Deadline for filing comments, motions to intervene, and protests is 30 days from the issuance date of this notice by the Commission.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include the docket number P–2299–088. Comments emailed to Commission staff are not considered part of the Commission record.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Request:* Turlock Irrigation District and Modesto Irrigation District (Districts) propose to replace three of the project's four turbine-generator units (*i.e.,* Units 1, 2, and 3) with modernized units. The existing units have reached the end of their useful life, which has resulted in frequent mechanical breakdowns and unscheduled outages. The modernized units would increase the total authorized installed capacity of the project from 168 to 206 megawatts, and increase the project's maximum hydraulic capacity by 10.4 percent. The replacements would not require any modifications to the power tunnel, turbine bypass hollow jet valve, Unit 4, the outlets for Units 1, 2 and 3, or the Districts' ''water first'' operations. Unit replacements would not require any modifications to the flow requirements of the license and the New Don Pedro Dam flood control operations would not be affected.

l. *Locations of the Application:* 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 website at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. Agencies may obtain copies of the application directly from the applicant. 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 the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll free, (866) 208–3676 or TTY, (202) 502–8659.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Documents:* Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

Dated: September 22, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–21013 Filed 9–27–21; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8983–01–R5; FDMS Docket No.: EPA–05–SFUND–2021–0581]

Proposed CERCLA Administrative Cost Recovery Settlement; West Vermont Drinking Water Contamination Site, Indianapolis, Indiana; EPA Agreement V–W–21–C–007

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comment.

SUMMARY: In accordance with Section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (''CERCLA''), notice is hereby given by the U.S. Environmental Protection Agency (''EPA''), Region 5, of a proposed administrative settlement for recovery of past response costs concerning the West Vermont Drinking Water Contamination Site (Site) in Indianapolis, Indiana with the following parties: AIMCO Michigan Meadows Holdings, LLC and AIMCO Properties, L.P. nka Apartment Income REIT, L.P. and Genuine Parts Company, as the Settling Parties and Respondents, and also AIMCO–GP, Inc. nka AIR–GP, Inc. and Apartment Investment and Management Company as Other Covered Parties. The settlement requires the Respondents to pay $2,825,000 in past response costs to a Special Account. Respondents will also prepare an Engineering Evaluation and Cost Analysis as well as pay specified interim and future response costs. The settlement includes a covenant not to sue pursuant to Sections 106 and 107 of CERCLA, relating to the Site, subject to limited reservations, and protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA. For thirty (30) days following the date of publication of this notice, EPA will receive written comments relating to the cost recovery component of this settlement. EPA will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations that indicate that the proposed settlement is inappropriate, improper, or inadequate. EPA's response to any comments received will be available for public inspection at *www.epa.gov/superfund/west-vermont-water.*

DATES: Comments must be submitted on or before October 28, 2021.

ADDRESSES: The proposed settlement is available for public inspection at *www.epa.gov/superfund/west-vermont-water.* Submit your comments, identified by Docket ID No. EPA–05–SFUND–2021–0581, to the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Mary Tierney, Remedial Project Manager, EPA, Superfund & Emergency Management Division, Region 5, 77 West Jackson Blvd. (SR–6J), Chicago, IL 60604; email: *tierney.mary@epa.gov;* phone: (312) 886–4785.

Douglas Ballotti,

Director, Superfund & Emergency Management Division, Region 5.

[FR Doc. 2021–20795 Filed 9–27–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2020–0673; FRL–8242.1–03–OW]

Applying the Supreme Court's County of Maui v. Hawaii Wildlife Fund Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability; rescission.

SUMMARY: The Environmental Protection Agency (EPA) issued a memorandum rescinding the guidance document entitled ''Applying the Supreme Court's *County of Maui* v. *Hawaii Wildlife Fund* Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program,'' which was signed on January 14, 2021. The memorandum was issued on September 15, 2021.

FOR FURTHER INFORMATION CONTACT: Marcus Zobrist, Office of Wastewater Management, Water Permits Division (MC4203M), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564–8311; email address: *zobrist.marcus@epa.gov.*

SUPPLEMENTARY INFORMATION:

How can I get copies of this document and other information?

You may access the memorandum electronically at *https://www.epa.gov/npdes/releases-point-source-groundwater* or at the public docket under Docket ID No. EPA–HQ–OW–2020–0673 which is accessible electronically at *http://www.regulations.gov.* The docket will also contain a copy of this **Federal Register** document and the **Federal Register** document that announced the guidance document (86 FR 6321, January 21, 2021). The public docket does not include confidential business information (CBI) or other information whose disclosure is restricted by statute. The telephone number for the Water Docket is (202) 566–2426.

Dated: September 22, 2021.

Andrew D. Sawyers,

Director, Office of Wastewater Management.

[FR Doc. 2021–20993 Filed 9–27–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OLEM–2018–0012; FRL–8891–01–OLEM]

Proposed Information Collection Request; Comment Request; State Program Adequacy Determination: Municipal Solid Waste Landfills (MSWLFs) and Non-Municipal, Non-Hazardous Waste Disposal Units That Receive Conditionally Exempt Small Quantity Generator (CESQG) Hazardous Waste, EPA ICR No. 1608.09, OMB Control No. 2050–0152

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit an information collection request (ICR), ''State Program Adequacy Determination: Municipal Solid Waste Landfills (MSWLFs) and Non-Municipal, Non-Hazardous Waste Disposal Units that Receive Conditionally Exempt Small Quantity Generator (CESQG) Hazardous Waste'' (Renewal), (EPA ICR No. 1608.09, OMB Control No. 2050–0152) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (PRA). Before doing so, the EPA is soliciting public comments on specific aspects of the proposed information collection as described in **SUPPLEMENTARY**

INFORMATION. This is a proposed extension of the ICR, which is currently approved through May 31, 2022. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before November 29, 2021.

ADDRESSES: Submit your comments, referencing by Docket ID No. EPA–HQ–OLEM–2018–0012, to: (1) EPA online using *www.regulations.gov* (our preferred method), by email to *rcra-docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460, and (2) OMB via email to *oira_submission@omb.eop.gov.* Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Craig Dufficy, Materials Recovery and Waste Management Division, Office of Resource Conservation and Recovery, mail code 5304P, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (703) 308–9037; fax number: (703) 308–0514; email address: *dufficy.craig@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov.* Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room is closed to the public, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone and webform. For further information about the EPA's public docket, Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.* The telephone number for the Docket Center is (202) 566–1744.

Pursuant to section 3506(c)(2)(A) of the PRA, the EPA is soliciting comments and information to enable it to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, the EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: Section 4010(c) of the Resource Conservation and Recovery Act (RCRA) of 1976 requires that EPA revise the landfill criteria promulgated under paragraph (1) of section 4004(a) and section 1008(a)(3). Section 4005(c) of RCRA, as amended by the Hazardous Solid Waste Amendments (HSWA) of 1984, requires states to develop and implement permit programs to ensure that MSWLFs and non-municipal, non-hazardous waste disposal units that receive household hazardous waste or CESQG hazardous waste are in compliance with the revised criteria for the design and operation of non-municipal, non-hazardous waste disposal units under 40 CFR part 257, subpart B and MSWLFs under 40 CFR part 258. (40 CFR part 257, subpart B and 40 CFR part 258 are henceforth referred to as the ''revised federal criteria''.) Section 4005(c) of RCRA further mandates the EPA Administrator to determine the adequacy of state permit programs to ensure owner and/or operator compliance with the revised federal criteria. A state program that is deemed adequate to ensure compliance may afford flexibility to owners or operators in the approaches they use to meet Federal requirements, significantly reducing the burden associated with compliance.

In response to the statutory requirement in section 4005(c), EPA developed 40 CFR part 239, commonly referred to as the State Implementation Rule (SIR). The SIR describes the state application and EPA review procedures and defines the elements of an adequate state permit program.

The collection of information from the state during the permit program adequacy determination process allows EPA to evaluate whether a program for which approval is requested is appropriate in structure and authority to ensure owner or operator compliance with the revised federal criteria. The SIR does not require the use of a particular application form. Section 239.3 of the SIR, however, requires that all state applications contain the following five components:

(1) A transmittal letter requesting permit program approval.

(2) A narrative description of the state permit program, including a demonstration that the state's standards for non-municipal, non-hazardous waste disposal units that receive CESQG hazardous waste are technically comparable to the 40 CFR part 257, subpart B criteria and/or that its MSWLF standards are technically comparable to the 40 CFR part 258 criteria.

(3) A legal certification demonstrating that the state has the authority to carry out the program.

(4) Copies of state laws, regulations, and guidance that the state believes demonstrate program adequacy.

(5) Copies of relevant state-tribal agreements if the state has negotiated with a tribe for the implementation of a permit program for non-municipal, non-hazardous waste disposal units that receive CESQG hazardous waste and/or MSWLFs on tribal lands.

The EPA Administrator has delegated the authority to make determinations of adequacy, as contained in the statute, to the EPA Regional Administrator. The appropriate EPA Regional Office, therefore, will use the information provided by each state to determine whether the state's permit program satisfies the statutory test reflected in the requirements of 40 CFR part 239. In all cases, the information will be analyzed to determine the adequacy of the state's permit program for ensuring compliance with the federal revised criteria.

Form Numbers: None.

Respondents/affected entities: Entities potentially affected by this section are States.

Respondent's obligation to respond: Mandatory under section 4005(c) of the Resource Conservation and Recovery Act (RCRA) of 1976.

Estimated number of respondents: 12.

Frequency of response: On occasion.

Total estimated burden: 968 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $54,872 (per year), which includes $54,872 for

annual labor and $0 for annualized capital or operation & maintenance costs. All costs are labor costs, there are no capital/start-up or operation & maintenance costs associated with this ICR.

Changes in Estimates: The burden hours are likely to stay substantially the same.

Dated: September 10, 2021.

Carolyn Hoskinson,

Director, Office of Resource Conservation and Recovery.

[FR Doc. 2021–21018 Filed 9–27–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OLEM–2018–0200; FRL–8890–01–OLEM]

Proposed Information Collection Request; Comment Request; Final Authorization for Hazardous Waste Management Programs, EPA ICR No. 0969.12, OMB Control No. 2050–0041

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit an information collection request (ICR), ''Final Authorization for Hazardous Waste Management Programs'' (Renewal), (EPA ICR No. 0969.12, OMB Control No. 2050–0041) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (PRA). Before doing so, the EPA is soliciting public comments on specific aspects of the proposed information collection as described in **SUPPLEMENTARY INFORMATION**. This is a proposed extension of the ICR, which is currently approved through May 31, 2022. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before November 29, 2021.

ADDRESSES: Submit your comments, referencing by Docket ID No. EPA–HQ–OLEM–2018–0200, to: (1) EPA online using *www.regulations.gov* (our preferred method), by email to *rcra-docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460, and (2) OMB via email to *oira_submission@omb.eop.gov.* Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Peggy Vyas, (mail code 5303P), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (703) 308–5477; fax number: (703) 308–8433; email address: *vyas.peggy@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov.* Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room is closed to the public, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone and webform. For further information about the EPA's public docket, Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.* The telephone number for the Docket Center is (202) 566–1744.

Pursuant to section 3506(c)(2)(A) of the PRA, the EPA is soliciting comments and information to enable it to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, the EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: In order for a State to obtain final authorization for a State hazardous waste program or to revise its previously authorized program, it must submit an official application to the EPA Regional office for approval. The purpose of the application is to enable the EPA to properly determine whether the State's program meets the requirements of section 3006 of RCRA. A State with an approved program may voluntarily transfer program responsibilities to EPA by notifying the EPA of the proposed transfer, as required by 40 CFR 271.23. Further, the EPA may withdraw a State's authorized program under 40 CFR 271.23.

State program revision may be necessary when the controlling Federal or State statutory or regulatory authority is modified or supplemented. In the event that the State is revising its program by adopting new Federal requirements, the State shall prepare and submit modified revisions of the program description, Attorney General's statement, Memorandum of Agreement, or such other documents as the EPA determines to be necessary. The State shall inform the EPA of any proposed modifications to its basic statutory or regulatory authority in accordance with 40 CFR 271.21. If a State is proposing to transfer all or any part of any program from the approved State agency to any other agency, it must notify the EPA in accordance with 40 CFR 271.21 and submit revised organizational charts as required under 40 CFR 271.6, in accordance with 40 CFR 271.21. These paperwork requirements are mandatory under section 3006(a). The EPA will use the information submitted by the State in order to determine whether the State's program meets the statutory and regulatory requirements for authorization.

Form Numbers: None.

Respondents/affected entities: State/territorial governments.

Respondent's obligation to respond: Mandatory (RCRA section 3006(a)).

Estimated number of respondents: 50.

Frequency of response: Annual.

Total estimated burden: 9,996 hours per year. Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $386,618 (per year), includes $386,618 in annualized labor and $0 in annualized capital or operation & maintenance costs.

Changes in Estimates: The burden hours are likely to stay substantially the same.

Dated: September 10, 2021.

Carolyn Hoskinson,

Director, Office of Resource Conservation and Recovery.

[FR Doc. 2021–21020 Filed 9–27–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9065–01–OW]

Notice of Virtual Public Meeting of the Environmental Financial Advisory Board via Webcast

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of virtual public meeting.

SUMMARY: The United States Environmental Protection Agency (EPA) announces a virtual public meeting via webcast of the Environmental Financial Advisory Board (EFAB). The meeting will be shared in real-time via webcast and public comments may be provided in writing in advance or virtually via webcast. Please see **SUPPLEMENTARY INFORMATION** for further details. The purpose of the meeting will be for the EFAB to provide workgroup updates and work products for previously accepted and potential charges, receive updates on EPA activities relating to administration priorities and environmental finance, and consider possible future advisory topics.

DATES: The virtual public meeting will be held on October 13, 2021 from 12 p.m. to 4 p.m. Eastern Time.

ADDRESSES: Information to access the webcast will be provided upon registration in advance of the meeting.

FOR FURTHER INFORMATION CONTACT: Any member of the public who wants information about the meeting may contact Ed Chu, the EFAB Designated Federal Officer, via telephone/voicemail at (913) 551–7333 or email to *efab@epa.gov.* General information concerning the EFAB is available at *https://www.epa.gov/waterfinancecenter/efab.*

SUPPLEMENTARY INFORMATION:

Background: The EFAB is an EPA advisory committee chartered under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, to provide advice and recommendations to EPA on innovative approaches to funding environmental programs, projects, and activities. Administrative support for the EFAB is provided by the Water Infrastructure and Resiliency Finance Center within EPA's Office of Water. Pursuant to FACA and EPA policy, notice is hereby given that the EFAB will hold a virtual public meeting via webcast for the following purposes:

(1) Provide EFAB workgroup updates to the Board regarding work products related to the Opportunity Zones charge the Board accepted during its October 2020 meeting;

(2) Discuss potential future EFAB charges including Stormwater Credit Trading, Environmental Risk and Cost of Capital, Financing Small Manufacturer Pollution Prevention Projects, and others; and

(3) Receive briefings from invited EPA speakers on environmental finance topics.

Registration for the Meeting: To register for the meeting, please visit *https://www.epa.gov/waterfinancecenter/efab#meeting.* Interested persons who wish to attend the meeting via webcast must register by October 5, 2021. Pre-registration is strongly encouraged.

Availability of Meeting Materials: Meeting materials, including the meeting agenda and briefing materials, will be available on EPA's website at *https://www.epa.gov/waterfinancecenter/efab.*

Procedures for Providing Public Input: Public comment for consideration by EPA's federal advisory committees has a different purpose from public comment provided to EPA program offices. Therefore, the process for submitting comments to a federal advisory committee is different from the process used to submit comments to an EPA program office. Federal advisory committees provide independent advice to EPA. Members of the public may submit comments on matters being considered by the EFAB for consideration as the Board develops its advice and recommendations to EPA.

Oral Statements: In general, individuals or groups requesting an oral presentation at a virtual public meeting will be limited to three minutes each. Persons interested in providing oral statements at the October 2021 meeting virtually via webcast should register in advance and provide notification, as noted in the registration confirmation, by October 5, 2021 to be placed on the list of registered speakers.

Written Statements: Written statements for the October 2021 meeting should be received by October 5, 2021 so that the information can be made available to the EFAB for its consideration prior to the meeting. Written statements should be sent via email to *efab@epa.gov.* Members of the public should be aware that their personal contact information, if included in any written comments, may be posted to the EFAB website. Copyrighted material will not be posted without explicit permission of the copyright holder.

Accessibility: For information on access or services for individuals with disabilities or to request accommodations for a disability, please register for the meeting and list any special requirements or accommodations needed on the registration form at least 10 business days prior to the meeting to allow as much time as possible to process your request.

Dated: September 22, 2021.

Andrew D. Sawyers,

Director, Office of Wastewater Management, Office of Water.

[FR Doc. 2021–20994 Filed 9–27–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OLEM–2018–0543; FRL–8889–01–OLEM]

Proposed Information Collection Request; Comment Request; Hazardous Remediation Waste Management Requirements (HWIR) Contaminated Media, EPA ICR No. 1775.09, OMB Control No. 2050–0161

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit an information collection request (ICR), ''Hazardous Remediation Waste Management Requirements (HWIR) Contaminated Media'' (Renewal), (EPA ICR No. 1775.09, OMB Control No. 2050–0161) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (PRA). Before doing so, the EPA is soliciting public comments on specific aspects of the proposed information collection as described in **SUPPLEMENTARY INFORMATION**. This is a proposed extension of the ICR, which is currently approved through April 30, 2022. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before November 29, 2021.

ADDRESSES: Submit your comments, referencing by Docket ID No. EPA–HQ–OLEM–2018–0543, to: (1) EPA online using *www.regulations.gov* (our preferred method), by email to *rcra-*

docket@epa.gov, or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460, and (2) OMB via email to *oira_submission@omb.eop.gov.* Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Peggy Vyas, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (703) 308–5477; fax number: (703) 308–8433; email address: *vyas.peggy@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov.* Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room is closed to the public, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone and webform. For further information about the EPA's public docket, Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.* The telephone number for the Docket Center is 202–566–1744.

Pursuant to section 3506(c)(2)(A) of the PRA, the EPA is soliciting comments and information to enable it to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, the EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: The Resource Conservation and Recovery Act (RCRA) requires EPA to establish a national regulatory program to ensure that hazardous wastes are managed in a manner protective of human health and the environment. Under this program, EPA regulates newly generated hazardous wastes, as well as hazardous remediation wastes (*i.e.,* hazardous wastes managed during cleanup). Hazardous remediation waste management sites must comply with all parts of 40 CFR part 264 except subparts B, C, and D. In place of these requirements, they need to comply with performance standards based on the general requirement goals in these sections, which are codified at 40 CFR 264.1(j).

Under 40 CFR 264.1(j), owners/operators of remediation waste management sites must develop and maintain procedures to prevent accidents. These procedures must address proper design, construction, maintenance, and operation of hazardous remediation waste management units at the site. In addition, owners/operators must develop and maintain a contingency and emergency plan to control accidents that occur. The plan must explain specifically how to treat, store, and dispose of the hazardous remediation waste in question, and must be implemented immediately whenever fire, explosion, or release of hazardous waste or hazardous waste constituents that could threaten human health or the environment. In addition, the Remedial Action Plan streamlines the permitting process for remediation waste management sites to allow cleanups to take place more quickly.

Form Numbers: None.

Respondents/affected entities: Entities potentially affected by this action are the private sector, as well as State, Local, or Tribal governments.

Respondent's obligation to respond: Mandatory (RCRA section 3004(u)).

Estimated number of respondents: 183.

Frequency of response: One-time.

Total estimated burden: 6,361 hours per year. Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $399,803 (per year), which includes $350,307 in annualized labor and $49,496 in annualized capital or operation & maintenance costs.

Changes in Estimates: The burden hours are likely to stay substantially the same.

Dated: September 10, 2021.

Carolyn Hoskinson,

Director, Office of Resource Conservation and Recovery.

[FR Doc. 2021–21019 Filed 9–27–21; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL DEPOSIT INSURANCE CORPORATION

[OMB No. 3064–0212]

Agency Information Collection Activities: Proposed Collection; Comment Request; Correction

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment; Correction.

SUMMARY: The FDIC published a document in the **Federal Register** of September 22, 2021 concerning request for comments on the agency's collection of information that may result from innovators obtaining information from banks and other members of the public in connection with innovation pilot programs, as required by the Paperwork Reduction Act of 1995. The document contained an incorrect number of hours in the ''General Description of Collection'' section in the document. The correct number of hours, however, was reflected in the ''Summary of Annual Burden'' Table in the document.

FOR FURTHER INFORMATION CONTACT: Jennifer Jones, Counsel, 202–898–6768, *jennjones@fdic.gov,* MB–3078, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of September 22, 2021, in FR Doc. 86 FR 52679, on page 52680, in the second column, correct the first sentence in the second paragraph to read:

The annual burden for this information collection is estimated to be 40,000 hours.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on September 22, 2021.

James Sheesley,

Assistant Executive Secretary.

[FR Doc. 2021–20973 Filed 9–27–21; 8:45 am]

BILLING CODE P

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

TIME AND DATE: Thursday, September 30, 2021 at 10:00 a.m.

PLACE: Virtual meeting. Note: Because of the Covid-19 pandemic, we will conduct the open meeting virtually. If you would like to access the meeting, see the instructions below.

STATUS: This meeting will be open to the public. To access the virtual meeting, go to the commission's website *www.fec.gov* and click on the banner to be taken to the meeting page.

MATTERS TO BE CONSIDERED:

Draft Advisory Opinion 2021–09: Certified Voter
Statement of Reasons in Support of Repayment Determination After Administrative Review—Dr. Jill Stein, Jill Stein for President (LRA #1021)
Campaign Guide for Congressional Candidates and Committees
Management and Administrative Matters

CONTACT PERSON FOR MORE INFORMATION: Judith Ingram, Press Officer ,Telephone: (202) 694–1220.

(Authority: Government in the Sunshine Act, 5 U.S.C. 552b)

Vicktoria J. Allen,

Acting Deputy Secretary of the Commission.

[FR Doc. 2021–21119 Filed 9–24–21; 11:15 am]

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 October 28, 2021.

A. Federal Reserve Bank of Minneapolis (Chris P. Wangen, Assistant Vice President), 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *Frandsen Financial Corporation, Arden Hills, Minnesota;* to acquire Bank of Zumbrota, Zumbrota, Minnesota and Pine Island Bank, Pine Island, Minnesota.

B. Federal Reserve Bank of Kansas City (Jeffrey Imgarten, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *First Western Financial, Inc., Denver, Colorado;* to merge with Teton Financial Services, Inc., Wilson, Wyoming, and thereby indirectly acquire Rocky Mountain Bank, Jackson, Wyoming.

Board of Governors of the Federal Reserve System, September 23, 2021.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2021–21028 Filed 9–27–21; 8:45 am]

BILLING CODE P

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Notice of Employee Thrift Advisory Council Meeting

DATES: October 19, 2021 at 10 a.m.

ADDRESSES: Telephonic. Dial-in (listen only) information: Number: 1–415–527–5035, Code: 2764 577 0210; or via web: *https://tspmeet.webex.com/tspmeet/onstage/g.php?MTID=e93b203932e7c4905279e93a87109ab84.*

FOR FURTHER INFORMATION CONTACT: Kimberly Weaver, Director, Office of External Affairs, (202) 942–1640.

SUPPLEMENTARY INFORMATION:

Meeting Agenda

1. Approval of the May 26, 2021 Joint Board/ETAC Meeting Minutes
2. Thrift Savings Fund Statistics
3. Legislative Update
4. FY2022 FRTIB Budget
5. Participant Satisfaction Report
6. Converge Update
7. New Business

Authority: 5 U.S.C. 552b(e)(1).

Dated: September 22, 2021.

Dharmesh Vashee,

General Counsel, Federal Retirement Thrift Investment Board.

[FR Doc. 2021–20976 Filed 9–27–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Patient Safety Organizations: Voluntary Relinquishment for the Chicago Breast Cancer Quality Consortium

AGENCY: Agency for Healthcare Research and Quality (AHRQ), Department of Health and Human Services (HHS).

ACTION: Notice of delisting.

SUMMARY: The Patient Safety and Quality Improvement Final Rule (Patient Safety Rule) authorizes AHRQ, on behalf of the Secretary of HHS, to list as a patient safety organization (PSO) an entity that attests that it meets the statutory and regulatory requirements for listing. A PSO can be ''delisted'' by the Secretary if it is found to no longer meet the requirements of the Patient Safety and Quality Improvement Act of 2005 (Patient Safety Act) and Patient Safety Rule, when a PSO chooses to voluntarily relinquish its status as a PSO for any reason, or when a PSO's listing expires. AHRQ accepted a notification of proposed voluntary relinquishment from the Chicago Breast Cancer Quality Consortium, PSO number P0074, of its status as a PSO, and has delisted the PSO accordingly.

DATES: The delisting was effective at 12:00 Midnight ET (2400) on September 14, 2021.

ADDRESSES: The directories for both listed and delisted PSOs are ongoing and reviewed weekly by AHRQ. Both directories can be accessed electronically at the following HHS website: *http://www.pso.ahrq.gov/listed.*

FOR FURTHER INFORMATION CONTACT: Cathryn Bach, Center for Quality Improvement and Patient Safety, AHRQ, 5600 Fishers Lane, MS 06N100B, Rockville, MD 20857; Telephone (toll free): (866) 403–3697; Telephone (local): (301) 427–1111; TTY (toll free): (866) 438–7231; TTY (local): (301) 427–1130; Email: *pso@ahrq.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Patient Safety Act, 42 U.S.C. 299b–21 to 299b–26, and the related Patient Safety Rule, 42 CFR part 3, published in the **Federal Register** on November 21, 2008 (73 FR 70732–70814), establish a framework by which individuals and entities that meet the definition of provider in the Patient Safety Rule may voluntarily report information to PSOs listed by AHRQ, on a privileged and confidential basis, for the aggregation and analysis of patient safety work product.

The Patient Safety Act authorizes the listing of PSOs, which are entities or component organizations whose mission and primary activity are to conduct activities to improve patient safety and the quality of health care delivery.

HHS issued the Patient Safety Rule to implement the Patient Safety Act. AHRQ administers the provisions of the Patient Safety Act and Patient Safety Rule relating to the listing and operation of PSOs. The Patient Safety Rule authorizes AHRQ to list as a PSO an entity that attests that it meets the statutory and regulatory requirements for listing. A PSO can be ''delisted'' if it is found to no longer meet the requirements of the Patient Safety Act and Patient Safety Rule, when a PSO chooses to voluntarily relinquish its status as a PSO for any reason, or when a PSO's listing expires. Section 3.108(d) of the Patient Safety Rule requires AHRQ to provide public notice when it removes an organization from the list of PSOs.

AHRQ has accepted a notification of proposed voluntary relinquishment from the Chicago Breast Cancer Quality Consortium to voluntarily relinquish its status as a PSO. Accordingly, the Chicago Breast Cancer Quality Consortium, P0074, was delisted effective at 12:00 Midnight ET (2400) on September 14, 2021.

Chicago Breast Cancer Quality Consortium has patient safety work product (PSWP) in its possession. The PSO will meet the requirements of section 3.108(c)(2)(i) of the Patient Safety Rule regarding notification to providers that have reported to the PSO and of section 3.108(c)(2)(ii) regarding disposition of PSWP consistent with section 3.108(b)(3). According to section 3.108(b)(3) of the Patient Safety Rule, the PSO has 90 days from the effective date of delisting and revocation to complete the disposition of PSWP that is currently in the PSO's possession.

More information on PSOs can be obtained through AHRQ's PSO website at *http://www.pso.ahrq.gov.*

Dated: September 23, 2021.

Marquita Cullom,

Associate Director.

[FR Doc. 2021–21072 Filed 9–27–21; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Rescission of Humanitarian Exemption for All Afghan Evacuees Subject to CDC's Global Testing Order

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Disease Control and Prevention (CDC), located within the Department of Health and Human Services (HHS), announces rescission of the temporary humanitarian exemption to the agency's Requirement for Negative Pre-Departure COVID–19 Test Result, which was previously granted for individuals relocating to the United States from Afghanistan (''Afghan Evacuees''), including U.S. citizens, lawful permanent residents (LPRs), third country nationals, and Afghans at risk, including Afghan Special Immigrant Visa (SIV) applicants.

DATES: This temporary humanitarian exemption to the Global Testing Order was rescinded September 20, 2021.

FOR FURTHER INFORMATION CONTACT: Tiffany Brown, Deputy Chief of Staff, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–10, Atlanta, GA 30329. Phone: 404–639–7000. Email: *cdcregulations@cdc.gov.*

SUPPLEMENTARY INFORMATION: On January 12, 2021, CDC issued an Order requiring all air passengers arriving to the U.S. from a foreign country to get tested no more than 3 days before their flight departs and to present the negative result or documentation of having recovered from COVID–19 to the airline or aircraft operator before boarding the flight. A copy of the Order was published in the **Federal Register** on January 21, 2021 (86 FR 6337) and went into effect January 26, 2021.

In August 2021, the U.S. Department of State (DOS) issued a series of Security Alerts for Afghanistan due to increased Taliban activity throughout the country, including the capital of Kabul. In response to a request from DOS on August 15, 2021, CDC and the U.S. Department of Health and Human Services (HHS) granted a blanket humanitarian exemption to CDC's Order to expedite the evacuation of U.S. citizens, lawful permanent residents (LPRs), third country nationals, and Afghans at risk, including Afghan Special Immigrant Visa (SIV) applicants, while adhering to other COVID–19 mitigation guidance issued by CDC.

The exemption, which is being administered with the assistance of DOS and other cooperating Federal and state agencies, was granted with the following conditions: (1) The CDC Order requiring mask use for passengers and crew on air conveyances bound for the United States should be followed to the extent possible; (2) all efforts should be made to test for COVID–19 at a transit location prior to arrival in the United States, and to provide test documentation to the traveler, which can be presented upon arrival, and if this cannot be done, individuals (travelers) arriving are required to undergo COVID–19 testing immediately upon arrival to the first port of entry in the United States; (3) individuals who test positive are required to isolate prior to continuing on commercial transportation to their final destination; and (4) family members of those testing positive may be required to adhere to self-quarantine recommendations as stipulated by CDC or state and local health authorities at the arrival location.

Beginning September 20, 2021, all Afghan Evacuees arriving in the United States will have to meet negative pre-departure COVID–19 test requirements or documentation of recovery. This means evacuees will need to be tested no more than three days before departure to the United States and be able to present the negative result or provide documentation of having recovered from COVID–19 within the last 90 days, to the airline or aircraft operator and upon request of United States Government authorities on arrival in the United States.

This requirement applies to all Afghan Evacuees arriving in the United States on any flight including U.S. Government-owned or -contracted, commercial, private, and general and business aviation (chartered) flights coming to the United States.

CDC is rescinding the humanitarian exemption because:

- The Department of State (DOS) has completed the emergency evacuation and concluded the transport of evacuees out of Afghanistan;
- With DOS's conclusion of emergency evacuation from Afghanistan, there is a need to resume appropriate health interventions, including pre-departure COVID–19

testing, before travel into the United States;

- Designated U.S. arrival Ports of Entry with specific testing operations and other services for Afghan Evacuees, which were specifically set up for early urgent evacuation arrival support, have been discontinued in the United States; and
- Evacuees who are still outside of the United States are in safe locations where testing can be accessed before traveling.

Authority: The CDC Director has issued this Notice authorizing the rescission of this temporary humanitarian exemption for individuals relocating to the United States from Afghanistan and reimposing the agency's Requirement for Negative Pre-Departure COVID–19 Test Result pursuant to Sections 361 of the Public Health Service Act, 42 U.S.C. 264, and implementing regulations at 42 CFR 71.20 and 71.31(b).

This Notice is issued to inform the public of this action.

Sherri Berger,

Chief of Staff, Centers for Disease Control and Prevention.

[FR Doc. 2021–20987 Filed 9–27–21; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–3413–FN]

Medicare Program: Application by the Association of Diabetes Care and Education Specialists (ADCES) for Continued CMS Approval of Its Diabetes Outpatient Self-Management Training Program

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

ACTION: Final notice.

SUMMARY: This final notice announces our decision to approve the Association of Diabetes Care and Education Specialists (ADCES) application for continued recognition as a national accrediting organization (AO) for accrediting entities that wish to furnish diabetes outpatient self-management training services to Medicare beneficiaries.

DATES: This final notice is effective on September 27, 2021 through September 27, 2027.

FOR FURTHER INFORMATION CONTACT: Shannon Freeland, (410) 786–4348. Caroline Gallaher, (410) 786–8705. Lillian Williams, (410) 786–8636.

SUPPLEMENTARY INFORMATION:

I. Background

Diabetes outpatient self-management training services are defined in section 1861(qq)(1) of the Social Security Act (the Act) as ''educational and training services furnished (at such times as the Secretary determines appropriate) to an individual with diabetes by a certified provider (as described in paragraph (2)(A)) in an outpatient setting by an individual or entity who meets the quality standards described in paragraph (2)(B), but only if the physician who is managing the individual's diabetic condition certifies that such services are needed under a comprehensive plan of care related to the individual's diabetic condition to ensure therapy compliance or to provide the individual with necessary skills and knowledge (including skills related to the self-administration of injectable drugs) to participate in the management of the individual's condition.''

In addition, section 1861(qq)(2)(A) of the Act describes a ''certified provider'' as a physician, or other individual or entity designated by the Secretary of the Department of Health and Human Services (the Secretary), that, in addition to providing diabetes outpatient self-management training services, provides other items or services for which payment may be made under this title. Section 1861(qq)(2)(B) of the Act further specifies that a physician, or such other individual or entity, must meet the quality standards established by the Secretary, except that the physician or other individual or entity shall be deemed to have met such standards if the physician or other individual or entity meets applicable standards originally established by the National Diabetes Advisory Board and subsequently revised by organizations who participated in the establishment of standards by such Board or is recognized by an organization that represents individuals (including individuals under this title) with diabetes as meeting standards for furnishing the services.

Section 1865 of the Act also permits the Secretary to use accrediting bodies to determine whether a provider entity meets Medicare regulatory quality standards, such as those established for diabetes outpatient self-management training programs. These accrediting bodies determine whether a diabetes outpatient self-management training supplier meets the Medicare regulatory quality standards established for diabetes outpatient self-management training service programs. A national accrediting organization (AO) must be approved by the Centers for Medicare & Medicaid Services (CMS) and meet the standards and requirements specified in 42 CFR part 410, subpart H, to qualify for Medicare deeming authority.

Our regulations regarding the application procedures for diabetes outpatient self-management training AOs seeking CMS approval are set forth at 42 CFR 410.142. A national accreditation organization applying for deeming authority must provide CMS with reasonable assurance that it will require the diabetes outpatient self-management training suppliers it accredits to meet the CMS' quality standards, the National Standards for Diabetes Self-Management Education and Support (NSDSMES) standards, or an alternative set of standards that meet or exceed our requirements that have been developed by that AO and that have been approved by CMS (see 42 CFR 410.144).

Section 410.142(a) of our regulations states that ''CMS may approve and recognize a nonprofit organization with demonstrated experience in representing the interests of individuals with diabetes to accredit entities to furnish training.'' Therefore, all diabetes outpatient self-management training AOs must be not-for-profit organizations.

Section 410.142(b) of our regulations require a diabetes outpatient self-management training AO to submit specific documents and information with their application, as discussed in section II of this final notice.

II. Provisions of the Proposed Notice

On April 27, 2021, we published a proposed notice in the **Federal Register** (86 FR 22208) acknowledging receipt of the Association of Diabetes Care and Education Specialists (ADCES) request for continued CMS approval of its diabetes outpatient self-management training accreditation program. In that proposed notice, we detailed our evaluation criteria.

Under section 1861(qq) of the Act and our regulations at § 410.142, we conducted a review of the ADCES's diabetes outpatient self-management training program application using the criteria specified by our regulations, which include authorization for CMS to conduct an onsite visit to verify information contained in the organization's application. For an onsite visit, the CMS review team travels to the AO's corporate office to review specific information and documents. An onsite visit is typically part of every application review. However, due to the

COVID–19 pandemic, it was not possible for us to conduct an onsite visit for the ADCES. We conducted our review virtually, using remote means to access and review the necessary information. During this virtual review, we reviewed documentation including the ADECS's: (1) Corporate policies; (2) financial and human resources records; (3) policies and procedures, including those for training, monitoring, and evaluation of its surveyors and investigating and responding appropriately to complaints against accredited diabetes outpatient self-management training suppliers; and (4) survey review and decision-making process for accreditation. This is the same information that would have been reviewed during an onsite visit.

Also, as part of our application review, we reviewed and assessed the following documents submitted by the ADCES:

- A detailed comparison including a crosswalk between the organization's standards and the CMS quality standards described in § 410.144(a).
- Detailed information about the organization's accreditation process, including all of the following information:

++ Frequency of accreditation.

++ Copies of accreditation forms, guidelines, and instructions to evaluators.

++ Descriptions of the following:

—The accreditation review process and the accreditation status decision making process.

—The procedures used to notify a deemed entity of deficiencies in its diabetes outpatient self-management training program and procedures to monitor the correction of those deficiencies.

—The procedures used to enforce compliance with the accreditation requirements and standards.

- Detailed information about the individuals who perform evaluations for the organization, including all of the following information:

++ The education and experience requirements for the individuals who perform evaluations.

++ The content and frequency of continuing education furnished to the individuals who perform evaluations.

++ The process used to monitor the performance of individuals who perform evaluations.

++ The organization's policies and practices for participation in the accreditation process by an individual who is professionally or financially affiliated with the entity being evaluated.

- A description of the organization's data management and analysis system for its accreditation activities and decisions, including the kinds of reports, tables, and other displays generated by that system.
- A description of the organization's procedures for responding to and investigating complaints against an approved entity, including policies and procedures regarding coordination of these activities with appropriate licensing bodies, ombudsmen programs, and CMS.
- A description of the organization's policies and procedures for withholding or removing a certificate of accreditation for failure to meet the organization's standards or requirements, and other actions the organization takes in response to noncompliance with its standards and requirements.
- A description of all types (for example, full or partial) and categories (for example, provisional, conditional, or temporary) of accreditation offered by the organization, the duration of each type and category of accreditation, and a statement identifying the types and categories that will serve as a basis for accreditation if CMS approves the organization.
- A list of all of the approved entities currently accredited to furnish training and the type, category, and expiration date of the accreditation held by each of them.
- The name and address of each person with an ownership or control interest in the organization.
- Documentation that demonstrates its ability to furnish CMS with electronic data in CMS-compatible format.
- A resource analysis that demonstrates that its staffing, funding, and other resources are adequate to perform the required accreditation activities.
- A statement acknowledging that, as a condition for approval and recognition by CMS of its accreditation program, it agrees to comply with the requirements set forth in §§ 410.142 through 410.146.
- Any additional information CMS requests to enable it to respond to the organization's request for CMS approval and recognition of its accreditation program to accredit entities to furnish training.

The April 27, 2021, proposed notice also solicited public comments regarding whether the ADCES's requirements meet or exceed the NSDSMES, which are the accreditation standards used for certification of the diabetes outpatient self-management training programs accredited by the ADCES, pursuant to § 410.144(b) and § 410.142(e)(1).

III. Analysis of and Responses to Public Comments on the Proposed Notice

We received six public comments in response to the April 27, 2021 proposed notice; however, only one of these comments were within the scope of the comment solicitation.

The comment and our response is addressed below.

Comment: One commenter stated that diabetes outpatient self-management training is an evidence-based vital service for people with diagnosed diabetes and it has been proven that this service helps to enhance their clinical outcomes. The commenter further stated that it is imperative that the ADCES continue to offer its services as an AO for diabetes outpatient self-management training suppliers.

Response: We thank the commenter for their support of the CMS diabetes outpatient self-management training program and for their recommendation that the ADCES continue as a CMS-approved diabetes outpatient self-management training AO.

IV. Provisions of the Final Notice

A. Comparison of the ADCES's Standards and Requirements for Accreditation to the NSDSMES and the Medicare Application Requirements

We compared the ADCES's diabetes outpatient self-management training accreditation requirements and survey process with the NSDSMES requirements, and the CMS application requirements in 42 CFR part 410, subpart H, as described in section II of this final notice.

We found the ADCES accreditation standards and process to be consistent with the NSDSMES standards and the CMS requirements.

B. Term of Approval

Based on the review and observations described in section II of this final notice, we have determined that the ADCES's requirements for diabetes outpatient self-management training meet our requirements. Therefore, we approve the ADCES as a national accreditation organization for diabetes outpatient self-management training programs that request participation in the Medicare program, effective September 27, 2021 through September 27, 2027.

V. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping, or

third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Administrator of the Centers for Medicare & Medicaid Services (CMS), Chiquita Brooks-LaSure, having reviewed and approved this document, authorizes Lynette Wilson, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Dated: September 22, 2021.

Lynette Wilson,

Federal Register Liaison, Centers for Medicare & Medicaid Services.

[FR Doc. 2021–20957 Filed 9–27–21; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–R–70, CMS–R–72 and CMS–10783]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by November 29, 2021.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number: _____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' website address at website address at *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html.*

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–R–70
Information Collection Requirements in HSQ–110, Acquisition, Protection and Disclosure of Peer review Organization Information and Supporting Regulations

CMS–R–72
Information Collection Requirements in 42 CFR 478.18, 478.34, 478.36, 478.42, QIO Reconsiderations and Appeals

CMS–10783
Generic Beneficiary and Family Centered-Care Quality Improvement Organization (BFCC–QIO) Data Collection Research

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Information Collection Requirements in HSQ–110, Acquisition, Protection and Disclosure of Peer review Organization Information and Supporting Regulations; *Use:* The Peer Review Improvement Act of 1982 authorizes quality improvement organizations (QIOs), formally known as peer review organizations (PROs), to acquire information necessary to fulfill their duties and functions and places limits on disclosure of the information. The QIOs are required to provide notices to the affected parties when disclosing information about them. These requirements serve to protect the rights of the affected parties. The information provided in these notices is used by the patients, practitioners and providers to: Obtain access to the data maintained and collected on them by the QIOs; add additional data or make changes to existing QIO data; and reflect in the QIO's record the reasons for the QIO's disagreeing with an individual's or provider's request for amendment. *Form Number:* CMS–R–70 (OMB control number: 0938–0426); *Frequency:* Reporting—On occasion; *Affected Public:* Business or other for-profits; *Number of Respondents:* 53,850; *Total Annual Responses:* 436,984; *Total Annual Hours:* 404,208. (For policy questions regarding this collection contact Kimberly Harris at 617–565–1285.)

2. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Information Collection Requirements in 42 CFR 478.18, 478.34, 478.36, 478.42, QIO Reconsiderations and Appeals; *Use:* In the event that a beneficiary, provider, physician, or other practitioner does not agree with the initial determination of a Quality Improvement Organization (QIO) or a QIO subcontractor, it is within that party's rights to request

reconsideration. The information collection requirements 42 CFR 478.18, 478.34, 478.36, and 478.42, contain procedures for QIOs to use in reconsideration of initial determinations. The information requirements contained in these regulations are on QIOs to provide information to parties requesting the reconsideration. These parties will use the information as guidelines for appeal rights in instances where issues are actively being disputed. *Form Number:* CMS–R–72 (OMB control number: 0938–0443); *Frequency:* Reporting—On occasion; *Affected Public:* Individuals or Households and Business or other for-profit institutions; *Number of Respondents:* 20,129; *Total Annual Responses:* 60,489; *Total Annual Hours:* 22,014. (For policy questions regarding this collection contact Kimberly Harris at 617–565–1285).

3. *Type of Information Collection Request:* New collection (Request for a new OMB control number); *Title of Information Collection:* Generic Beneficiary and Family Centered-Care Quality Improvement Organization (BFCC–QIO) Data Collection Research; *Use:* The purpose of this submission is to request approval for generic clearance that covers a program of data collection activities to obtain feedback from a broad audience that may include, but will not be limited to Medicare beneficiaries, their family, health care providers and other key stakeholders who have used or may use and have been impacted by the BFCC–QIO services and its offerings. This data collection effort is part of a strategic plan to obtain direct feedback from Medicare beneficiaries, their family, health care providers and other key stakeholders on QIO process improvement efforts and their satisfaction with the services provided by these BFCC–QIOs. Feedback obtained will be used to improve the BFCC QIO program. With the approval of this clearance, the Division of Beneficiary Reviews and Care Management (DBRCM) will be able to maintain a proactive process for rapid data collection to inform the work of the BFCC–QIO program around new and existing initiatives, as well as providing rapid feedback on service delivery and satisfaction for continuous improvement of the BFCC–QIO program.

The BFCC–QIO program is statutorily mandated to improve the quality of healthcare services Medicare beneficiaries receive. BFCC–QIOs provide the foundational level of quality in the health care system by investigating quality of care complaints made by Medicare beneficiaries and their families; by providing an avenue for appeals if they feel they are being released from a facility too soon; by requesting for immediate advocacy services when they have concerns about their care that need a quick resolution; and by providing care management services to help people with Medicare navigate the healthcare system and coordinate their care. The BFCC–QIOs provide these essential services for beneficiaries and families of the national Medicare program.

This generic clearance will cover a program of qualitative (in-depth interviews and focus group interviews), and quantitative methods (surveys) to obtain feedback from a wide range of audience that may include, but will not be limited to Medicare beneficiaries, their family, healthcare providers and any other key audiences that would support CMS in informing and improving QIO services, and any new and existing initiatives. *Form Number:* CMS–10783 (OMB control number: 0938–NEW); *Frequency:* Occasionally; *Affected Public:* Individuals and Households; *Number of Respondents:* 16,800; *Total Annual Responses:* 191,200; *Total Annual Hours:* 59,400. For policy questions regarding this collection, contact Yewande Oladeinde at 410–786–2157.)

Dated: September 22, 2021.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2021–20978 Filed 9–27–21; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2021–N–0689]

Public Workshop: Analgesic Clinical Trial Designs, Extrapolation, and Endpoints in Patients From Birth to Less Than Two Years of Age

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop.

SUMMARY: The Food and Drug Administration (FDA) is announcing a public workshop entitled ''Analgesic Clinical Trial Designs, Extrapolation, and Endpoints in Patients from Birth to Less Than Two Years of Age.'' The purpose of the public workshop is to discuss the state of science, data gaps, and challenges in drug development for drugs intended to treat acute pain in patients less than 2 years of age.

DATES: The public workshop will be held virtually on October 13 and 14, 2021, from 10 a.m. to 2 p.m. Eastern Standard Time. See the **SUPPLEMENTARY INFORMATION** section for registration date and information.

ADDRESSES: The public workshop will be held in virtual format only and will not be held at a specific location. Please note that due to the impact of the COVID–19 pandemic, all meeting participants will be joining this public meeting via an online teleconferencing platform. The public workshop will be held at *https://go.umd.edu/analgesic-clinical-trial.*

FOR FURTHER INFORMATION CONTACT: Heather Buck at *Heather.Buck@fda.hhs.gov,* 301–796–1413 or Kerri-Ann Jennings at *Kerri-Ann.Jennings@fda.hhs.gov,* 301–796–2919, Food and Drug Administration, Center for Drug Evaluation and Research, 10903 New Hampshire Ave., Bldg. 22, Rm. 6467, Silver Spring, MD 20903–0002.

SUPPLEMENTARY INFORMATION:

I. Background

In 2009, FDA convened a scientific workshop with experts in pediatric pain, pediatric clinical trial design, pediatric ethics, and pediatric drug development [1]. Based on the available data at the time, the expert panel recommended extrapolation of efficacy in patients 2 years and older, relying on matching effective drug exposures in adults. The current approach to study drugs with well-established mechanisms of action, such as opioids, non-steroidal anti-inflammatory drugs (NSAIDS), acetaminophen, and local anesthetics, relies on matching safe and effective drug exposures in adults to support the efficacy of drugs used to treat acute pain in pediatric patients at least 2 years of age. Controlled efficacy trials are only required in patients from birth to less than 2 years of age. When controlled efficacy trials are needed, FDA has recommended an ''add-on'' design using opioid-sparing calculation rather than the change in pain intensity used in efficacy trials of analgesics in adults.

Despite these advances in clinical trial design, there continues to be unmet needs in the availability of products to treat acute pain, especially in patients less than 2 years of age. There is currently only one analgesic labeled for use in patients less than 2 years of age: Ibuprofen is approved for the treatment

[1] Berde, CB, et.al., Pediatrics 2012 Feb;129(2):354–64. *https://www.fda.gov/advisory-committees/advisory-committee-calendar/april-12-2016-pediatric-advisory-committee-meeting-announcement-04122016-04122016.*

of pain in children 6 months of age and older. Furthermore, controlled trials in patients less than 2 years of age have been difficult to complete and the data obtained from completed trials have often been difficult to interpret.

The purpose of the public workshop is to discuss the current state of therapies to treat acute pain in children, identify data gaps, and consider methods to improve the current drug development paradigm for acute pain in patients less than 2 years of age (*e.g.,* use of pediatric extrapolation, and novel clinical trial designs). The workshop is intended to focus on drugs with well-established mechanisms of action (NSAIDs, acetaminophen, local anesthetics, opioids), rather than drugs with novel mechanisms of action.

II. Topics for Discussion at the Public Workshop

The main objective of the ''Analgesic Clinical Trial Designs, Extrapolation, and Endpoints in Patients from Birth to Less Than Two Years of Age'' workshop is to discuss the current state of therapies to treat acute pain in children, identify data gaps, and discuss feasible trial designs and methods (*e.g.,* use of pediatric extrapolation) to improve the current drug development paradigm for acute pain in patients less than 2 years of age. The workshop will include regulators, industry, academia, and patient organizations to optimize the discussion of the selected topics.

III. Participating in the Public Workshop

Registration: Please visit the following website to register for this public workshop: *https://go.umd.edu/analgesic-clinical-trial.* Please provide complete contact information for each attendee, including name, title, affiliation, address, email, and telephone.

Streaming Webcast of the Public Workshop: This public workshop will also be webcast at the following site: *https://collaboration.fda.gov/rz3mubd491lo/.*

If you have never attended a Connect Pro event before, test your connection at *https://collaboration.fda.gov/common/help/en/support/meeting_test.htm.* For an overview of the Connect Pro program, visit *https://www.adobe.com/go/connectpro_overview.* FDA has verified the website addresses in this document, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

Dated: September 22, 2021.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2021–21000 Filed 9–27–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Office of the National Coordinator for Health Information Technology; Delegation of Authority

Notice is hereby given that I have delegated to the National Coordinator for Health Information Technology (National Coordinator), Office of the National Coordinator for Health Information Technology (ONC), or his or her successor, the authority vested in the Secretary of Health and Human Services: (a) To administer the provisions of subtitle A of title XXX of the Public Health Service Act (42 U.S.C. 300jj–11 *et seq.*), as amended, as specified under section 3001 (with the exception of section 3001(a)) and section 3009A; (b) to administer the provisions of subtitle C of title XXX of the Public Health Service Act (42 U.S.C. 300jj–52), as amended, as specified under section 3022 (with the exception of section 3022(b) and (d)(4)); (c) to administer the provisions of title II, subtitle E, section 2401(b)(5) of the American Rescue Plan Act of 2021 (Pub. L. 117–2), for the purpose of carrying out COVID–19 activities related to enhancing information technology, data modernization, and reporting, including improvements necessary to support sharing of data related to public health capabilities; and (d) to administer the provisions of title II, subtitle F, section 2501 of the American Rescue Plan Act of 2021 (Pub. L. 117–2), for the purpose of carrying out COVID–19 activities related to establishing, expanding, and sustaining a public health workforce by making awards of funds.

Limitations

This delegation of authority may be re-delegated.

The Secretary retains the authority to submit reports to Congress, promulgate regulations, and to establish advisory committees and councils and appoint their members, as applicable.

Previous delegations made to officials within the Department of Health and Human Services for authority under title II, subtitle E, section 2401(b)(5), and title II, subtitle F, section 2501 of the American Rescue Plan Act of 2021 (Pub. L. 117–2) continue in effect.

Exercise of this authority shall be in accordance with established policies, procedures, guidelines, and regulations as prescribed by the Secretary.

I hereby affirm and ratify any actions taken by the National Coordinator, or his or her subordinates, which involved the exercise of the authority delegated herein prior to the effective date of this delegation.

Effective Date

This delegation is valid upon date of signature.

Authority

5 U.S.C. 301; section 6 of the Reorganization Plan No. 1 of 1953; and section 2 of the Reorganization Plan No. 3 of 1966.

Dated: September 23, 2021.

Xavier Becerra,

Secretary of Health and Human Services.

[FR Doc. 2021–21140 Filed 9–24–21; 4:15 pm]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Nursing Research Initial Review Group.

Date: October 21–22, 2021.

Time: 9:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Nursing Research, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Cheryl Nordstrom, Ph.D., Scientific Review Officer, National Institute of Nursing Research, National Institutes of Health, 6701 Democracy Blvd., Suite 703H Bethesda, MD 20892, (301) 827–1499, *cheryl.nordstrom@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: September 22, 2021.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–21002 Filed 9–27–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group; Biobehavioral Mechanisms of Emotion, Stress and Health Study Section.

Date: October 25–26, 2021.

Time: 10:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Alyssa Todaro Brooks, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1000F, Bethesda, MD 20892, (301) 827–9299, *brooksaly@mail.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Mechanisms of Emotion, Stress and Health.

Date: October 25, 2021.

Time: 5:00 p.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Maribeth Champoux, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3182, MSC 7759, Bethesda, MD 20892, 301–594–3163, *champoum@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Cell Biology, Developmental Biology and Bioengineering.

Date: November 2–3, 2021.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Alexander Gubin, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4196, MSC 7812, Bethesda, MD 20892, 301–435–2902, *gubina@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowship: Cancer Immunology and Immunotherapy.

Date: November 2–3, 2021.

Time: 9:30 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ola Mae Zack Howard, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4192, MSC 7806, Bethesda, MD 20892, 301–451–4467, *howardz@mail.nih.gov*.

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group; Organization and Delivery of Health Services Study Section.

Date: November 3–4, 2021.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Catherine Hadeler Maulsby, Ph.D., MPH, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 435–1266, *maulsbych@csr.nih.gov*.

Name of Committee: Infectious Diseases and Immunology A Integrated Review Group; Virology—B Study Section.

Date: November 3–4, 2021.

Time: 9:30 a.m. to 8:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Neerja Kaushik-Basu, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3198, MSC 7808, Bethesda, MD 20892, (301) 435–1742, *kaushikbasun@csr.nih.gov*.

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Neurobiology of Motivated Behavior Study Section.

Date: November 4–5, 2021.

Time: 9:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Janita N. Turchi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, *turchij@mail.nih.gov*.

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Synapses, Cytoskeleton and Trafficking Study Section.

Date: November 4–5, 2021.

Time: 9:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Linda MacArthur, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4187, Bethesda, MD 20892, 301–537–9986, *macarthurlh@csr.nih.gov*.

Name of Committee: Digestive, Kidney and Urological Systems Integrated Review Group; Systemic Injury by Environmental Exposure.

Date: November 4–5, 2021.

Time: 9:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jodie Michelle Fleming, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 812R, Bethesda, MD 20892, (301) 867–5309, *flemingjm@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: September 23, 2021.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–21035 Filed 9–27–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Cancer Institute Council of Research Advocates, September 29, 2021, 12:00 p.m. to September 29, 2021, 4:00 p.m., National Cancer Institute Shady Grove, 9609 Medical Center Drive, Rockville, MD 20850 which was published in the **Federal Register** on September 17, 2021, FR Doc 2021–20075, 86 FR 51903.

This notice is being amended to change the meeting end time. The meeting will now be held from 12:00 p.m. to 3:15 p.m. The meeting is open to the public.

Dated: September 22, 2021.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–20983 Filed 9–27–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Program Project V (P01).

Date: October 28–29, 2021.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W240, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Hasan Siddiqui, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W240, Rockville, Maryland 20850, 240–276–5122, *hasan.siddiqui@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–7: NCI Clinical and Translational Cancer Research.

Date: November 16–17, 2021.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W104, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Robert F. Gahl, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9606 Medical Center Drive, Room 7W104, Rockville, Maryland 20850, 240–276–7869, *robert.gahl@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: September 23, 2021.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–21034 Filed 9–27–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Frederick National Laboratory Advisory Committee to the National Cancer Institute.

The meeting will be held virtually and is open to the public. Individuals who plan to view the virtual meeting and need special assistance or other reasonable accommodations to view the meeting, should notify the Contact Person listed below in advance of the meeting. The meeting will be videocast and can be accessed from the NIH Videocasting and Podcasting website (*http://videocast.nih.gov*).

Name of Committee: Frederick National Laboratory Advisory Committee to the National Cancer Institute.

Date: October 18, 2021.

Time: 1:00 p.m. to 4:30 p.m.

Agenda: Ongoing and new activities at the Frederick National Laboratory for Cancer Research.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Rockville, MD 20850 (Virtual Meeting).

Contact Person: Wlodek Lopaczynski, M.D., Ph.D., Assistant Director, Division of Extramural Activities, National Cancer Institute, National Institutes of Health, 9609 Medical Center Drive, Seventh Floor, West Tower, Room 7W514, Bethesda, MD 20892, 240–276–6458, *lopacw@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: FNLAC: *https://deainfo.nci.nih.gov/advisory/fac/fac.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: September 23, 2021.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–21036 Filed 9–27–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Complementary & Integrative Health; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center for Complementary and Integrative Health Special Emphasis Panel; Promoting Research on Music and Health: Phased Innovation Award for Music Interventions (R61/R33 Clinical Trial Optional).

Date: October 21, 2021.

Time: 11:00 a.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Center for Complementary and Integrative, Democracy II, 6707 Democracy Blvd., Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Shiyong Huang, Ph.D., Scientific Review Officer, Office of Scientific Review, Division of Extramural Activities, NCCIH/NIH, 6707 Democracy Boulevard, Suite 401, Bethesda, MD 20817, *shiyong.huang@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.213, Research and Training in Complementary and Alternative Medicine, National Institutes of Health, HHS)

Dated: September 22, 2021.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–21003 Filed 9–27–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Biomedical Imaging and Bioengineering; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel; Career Development (Ks) and Conference support (R13).

Date: November 5, 2021.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Democracy II, 6707 Democracy Blvd., Bethesda, MD 20892 (Virtual Meeting).

Contact Person: John P. Holden, Ph.D., Scientific Review Officer, National Institute of Biomedical Imaging and Bioengineering, National Institutes of Health, 6707 Democracy Blvd., Suite 920, Bethesda, MD 20892, (301) 496–8775, *john.holden@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, National Institute of Biomedical Imaging and Bioengineering, National Institutes of Health, HHS)

Dated: September 22, 2021.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–21001 Filed 9–27–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[1651–0140]

Collection of Advance Information From Certain Undocumented Individuals on the Land Border

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments; revision of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than November 29, 2021) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0140 in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov.*

Due to COVID–19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov.* Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/.*

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions 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, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Collection of Advance Information from Certain Undocumented Individuals on the Land Border.

OMB Number: 1651–0140.

Form Number: N/A.

Current Actions: Revision.

Type of Review: Revision.

Affected Public: Individuals.

Abstract: The Department of Homeland Security (DHS), in consultation with U.S. Customs and Border Protection (CBP), has established a process to streamline the processing of undocumented noncitizens under Title 8 of the United States Code at certain ports of entry (POEs), as these individuals require secondary processing upon their arrival, which takes longer than when individuals arrive with sufficient travel documentation.

CBP is proposing extending and amending this data collection, which was established on an emergency basis on May 3, 2021. This data collection expands on the previous collection process for persons who may warrant an exception to the CDC's Order *Suspending the Right To Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists* (''CDC Order'') (85 FR 65806), to include undocumented noncitizens who

will be processed under Title 8 at the time they arrive at the POE after the CDC Order is rescinded, in whole or in part. The purpose is to continue to achieve efficiencies to process undocumented noncitizens under Title 8 upon their arrival at the POE, consistent with public health protocols, space limitations, and other restrictions.

CBP collects certain biographic and biometric information from undocumented noncitizens prior to their arrival at a POE, to streamline their processing at the POE. The requested information is that which CBP would otherwise collect from these individuals during primary and/or secondary processing. This information is voluntarily provided by undocumented noncitizens, directly or through non-governmental organizations (NGOs) and international organizations (IOs). Providing this information is not a prerequisite for processing under Title 8, but reduces the amount of data entered by CBP Officers (CBPOs) and the length of time an undocumented noncitizen remains in CBP custody.

The biographic and biometric information being collected in advance, that would otherwise be collected during primary and/or secondary processing at the POEs includes, but is not limited to, descriptive information such as: Name, Data of birth, Country of Birth, City of Birth, Country of Residence, Contact Information, Addresses, Nationality, Employment history (optional), Travel history, Emergency Contact (optional), U.S. and foreign addresses, Familial Information (optional), Marital Status (optional), Identity Document (not a WHTI compliant document) (optional), Gender, Preferred Language, Height, Weight, Eye color and Photograph.

This information is submitted to CBP by undocumented noncitizens on a voluntary basis, for the purpose of facilitating and implementing CBP's mission. This collection is consistent with DHS' and CBP's authorities, including under 6 U.S.C. 202 and 211(c). Pursuant to these sections, DHS and CBP are generally charged with ''[s]ecuring the borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems of the United States,'' and ''implement[ing] screening and targeting capabilities, including the screening, reviewing, identifying, and prioritizing of passengers and cargo across all international modes of transportation, both inbound and outbound.''

Proposed Changes: This information collection is being changed to require the submission of the photograph—previously optional—for all who choose to provide advance information. The submission of a photograph in advance will provide CBPOs with a mechanism to match a noncitizen who arrives at the POE with the photograph submitted in advance, therefore identifying those individuals, and verifying their identity. The photograph is particularly important for identity verification once NGOs/IOs are no longer facilitating the presentation of all individuals for CBP processing (NGOs/IOs will be able to continue assisting for some individuals but others will be able to participate on their own).

CBP will also allow individuals to request to present themselves for processing at a specific POE on a specific day and time, although such a request does not guarantee that an individual will be processed at a given time. Individuals will have the opportunity to modify their requests within the CBP One™ application to an alternate day or time. In all cases, CBP will inspect, and process individuals based on available capacity at the POE. This new functionality does not require the collection of new Personal Identifiable Information (PII) data elements.

Type of Information Collection: Advance Information on Undocumented Travelers.

Estimated Number of Respondents: 91,250.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 91,250.

Estimated Time per Response: 16 minutes.

Estimated Total Annual Burden Hours: 24,333.

Dated: September 23, 2021.

Seth D. Renkema,

Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.

[FR Doc. 2021–20988 Filed 9–27–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2021–0002]

Final Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Flood hazard determinations, which may include additions or modifications of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or regulatory floodways on the Flood Insurance Rate Maps (FIRMs) and where applicable, in the supporting Flood Insurance Study (FIS) reports have been made final for the communities listed in the table below.

The FIRM and FIS report are the basis of the floodplain management measures that a community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the Federal Emergency Management Agency's (FEMA's) National Flood Insurance Program (NFIP). In addition, the FIRM and FIS report are used by insurance agents and others to calculate appropriate flood insurance premium rates for buildings and the contents of those buildings.

DATES: The date of January 28, 2022 has been established for the FIRM and, where applicable, the supporting FIS report showing the new or modified flood hazard information for each community.

ADDRESSES: The FIRM, and if applicable, the FIS report containing the final flood hazard information for each community is available for inspection at the respective Community Map Repository address listed in the tables below and will be available online through the FEMA Map Service Center at *https://msc.fema.gov* by the date indicated above.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the new or modified flood hazard information for each community listed. Notification of these changes has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

This final notice is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67.

FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the new or revised FIRM and FIS report available at the address cited below for each community or online through the FEMA Map Service Center at *https://msc.fema.gov.*

The flood hazard determinations are made final in the watersheds and/or communities listed in the table below.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Michael M. Grimm,

Assistant Administrator for Risk Management, Department of Homeland Security, Federal Emergency Management Agency.

Community	Community map repository address
Levy County, Florida and Incorporated Areas Docket No.: FEMA–B–2060	
Town of Bronson	Town Hall, 650 Oak Street, Bronson, FL 32621.
Town of Otter Creek	Town Hall, 555 Southwest 2nd Avenue, Otter Creek, FL 32683.
Unincorporated Areas of Levy County	Levy County Building Department, 622 East Hathaway Avenue, Bronson, FL 32621.
Jackson County, Iowa and Incorporated Areas Docket No.: FEMA–B–2047	
City of Baldwin	City Hall, 4746 50th Avenue, Baldwin, IA 52207.
City of Bellevue	City Hall, 106 North 3rd Street, Bellevue, IA 52031.
City of La Motte	City Hall, 102 South Main Street, La Motte, IA 52054.
City of Maquoketa	City Hall, 201 East Pleasant Street, Maquoketa, IA 52060.
City of Miles	City Hall, 430 Ferry Road, Miles, IA 52064.
City of Monmouth	City Hall, 501 North Division Street, Monmouth, IA 52309.
City of Preston	City Hall, 1 West Gillet Street, Preston, IA 52069.
City of Sabula	City Hall, 411 Broad Street, Sabula, IA 52070.
City of Sprague ville	City Hall, 127 East Main Street, Sprague ville, IA 52074.
City of Springbrook	City Hall, 203 North 12th Street, Springbrook, IA 52075.
City of St. Donatus	City Hall, 114 East 2nd Street, St. Donatus, IA 52071.
Unincorporated Areas of Jackson County	Jackson County Courthouse, 201 West Platt Street, Maquoketa, IA 52060.
Muscatine County, Iowa and Incorporated Areas Docket No.: FEMA–B–1933 and FEMA–B–2055	
City of Atalissa	City Hall, 122 3rd Street, Atalissa, IA 52720.
City of Muscatine	City Hall, 215 Sycamore Street, Muscatine, IA 52761.
City of Nichols	City Hall, 429 Ijem Avenue, Nichols, IA 52766.
City of Stockton	City Hall, 318 Commerce Street, Stockton, IA 52769.
City of West Liberty	City Hall, 409 North Calhoun Street, West Liberty, IA 52776.
City of Wilton	City Hall, 104 East 4th Street, Wilton, IA 52778.
Unincorporated Areas of Muscatine County	Muscatine County Building, 3610 Park Avenue West, Muscatine, IA 52761.

[FR Doc. 2021–20980 Filed 9–27–21; 8:45 am]
BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2021–0002; Internal Agency Docket No. FEMA–B–2168]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, the FIRM and FIS report, once effective, will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents of those buildings.

DATES: Comments are to be submitted on or before December 27, 2021.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

You may submit comments, identified by Docket No. FEMA–B–2168, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400

C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP and are used to calculate the appropriate flood insurance premium rates for new buildings built after the FIRM and FIS report become effective.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at *https://www.floodsrp.org/pdfs/srp_overview.pdf.*

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Michael M. Grimm,

Assistant Administrator for Risk Management, Department of Homeland Security, Federal Emergency Management Agency.

Community	Community map repository address
Delta County, Michigan (All Jurisdictions) Project: 14–05–3362S Preliminary Date: April 30, 2021	
City of Escanaba	City Hall Protective Inspection Department, 410 Ludington Street, Escanaba, MI 49829.
City of Gladstone	City of Gladstone Zoning Administrator's Office, 1100 Delta Avenue, Gladstone, MI 49837.
Little Traverse Bay Bands of Odawa Indians	Little Traverse Bay Bands of Odawa Indians Government Center, 7500 Odawa Circle, Harbor Springs, MI 49740.
Township of Baldwin	Baldwin Township Hall, 5901 Perkins 30.5 Road, Perkins, MI 49872.
Township of Bay De Noc	Bay De Noc Township Hall, 5870 County 513 T Road, Rapid River, MI 49878.
Township of Brampton	Brampton Township Hall, 9019 Bay Shore Drive, Gladstone, MI 49837.
Township of Cornell	Township Supervisor's Office, 9912 River J.5 Lane, Cornell, MI 49818.
Township of Ensign	Ensign Fire Hall, 9498 24th Road, Rapid River, MI 49878.
Township of Escanaba	Escanaba Township Hall, 4618 County 416 20th Road, Gladstone, MI 49837.
Township of Fairbanks	Fairbanks Township Hall, 13717 11th Road, Garden, MI 49835.
Township of Ford River	Ford River Township Building, 3845 K Road, Bark River, MI 49807.
Township of Garden	Garden Township Office, 6316 State Street, Garden, MI 49835.
Township of Maple Ridge	Maple Ridge Community Building, 3892 West Maple Ridge 37th Road, Rock, MI 49880.
Township of Masonville	Masonville Township Office, 10574 North Main Street, Rapid River, MI 49878.
Township of Nahma	Township Hall, 13751 Wells Street, Nahma, MI 49864.
Township of Wells	Township Building, 6436 North 8th Street, Wells, MI 49894.
Village of Garden	Village Hall, 15951 Garden Avenue, Garden, MI 49835.
Hamilton County, Ohio and Incorporated Areas Project: 14–05–4202S Preliminary Date: March 5, 2021	
City of Blue Ash	City Hall, 4343 Cooper Road, Blue Ash, OH 45242.
City of Cincinnati	City Hall, 801 Plum Street, Cincinnati, OH 45202.
City of Loveland	City Hall, 120 West Loveland Avenue, Loveland, OH 45140.
City of Madeira	City Hall, 7141 Miami Avenue, Madeira, OH 45243.
City of Montgomery	City Hall, 10101 Montgomery Road, Montgomery, OH 45242.
City of The Village of Indian Hill	Indian Hill Village Hall, 6525 Drake Road, Cincinnati, OH 45243.

Community	Community map repository address
Unincorporated Areas of Hamilton County	Hamilton County Department of Public Works, 138 East Court Street, Room 800, Cincinnati, OH 45202.
Village of Fairfax	Municipal Building, 5903 Hawthorne Avenue, Fairfax, OH 45227.
Village of Mariemont	Municipal Building, 6907 Wooster Pike, Mariemont, OH 45227.
Village of Newtown	Town Hall, 3536 Church Street, Newtown, OH 45244.
Village of Terrace Park	Community Building, 428 Elm Avenue, Terrace Park, OH 45174.

[FR Doc. 2021–20982 Filed 9–27–21; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2021–0002; Internal Agency Docket No. FEMA–B–2166]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, the FIRM and FIS report, once effective, will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents of those buildings.

DATES: Comments are to be submitted on or before December 27, 2021.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

You may submit comments, identified by Docket No. FEMA–B–2166, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP and are used to calculate the appropriate flood insurance premium rates for new buildings built after the FIRM and FIS report become effective.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at *https://www.floodsrp.org/pdfs/srp_overview.pdf.*

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Michael M. Grimm,

Assistant Administrator for Risk Management, Department of Homeland Security, Federal Emergency Management Agency.

Community	Community map repository address
Miami-Dade County, Florida and Incorporated Areas Project: 15–04–4157S Preliminary Date: February 25, 2021	
City of Aventura	Community Development Department, 19200 West Country Club Drive, Aventura, FL 33180.
City of Coral Gables	City Hall—Building Division, 405 Biltmore Way, 3rd Floor, Coral Gables, FL 33134.
City of Doral	Building Department, 8401 Northwest 53rd Terrace, Doral, FL 33166.
City of Florida City	Building Department, 404 West Palm Drive, Florida City, FL 33034.
City of Hialeah	Building Department, 501 Palm Avenue, Hialeah, FL 33010.
City of Hialeah Gardens	City Hall, 10001 Northwest 87th Avenue, Hialeah Gardens, FL 33016.
City of Homestead	City Hall—Building and Safety Division, 100 Civic Court, Homestead, FL 33030.
City of Miami	Planning and Zoning Building Department, 444 Southwest 2nd Avenue, 4th Floor, Miami, FL 33130.
City of Miami Beach	Building Department, 1700 Convention Center Drive, Miami Beach, FL 33139.
City of Miami Gardens	Building Department, 18605 Northwest 27th Avenue, Miami Gardens, FL 33056.
City of Miami Springs	Building Department, 201 Westward Drive, Miami Springs, FL 33166.
City of North Bay Village	City Hall—Building Department, 1666 79th Street Causeway, 3rd Floor, North Bay Village, FL 33141.
City of North Miami	Public Works Department, 776 Northeast 125th Street, 3rd Floor, North Miami, FL 33161.
City of North Miami Beach	Building, Planning, and Zoning Department, 17050 Northeast 19th Avenue, 1st Floor, North Miami Beach, FL 33162.
City of Opa-Locka	Building Department, 780 Fisherman Street, 4th Floor, Opa-Locka, FL 33054.
City of South Miami	Planning and Zoning Department, 6130 Sunset Drive, South Miami, FL 33143.
City of Sunny Isles Beach	Building Department, 3rd Floor, 18070 Collins Avenue, Sunny Isles Beach, FL 33160.
City of Sweetwater	Engineering Division, 1701 Northwest 112th Avenue, Unit 103, Sweetwater, FL 33172.
City of West Miami	Public Works Department, 901 Southwest 62nd Avenue, West Miami, FL 33144.
Town of Bay Harbor Islands	Building Department, 9665 Bay Harbor Terrace, Bay Harbor Islands, FL 33154.
Town of Cutler Bay	Public Works Department, 10720 Caribbean Boulevard, Suite 105, Cutler Bay, FL 33189.
Town of Golden Beach	Building Department, 1 Golden Beach Drive, Golden Beach, FL 33160.
Town of Medley	Town Hall, 7777 Northwest 72nd Avenue, Medley, FL 33166.
Town of Miami Lakes	Town Hall, 6601 Main Street, Miami Lakes, FL 33014.
Town of Surfside	Building Department, 9293 Harding Avenue, Surfside, FL 33154.
Unincorporated Areas of Miami-Dade County	Miami-Dade County Water Management Division, 701 Northwest 1st Court, 5th Floor, Miami, FL 33136.
Village of Bal Harbour Village	Building Department, 655 96th Street, Bal Harbour Village, FL 33154.
Village of Biscayne Park	Village Hall, 600 Northeast 114th Street, Biscayne Park, FL 33161.
Village of El Portal	Village Hall, 500 Northeast 87th Street, El Portal, FL 33138.
Village of Indian Creek Village	Village Hall, 9080 Bay Drive, Indian Creek Village, FL 33154.
Village of Key Biscayne	Building Department, 88 West McIntyre Street, Key Biscayne, FL 33149.
Village of Miami Shores Village	Village Hall—Planning and Zoning Department, 10050 Northeast 2nd Avenue, Miami Shores Village, FL 33138.
Village of Palmetto Bay	Building Department, 9705 East Hibiscus Street, Palmetto Bay, FL 33157.
Village of Pinecrest	Building and Planning Department, 12645 Pinecrest Parkway, Pinecrest, FL 33156.
Village of Virginia Gardens	Village Hall, 6498 Northwest 38th Terrace, Virginia Gardens, FL 33166.

[FR Doc. 2021–20981 Filed 9–27–21; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[FR–6264–N–01]

Notice of HUD-Held Multifamily and Healthcare Loan Sale (MHLS 2022–1)

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice of sale of three multifamily and six healthcare mortgage loans.

SUMMARY: This notice announces HUD's intention to sell three unsubsidized multifamily and six unsubsidized healthcare mortgage loans, without Federal Housing Administration (FHA) insurance, in a competitive, sealed bid sale on or about October 20th, 2021

(MHLS 2022–1or Loan Sale). This notice also describes generally the bidding process for the sale and certain persons who are ineligible to bid.

DATES: A Bidder's Information Package (BIP) will be made available on or about September 22, 2021. Bids for the loans must be submitted on the bid date, which is currently scheduled for October 20th, 2021, between certain specified hours. HUD anticipates that an award or awards will be made on or before October 26, 2021. Closing is expected to take place Wednesday November 3, 2021.

ADDRESSES: To become a qualified bidder and receive the BIP, prospective bidders must complete, execute, and submit a Confidentiality Agreement and a Qualification Statement acceptable to HUD. Both documents will be available on the HUD website at *www.hud.gov/fhaloansales.* Please fax or email as well as mail executed original documents to JS Watkins Realty Partners, LLC: JS Watkins Realty Partners, LLC, c/o The Debt Exchange, 133 Federal Street, 10th Floor, Boston, MA 02111, Attention: MHLS 2022–1 Sale Coordinator, Fax: 1–978–967–8607, Email: *mhls2022-1@debtx.com.*

FOR FURTHER INFORMATION CONTACT: John Lucey, Director, Asset Sales, U.S. Department of Housing and Urban Development at *john.w.lucey@hud.gov,* or at telephone number 202–708–2625 (this is not a toll-free number). Persons with hearing or speech challenges may access this number through TTY by calling the toll-free Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION: HUD announces its intention to sell, in MHLS 2022–1, eleven (11) unsubsidized mortgage loans (Mortgage Loans), consisting of six (6) first lien healthcare notes secured by assisted living facilities located in various locations within Ohio, Arizona, Illinois, South Carolina, Indiana, and Pennsylvania, one first lien multifamily note secured by a multifamily property located in South Carolina, one first lien multifamily note secured by a multifamily property located in Alaska, and one multifamily first lien note with second and third lien Mark-to-Market notes secured by a property located in Georgia. The Mortgage Loans are non-performing mortgage loans. The listing of the Mortgage Loans is included in the BIP. The Mortgage Loans will be sold without FHA insurance and with HUD servicing released. HUD will offer qualified bidders an opportunity to bid competitively on the Mortgage Loans. Qualified bidders may submit bids on one or more of the Mortgage Loans.

The Mortgage Loans will be stratified for bidding purposes into mortgage loan pools as appropriate. Each pool will contain Mortgage Loans that generally have similar performance, property type, geographic location, lien position and other characteristics. Qualified bidders may submit bids on one or more pools of Mortgage Loans or may bid on individual loans.

Bidder eligibility criteria is set forth in the Qualification Statement. As detailed in the Qualification Statement, certain entities/individuals may be precluded from bidding depending on their prior involvement with the loan(s).

The Bidding Process

The BIP describes in detail the procedure for bidding in MHLS 2022–1. The BIP also includes a standardized non-negotiable loan sale agreement (Loan Sale Agreement).

As part of its bid, each bidder must submit a minimum deposit of the greater of One Hundred Thousand Dollars ($100,000) or ten percent (10%) of the aggregate bid prices for all of such bidder's bids. In the event the bidder's aggregate bid is less than One Hundred Thousand Dollars ($100,000), the minimum deposit shall be not less than fifty percent (50%) of the bidder's aggregate bid. HUD will evaluate the bids submitted and determine the successful bid(s) in its sole and absolute discretion. If a bidder is successful, the bidder's deposit will be non-refundable and will be applied toward the purchase price, with any amount beyond the purchase price being returned to the bidder. Deposits will be returned to unsuccessful bidders after notification to sucessful bidders. Closings are expected to take place on November 3, 2021.

The Loan Sale Agreement, which is included in the BIP, contains additional terms and details. To ensure a competitive auction, the terms of the bidding process and the Loan Sale Agreement are not subject to negotiation.

Due Diligence Review

The BIP describes the due diligence process for reviewing loan files in MHLS 2022–1. Qualified bidders will be able to access loan information remotely via a high-speed internet connection. Further information on performing due diligence review of the Mortgage Loans is provided in the BIP.

Mortgage Loan Sale Policy

HUD reserves the right to add Mortgage Loans to or delete Mortgage Loans from MHLS 2022–1 at any time prior to the award date. HUD also reserves the right to reject any and all bids, in whole or in part, without prejudice to HUD's right to include the Mortgage Loans in a later sale. The Mortgage Loans will not be withdrawn after the award date except as is specifically provided for in the Loan Sale Agreement.

This is a sale of unsubsidized mortgage loans, pursuant to Section 204(a) of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1997 (12 U.S.C. 1715z–11a(a)).

Mortgage Loan Sale Procedure

HUD selected a competitive auction as the method to sell the Mortgage Loans. This method of sale optimizes HUD's return on the sale of these Mortgage Loans, affords the greatest opportunity for all qualified bidders to bid on the Mortgage Loans, and provides the most efficient vehicle for HUD to dispose of the Mortgage Loans.

Bidder Eligibility

In order to bid in the sale, a prospective bidder must complete, execute and submit both a Confidentiality Agreement and a Qualification Statement acceptable to HUD. The following individuals and entities are among those INELIGIBLE to bid on the Mortgage Loans being sold in MHLS 2022–1:

1. A mortgagor or healthcare operator, including its principals, affiliates, family members, and assigns, with respect to one or more of the Mortgage Loans being offered in the Loan Sale, or an Active Shareholder (as such term is defined in the Qualification Statement);

2. With respect to any other HUD multifamily and/or healthcare mortgage loan not offered in the Loan Sale, any mortgagor or healthcare operator, incuding any Related Party (as such term is defined in the Qualification Statement) of either, that has failed to file financial statements or is otherwise in default under such mortgage loan or is in violation or noncompliance of any regulatory or business agreements with HUD and that fails to cure such default or violation by no later than October 1, 2021;

3. Any individual or entity that is debarred, suspended, or excluded from doing business with HUD pursuant to Title 2 of the Code of Federal Regulations, part 2424;

4. Any contractor, subcontractor and/or consultant or advisor (including any agent, employee, partner, director, principal or affiliate of any of the foregoing) who performed services for,

or on behalf of, HUD in connection with MHLS 2022–1;

5. Any employee of HUD, a member of such employee's family, or an entity owned or controlled by any such employee or member of such an employee's family;

6. Any individual or entity that uses the services, directly or indirectly, of any person or entity ineligible under provisions (3) through (5) above to assist in preparing its bid on any Mortgage Loan;

7. An FHA-approved mortgagee, including any principals, affiliates, or assigns thereof, that has received FHA insurance benefits for one or more of the Mortgage Loans being offered in the Loan Sale;

8. An FHA-approved mortgagee and/or loan servicer, including any principals, affiliates, or assigns thereof, that originated one or more of the Mortgage Loans being offered in the Loan Sale if the Mortgage Loan defaulted within two years of origination and resulted in the payment of an FHA insurance claim;

9. Any affiliate, principal or employee of any person or entity that, within the two-year period prior to October 1, 2021, serviced any Mortgage Loan or performed other services for or on behalf of HUD in regards to any Mortgage Loan;

10. Any contractor or subcontractor working for or on behalf of HUD that had access to information concerning any Mortgage Loan or provided services to any person or entity which, within the two-year period prior to October 1, 2021, had access to information with respect to any Mortgage Loan; and/or

11. Any employee, officer, director or any other person that provides or will provide services to the prospective bidder with respect to the Mortgage Loans during any warranty period established for the Loan Sale, that serviced the Mortgage Loans or performed other services for or on behalf of HUD or within the two-year period prior to October 1, 2021, provided services to any person or entity which serviced, performed services or otherwise had access to information with respect to any Mortgage Loan for or on behalf of HUD.

Other entities/individuals not described herein may also be restricted from bidding on the Mortgage Loans, as fully detailed in the Qualification Statement.

The Qualification Statement provides further details pertaining to eligibility requirements. Prospective bidders should carefully review the Qualification Statement to determine whether they are eligible to submit bids on the Mortgage Loans in MHLS 2022–1.

Freedom of Information Act Requests

HUD reserves the right, in its sole and absolute discretion, to disclose information regarding MHLS 2022–1, including, but not limited to, the identity of any successful bidder and its bid price or bid percentage for the Mortgage Loans, upon the closing of the sale of the Mortgage Loans. Even if HUD elects not to publicly disclose any information relating to MHLS 2022–1, HUD may be required to disclose information relating to MHLS 2022–1 pursuant to the Freedom of Information Act and all regulations promulgated thereunder.

Scope of Notice

This notice applies to MHLS 2022–1 and does not establish HUD's policy for the sale of other mortgage loans.

Lopa Kolluri,

Principal Deputy, Assistant Secretary for Housing.

[FR Doc. 2021–21054 Filed 9–27–21; 8:45 am]

BILLING CODE 4210–67–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1204]

Certain Chemical Mechanical Planarization Slurries and Components Thereof; Commission Determination To Review in Part a Final Initial Determination Finding a Violation of Section 337; Request for Written Submissions on the Issues Under Review and on Remedy, the Public Interest, and Bonding

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part the Administrative Law Judge's (''ALJ'') final initial determination (''ID'') issued on July 8, 2021, finding a violation of section 337 in the above-referenced investigation. The Commission requests briefing from the parties on certain issues under review, as indicated in this notice, and submissions from the parties, interested government agencies, and interested persons on the issues of remedy, the public interest, and bonding as indicated in this notice under the schedule set forth below.

FOR FURTHER INFORMATION CONTACT: Panyin A. Hughes, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–3042. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: On July 7, 2020, the Commission instituted this investigation under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (''section 337''), based on a complaint filed by Cabot Microelectronics Corporation (''CMC'') of Aurora, Illinois. 85 FR 40685–86 (July 7, 2020). The complaint, as supplemented, alleges violations of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain chemical mechanical planarization (''CMP'') slurries and components thereof by reason of infringement of one or more of claims 1, 3–6, 10, 11, 13, 14, 18–20, 24, 26–29, 31, 35–37, and 39- 44 of U.S. Patent No. 9,499,721 (''the '721 patent''). *Id.* at 40685. The Commission's notice of investigation named as respondents DuPont de Nemours, Inc. of Wilmington, Delaware; Rohm and Haas Electronic Materials CMP, LLC of Newark, Delaware; Rohm and Haas Electronic Materials CMP Asia Inc. (d/b/a Rohm and Haas Electronic Materials CMP Asia Inc., Taiwan Branch (U.S.A.)) of Taoyuan City, Taiwan; Rohm and Haas Electronic Materials Asia-Pacific Co., Ltd. of Miaoli, Taiwan; Rohm and Haas Electronic Materials K.K. of Tokyo, Japan; and Rohm and Haas Electronic Materials LLC of Marlborough, Massachusetts (collectively, ''Respondents'' or ''DuPont''). *Id.* at 40686. The Office of Unfair Import Investigations (''OUII'') is participating in this investigation. *Id.*

On October 1, 2020, the ALJ issued an initial determination granting CMC's unopposed motion to amend the complaint and notice of investigation to assert infringement of claims 17 and 46 of the '721 patent. Order No. 7 (Oct. 1, 2020), *unreviewed by* Notice (Oct. 16, 2020).

On November 10, 2020, the ALJ issued an initial determination granting

CMC's unopposed motion to amend the complaint and notice of investigation to change the name of Complainant from Cabot Microelectronics Corporation to CMC Materials, Inc. Order No. 8 (Nov. 10, 2020), *unreviewed by* Notice (Nov. 24, 2020).

On January 26, 2021, the ALJ issued an initial determination granting CMC's unopposed motion to amend the complaint and notice of investigation to reflect the conversion of Rohm and Haas Electronic Materials, Inc. to Rohm and Haas Electronic Materials CMP, LLC. Order No. 13 (Jan. 26, 2021), *unreviewed by* Notice (Feb. 11, 2021).

On January 26, 2021, the ALJ issued an initial determination granting CMC's unopposed motion to terminate the investigation as to claim 5 of the '721 patent. Order No. 12 (Jan. 26, 2021), *unreviewed by* Notice (Feb. 16, 2021).

On July 8, 2021, the ALJ issued the subject final ID finding a violation of section 337. The ID found that the parties do not contest personal jurisdiction, and that the Commission has *in rem* jurisdiction over the accused products. ID at 11. The ID further found that the importation requirement under 19 U.S.C. 1337(a)(1)(B) is satisfied. ID at 11–30. The ID also found that CMC established the existence of a domestic industry that practices the '721 patent. ID at 144–169, 297–314. The ID concluded that CMC proved that Respondent's accused products infringe the asserted claims of the '721 patent and that Respondents failed to show that the asserted claims are invalid. ID at 87–144. The ID included the ALJ's recommended determination on remedy and bonding (''RD''). The RD recommended that, should the Commission find a violation, issuance of a limited exclusion order and cease and desist orders would be appropriate. ID/RD at 316–331. The RD also recommended imposing a bond in the amount of one hundred percent of the entered value for covered products imported during the period of Presidential review. ID at 331.

On July 15, 2021, OUII filed a motion to extend the time for the parties to file petitions for review from July 20, 2021 (with responses due July 28, 2021) to July 29, 2021 (with responses due August 12, 2021). On July 16, 2021, the Chair granted the motion.

On July 29, 2021, Respondents and OUII filed separate petitions for review of the ID. On August 12, 2021, CMC submitted responses to the petitions filed by DuPont and OUII, and OUII submitted a response to DuPont's petition.

On August 30, 2021, the Commission extended the due date for determining whether to review the final ID from September 8, 2021, to September 22, 2021.

Having examined the record of this investigation, including the ID, the petitions for review, and the responses thereto, the Commission has determined to review the ID's findings on importation, infringement, and domestic industry. The Commission has determined not to review the remainder of the ID. The parties are requested to brief their positions with reference to the applicable law and the evidentiary record regarding only the following issues:

(1) Please discuss whether, including under the framework articulated by Chair Kearns in his Additional Views in *Certain High-Density Fiber Optic Equipment and Components Thereof,* Inv. No. 337–TA–1194, the Fuso BS–3 particles should be considered articles that directly infringe the asserted claims of the '721 patent and therefore are articles that infringe under section 337. *See Certain High-Density Fiber Optic Equipment and Components Thereof,* Inv. No. 337–TA–1194, Comm'n Op. at 98–104, Additional Views of Chair Kearns Regarding ''Articles that Infringe'' (Aug. 23, 2021).

(2) The ID credits the entirety of investments in certain assets necessary for manufacturing the DI products, including a portion of the 845 Enterprise Facility and certain equipment at the 845 Enterprise Facility, even though these assets may also be used to manufacture other products. ID at 301–303. Please indicate why allocation to the DI products is not required under the facts of this investigation, and the percentage of these assets that are used for the DI products as opposed to other products.

In connection with the final disposition of this investigation, the Commission may issue: (1) An exclusion order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) a cease-and-desist order that could result in the respondent being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, *see Certain Devices for Connecting Computers via Telephone Lines,* Inv. No. 337–TA–360, USITC Pub. No. 2843, Comm'n Op. at 7–10 (Dec. 1994).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation. In that regard, the parties are requested to also brief their positions on the following questions:

(1) Is there currently a shortage of semiconductor chips available in the United States, and if so, how long is this shortage likely to continue?

(2) How would an exclusion order or cease and desist order impact the availability of semiconductor chips in the United States?

(3) If the Commission issues an exclusion order directed to DuPont's infringing CMP products, including the BS–3 particle, are there other CMP products readily available that can meet domestic demand? Please identify sources of these alternatives and their capacity to replace the excluded products.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve, disapprove, or take no action on the Commission's determination. *See* Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

Written Submissions: The parties to this investigation are requested to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determination by the ALJ on remedy and bonding. In their initial submissions, Complainant is also requested to identify the remedy sought

and Complainant and OUII are requested to submit proposed remedial orders for the Commission's consideration. Complainant is also requested to state the date that the patent expires and the HTSUS subheadings under which the accused products are imported. Complainant is further requested to supply the names of known importers of the Respondent's products at issue in this investigation.

The parties' written submissions and proposed remedial orders must be filed no later than the close of business on October 6, 2021. Reply submissions must be filed no later than the close of business on October 13, 2021. Opening submissions are limited to 50 pages. Reply submissions are limited to 30 pages. Such submissions should address the ALJ's recommended determination on remedy and bonding. Interested government agencies and any other interested parties are also encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Third-party submissions should be filed no later than the close of business on October 6, 2021. No further submissions on any of these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. The Commission's paper filing requirements in 19 CFR 210.4(f) are currently waived. 85 FR 15798 (March 19, 2020). Submissions should refer to the investigation number (''Inv. No. 337–TA–1204'') in a prominent place on the cover page and/or the first page. (*See* Handbook on Filing Procedures, *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf*). Persons with questions regarding filing should contact the Secretary at (202) 205–2000.

Any person desiring to submit a document to the Commission in confidence must request confidential treatment by marking each document with a header indicating that the document contains confidential information. This marking will be deemed to satisfy the request procedure set forth in Rules 201.6(b) and 210.5(e)(2) (19 CFR 201.6(b) & 210.5(e)(2)). Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All nonconfidential written submissions will be available for public inspection on EDIS.

The Commission's vote on this determination took place on September 22, 2021.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR 210).

By order of the Commission.

Issued: September 22, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–20984 Filed 9–27–21; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1110–0004]

Agency Information Collection Activities; Proposed eCollection; eComments requested; Revision of a Currently Approved Collection; Number of Law Enforcement Employees as of October 31

AGENCY: Federal Bureau of Investigation, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, will be submitting the following information collection request to the Office of Management and Budget for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until November 29, 2021.

FOR FURTHER INFORMATION CONTACT: All comments, suggestions, or questions regarding additional information, to include obtaining a copy of the proposed information collection instrument with instructions, should be directed to Ms. Amy C. Blasher, Unit Chief, Federal Bureau of Investigation, Criminal Justice Information Services Division, Module E–3, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306; Email: *acblasher@fbi.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

1. *Type of Information Collection:* Revision of a currently approved collection.

2. *The Title of the Form/Collection:* Number of Law Enforcement Employees as of October 31.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form number is: 1–711. The applicable component within the Department of Justice is the Criminal Justice Information Services Division, in the Federal Bureau of Investigation.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Federal, state, county, city, and tribal law enforcement agencies.

Abstract: Under Title 34, United States Code (U.S.C.) Section (§) 41303 and 28 U.S.C 534, this collection requests the number of full and part-time law enforcement employees by race/ethnicity for both officers and civilians, from federal, state, county, city, and tribal law enforcement agencies in order for the Federal Bureau

of Investigation Uniform Crime Reporting Program to serve as the national clearinghouse for the collection and dissemination of police employee data and to publish these statistics in *Crime in the United States.*

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There are approximately 14,993 law enforcement agency respondents that submit once a year for a total of 14,993 responses with an estimated response time of eight minutes per response.

6. *An estimate of the total public burden (in hours) associated with the collection:* There are approximately 2,299 hours, annual burden, associated with this information collection. This total is comprised of 1,999 hours estimated burden for completion of the survey and an additional 300 hours for review and any potential expansion of participating agencies.

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: September 23, 2021.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2021–21068 Filed 9–27–21; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1125–0009]

Agency Information Collection Activities; Proposed Collection Comments Requested; Application for Suspension of Deportation (EOIR–40)

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Department of Justice (DOJ), Executive Office for Immigration Review (EOIR), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until November 29, 2021.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2500, Falls Church, VA 22041, telephone: (703) 305–0289.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Executive Office for Immigration Review, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

1. *Type of Information Collection:* Renewal, with change, of a currently approved collection.

2. *The Title of the Form/Collection:* Application for Suspension of Deportation.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form number is EOIR–40; the sponsoring component is Executive Office for Immigration Review, United States Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individual aliens determined to be deportable from the United States. Other: None. Abstract: This information collection is necessary to determine the statutory eligibility of individual aliens, who have been determined to be deportable from the United States, for suspension of their deportation pursuant to former section 244 of the Immigration and Nationality Act and 8 CFR 1240.55 (2011), as well as to provide information relevant to a favorable exercise of discretion.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 133 respondents will complete the form annually with an average of 5 hour and 45 minutes per response.

6. *An estimate of the total public burden (in hours) associated with the collection:* The estimated public burden associated with this collection is 765.75 hours. It is estimated that respondents will take 1 hour to complete the form.

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405B, Washington, DC 20530.

Dated: September 23, 2021.

Melody D. Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2021–21066 Filed 9–27–21; 8:45 am]

BILLING CODE 4410–30–P

DEPARTMENT OF JUSTICE

[OMB Number 1117–0015]

Agency Information Collection Activities; Proposed eCollection, eComments Requested; Extension Without Change of a Previously Approved Collection; Application for Registration, Application for Registration Renewal DEA Forms 363, 363a

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Drug Enforcement Administration (DEA), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection was previously published in the **Federal Register**, on January 7, 2021 allowing for a 60 day comment period. The burden in this 30-day notice differs from that in the previously published information collection, as that analysis was based on a proposal to remove the option of submitting a paper application. The proposed rule would

mandate all applications be submitted online; however, that rule has yet to be finalized. Therefore, DEA has returned to a burden analysis which shows both options an application can be submitted.

DATES: Comments are encouraged and will be accepted for 30 days until October 28, 2021.

FOR FURTHER INFORMATION CONTACT: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information proposed to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

1. *Type of Information Collection:* Extension of a currently approved collection.

2. *Title of the Form/Collection:* Application for Registration, Application for Registration Renewal.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form numbers are DEA Forms 363, 363a. The applicable component within the Department of Justice is the Drug Enforcement Administration, Diversion Control Division.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:*

Affected public: Business or other for-profit.

Affected public (Other): Not-for-profit institutions, Federal, State, local, and tribal governments.

Abstract: The Controlled Substances Act requires practitioners who dispense narcotic drugs to individuals for maintenance or detoxification treatment to register annually with DEA.[1] 21 U.S.C. 822, 823; 21 CFR 1301.11 and 1301.13. Registration is a necessary control measure and helps to prevent diversion by ensuring the closed system of distribution of controlled substances can be monitored by DEA and the businesses and individuals handling controlled substances are qualified to do so and are accountable.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* DEA Form 363 is submitted on an as needed basis by persons seeking to become registered; DEA Form 363a is submitted on an annual basis thereafter to renew existing registrations. The below table presents information regarding the number of respondents, responses and associated burden hours.

	Number of annual respondents	Average time per response	Total annual hours *
DEA Form 363 (paper)	5	0.33 hours (20 minutes)	2
DEA Form 363 (online)	239	0.33 hours (20 minutes)	80
DEA Form 363a (paper)	21	0.17 hours (10 minutes)	4
DEA Form 363a (online)	1,635	0.17 hours (10 minutes)	273
Total	1,900		357

* Figures are rounded.

6. *An estimate of the total public burden (in hours) associated with the proposed collection:* The DEA estimates that this collection takes 357 annual burden hours.

If additional information is required please contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, Suite 3E.405B, Washington, DC 20530.

Dated: September 23, 2021.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2021–21069 Filed 9–27–21; 8:45 am]

BILLING CODE 4410–09–P

[1] This registration requirement is waived for certain practitioners under specified circumstances. See 21 U.S.C. 823(g)(2).

DEPARTMENT OF JUSTICE

[OMB Number 1121–0277]

Agency Information Collection Activities; Proposed Collection and Comments Requested; Reinstatement With Change of Previously Approved Collection #1121–0277: OJJDP's National Training and Technical Assistance Center (NTTAC) Feedback Form Package

AGENCY: Office for Juvenile Justice and Delinquency Prevention, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice, Office of Justice Programs has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for an additional 30 days until October 28, 2021.

FOR FURTHER INFORMATION CONTACT: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
—Enhance the quality, utility, and clarity of the information to be collected; and/or
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

1. *Type of Information Collection:* Reinstatement with change of previously approved collection.

2. *The Title of the Form/Collection:* OJJDP's NTTAC Feedback Form Package.

3. *The agency form number:* OJJDP's NTTAC, all forms included in package #1121–0277.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. Other: Federal Government, State, local or tribal government; Not-for-profit institutions; Businesses or other for-profit.

Abstract: The Office for Juvenile Justice and Delinquency Prevention National Training and Technical Assistance Center (NTTAC) Feedback Form Package is designed to collect in-person and online data necessary to continuously assess the outcomes of the assistance provided for both monitoring and accountability purposes and for continuously assessing and meeting the needs of the field. OJJDP's NTTAC will send these forms to technical assistance (TA) recipients; conference attendees; training and TA providers; online meeting participants; in-person meeting participants; and focus group participants to capture important feedback on the recipients' satisfaction with the quality, efficiency, referrals, information, and resources provided and assess the recipients' additional training and TA needs. The data will then be used to advise OJJDP's NTTAC on ways to improve the support provided to its users; the juvenile justice field at-large; and ultimately improve services and outcomes for youth.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 5,066 respondents will complete forms and the response time will range from .03 hours to 1.5 hours.

6. *An estimate of the total public burden (in hours) associated with the collection:* An estimated 520.5 total annual burden hours are associated with this collection.

If additional information is required, contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405B, Washington, DC 20530.

Dated: September 23, 2021.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2021–21077 Filed 9–27–21; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

[OMB Number 1125–0016]

Agency Information Collection Activities; Proposed Collection Comments Requested; Unfair Immigration-Related Employment Practices Complaint Form

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Department of Justice (DOJ), Executive Office for Immigration Review (EOIR), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until November 29, 2021.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2500, Falls Church, VA 22041, telephone: (703) 305–0289.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Executive Office for Immigration Review, including whether the information will have practical utility;
—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,*

permitting electronic submission of responses.

Overview of This Information Collection

1. *Type of Information Collection:* Renewal, with change, of a currently approved collection.

2. *The Title of the Form/Collection:* Unfair Immigration-Related Employment Practices Complaint Form.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form number is EOIR–58, Office of the Chief Administrative Hearing Officer (OCAHO), Executive Office for Immigration Review, United States Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals who wish to file a complaint alleging unfair immigration-related employment practices under section 274B of the Immigration and Nationality Act (INA). Other: None. Abstract: Section 274B of the INA prohibits: Employment discrimination on the basis of citizenship status or national origin; retaliation or intimidation by an employer against an individual seeking to exercise his or her right under this section; and ''document abuse'' or over-documentation by the employer, which occurs when the employer asks an applicant or employee for more or different documents than required for employment eligibility verification under INA section 274A, with the intent of discriminating against the employee in violation of section 274B. Individuals who believe that they have suffered discrimination in violation of section 274B may file a charge with the Department of Justice, Immigrant and Employee Rights Section (IER). The IER then has 120 days to determine whether to file a complaint with OCAHO on behalf of the individual charging party. If the IER chooses not to file a complaint, the individual may then file his or her own complaint directly with OCAHO. This information collection may be used by an individual to file his or her own complaint with OCAHO. The Form EOIR–58 will elicit, in a uniform manner, all of the required information for OCAHO to assign a section 274B complaint to an Administrative Law Judge for adjudication.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 26 respondents will complete the form annually with an average of 30 minutes per response.

6. *An estimate of the total public burden (in hours) associated with the collection:* The estimated public burden associated with this collection is 13 hours. It is estimated that respondents will take 30 minutes to complete the form.

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405B, Washington, DC 20530.

Dated: September 23, 2021.

Melody D. Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2021–21065 Filed 9–27–21; 8:45 am]

BILLING CODE 4410–30–P

DEPARTMENT OF JUSTICE

[OMB Number 1103–0093]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Revision of a Previously Approved Collection; COPS Extension Request Form

AGENCY: Community Oriented Policing Services (COPS) Office, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Department of Justice (DOJ), Community Oriented Policing Services (COPS) Office, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until November 29, 2021.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Lashon M. Hilliard, Policy Analyst, Department of Justice, Community Oriented Policing Services (COPS) Office, 145 N Street NE, Washington, DC 20530 (202–514–6563).

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

1. *Type of Information Collection:* Revision of a currently approved collection, with change; comments requested.

2. *The Title of the Form/Collection:* COPS Extension Request Form.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* None. U.S. Department of Justice, Community Oriented Policing Services (COPS) Office.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Law enforcement agencies and other COPS grants recipients that have grants expiring within 90 days of the date of the form/request. The extension request form will allow recipients of COPS grants the opportunity to request a ''no-cost'' time extension in order to complete the federal funding period and requirements for their grant/cooperative agreement award. Requesting and/or receiving a time extension *will not* provide additional funding.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that approximately 2,700 respondents annually will complete the form within 30 minutes.

6. *An estimate of the total public burden (in hours) associated with the collection:* 1,350 total annual burden hours (0.5 hours × 2,700 respondents + 1,350 total burden hours).

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice

Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, Washington, DC 20530.

Dated: September 23, 2021.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2021–21070 Filed 9–27–21; 8:45 am]

BILLING CODE 4410–AT–P

DEPARTMENT OF JUSTICE

[OMB Number 1110–0064]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Revision of a Currently Approved Collection; FBI Expungement Form (FD–1114)

AGENCY: Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division.

ACTION: 60-Day notice.

SUMMARY: The Department of Justice (DOJ), Federal Bureau of Investigation (FBI), Criminal Justice Information Services (CJIS) Division, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and will be accepted for 60 days until November 29, 2021.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Gerry Lynn Brovey, Supervisory Information Liaison Specialist, FBI, CJIS, Resources Management Section, Administrative Unit, Module C–2, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306; phone: 304–625–4320 or email *glbrovey@fbi.gov.* Written comments and/or suggestions can also be sent to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted via email to *OIRA_submission@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so, how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *Title of the Form/Collection:* FBI Expungement Form.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* Agency form number: FD–1114.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: This form is utilized by criminal justice and affiliated judicial agencies to request appropriate removal of criminal history information from an individual's record.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 105 respondents are authorized to complete the form which would require approximately 3.5 minutes. The total number of respondents is reoccurring with an annual response of 318,598.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 18,585 total annual burden hours associated with this collection.

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: September 23, 2021.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2021–21067 Filed 9–27–21; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1105–0106]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Extension Without Change of a Currently Approved Collection; Comments Requested: Form USM–164, Applicant Appraisal Questionnaire

AGENCY: U.S. Marshals Service, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), U.S. Marshals Service (USMS), will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for an additional 30 days until October 28, 2021.

FOR FURTHER INFORMATION CONTACT: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to

respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension without change of a currently approved collection.

(2) *The Title of the Form/Collection:* Form USM–164, Applicant Appraisal Questionnaire.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number: Form USM–164.

Component: U.S. Marshals Service, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Individuals (supervisors, peers, subordinates).

Other: [None].

Abstract: This form is used to collect applicant reference information. Reference checking is an objective evaluation of an applicant's past job performance based on information collected from key individuals (*e.g.,* supervisors, peers, subordinates) who have known and worked with the applicant. Reference checking is a necessary supplement to the evaluation of resumes and other descriptions of training and experience, and allows the selecting official to hire applicants with a strong history of performance. The questions on this form have been developed following the OPM, MSPB, and DOJ ''Best Practice'' guidelines for reference checking.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 500 respondents will utilize the form, and it will take each respondent approximately 20 minutes to complete the form.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with this collection is 167 hours, which is equal to (500 (total # of annual responses) * 20 minutes.

(7) *An Explanation of the Change in Estimates:* N/A.

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: September 23, 2021.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2021–21071 Filed 9–27–21; 8:45 am]

BILLING CODE 4410–04–P

DEPARTMENT OF JUSTICE

[OMB Number 1123–0010]

Agency Information Collection Activities: Proposed Collection; Comments Requested; Request for Registration Under the Gambling Devices Act of 1962

ACTION: 60-Day notice.

SUMMARY: The Department of Justice (DOJ), Criminal Division, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for 60 until November 29, 2021.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Michelle Hill, Counsel to the Director, U.S. Department of Justice, 950 Pennsylvania Avenue NW, Criminal Division, Office of Enforcement Operations, Gambling Device Registration Program, JCK Building, Washington, DC 20530–0001. (telephone: 202–514–7049)

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *Title of the Form/Collection:* Request for Registration Under the Gambling Devices Act of 1962.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: DOJ\CRM\OEO\GDR–1. Sponsoring component: Criminal Division, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. Other: Not-for-profit institutions, individuals or households, and State, Local or Tribal Government. The form can be used by any entity required to register under the Gambling Devices Act of 1962 (15 U.S.C. 1171–1178).

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: It is estimated that 7,800 respondents will complete each form within approximately 5 minutes.

(6) An estimate of the total public burden (in hours) associated with the collection: There are an estimated 650 total annual burden hours associated with this collection.

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: September 22, 2021.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2021–20958 Filed 9–27–21; 8:45 am]

BILLING CODE 4410–14–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Eligibility To Apply for Trade Adjustment Assistance

In accordance with the Trade Act of 1974 (19 U.S.C. 2271, *et seq.*) (''Act''), as amended, the Department of Labor herein presents notice of investigations regarding eligibility to apply for trade adjustment assistance under Chapter 2 of the Act (''TAA'') for workers by (TA–W) started during the period of *August 1 2021 through August 31 2021.*

This notice includes instituted initial investigations following the receipt of validly filed petitions. Furthermore, if applicable, this notice includes investigations to reconsider negative initial determinations or terminated initial investigations following the receipt of a valid application for reconsideration.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, chapter 2, of the Act. Any persons showing a substantial interest in the subject matter of the investigations may request a public hearing provided such request is filed in writing with the Administrator, Office of Trade Adjustment Assistance, at the address shown below, no later than ten days after publication in **Federal Register**.

Initial Investigations

The following are initial investigations commenced following the receipt of a properly filed petition.

TA–W No.	Workers' firm	Location	Investigation start date
98021	Commemorative Brands, Inc	Austin, TX	8/3/2021
98022	Symbol Mattress of Florida	Kissimmee, FL	8/3/2021
98023	Honeywell Building Technologies–Fire & Security, Integrated Supply Chain.	Northford, CT	8/4/2021
98024	NCR Corporation	Atlanta, GA	8/4/2021
98025	Oceana Foods	Shelby, MI	8/4/2021
98026	Southern Graphic Systems Inc	Minneapolis, MN	8/5/2021
98027	Rackspace, US, Inc	Windcrest, TX	8/6/2021
98028	Interdyne, Inc	Jonesville, MI	8/11/2021
98029	RealPage, Inc	Richardson, TX	8/13/2021
98030	The Coleman Company Inc	Sauk Rapids, MN	8/13/2021
98031	Augusta Sportswear	Coburg, OR	8/16/2021
98032	Fall Creek Farm and Nursery, Inc	Lowell, OR	8/16/2021
98033	LargeWords	Blue Springs, MO	8/18/2021
98034	Trinity Tank Car, Inc	Longview, TX	8/18/2021
98035	AT&T Corporate Offices	Bothell, WA	8/19/2021
98036	NTT DATA Services, LLC	Plano, TX	8/19/2021
98037	Truck Accessories Group, LLC	Long Beach, CA	8/19/2021
98038	Genpact LLC	Jacksonville, FL	8/20/2021
98039	Siemens Energy USA	Orlando, FL	8/20/2021
98040	Honeywell Aerospace	Phoenix, AZ	8/25/2021
98041	Greystar Management	Phoenix, AZ	8/26/2021
98042	Stellantis	Belvidere, IL	8/26/2021
98043	Rackspace Technology	Elk Grove, IL	8/30/2021
98044	Legrand	Orem, UT	8/31/2021
98045	Occidental Chemical Corporation	Niagara Falls, NY	8/31/2021
98046	Revel Apparel	Greensboro, NC	8/31/2021

A record of these investigations and petitions filed are available, subject to redaction, on the Department's website *https://www.dol.gov/agencies/eta/tradeact* under the searchable listing or by calling the Office of Trade Adjustment Assistance toll free at 888–365–6822.

Signed at Washington, DC, this 17th day of September 2021.

Hope D. Kinglock,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2021–20951 Filed 9–27–21; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Determinations Regarding Eligibility To Apply for Trade Adjustment Assistance

In accordance with Sections 223 and 284 (19 U.S.C. 2273 and 2395) of the Trade Act of 1974 (19 U.S.C. 2271, *et seq.*) (''Act''), as amended, the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance under Chapter 2 of the Act (''TAA'') for workers by (TA–W) issued during the period of *August 1 2021 through August 31 2021.*

This notice includes summaries of initial determinations such as Affirmative Determinations of Eligibility, Negative Determinations of Eligibility, and Determinations Terminating Investigations of Eligibility within the period. If issued in the period, this notice also includes summaries of post-initial determinations that modify or amend initial determinations such as Affirmative Determinations Regarding Applications for Reconsideration, Negative Determinations Regarding Applications for Reconsideration, Revised Certifications of Eligibility, Revised Determinations on Reconsideration, Negative Determinations on Reconsideration, Revised Determinations on remand from the Court of International Trade, and Negative Determinations on remand from the Court of International Trade.

Affirmative Determinations for Trade Adjustment Assistance

The following certifications have been issued.

TA–W No.	Workers' firm	Location	Reason(s)
96061	Daramic LLC	Corydon, IN	Shift in Production to a Foreign Country.
96593	Sodecia	Lake Orion, MI	Shift in Production to a Foreign Country.
96742	Honeywell	South Bend, IN	Secondary Component Supplier.
96746	Ascension Technologies	Troy, MI	Acquisition of Services from a Foreign Country.
96752	Micro Contacts, Inc. DBA Micro Technologies.	Hicksville, NY	Shift in Production to a Foreign Country.
96782	ABB Enterprise Software (aka Hitachi ABB Power Grids).	Mount Pleasant, PA	Shift in Production to a Foreign Country.
96826	Mitsubishi Chemical America Inc	Nederland, TX	Acquisition of Articles from a Foreign Country.
96832	STTS USA, Inc.	Portland, OR	Downstream Producer.
96860	Synchrony Bank	Stamford, CT	Shift in Services to a Foreign Country.
96860E	Synchrony Bank	Saint Paul, MN	Shift in Services to a Foreign Country.
96866	nference, inc	Cambridge, MA	Customer Imports of Services.
96870	Bright Wood Corporation	Redmond, OR	Secondary Service Supplier.
96870A	Bright Wood Corporation	Prineville, OR	Secondary Service Supplier.
96901	Bedford Industries	Worthington, MN	ITC Determination.
96912	Certech, Inc	Wood Ridge, NJ	Shift in Production to a Foreign Country.
96918	T.D.R.N. Inc	Spalding, MI	Customer Imports of Articles.
96920	Stanley Furniture Company LLC	Martinsville, VA	Shift in Services to a Foreign Country.
96930	Aleris Rolled Products, Inc	Uhrichsville, OH	ITC Determination.
96930A	Aleris Rolled Products, Inc	Ashville, OH	ITC Determination.
96932	Dun & Bradstreet Corporation	Center Valley, PA	Shift in Services to a Foreign Country.
96935	Prudential Financial	Dubuque, IA	Acquisition of Services from a Foreign Country.
96937	Prudential Financial	Hartford, CT	Acquisition of Services from a Foreign Country.
96945	Unum Group	Portland, ME	Acquisition of Services from a Foreign Country.
96947	Collins Aerospace	Jamestown, ND	Secondary Component Supplier.
96960	Signify	Tupelo, MS	Shift in Production to a Foreign Country.
96967	Data Axle (formerly Infogroup)	Papillion, NE	Shift in Services to a Foreign Country.
96970	TCI Texarkana, Inc. dba Texarkana Aluminum.	Texarkana, TX	ITC Determination.
96980	Mars Global Services	Hackettstown, NJ	Acquisition of Services from a Foreign Country.
96985	Tupelo Sleeper	Tupelo, MS	ITC Determination.
96997	Arconic Corporation	Riverdale, IA	ITC Determination.
97021	Microchip Technology, Inc	Gresham, OR	Imports of Finished Articles Containing Like or Directly Competitive Components.
97030	Liberty Mutual Group Inc	Dover, NH	Acquisition of Services from a Foreign Country.
97031	McKesson Medical-Surgical Inc	Plymouth, MN	Acquisition of Services from a Foreign Country.
97033	IKO Production Inc	Wilmington, DE	Shift in Production to a Foreign Country.
97045	Durr Universal, Inc	Muscoda, WI	Shift in Production to a Foreign Country.
97046	QVC, Inc	West Chester, PA	Shift in Services to a Foreign Country.
97047	ALSTOM	Plattsburgh, NY	Shift in Production to a Foreign Country.
97052	Briggs & Stratton LLC	Wauwatosa, WI	ITC Determination.
97060	EnerVest Operating, LLC	Houston, TX	Secondary Service Supplier.
97062	Energizer Manufacturing, Inc	Bennington, VT	Shift in Production to a Foreign Country.
97067	Tranter, Inc	Wichita Falls, TX	Shift in Production to a Foreign Country.
97071	Collins Aerospace	Vergennes, VT	Secondary Component Supplier.
97074	Lee Aerospace, Inc	Wichita, KS	Secondary Component Supplier.
97076	NTT DATA Services, LLC	Plano, TX	Shift in Services to a Foreign Country.
97078	Kimberly-Clark Corporation	Conway, AR	Shift in Production to a Foreign Country.
97079	AW Industries, Inc	Hyattsville, MD	ITC Determination.
97081	Hospitality Mints, LLC	Boone, NC	Shift in Production to a Foreign Country.
97083	Sunset Moulding Co	Chico, CA	ITC Determination.
97083A	Sunset Moulding Co	Live Oak, CA	ITC Determination.
97085	Novelis Corporation	Oswego, NY	ITC Determination.
97086	Serta Simmons Bedding Manufacturing	Jamestown, NY	ITC Determination.
97088	KYOCERA SENCO Industrial Tools, Inc	Cincinnati, OH	ITC Determination.
97091	TimkenSteel Corporation	Canton, OH	ITC Determination.
97092	Marmon Foodservice Technologies Inc., d.b.a. Silver King.	Minneapolis, MN	Shift in Production to a Foreign Country.

TA–W No.	Workers' firm	Location	Reason(s)
97093	Medtronic	Minneapolis, MN	Shift in Services to a Foreign Country.
97100	Acme Staple Company, Inc.	Franklin, NH	ITC Determination.
97105	Aleris Rolled Products, Inc	Richmond, VA	ITC Determination.
97113	NETZSCH Premier Technologies, LLC	Exton, PA	Shift in Production to a Foreign Country.
97121	SSB Manufacturing Company	West Coxsackie, NY	ITC Determination.
97122	Sierra Pacific Industries	Red Bluff, CA	ITC Determination.
97122A	Sierra Pacific Industries	Corning, CA	ITC Determination.
97123	Yuba River Moulding and Millwork, Inc	Olivehurst, CA	ITC Determination.
98018	Prismview LLC	Logan, UT	Shift in Production to an FTA Country or Beneficiary.

Negative Determinations for Trade Adjustment Assistance

The following investigations revealed that the eligibility criteria for TAA have not been met for the reason(s) specified.

TA–W No.	Workers' firm	Location	Reason(s)
95810	Papyrus Stationary	St. Louis, MO	No Shift in Services or Other Basis.
95829	Baxalta US Inc	Thousand Oaks, CA	No Shift in Production or Other Basis.
96639	Pratt & Whitney Engine Services, Inc.	Wichita, KS	No Shift in Services or Other Basis.
96745	EFCO Corporation	Springfield, MO	No Shift in Production or Other Basis.
96745A	EFCO Corporation	Springfield, MO	No Shift in Production or Other Basis.
96782A	ABB Enterprise Software (aka Hitachi ABB Power Grids).	Greensburg, PA	No Shift in Production or Other Basis.
96794	The Register Guard	Eugene, OR	No Shift in Production or Other Basis.
96853	Mondelez Global LLC Atlanta Bakery	Atlanta, GA	No Sales or Production Decline or Other Basis.
96859	Woodgrain	La Grande, OR	No Sales or Production Decline or Other Basis.
96868	Colorado Oil & Gas Association	Denver, CO	No Shift in Services or Other Basis.
96870B	Bright Wood Corporation	Culver, OR	No Employment Decline or Threat of Separation or ITC.
96888	PCC Aerostructures	Wilkes Barre, PA	No Shift in Production or Other Basis.
96894	Vestas-American Wind Technology, Inc	Portland, OR	No Sales or Service Decline or Other Basis.
96964	GE Aviation	Hooksett, NH	No Shift in Production or Other Basis.
96981	Leadec Corporation	Blue Ash, OH	No Sales or Service Decline or Other Basis.
96989	GE Aviation	Newark, DE	No Sales or Production Decline or Other Basis.
96995	Baker Hughes Oilfield, LLC	Prudhoe Bay, AK	No Shift in Services or Other Basis.
97002	Arconic Mill Products	Elmendorf, TX	No Employment Decline or Threat of Separation or ITC.
97016	National Life Insurance Company	Montpelier, VT	No Shift in Services or Other Basis.
97019	Tenneco Inc	Jeffersonville, IN	No Sales or Production Decline or Other Basis.
97020	Demetech Corporation	Miami Lakes, FL	No Sales or Production Decline or Other Basis.
97029	Eastern Sleep Products Company	North Chesterfield, VA	No Sales or Production Decline or Other Basis.
97049	GE Aviation	Rutland, VT	No Shift in Production or Other Basis.
97065	GE Aviation	Batesville, MS	No Shift in Production or Other Basis.
97068	GE Aviation	Arkansas City, KS	No Shift in Production or Other Basis.
97094	Exostar LLC	Herndon, VA	No Sales or Service Decline or Other Basis.
98000	Malteurop North America, Inc	Milwaukee, WI	No Sales or Production Decline/Shift in Production (Domestic Transfer).

Determinations Terminating Investigations for Trade Adjustment Assistance

The following investigations were terminated for the reason(s) specified.

TA–W No.	Workers' firm	Location	Reason(s)
96860A	Synchrony Bank	Alpharetta, GA	Existing Certification in Effect.
96860B	Synchrony Bank	Charlotte, NC	Existing Certification in Effect.
96860C	Synchrony Bank	Kettering, OH	Existing Certification in Effect.
96860D	Synchrony Bank	Phoenix, AZ	Existing Certification in Effect.
96872	Allegheny Wood Products, Inc	Beckley, WV	Petitioner Requests Withdrawal.
96872A	Allegheny Wood Products, Inc	Coalton, WV	Petitioner Requests Withdrawal.
96880	Ascension Technologies	Saint Louis, MO	Existing Certification in Effect.
96924	Mondelez International Inc. Atlanta Bakery.	Atlanta, GA	Negative Determination Recently Issued.
96983	HP Inc—Puerto Rico	Aguadilla, PR	Existing Certification in Effect.
97116	Peak Oilfield Service Company	Prudhoe Bay, AK	Ongoing Investigation in Process.

Negative Determinations on Reconsideration

The following negative determinations on reconsideration have been issued because the eligibility criteria for TAA have not been met for the reason(s) specified.

TA–W No.	Workers' firm	Location	Reason(s)
96717	Comprehensive Decommissioning International.	Plymouth, MA	No Shift in Services or Other Basis.

I hereby certify that the aforementioned determinations were issued during the period of *August 1 2021 through August 31 2021.* These determinations are available on the Department's website *https://www.dol.gov/agencies/eta/tradeact* under the searchable listing determinations or by calling the Office of Trade Adjustment Assistance toll free at 888–365–6822.

Signed at Washington, DC, this 17th day of September 2021.

Hope D. Kinglock,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2021–20953 Filed 9–27–21; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Tax Performance System

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Employment and Training Administration (ETA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before October 28, 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.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Mara Blumenthal by telephone at 202–693–8538, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: Section 303(a)(1) and (6) of the Social Security Act authorizes this information collection. Since 1987, the regulation at 20 CFR part 602 requires states to operate a program to assess their Unemployment Insurance (UI) tax and benefit programs. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on January 22, 2021 (86 FR 6672).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–ETA.

Title of Collection: Tax Performance System.

OMB Control Number: 1205–0332.

Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Respondents: 52.

Total Estimated Number of Responses: 52.

Total Estimated Annual Time Burden: 89,232 hours.

Total Estimated Annual Other Costs Burden: $0.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: September 21, 2021.

Mara Blumenthal,

Senior PRA Analyst.

[FR Doc. 2021–20950 Filed 9–27–21; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; YouthBuild Reporting System

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Employment and Training Administration (ETA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before October 28, 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.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Mara Blumenthal by telephone at 202–693–8538, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The YouthBuild legacy quarterly performance report (ETA–9136 and ETA–9138) includes aggregate and participant-level information on demographic characteristics, types of services received, placements, outcomes, and follow-up status. Specifically, these reports collect data on individuals who receive education, occupational skill training, leadership development services, and other services essential to preparing at-risk youth for in-demand occupations through YouthBuild programs. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on January 4, 2021 (86 FR 145).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–ETA.

Title of Collection: YouthBuild Reporting System.

OMB Control Number: 1205–0464.

Affected Public: Private Sector—Not-for-profit institutions.

Total Estimated Number of Respondents: 6,860.

Total Estimated Number of Responses: 7,490.

Total Estimated Annual Time Burden: 24,489 hours.

Total Estimated Annual Other Costs Burden: $0.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: September 21, 2021.

Mara Blumenthal,

Senior PRA Analyst.

[FR Doc. 2021–21007 Filed 9–27–21; 8:45 am]

BILLING CODE 4510–FT–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Coverage of Certain Preventive Services Under the Affordable Care Act—Private Sector

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Employee Benefits Security Administration (EBSA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before October 28, 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.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Mara Blumenthal by telephone at 202–693–8538, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The Patient Protection and Affordable Care Act, Public Law 111–148, (the Affordable Care Act) was enacted on March 23, 2010 and amended by the Health Care and Education Reconciliation Act of 2010, Public Law 111–152 on March 30, 2010. The Affordable Care Act added section 2713 to the Public Health Service (PHS) Act

and incorporated this provision into ERISA and the Code. The related regulations contain the following collections of information: (1) Each organization seeking to be treated as an eligible organization to use the optional accommodation process offered under the regulation must either notify an issuer or third party administrator using the EBSA Form 700 method of self-certification or provide notice to HHS of its religious or moral objection to coverage of all or a subset of contraceptive services. (2) A health insurance issuer or third party administrator providing or arranging separate payments for contraceptive services for participants and beneficiaries in insured plans (or student enrollees and covered dependents in student health insurance coverage) of eligible organizations is required to provide a written notice to plan participants and beneficiaries (or student enrollees and covered dependents) informing them of the availability of such payments. The notice must be separate from but, contemporaneous with (to the extent possible) any application materials distributed in connection with enrollment (or re-enrollment) in group or student coverage of the eligible organization in any plan year to which the accommodation is to apply and will be provided annually. To satisfy the notice requirement, issuers may, but are not required to, use the model language set forth previously or substantially similar language. (3) An eligible organization may also revoke its use of the accommodation process and must provide participants and beneficiaries written notice of such revocation as soon as possible. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on March 31, 2021 (86 FR 16787).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–EBSA.

Title of Collection: Coverage of Certain Preventive Services under the Affordable Care Act—Private Sector.

OMB Control Number: 1210–0150.

Affected Public: Private Sector—Businesses or other for-profits and not-for-profit institutions.

Total Estimated Number of Respondents: 114.

Total Estimated Number of Responses: 777,362.

Total Estimated Annual Time Burden: 181 hours.

Total Estimated Annual Other Costs Burden: $194,963.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: September 21, 2021.

Mara Blumenthal,

Senior PRA Analyst.

[FR Doc. 2021–20971 Filed 9–27–21; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Labor Condition Application for H–1B, H–1B1, and E–3 Nonimmigrants and the Nonimmigrant Worker Information Form

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Employment and Training Administration (ETA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before October 28, 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.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Mara Blumenthal by telephone at 202–693–8538, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: This information collection is required under sections 212(n) and (t) and 214(c) of the Immigration and Nationality Act (INA) and 8 U.S.C. 1182(n) and (t), and 8 U.S.C.1184(c). DOL and the Department of Homeland Security have promulgated regulations to implement the INA's requirements at 20 CFR 655 Subparts H and I, and 8 CFR 214.2(h)(4), respectively. The INA mandates that no H–1B, H–1B1 or E–3 temporary nonimmigrant worker may enter the United States (U.S.) to perform work in a specialty occupation or as a fashion model of distinguished merit and ability unless the U.S. employer makes certain attestations to the Secretary of Labor. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on April 28, 2021 (86 FR 22457).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–ETA.

Title of Collection: Labor Condition Application for H–1B, H–1B1, and E–3 Nonimmigrants and the Nonimmigrant Worker Information Form.

OMB Control Number: 1205–0310.

Affected Public: Private Sector: Business or other for-profits and not-for-profit institutions; State, Local, and Tribal Governments; Individuals or Households.

Total Estimated Number of Respondents: 135,511.

Total Estimated Number of Responses: 635,520.

Total Estimated Annual Time Burden: 834,305 hours.

Total Estimated Annual Other Costs Burden: $94,880.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: September 21, 2021.

Mara Blumenthal,

Senior PRA Analyst.

[FR Doc. 2021–21005 Filed 9–27–21; 8:45 am]

BILLING CODE 4510–FP–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Experience Rating Report

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Employment and Training Administration (ETA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before October 28, 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.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Mara Blumenthal by telephone at 202–693–8538, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The data submitted annually on the ETA 204 report enables ETA to project revenues for the Unemployment Insurance (UI) program on a state-by state basis and to measure the variations in assigned contribution rates that result from different experience rating systems. Section 303 of the Social Security Act (SSA 303(a)(6)) authorizes ETA to collect this information. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on March 24, 2021 (86 FR 15721).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–ETA.

Title of Collection: Experience Rating Report.

OMB Control Number: 1205–0164.

Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Respondents: 53.

Total Estimated Number of Responses: 53.

Total Estimated Annual Time Burden: 27 hours.

Total Estimated Annual Other Costs Burden: $0.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: September 21, 2021.

Mara Blumenthal,

Senior PRA Analyst.

[FR Doc. 2021–20952 Filed 9–27–21; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Asbestos in Construction Standard

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Occupational Safety and Health Administration (OSHA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before October 28, 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.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Crystal Rennie by telephone at 202–693–0456 or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: This standard requires employers to train workers about the hazards of asbestos, monitor worker exposure, provide medical surveillance, and maintain accurate records of worker exposure to asbestos. These records are used by employers, workers, and the Government to ensure that workers are not harmed by exposure to asbestos in the workplace. For additional substantive information about this ICR,

see the related notice published in the **Federal Register** on June 23, 2021 (86 FR 32980).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–OSHA.

Title of Collection: Asbestos in Construction Standard.

OMB Control Number: 1218–0134.

Affected Public: Private Sector: Businesses or other for-profits.

Total Estimated Number of Respondents: 1,104,261.

Total Estimated Number of Responses: 41,566,376.

Total Estimated Annual Time Burden: 4,199,335 hours.

Total Estimated Annual Other Costs Burden: $66,912,658.

Authority: 44 U.S.C. 3507(a)(1)(D).

Crystal Rennie,

Senior PRA Analyst.

[FR Doc. 2021–21004 Filed 9–27–21; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Veterans' Employment and Training Service

Advisory Committee on Veterans' Employment, Training and Employer Outreach (ACVETEO): Meeting

AGENCY: Veterans' Employment and Training Service (VETS), Department of Labor (DOL).

ACTION: Notice of virtual open meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the ACVETEO. The ACVETEO will discuss the DOL core programs and services that assist veterans seeking employment and raise employer awareness as to the advantages of hiring veterans. There will be an opportunity for individuals or organizations to address the committee. Any individual or organization that wishes to do so should contact Mr. Gregory Green at *ACVETEO@dol.gov.* Additional information regarding the Committee, including its charter, current membership list, annual reports, meeting minutes, and meeting updates may be found at *https://www.dol.gov/agencies/vets/about/advisorycommittee.* This notice also describes the functions of the ACVETEO. Notice of this meeting is required under Section 10(a)(2) of the Federal Advisory Committee Act. This document is intended to notify the general public.

DATES: Thursday, October 14, 2021 beginning at 9:00 a.m. and ending at approximately 12:00 p.m.(EDT).

ADDRESSES: This ACVETEO meeting will be held via TEAMS and teleconference. Meeting information will be posted at the link below under the Meeting Updates tab. *https://www.dol.gov/agencies/vets/about/advisorycommittee.*

Notice of Intent To Attend the Meeting: All meeting participants should submit a notice of intent to attend by Friday, October 8, 2021, via email to Mr. Gregory Green at *ACVETEO@dol.gov,* subject line ''October 2021 ACVETEO Meeting.''

Individuals who will need accommodations for a disability in order to attend the meeting (*e.g.,* interpreting services, assistive listening devices, and/or materials in alternative format) should notify the Advisory Committee no later than Friday, October 8, 2021 by contacting Mr. Gregory Green at *ACVETEO@dol.gov.* Requests made after this date will be reviewed, but availability of the requested accommodations cannot be guaranteed.

FOR FURTHER INFORMATION CONTACT: Mr. Gregory Green, Designated Federal Official for the ACVETEO, *ACVETEO@dol.gov,* (202) 693–4734.

SUPPLEMENTARY INFORMATION: The ACVETEO is a Congressionally mandated advisory committee authorized under Title 38, U.S. Code, Section 4110 and subject to the Federal Advisory Committee Act, 5 U.S.C. App. 2, as amended. The ACVETEO is responsible for: assessing employment and training needs of veterans; determining the extent to which the programs and activities of the U.S. Department of Labor meet these needs; assisting to conduct outreach to employers seeking to hire veterans; making recommendations to the Secretary, through the Assistant Secretary for Veterans' Employment and Training Service, with respect to outreach activities and employment and training needs of veterans; and carrying out such other activities necessary to make required reports and recommendations. The ACVETEO meets at least quarterly.

Agenda

9:00 a.m. Welcome and remarks, James Rodriguez, Acting Assistant Secretary, Veterans' Employment and Training Service
9:10 a.m. Administrative Business, Gregory Green, Designated Federal Official
9:15 a.m. Service Delivery Subcommittee Discussion Fiscal Year 2021 Annual Report Recommendations
10:00 a.m. Underserved Populations Subcommittee Discussion Fiscal Year 2021 Annual Report Recommendations
10:45 a.m. Innovative Veteran Training Subcommittee Discussion Fiscal Year 2021 Annual Report Recommendations
11:30 a.m. Public Forum, Gregory Green, Designated Federal Official
12:00 p.m. Adjourn

Signed in Washington, DC, this 20th day of September 2021.

James Rodriquez,

Acting Assistant Secretary, Veterans' Employment and Training.

[FR Doc. 2021–20955 Filed 9–27–21; 8:45 am]

BILLING CODE 4510–79–P

DEPARTMENT OF LABOR

Wage and Hour Division

Agency Information Collection Activities; Comment Request; Information Collections: Work Study Program of the Child Labor Regulations.

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (the Department) is soliciting comments concerning a proposed extension of the information collection request (ICR) titled ''Work Study Programs of the Child Labor Regulations.'' This comment request is part of continuing Departmental efforts to reduce paperwork and respondent burden in accordance with the Paperwork Reduction Act of 1995 (PRA). The Department proposes to extend the approval of this existing information collection without change.

This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. A copy of the

proposed information request may be obtained by contacting the office listed below in the **FOR FURTHER INFORMATION CONTACT** section of this Notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before November 29, 2021.

ADDRESSES: You may submit comments identified by Control Number 1235–0024, by either one of the following methods: *Email: WHDPRAComments@dol.gov; Mail, Hand Delivery, Courier:* Division of Regulations, Legislation, and Interpretation, Wage and Hour, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210.

Instructions: Please submit one copy of your comments by only one method. All submissions received must include the agency name and Control Number identified above for this information collection. Because we continue to experience delays in receiving mail in the Washington, DC area, commenters are strongly encouraged to transmit their comments electronically via email or to submit them by mail early. Comments, including any personal information provided, become a matter of public record. They will also be summarized and/or included in the request for Office of Management and Budget (OMB) approval of the information collection request.

FOR FURTHER INFORMATION CONTACT: Robert Waterman, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, 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 notice may be obtained in alternative formats (Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, large print, braille, audiotape, compact disc, or other accessible format), upon request, by calling (202) 693–0023 (not a toll-free number). TTY/TTD callers may dial toll-free (877) 889–5627 to obtain information or request materials in alternative formats.

SUPPLEMENTARY INFORMATION:

I. *Background:* The Wage and Hour Division (WHD) of the Department of Labor administers the Fair Labor Standards Act (FLSA), 29 U.S.C. 201, *et seq.*. Section 3(l) of the Act establishes a minimum age of 16 years for most non-agricultural employment, but allows the employment of 14- and 15-year olds in occupations other than manufacturing and mining if the Secretary of Labor determines such employment is confined to: (1) Periods that will not interfere with the minor's schooling; and (2) conditions that will not interfere with the minor's health and well-being. FLSA section 11(c) requires all covered employers to make, keep, and preserve records of their employees' wages, hours, and other conditions of employment. Section 11(c) authorizes the Secretary of Labor to prescribe the recordkeeping and reporting requirements for these records. The regulations set forth reporting requirements that include a Work Study Program application and written participation agreement. In order to use the child labor work study provisions, § 570.37(b) requires a local public or private school system to file with the Wage and Hour Division Administrator an application for approval of a Work Study Program as one that does not interfere with the schooling or health and well-being of the minors involved. The regulations also require preparation of a written participation agreement for each student participating in a Work Study Program and that the teacher-coordinator, employer, and student each sign the agreement.

II. *Review Focus:* The Department of Labor is particularly interested in comments which:

- 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;
- Enhance the quality, utility, and clarity of the information to be collected;
- 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;
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

III. *Current Actions:* The Department of Labor seeks approval for an extension of this information collection in order to ensure effective administration of Work Study programs.

Type of Review: Extension.

Agency: Wage and Hour Division.

Title: Work Study Program of the Child Labor Regulations.

OMB Control Number: 1235–0024.

Affected Public: Business or other for-profit, Not-for-profit institutions, Farms, Federal, State, Local, or Tribal Government.

Total Respondents: WSP Applications: 10; Written Participation Agreements: 500.

Total Annual Responses: WSP Applications: 10.

Written Participation Agreements: 1,000.

Estimated Total Burden Hours: 1,529.

Estimated Time per Response: WSP Application: 121 minutes; Written Participation Agreements: 31 minutes.

Frequency: On occasion.

Total Burden Cost (capital/startup): $0.

Dated: September 20, 2021.

Amy DeBisschop,

Director, Division of Regulations, Legislation, and Interpretation.

[FR Doc. 2021–20956 Filed 9–27–21; 8:45 am]

BILLING CODE 4510–27–P

OFFICE OF MANAGEMENT AND BUDGET

Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14042

AGENCY: Executive Office of the President, Office of Management and Budget.

ACTION: Notice of determination.

SUMMARY: The Director of the Office of Management and Budget determines that compliance by Federal contractors and subcontractors with the COVID–19-workplace safety protocols detailed in the Safer Federal Workforce Task Force guidance issued on September 24, 2021 will improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract.

DATES: September 24, 2021.

ADDRESSES: The Safer Federal Workforce Task Force Guidance for Federal Contractors and Subcontractors on COVID–19 Workplace Safety is available at: *https://www.saferfederalworkforce.gov/new/.*

FOR FURTHER INFORMATION CONTACT: Cristin Dorgelo, 725 17th Street N, Email address: *Cristin.a.dorgelo@omb.eop.gov,* telephone number: (202) 456–4066. Because of delays in the receipt of regular mail related to security screening, respondents are encouraged to use electronic communications.

SUPPLEMENTARY INFORMATION: As explained in Executive Order No. 14042

on *Ensuring Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors,* compliance with COVID–19-related safety protocols improves economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract. Section 2(c) of E.O. 14042 requires that, before Federal contractors and subcontractors must adhere to any guidance from the Safer Federal Workforce Task Force pursuant to Executive Order No. 14042, the Director of the Office of Management and Budget must determine that such guidance will promote economy and efficiency in Federal contracting if adhered to by Government contractors and subcontractors. Based on my review of the Safer Federal Workforce Task Force's COVID–19 Workplace Safety: Guidance for Federal Contractors and Subcontractors, scheduled for issuance on September 24, 2021, and exercising the President's authority under the Federal Property and Administrative Services Act (see 3 U.S.C. 301I) delegated to me through Executive Order No. 14042, I have determined that compliance by Federal contractors and subcontractors with the COVID–19-workplace safety protocols detailed in that guidance will improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract.

Shalanda Young,

Acting Director, Office of Management and Budget.

[FR Doc. 2021–21184 Filed 9–24–21; 4:15 pm]

BILLING CODE 3110–01–P

NATIONAL CAPITAL PLANNING COMMISSION

Senior Executive Service; Performance Review Board; Members

AGENCY: National Capital Planning Commission.

ACTION: Notice of members of senior executive service performance review board.

SUMMARY: This notice announces the membership of the National Capital Planning Commission Senior Executive Service Performance Review Board in accordance with section 4314(c) of Title 5, U.S.C. and 5 CFR 430.311.

FOR FURTHER INFORMATION CONTACT: Debra L. Dickson, Director of Administration, National Capital Planning Commission, 401 Ninth Street NW, Suite 500, Washington, DC 20004, (202) 482–7229.

SUPPLEMENTARY INFORMATION: The following persons have been appointed to serve as members of the Performance Review Board for the National Capital Planning Commission from October 1, 2021, to September 30, 2023: Paige Cottingham-Streater, Executive Director, Japan U.S. Friendship Commission; John Farrell, Executive Director, U.S. Arctic Research Commission; and Christopher J. Roscetti, Technical Director, Defense Nuclear Facilities Safety Board.

Dated: September 22, 2021.

Debra L. Dickson,

Director of Administration, National Capital Planning Commission.

[FR Doc. 2021–20961 Filed 9–27–21; 8:45 am]

BILLING CODE P

NATIONAL CREDIT UNION ADMINISTRATION

[NCUA 2021–0102]

RIN 3133–AF39

Request for Information and Comment on Digital Assets and Related Technologies

AGENCY: National Credit Union Administration (NCUA).

ACTION: Request for information and comment; extension of comment period.

SUMMARY: On July 27, 2021, the NCUA Board (Board) published in the **Federal Register** a document entitled ''Request for Information and Comment on Digital Assets and Related Technologies'' (RFI) and invited comments from interested parties regarding the current and potential impact of activities connected to digital assets and related technologies on federally insured credit unions (FICUs), related entities, and the NCUA. The Board noted that it was broadly interested in receiving input on commenters' views in this area, including current and potential uses in the credit union system, and the risks associated with them. To allow interested persons more time to consider and submit their comments, the Board has decided to extend the comment period for an additional 30 days.

DATES: The comment period for the RFI published July 27, 2021, at 86 FR 40213, is extended. Responses to the RFI must now be received on or before October 27, 2021.

ADDRESSES: You may submit comments by any one of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments for NCUA Docket 2021–0102.
- *Fax:* (703) 518–6319. Include ''[Your name] Comments on ''Request for Information and Comment on Digital Assets and Related Technologies.''
- *Mail:* Address to Melane Conyers-Ausbrooks, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.
- *Hand Delivery/Courier:* Same as mailing address.

Public Inspection: You may view all public comments on the Federal eRulemaking Portal at *http://www.regulations.gov* as submitted, except for those we cannot post for technical reasons. NCUA will not edit or remove any identifying or contact information from the public comments submitted. Due to social distancing measures in effect, the usual opportunity to inspect paper copies of comments in the NCUA's law library is not currently available. After social distancing measures are relaxed, visitors may make an appointment to review paper copies by calling (703) 518–6540 or emailing *OGCMail@ncua.gov.*

FOR FURTHER INFORMATION CONTACT: *Policy and Analysis:* Scott Borger, Senior Financial Modeler and Todd Sims, National Payment Systems Officer, Office of National Examinations and Supervision, (703) 518–6640; *Legal:* Thomas Zells, Senior Staff Attorney, Office of General Counsel, (703) 518–6540; or by mail at National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314.

SUPPLEMENTARY INFORMATION: On July 27, 2021, the Board published in the **Federal Register** an RFI inviting comments from interested parties regarding the current and potential impact of activities connected to digital assets and related technologies on FICUs, related entities, and the NCUA.[1] The Board published the RFI with the aim of engaging the broad credit union industry and other stakeholders and learning how emerging DLT and DeFi applications are viewed and used. The RFI emphasized that the NCUA hopes to learn how the credit union community is using these emerging technologies and gain additional feedback as to the role the NCUA can play in safeguarding the financial system and consumers in the context of these emerging technologies. In order to continue to

[1] 86 FR 40213 (July 27, 2021).

fulfill its mandate to maintain a safe and sound credit union system and protect credit union members, the NCUA is working to better understand the implications of these changes and the associated benefits or challenges that may exist.

The RFI provided a 60-day public comment period that closed on September 27, 2021. Given the complexity of the subject and the breadth of the request, the Board believes it is necessary to extend the comment period to give all interested parties sufficient time to consider the RFI and provide input. The Board believes that extending the comment period for an additional 30 days is appropriate. This extension should allow interested parties more time to prepare responses without delaying the NCUA's review of the comments already received.

As stated in the RFI, the Board is seeking comments on the current and potential impact of activities related to DLT and DeFi on the credit union system. The NCUA remains broadly interested in receiving input on parties' views in this area, including current and potential uses. Commenters are also encouraged to discuss any and all relevant issues they believe the Board should consider with respect to these technologies and related matters. It is worth reiterating that the RFI did not modify any existing requirements applicable to FICUs and does not grant FICUs any new authorities or limit any existing authorities. The RFI also did not speak to the permissibility or impermissibility of any specific activity.

Authority: 12 U.S.C. 1756 and 1784.

By the National Credit Union Administration Board.

Melane Conyers-Ausbrooks,

Secretary of the Board.

[FR Doc. 2021–21085 Filed 9–23–21; 4:15 pm]

BILLING CODE 7535–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

Notice of Proposed Information Collection Request: Public Libraries Survey FY 2021–FY 2023

AGENCY: Institute of Museum and Library Services.

ACTION: Submission for OMB review, comment request.

SUMMARY: The Institute of Museum and Library Services announces the following information collection has been submitted to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. By this Notice, IMLS is soliciting comments concerning the new three-year approval of the IMLS administered Public Libraries Survey. A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **FOR FURTHER INFORMATION CONTACT** section of this Notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before October 28, 2021.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this Notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection request by selecting ''Institute of Museum and Library Services'' under ''Currently Under Review;'' then check ''Only Show ICR for Public Comment'' checkbox. Once you have found this information collection request, select ''Comment,'' and enter or upload your comment and information. Alternatively, please mail your written comments to Office of Information and Regulatory Affairs, *Attn.:* OMB Desk Officer for Education, Office of Management and Budget, Room 10235, Washington, DC 20503, (202) 395–7316.

OMB is particularly interested in comments that help the agency to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including 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).

FOR FURTHER INFORMATION CONTACT: Connie Bodner, Ph.D., Director, Office of Grants Policy and Management, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Dr. Bodner can be reached by Telephone: 202–653–4636, or by email at *cbodner@imls.gov.* Persons who are deaf or hard of hearing (TTY users) can contact IMLS at 202–207–7858 via 711 for TTY-Based Telecommunications Relay Service.

SUPPLEMENTARY INFORMATION:

I. Background

The Institute of Museum and Library Services is the primary source of federal support for the nation's libraries and museums. We advance, support, and empower America's museums, libraries, and related organizations through grant making, research, and policy development. To learn more, visit *www.imls.gov.*

II. Current Actions

Pursuant to Public Law 107–279, this Public Libraries Survey collects annual descriptive data on the universe of public libraries in the United States and the Outlying Areas. Information such as public service hours per year, circulation of library books, number of librarians, population of legal service area, expenditures for library collection, programs for children and young adults, staff salary data, and access to technology would be collected. The request includes new public library data regarding programs and other physical collections. The Public Libraries Survey has been conducted by the Institute of Museum and Library Services under the clearance number 3137–0074, which expires September 30, 2023. This action is to request a new three-year approval. The 60-day Notice was published in the **Federal Register** on June 25, 2021 (86 FR 33782). The agency received one comment in response to the Notice.

Agency: Institute of Museum and Library Services.

Title: Public Libraries Survey, FY 2021–FY 2023.

OMB Number: 3137–0074.

Agency Number: 3137.

Affected Public: State and local governments, State library administrative agencies, and public libraries.

Number of Respondents: 56.

Frequency: Annually.

Burden Hours per Respondent: 94.1.

Total burden hours: 5,270.

Total Annualized capital/startup costs: n/a.

Total Annual Costs: $154,104.73.
Total Annual Federal Costs: $726,187.85.

Dated: September 23, 2021.

Kim Miller,

Senior Grants Management Specialist, Institute of Museum and Library Services.

[FR Doc. 2021–21086 Filed 9–27–21; 8:45 am]

BILLING CODE 7036–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts

National Council on the Arts 204th Meeting

AGENCY: National Endowment for the Arts, National Foundation on the Arts and the Humanities.

ACTION: Notice of meeting.

SUMMARY: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act, as amended, notice is hereby given that a meeting of the National Council on the Arts will be held open to the public by videoconference or teleconference.

DATES: See the **SUPPLEMENTARY INFORMATION** section for meeting time and date. The meeting is Eastern time and the ending time is approximate.

ADDRESSES: The National Endowment for the Arts, Constitution Center, 400 Seventh Street SW, Washington, DC 20560. Please see *arts.gov* for the most up-to-date information.

FOR FURTHER INFORMATION CONTACT: Victoria Hutter, Office of Public Affairs, National Endowment for the Arts, Washington, DC 20506, at 202/682–5570.

SUPPLEMENTARY INFORMATION: If, in the course of the open session discussion, it becomes necessary for the Council to discuss non-public commercial or financial information of intrinsic value, the Council will go into closed session pursuant to subsection (c)(4) of the Government in the Sunshine Act, 5 U.S.C. 552b, and in accordance with the September 10, 2019 determination of the Chairman. Additionally, discussion concerning purely personal information about individuals, such as personal biographical and salary data or medical information, may be conducted by the Council in closed session in accordance with subsection (c)(6) of 5 U.S.C. 552b.

Any interested persons may attend, as observers, to Council discussions and reviews that are open to the public. If you need special accommodations due to a disability, please contact Beth Bienvenu, Office of Accessibility, National Endowment for the Arts, at 202/682–5532 or *accessibility@arts.gov,* at least seven (7) days prior to the meeting.

The upcoming meeting is:

National Council on the Arts 204th Meeting

This meeting will be held by videoconference or teleconference.

Date and time: October 28, 2021; 3:15 p.m. to 4:00 p.m., ET.

There will be opening remarks and voting on recommendations for grant funding and rejection, followed by updates from the NEA Acting Chairman.

Register in advance for this webinar: *https://arts.zoomgov.com/j/1616136274?pwd=Ri9pdGQrOU44QWYybUpZdnN2Qm0wZz09*
Passcode: Arts

Dated: September 23, 2021.

Sherry P. Hale,

Staff Assistant, National Endowment for the Arts.

[FR Doc. 2021–21025 Filed 9–27–21; 8:45 am]

BILLING CODE 7537–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 70–1151; NRC–2015–0039]

Westinghouse Electric Company, LLC, Columbia Fuel Fabrication Facility

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft environmental impact statement; reopening of comment period.

SUMMARY: On July 30, 2021, the U.S. Nuclear Regulatory Commission (NRC) issued a draft Environmental Impact Statement (EIS) for Westinghouse Electric Company, LLC's (WEC's) license renewal application to continue to operate its Columbia Fuel Fabrication Facility (CFFF) for an additional 40 years. The public comment period for the draft EIS opened on August 6 and closed on September 20, 2021. The NRC has decided to re-open the public comment period until November 19, 2021 to allow more time for the public to submit comments. The CFFF is located in Hopkins, South Carolina, and manufactures nuclear fuel assemblies for commercial nuclear power plants. The WEC's license renewal request, if granted as proposed, would allow the CFFF to continue to be a source of nuclear fuel for commercial nuclear power plants for 40 years from the date the NRC approves the renewal.

DATES: The comment period for the document published on August 6, 2021 (86 FR 43276) has been reopened. Comments should be filed no later than November 19, 2021. Comments received after this date will be considered, if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov/* and search for Docket ID NRC–2015–0039. Address questions about Docket IDs to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.
- *Email comments to: WEC_CFFF_EIS@nrc.gov.*
- *Leave comments by voicemail at:* 1–800–216–0881.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Diana Diaz-Toro, telephone: 301–415–0930; email: *Diana.Diaz-Toro@nrc.gov* or Jean Trefethen, telephone: 301–415–0867; email: *Jean.Trefethen@nrc.gov.* Both are staff of the Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2015–0039 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this action by the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2015–0039.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact

the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The draft EIS can be found in ADAMS under Accession No. ML21209A213.

- *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. (ET), Monday through Friday, except Federal holidays.
- *Project Website:* Information related to the WEC project can be accessed on the NRC's WEC website at *https://www.nrc.gov/info-finder/fc/westinghouse-fuel-fab-fac-sc-lc.html.* Under the section titled ''Operating,'' scroll down to ''Key Documents'' and click on draft EIS, NUREG–2248, draft Report for Comment.
- *Public Libraries:* A copy of the NRC staff's draft EIS is available at the following public libraries (library access and hours are determined by local policy):
- Richland Public Library—Main: 1431 Assembly St., Columbia, SC 29201;
- Richland Public Library—Lower Richland: 9019 Garners Ferry Road, Hopkins, SC 29061; and
- Richland Public Library—Eastover: 608 Main Street, Eastover, SC 29044.

B. Submitting Comments

Please include Docket ID NRC–2015–0039 in the subject line of your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov/* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Discussion

On August 6, 2021, the NRC issued for public comment the draft EIS for WEC's license renewal application, which includes the NRC staff's analysis that evaluates the environmental impacts of the proposed action and alternatives to the proposed action. Based on the NRC staff's (i) review of the license renewal application request, which includes the environmental report, supplemental documents, and the licensee's responses to the NRC staff's requests for additional information; (ii) consultation with federal, state, and tribal agencies and input from other stakeholders; and (iii) independent review as documented in the assessments summarized in the draft EIS, the NRC staff has concluded that the proposed action would result in small impacts on all resource areas except for groundwater resources for which the impacts would be small to moderate.

The public comment period closed on September 20, 2021 (86 FR 43276). The NRC received requests from members of the public and state-elected officials to extend the comment period. After considering these requests, the NRC has decided to re-open the comment period to allow more time for the public to submit comments on the draft EIS. Comments should be submitted by November 19, 2021, to ensure consideration.

Dated: September 23, 2021.

For the Nuclear Regulatory Commission.

Jessie M. Quintero,

Chief, Environmental Review Materials Branch, Division of Rulemaking, Environmental and Financial Support, Office of Nuclear Material Safety, and Safeguards.

[FR Doc. 2021–21053 Filed 9–27–21; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2021–132 and CP2021–137; MC2021–133 and CP2021–138]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* September 30, 2021.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s):* MC2021–132 and CP2021–137; *Filing Title:* USPS Request to Add Priority Mail Contract 721 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* September 22, 2021; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* September 30, 2021.

2. *Docket No(s):* MC2021–133 and CP2021–138; *Filing Title:* USPS Request to Add Priority Mail & First-Class Package Service Contract 202 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* September 22, 2021; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* September 30, 2021.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2021–21037 Filed 9–27–21; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Sunshine Act Meetings

TIME AND DATE: October 5, 2021, at 2:30 p.m.

PLACE: Minneapolis, MN.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

Tuesday, October 5, 2021, at 2:30 p.m.

1. Strategic Items
2. Financial and Operational Matters
3. Compensation and Personnel Matters
4. 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 of Governors, U.S. Postal Service, 475 L'Enfant Plaza SW, Washington, DC 20260–1000. Telephone: (202) 268–4800.

Michael J. Elston,

Secretary.

[FR Doc. 2021–21165 Filed 9–24–21; 4:15 pm]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93103; File No. SR–FINRA–2021–016]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Instituting Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change To Amend Rule 2165 (Financial Exploitation of Specified Adults)

September 22, 2021.

I. Introduction

On June 9, 2021, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change SR–FINRA–2021–016 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder [2] to amend FINRA Rule 2165 (Financial Exploitation of Specified Adults) to: (1) Permit member firms to place a temporary hold on a securities transaction, subject to the same terms and restrictions applicable to a temporary hold on disbursements of funds or securities (''disbursements''), where there is a reasonable belief of financial exploitation of a ''specified adult'' as defined in the rule; [3] (2) permit member firms to extend a temporary hold, whether on a disbursement or a transaction, for an additional 30 business days if the member firm has reported the matter to a state regulator or agency or a court of competent jurisdiction; and (3) require member firms to retain records of the reason and support for any extension of any temporary hold, including information regarding any communications with, or by, a state regulator or agency of competent jurisdiction or a court of competent jurisdiction. The proposed rule change was published for comment in the **Federal Register** on June 28, 2021.[4] On July 20, 2021, FINRA consented to extend until September 24, 2021, the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.[5] On August 23, 2021, FINRA responded to the comment letters received in response to the Notice.[6]

The Commission is publishing this order pursuant to Section 19(b)(2)(B) of the Exchange Act [7] to solicit comments on the proposed rule change from interested persons and to institute proceedings to determine whether to approve or disapprove the proposed rule change.

II. Description of the Proposed Rule Change

Background

FINRA's proposed rule change would amend Rule 2165, which currently permits a member firm to place a temporary hold on a disbursement from the account of a ''specified adult'' customer for up to 25 business days if the criteria of the rule are satisfied.[8] A ''specified adult'' is someone either age 65 and older, or age 18 and older if the member firm reasonably believes that a mental or physical impairment has rendered the person incapable of protecting their own interests.[9] According to FINRA, temporary holds on disbursements have played a significant role in providing member firms with a way to respond promptly to suspicions of customer financial exploitation before a customer experiences potentially significant losses.[10]

A member firm's ability to place a temporary hold on disbursements is subject to a number of conditions that are designed to help prevent misapplication of the rule.[11] These

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See infra* note 9 and accompanying text.

[4] *See* Exchange Act Release No. 92225 (Jun. 22, 2021), 86 FR 34084 (Jun. 28, 2021) (File No. SR–FINRA–2021–016) (''Notice'').

[5] *See* letter from Jeanette Wingler, Associate General Counsel, FINRA, to Lourdes Gonzalez, Assistant Chief Counsel—Sales Practices, Division of Trading and Markets, Commission, dated July 20, 2021. This letter is available at *https://www.finra.org/sites/default/files/2021-07/SR-FINRA-2021-016-Extension1.pdf.*

[6] *See* letter from Jeanette Wingler, Associate General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission dated August 23, 2021 (''FINRA Letter''). The FINRA Letter is available at the Commission's website at *https://www.sec.gov/comments/sr-finra-2021-016/srfinra2021016-9160159-247786.pdf.*

[7] 15 U.S.C. 78s(b)(2)(B).

[8] *See infra* for a discussion of existing safeguards incorporated into Rule 2165.

[9] *See* Rule 2165(a)(1). Supplementary Material .03 to Rule 2165 provides that a member firm's reasonable belief that a natural person age 18 and older has a mental or physical impairment that renders the individual unable to protect their own interests may be based on the facts and circumstances observed in the member firm's business relationship with the person. *See* Notice at 34086 n.17.

[10] *See* Notice at 34086. For example, according to FINRA member firms have placed temporary holds to prevent senior investors from losing: (1) $200,000 (representing approximately two-thirds of the investor's account) related to a lawsuit scam; (2) $10,000 in a lottery scam; (3) $60,000 in a romance scam; and (4) $50,000 to financial exploitation by a brother-in-law. *Id.*

[11] *Id.*

safeguards would apply equally to the proposed rule change permitting temporary holds on transactions. The safeguards include requiring that member firms provide notification of both the hold, and the reason for the hold, to all parties authorized to transact business on the customer's account, including the customer and a trusted contact person of the customer, no later than two business days after the day on which the firm first placed the hold.[12] Temporary holds may only be placed based on a member's reasonable belief of financial exploitation—for example, a customer payment related to a commonly known scam, such as a lottery scam.[13]

Once the temporary hold has been placed, the member firm must immediately initiate an internal review of the facts and circumstances that caused the firm to reasonably believe that the financial exploitation of the specified adult has occurred, is occurring, has been attempted, or will be attempted.[14] Furthermore, the general supervisory and recordkeeping requirements of certain FINRA rules [15] require a member firm relying on Rule 2165 to establish and maintain written supervisory procedures that are reasonably designed to achieve compliance with the rule, including, but not limited to, procedures related to the identification, escalation, and reporting of matters related to the financial exploitation of specified adults.[16] With respect to associated persons who may be handling the customer's account, Rule 2165 also requires that any request for a hold be escalated to a supervisor, compliance department or legal department rather than allowing the associated person to independently place a hold.[17] In addition, a member firm relying on the rule is required to develop and document training policies or programs reasonably designed to ensure that such associated persons comply with the requirements of the rule,[18] as well as retain records related to compliance with the rule, which must be made readily available to FINRA upon request.[19]

The proposed rule change would expand upon Rule 2165 in both scope and temporal reach by: (1) Expanding the scope of Rule 2165(b)(1) by permitting member firms to place a temporary hold on a securities transaction, in addition to the already-permitted hold on disbursements, where the preexisting conditions of the rule, including the member's reasonable belief of customer financial exploitation, are met; [20] (2) permitting firms to extend the maximum time period for any temporary hold initiated pursuant to Rule 2165(b)(1) for an additional 30 business days beyond the current maximum of 25 business days, if the firm has reported the matter to a state regulator or agency of competent jurisdiction, or a court of competent jurisdiction; [21] and (3) requiring member firms to retain records of the reason and support for any extension of a temporary hold, including information regarding any communications with, or by, a state regulator or agency of competent jurisdiction or a court of competent jurisdiction.[22] According to FINRA, the proposed rule change is designed to protect investors and the public interest by strengthening the tools available to FINRA's member firms to combat the financial exploitation of vulnerable investors, which presents the potential for significant and longstanding harm to those investors.[23]

Rule 2165(b) (Temporary Hold on Disbursements or Transactions in the Account of a Specified Adult)

With respect to placing holds on securities transactions, FINRA indicated that a hold on disbursements may be insufficient to protect certain investors from financial exploitation. In support of its proposal, FINRA pointed out that even if a temporary hold is placed on the resulting disbursement out of a customer's account, the execution of the transaction may still subject the customer to significant, negative financial consequences.[24] Additionally, and as noted above, the safeguards in Rule 2165 are designed to help prevent misapplication of the rule with respect to temporary holds on disbursements, and these safeguards would apply equally to temporary holds on transactions.

Rule 2165(b)(4) (30-Day Extension of the Temporary Hold Period)

By increasing the potential maximum duration of the temporary hold, whether for disbursements or transactions, from 25 business days to 55 business days, the proposed rule change would provide member firms with additional time to resolve matters arising from suspected financial exploitation in instances where the firm has reported the suspected exploitation to state regulators, adult protective services (''APS'') agencies, or law enforcement.[25]

FINRA indicated that information it gathered during the retrospective review supported the need for member firms to have additional time to resolve financial exploitation matters.[26] Although some retrospective review stakeholders and commenters on a FINRA regulatory notice [27] stated that some matters, such as activity that generally occurs as a result of a commonly-known scam, can be quickly resolved after placing a temporary hold, other matters are more complex and may require additional time.[28] For example, suspected financial exploitation of an elderly customer by a family member or caregiver may require additional time to resolve because of the need to interview multiple individuals, as well as to collect and review relevant documents according to FINRA. In these more complex cases, both the firm that has reported the suspected exploitation and the government or law enforcement entity investigating the conduct often need additional time to collect and share information to bring the investigation to resolution. In support of a maximum time period of 55 business days, FINRA cited to data indicating that the average duration of an

[12] *See* Rule 2165(b)(1)(B).

[13] *See* Notice at 34086.

[14] *See* Rule 2165(b)(1)(C).

[15] *See* Rules 3110, 3120, 3130, 3150, and the Rule 4510 Series.

[16] *See* Rule 2165(c)(1).

[17] *See* Rule 2165(c)(2).

[18] *See* Supplementary Material .02 to Rule 2165.

[19] *See* Rule 2165(d).

[20] *See* proposed Rule 2165(b).

[21] *Id.*

[22] *See* proposed Rule 2165(d).

[23] In August 2019, FINRA engaged in a retrospective review to assess the effectiveness and efficiency of its rules and administrative processes designed to protect senior investors from financial exploitation, including Rule 2165. FINRA stated that information gathered during the review supported the need for additional time for firms to resolve matters arising from suspected financial exploitation, as well as extending the rule to allow firms to place securities transaction holds. *See* Notice at 34087.

[24] *See* Notice at 34087. For example, according to FINRA such customers may be subject to adverse tax consequences, early withdrawal penalties (such as surrender charges), the inability to regain access to a sold investment that was subsequently closed to new investors, or unauthorized trading in the customer's account, including in inappropriately high risk or illiquid securities. *Id.* A ''surrender charge'' is a type of sales charge that must be paid if money from a variable annuity is sold or withdrawn during the ''surrender period''—a set period of time that typically lasts six to eight years after the annuity is purchased. *See, e.g.,* Commission, Office of Investor Education and Advocacy, Variable Annuity Surrender Charges (Glossary), Investor.gov website, (Aug. 11, 2021), *https://www.investor.gov/introduction-investing/investing-basics/glossary/variable-annuity-surrender-charges.*

[25] *See* Notice at 34087; 34089.

[26] *See* Notice at 34087.

[27] The commenters referenced in this instance are commenters on FINRA *Regulatory Notice* 20–34 (Oct. 2020). *See* Notice at 34086. FINRA stated that it considered the collective feedback from the retrospective review stakeholders and comments to the Notice 20–34 proposal in assessing Rule 2165 and the proposed amendments. *See* Notice at 34091.

[28] *See* Notice at 34088.

investigation for matters reported to the federal National Adult Maltreatment Reporting System (NAMRS) is 52.6 days.[29]

Proposed Rule Change

As noted above, proposed Rule 2165 would: (1) Expand the current rule by permitting member firms to place a temporary hold on a securities transaction, subject to the same terms and restrictions currently applicable to a temporary hold on disbursements, where there is a reasonable belief of financial exploitation,[30] (2) permit member firms to extend the maximum time period for any temporary hold initiated under the rule for an additional 30 business days if the firm has reported the matter to a state regulator or agency of competent jurisdiction, or a court of competent jurisdiction,[31] and (3) require member firms to retain records of the reason and support for any extension of any temporary hold, including information regarding any communications with, or by, a state regulator or agency of competent jurisdiction or a court of competent jurisdiction.[32]

Rule 2165(b) (Temporary Hold on Disbursements or Transactions in the Account of a Specified Adult)

Rule 2165 currently permits temporary holds to be placed on disbursements of funds or securities when the firm has a reasonable belief that the customer is being financially exploited. Although this serves to stop funds or securities from leaving a customer's account, the rule does not permit a firm to place a hold on a securities transaction where the same financial exploitation is suspected.[33] Accordingly, FINRA is proposing to amend Rule 2165 to permit firms to place a temporary hold on securities transactions when the firm has a reasonable belief that the customer is being financially exploited.[34] In accordance with the Rule's safe harbor approach for holds on disbursements,[35] the proposed rule change would permit, but not require, firms to place a hold on transactions in these circumstances.

Rule 2165(b)(4) (30-Day Extension of the Temporary Hold Period); Rule 2165(d) (Record Retention)

Rule 2165 currently allows a member firm to place a temporary disbursement hold on a specified adult customer's account for up to 15 business days if the specified conditions required by the rule are satisfied, unless otherwise terminated or extended by a state regulator or agency of competent jurisdiction, or a court of competent jurisdiction.[36] The member firm may extend that hold for an additional 10 business days, for a maximum of 25 business days total, if the member firm's internal review of the facts and circumstances supports its reasonable belief that the financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted, unless otherwise terminated or extended by a state regulator or agency of competent jurisdiction, or a court of competent jurisdiction.[37] Under FINRA's proposal, these hold periods would also apply to transactions held under the same conditions described above.

FINRA is proposing to amend Rule 2165 to permit firms to extend any temporary hold under the rule for an additional 30 business days if the member firm has reported the matter to a state regulator or agency of competent jurisdiction, or a court of competent jurisdiction.[38] Thus, firms would be able to extend a transaction or disbursement hold up to a maximum of 55 business days only in instances where they have externally reported the suspicious conduct.

In addition, Rule 2165(d) currently requires member firms to retain records related to compliance with the rule, which must be readily available to FINRA upon request. To evidence compliance with Rule 2165 in placing or extending a temporary hold, FINRA is proposing to amend Rule 2165(d) to require that a member firm retain records of the reason and support for any extension of a temporary hold, including information regarding any communications with, or by, a state regulator or agency of competent jurisdiction or a court of competent jurisdiction.[39]

III. Proceedings To Determine Whether To Approve or Disapprove File Number SR–FINRA–2021–016 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings to further consider the proposed rule change and the issues raised by commenters. Specifically, the Commission is providing notice of the following grounds for possible disapproval under consideration:

- Whether FINRA has demonstrated how its proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act, which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.[40]

Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the [Exchange Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.'' [41] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[42] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations issued thereunder.[43]

For the reasons discussed above, the Commission believes it is appropriate to institute proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act to allow for additional consideration of the issues raised by the proposed rule change as it determines whether the proposed rule change should be approved or disapproved.[44] Institution of proceedings does not indicate that the Commission has reached any

[29] *See* Notice at 34092.

[30] *See* proposed Rule 2165(b).

[31] *Id.*

[32] *See* proposed Rule 2165(d).

[33] For example, FINRA stated that Rule 2165 currently would not apply to a customer's order to sell his shares of a stock. However, FINRA elaborated that if a customer requested that the proceeds of a sale of shares of a stock be disbursed out of his account at the member firm, then the rule could apply to the disbursement of the proceeds where the customer is a ''specified adult'' and there is reasonable belief of financial exploitation. *See* Notice at 34087 at n.33.

[34] *See* proposed Rule 2165(b).

[35] FINRA stated that Rule 2165 provides member firms and their associated persons with a safe harbor from FINRA Rules 2010 (Standards of Commercial Honor and Principles of Trade), 2150 (Improper Use of Customers' Securities or Funds; Prohibition Against Guarantees and Sharing in Accounts) and 11870 (Customer Account Transfer Contracts) when member firms exercise discretion in placing temporary holds on disbursements of funds or securities from the accounts of specified adults consistent with the requirements of Rule 2165. *See* Notice at 34086.

[36] *See* Rule 2165(b)(2).

[37] *See* Rule 2165(b)(3).

[38] FINRA stated that the 30 business day hold period in proposed Rule 2165(b)(4) would be in addition to the 15 business day hold in Rule 2165(b)(2) and the 10 business day hold in Rule 2165(b)(3). *See* Notice at 34087 n.31.

[39] *See* proposed Rule 2165(d)(6).

[40] 15 U.S.C. 78o–3(b)(6).

[41] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[42] *See id.*

[43] *See id.*

[44] 15 U.S.C. 78s(b)(2)(B).

conclusions with respect to the proposed rule change.

IV. Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposed rule change. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change is consistent with the Exchange Act and the rules thereunder.

Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[45]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be approved or disapproved by October 13, 2021. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by October 19, 2021. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2021–016 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR- FINRA–2021–016. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA.

All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–FINRA–2021–016 and should be submitted on or before October 13, 2021. If comments are received, any rebuttal comments should be submitted on or before October 19, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[46]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–20970 Filed 9–27–21; 8:45 am]

BILLING CODE 8011–01–P

[45] Section 19(b)(2) of the Exchange Act, as amended by the Securities Acts Amendments of 1975, Public Law 94–29, 89 Stat. 97 (1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[46] 17 CFR 200.30–3(a)(12); 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93112; File No. PCAOB–2021–01]

Public Company Accounting Oversight Board; Notice of Filing of Proposed Rule on Board Determinations Under the Holding Foreign Companies Accountable Act

September 23, 2021.

Pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the ''Act''), notice is hereby given that on September 23, 2021, the Public Company Accounting Oversight Board (the ''Board'' or ''PCAOB'') filed with the Securities and Exchange Commission (the ''Commission'' or ''SEC'') the proposed rule described in items I and II below, which items have been prepared by the Board. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

I. Board's Statement of the Terms of Substance of the Proposed Rule

On September 22, 2021, the Board adopted PCAOB Rule 6100, *Board Determinations Under the Holding Foreign Companies Accountable Act* (the ''proposed rule''). The text of the proposed rule appears in Exhibit A to the SEC Filing Form 19b–4 and is available on the Board's website at *https://pcaobus.org/about/rules-rulemaking/rulemaking-dockets/docket-048-proposed-rule-governing-board-determinations-under-holding-foreign-companies-accountable-act* and at the Commission's Public Reference Room.

II. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule

In its filing with the Commission, the Board included statements concerning the purpose of, and basis for, the proposed rule and discussed comments it received on the proposed rule. The text of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in Sections A, B, C, and D below, of the most significant aspects of such statements. In addition, the Board is requesting that the Commission determine that Section 103(a)(3)(C) of the Act does not apply to the proposed rule. The Board's conclusion in this regard is set forth in Section D.

A. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule

(a) Purpose

The Act mandates that the Board inspect registered public accounting firms and investigate possible statutory, rule, and professional standards violations committed by those firms and their associated persons. That mandate applies with equal force to the Board's oversight of registered firms in the United States and in foreign jurisdictions.

Over the course of more than a decade, the Board has worked effectively with authorities in foreign jurisdictions to fulfill its mandate to oversee registered firms located outside the United States. With rare exceptions, foreign audit regulators have cooperated with the Board and allowed it to exercise its oversight authority as it relates to registered firms located within

their respective jurisdictions. The norms of international comity have guided those efforts and allowed the Board to work cooperatively across borders, to resolve conflicts of law, and to overcome other potential obstacles. The Board benefits greatly from cross-border cooperation with its international counterparts and has built constructive relationships that facilitate meaningful oversight. Authorities in a limited number of foreign jurisdictions, however, have taken positions that deny the Board the access it needs to conduct its mandated oversight activities.

Recognizing the ongoing obstacles to Board inspections and investigations in certain foreign jurisdictions, Congress enacted the Holding Foreign Companies Accountable Act (''HFCAA'').[1] The HFCAA requires that the Board determine whether it is unable to inspect or investigate completely registered public accounting firms located in a foreign jurisdiction because of a position taken by one or more authorities in that jurisdiction. The HFCAA, among other things, also mandates that, after the Board makes such a determination, the Commission shall require covered issuers [2] who retain such firms to make certain disclosures in their annual reports and, eventually, if certain conditions persist, shall prohibit trading in those issuers' securities.[3]

Following public comment, the Board adopted the proposed rule, with some modifications after consideration of comments, to establish a framework for the Board to make its determinations under the HFCAA. The proposed rule establishes the manner of the Board's determinations; the factors the Board will evaluate and the documents and information it will consider when assessing whether a determination is warranted; the form, public availability, effective date, and duration of such determinations; and the process by which the Board will reaffirm, modify, or vacate any such determinations.

(b) Statutory Basis

The statutory basis for the proposed rule is Title I of the Act.

B. Board's Statement on Burden on Competition

Not applicable. The Board's consideration of the economic impacts of the proposed rule is discussed in Section D below.

C. Board's Statement on Comments on the Proposed Rule Received From Members, Participants or Others

Rulemaking History

On May 13, 2021, the Board proposed a new rule that would establish a framework for the Board's determinations under the HFCAA.[4] The Board received eight comments on the proposal from commenters across a range of affiliations.[5] Commenters generally noted that the Board's statutorily mandated oversight activities—including the Board inspections and investigations referenced in the HFCAA—promote audit quality and enhance the quality of financial reporting, which serve to protect investors and further the public interest. The proposed rule is informed by the comments received. The proposed rule also takes into account observations based on PCAOB oversight activities.

Background

The Board's Oversight of Non-U.S. Registered Public Accounting Firms Through Board Inspections and Investigations

Section 102 of the Act prohibits public accounting firms that are not registered with the Board from preparing or issuing, or from participating in the preparation or issuance of, audit reports with respect to issuers, brokers, or dealers.[6] Implementing this prohibition, PCAOB Rule 2100, *Registration Requirements for Public Accounting Firms,* provides that each public accounting firm that prepares or issues an audit report with respect to an issuer, broker, or dealer, or plays a substantial role in the preparation or furnishing of such a report, must be registered with the Board.[7]

These provisions apply equally to U.S. and non-U.S. public accounting firms. Section 106 of the Act provides that any non-U.S. public accounting firm that prepares or furnishes an audit report with respect to an issuer, broker, or dealer is subject to the Act and to the Board's rules ''in the same manner and to the same extent'' as a U.S. public accounting firm.[8] Therefore, non-U.S. firms issuing such reports must register with the Board. Section 106 of the Act further authorizes the Board to require non-U.S. firms that do not issue such reports but that play a substantial role in the preparation or furnishing of such reports to register with the Board,[9] and the Board exercised that authority when it adopted Rule 2100.[10]

Thus, by virtue of Section 106 of the Act and Rule 2100, non-U.S. firms are subject to the same registration requirements as U.S. firms, and, once registered, they are subject to the same oversight as U.S. firms. This oversight includes Board inspections at mandated regular intervals and Board investigations.

The Board's Inspection Mandate

The Act mandates that the Board administer a continuing program of inspections that assesses registered firms' and their associated persons' compliance with the Act, the rules of the Board, the rules of the Commission, and professional standards in connection with the performance of audits, the issuance of audit reports, and related matters involving issuers.[11]

[1] Public Law 116–222, 134 Stat. 1063 (Dec. 18, 2020).

[2] *See* HFCAA § 2(i)(1)(A), 15 U.S.C. 7214(i)(1)(A) (defining ''covered issuer''). An ''issuer,'' as that term is used here, is distinct from a ''covered issuer,'' and is defined in Section 2(a)(7) of the Act.

[3] See generally Holding Foreign Companies Accountable Act Disclosure, SEC Exchange Act Release No. 91364 (Mar. 18, 2021).

[4] See PCAOB Rel. No. 2021–001, Proposed Rule Governing Board Determinations Under the Holding Foreign Companies Accountable Act (May 13, 2021).

[5] The comment letters on the proposal are available on the Board's website in Rulemaking Docket No. 048, *available at https://pcaobus.org/about/rules-rulemaking/rulemaking-dockets/docket-048-proposed-rule-governing-board-determinations-under-holding-foreign-companies-accountable-act.* During the comment period, Board members and staff discussed the proposal during a webinar for investors on international issues, a transcript of which also is available in Rulemaking Docket No. 048.

[6] *See* Section 102(a) of the Act; *see also* Section 2(a)(7) of the Act & PCAOB Rule 1001(i)(iii) (defining ''issuer''); Section 110(3) of the Act & PCAOB Rule 1001(b)(iii) (defining ''broker''); Section 110(4) of the Act & PCAOB Rule 1001(d)(iii) (defining ''dealer'').

[7] *See* PCAOB Rule 2100; *see also* PCAOB Rule 1001(p)(ii) (defining ''play a substantial role in the preparation or furnishing of an audit report'').

[8] Section 106(a)(1) of the Act.

[9] *See* Section 106(a)(2) of the Act.

[10] *See* PCAOB Rule 2100. Section 106(c) of the Act allows the Board, subject to Commission approval, to exempt a non-U.S. firm or any class of such firms from any provision of the Act or the Board's rules, upon a determination that doing so is necessary or appropriate in the public interest or for the protection of investors. In connection with the launch of its oversight system in 2003, the Board received numerous requests that non-U.S. firms be exempted from the Board's oversight requirements, but the Board declined to adopt any such exemptions, finding such exemptions to be inconsistent with its mandate to protect investors. *See, e.g., Registration System for Public Accounting Firms,* PCAOB Rel. No. 2003–007, at 13, 17–20 (May 6, 2003); *see also, e.g., Final Rule Concerning the Timing of Certain Inspections of Non-U.S. Firms, and Other Issues Relating to Inspections of Non-U.S. Firms,* PCAOB Rel. No. 2009–003, at 9 n.23 (June 25, 2009).

[11] *See* Section 104(a)(1) of the Act; *see also* Section 101(c)(3) of the Act; PCAOB Rule 4000(a), *General.* The Act also permits the Board to

Board inspections are the Board's ''primary tool of oversight.'' [12]

In accordance with the Act, and as set forth in the Board's rules, the Board periodically inspects the audits of registered public accounting firms.[13] Board inspections must be performed annually with respect to each registered firm that regularly provides audit reports for more than 100 issuers, and at least triennially with respect to each registered firm that regularly provides audit reports for 100 or fewer issuers.[14] The Board also may conduct special inspections on its own initiative or at the Commission's request.[15]

During an inspection, the Board reviews audit engagements ''selected by the Board.'' [16] The Board also evaluates the sufficiency of the firm's quality control system (and the documentation and communication of that system), and may perform other testing of the firm's audit, supervisory, and quality control procedures as deemed necessary or appropriate in light of the purpose of the inspection and the responsibilities of the Board.[17]

To conduct an inspection, the Board must obtain documents and information from the firm and its associated persons, and when the Board requests such documents or information, registered firms and their associated persons must comply. In this regard, the Act provides that a firm's cooperation in and compliance with document requests made in furtherance of the Board's authority and responsibilities under the Act are a condition to the continuing effectiveness of the firm's registration with the Board.[18] Furthermore, PCAOB Rule 4006, *Duty to Cooperate With Inspectors,* imposes on registered firms and their associated persons a duty to cooperate with PCAOB inspectors, which includes complying with requests for access to, and the ability to copy, any record in their possession, custody, or control, and with requests for information by oral interviews, written responses, or otherwise.[19]

The Board's Investigation Mandate

The Act also authorizes the Board to conduct investigations (and, relatedly, disciplinary proceedings) with respect to registered firms and their associated persons.[20] The Board may investigate any act, practice, or omission to act by a registered firm or associated person that may violate the Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards, regardless of how the act, practice, or omission came to the Board's attention.[21]

As with inspections, the Board's ability to conduct investigations depends on the Board's ability to obtain documents and information from registered firms and their associated persons. Pursuant to the Act,[22] the Board has adopted rules under which the Board may (1) require testimony of a registered firm or an associated person thereof with respect to any matter that the Board considers relevant or material to an investigation; [23] (2) require production of audit work papers and any other document or information possessed by a registered firm or associated person, wherever domiciled, that the Board considers relevant or material to an investigation; [24] (3) inspect the books or records of a registered firm or associated person to verify the accuracy of any documents or information supplied; [25] (4) request the testimony of, or any document in the possession of, any other person that the Board considers relevant or material to an investigation, subject to certain limitations; [26] and (5) seek issuance by the Commission, in a manner established by the Commission, of a subpoena requiring the testimony of, or the production of any document in the possession of, any person that the Board considers relevant or material to an investigation.[27]

Pursuant to the Act, a firm's cooperation in and compliance with requests for testimony and for the production of documents made in furtherance of the Board's authority and responsibilities are a condition to the continuing effectiveness of the firm's registration with the Board.[28] Moreover, if a registered firm or associated person refuses to testify, produce documents, or otherwise cooperate with a Board investigation, the Board can impose sanctions, which may include suspending or revoking a firm's registration and suspending or barring an individual from associating with a registered firm.[29] As the Commission has observed, failing to cooperate in a

establish, by rule, a program of inspection with respect to registered firms that provide one or more audit reports for a broker or dealer. *See* Section 104(a)(2) of the Act. The Board's rules provide for an interim inspection program related to audits of brokers and dealers. *See* PCAOB Rule 4020T, *Interim Inspection Program Related to Audits of Brokers and Dealers.*

[12] PCAOB Rel. No. 2009–003, at 8–9; *see also Order Approving Proposed Amendment to Board Rules Relating to Inspections,* SEC Exchange Act Release No. 61649, at 5 (Mar. 4, 2010) (observing that inspections are ''the cornerstone of the Board's regulatory oversight of audit firms'').

[13] *See* Section 104(a)(1) of the Act. Generally, a registered firm's issuance of an audit report triggers a PCAOB inspection, subject to certain limited exceptions. *See* Section 104(b)(1) of the Act; PCAOB Rules 4003(a)–(b), *Frequency of Inspections; see also* PCAOB Rules 4003(c) & (e) (identifying certain circumstances in which the Board has discretion to forgo an inspection of a firm). Additionally, the Board conducts inspections of firms that have not issued an audit report with respect to an issuer but have played a substantial role in the preparation or furnishing of such a report. *See* PCAOB Rule 4003(h).

[14] *See* Section 104(b)(1) of the Act; *see also* PCAOB Rules 4003(a)–(b). The Act provides that the Board, by rule, may adjust the annual and triennial inspection schedules if the Board finds that different schedules are consistent with the purposes of the Act, the public interest, and the protection of investors. *See* Section 104(b)(2) of the Act; *see also* PCAOB Rules 4003(d)–(g) (adjusting the inspection schedule in certain circumstances).

[15] *See* Section 104(b)(2) of the Act.

[16] Section 104(d)(1) of the Act.

[17] *See* Sections 104(d)(2) and 104(d)(3) of the Act.

[18] *See* Section 102(b)(3) of the Act. Section 102(b)(3)(A) of the Act specifies that each registration application shall contain ''a consent executed by the . . . firm to cooperation in and compliance with any request for . . . documents made by the Board in the furtherance of its authority and responsibilities'' under the Act. Section 102(b)(3)(B) of the Act, in turn, provides that each registration application shall contain a statement that the firm ''understands and agrees that [such] cooperation and compliance . . . shall be a condition to the continuing effectiveness of the registration of the firm with the Board.''

[19] *See* PCAOB Rule 4006; *see also Gately & Assocs., LLC,* SEC Exchange Act Release No. 62656, at 9 (Aug. 5, 2010) (''The obligations under Rule 4006 are unequivocal, and apply to 'any request[ ] made in furtherance of the Board's authority and responsibilities.' '' (quoting Rule 4006)). Documents and information prepared or received by or specifically for the Board in connection with an inspection are confidential and privileged as an evidentiary matter, but the Board may share them with the Commission and, under certain circumstances, with the Attorney General of the United States, certain federal regulators, state attorneys general, certain state regulators, and certain self-regulatory organizations. *See* Section 105(b)(5)(B) of the Act.

[20] *See* Section 101(c)(4) of the Act; *see also* Section 105(a) of the Act.

[21] *See* Section 105(b)(1) of the Act.

[22] *See* Section 105(b)(2) of the Act.

[23] See PCAOB Rule 5102, Testimony of Registered Public Accounting Firms and Associated Persons in Investigations.

[24] See PCAOB Rule 5103, Demands for Production of Audit Workpapers and Other Documents from Registered Public Accounting Firms and Associated Persons.

[25] See PCAOB Rule 5104, Examination of Books and Records in Aid of Investigations.

[26] See PCAOB Rule 5105, Requests for Testimony or Production of Documents from Persons Not Associated with Registered Public Accounting Firms.

[27] See PCAOB Rule 5111, Requests for Issuance of Commission Subpoenas in Aid of an Investigation.

[28] *See* Section 102(b)(3) of the Act.

[29] *See* Section 105(b)(3) of the Act; PCAOB Rule 5110, *Noncooperation with an Investigation.*

Board investigation is ''very serious misconduct.'' [30]

The Act requires the Board to coordinate its investigations with the Commission. The Board must notify the Commission of any pending Board investigation that involves a potential violation of the securities laws, and must thereafter coordinate its work with the Commission's Division of Enforcement as necessary to protect any ongoing Commission investigation.[31] The Act also authorizes the Board to refer an investigation to the Commission, a self-regulatory organization, certain other federal regulators, and, at the Commission's direction, certain attorneys general and state regulators.[32]

The Board's Cooperative Framework for International Oversight

The Board has long observed that certain aspects of its inspection and investigation mandates raise special concerns for non-U.S. firms, including potential conflicts with non-U.S. law.[33] Acknowledging these challenges early on, the Board affirmed its commitment ''to finding ways to accomplish the goals of the Act without subjecting non-U.S. firms to conflicting requirements.'' [34] The Board then worked with its international counterparts where necessary or appropriate, based on norms of international comity, to develop arrangements and working practices to enable the Board and other audit regulators to achieve their respective mandates in a manner responsive to the potential conflicts of law that non-U.S. firms might confront.[35] The Board's cooperative approach to oversight of registered firms located outside the United States did not, however, entail any abandonment of the Board's inspection or investigation mandates or any relinquishment of the Board's statutory authority to obtain the documents and information it needs from non-U.S. firms in order to execute those mandates.[36]

When the Board adopted its cooperative framework for overseeing non-U.S. registered firms,[37] it rejected calls to afford non-U.S. firms that elected to register with the Board a legal-conflict accommodation during inspections and investigations.[38] In so doing, the Board reiterated that ''[p]reserving the Board's ability to access audit work papers and other documents or information maintained by registered public accounting firms, including non-U.S. registered public accounting firms, is critical to the Board carrying out its obligations under the Act.'' [39] For that reason, the Board did not believe that it would be ''in the interests of U.S. investors or the public for the Board to adopt a rule of general application that would limit its ability to access such documents or information regardless of the circumstances or need for those documents or information.'' [40]

The Commission approved the Board's rules regarding oversight of non-U.S. firms, which embody the cooperative approach described above.[41] The Commission observed that the PCAOB was discussing potential conflicts of law with foreign audit oversight bodies and encouraged the PCAOB to continue those discussions and to consider ways to work cooperatively with its international counterparts.[42]

Those discussions have continued, and nearly all have been fruitful. The Board's oversight programs take into account the possibility that a non-U.S. firm's obligations under the Act or the Board's rules might conflict with non-U.S. law. The Board has established procedures that enable non-U.S. firms to assert legal conflicts during the registration and periodic reporting processes so that such firms are not prevented from completing a registration application or complying with periodic reporting requirements.[43] The Board also seeks to coordinate and cooperate with its international counterparts when conducting inspections or investigations in other countries.[44] Nevertheless, in all respects, the Board has made clear that its statutory authority to obtain the documents and information it needs to conduct inspections and investigations has not been relinquished, surrendered, forfeited, or otherwise vitiated.[45]

Resolution of Obstacles to Inspections and Investigations in Non-U.S. Jurisdictions

The practices and approaches the Board has successfully developed with foreign regulators to resolve conflicts and to complete inspections and investigations under the Act can differ from jurisdiction to jurisdiction, but they all implement three core principles:

[30] *R.E. Bassie & Co.,* SEC Accounting and Auditing Enforcement Release No. 3354, at 11 (Jan. 10, 2012).

[31] *See* Section 105(b)(4)(A) of the Act; *see also* PCAOB Rule 5112(a), *Commission Notification of Order of Formal Investigation.* Documents and information prepared or received by or specifically for the Board in connection with an investigation are confidential and privileged as an evidentiary matter, but the Board may share them with the Commission and, under certain circumstances, with the Attorney General of the United States, certain federal regulators, state attorneys general, certain state regulators, and certain self-regulatory organizations. *See* Section 105(b)(5)(B) of the Act.

[32] See Section 105(b)(4)(B) of the Act; see also PCAOB Rule 5112(b), Board Referrals of Investigations; PCAOB Rule 5112(c), Commission-directed Referrals of Investigations.

[33] See, *e.g.,* Proposed Rules Relating to the Oversight of Non-U.S. Public Accounting Firms, PCAOB Rel. No. 2003–024, at 3 (Dec. 10, 2003).

[34] *Inspection of Registered Public Accounting Firms,* PCAOB Rel. No. 2003–019, at 5, A2–15–A2–16 (Oct. 7, 2003).

[35] *See, e.g.,* Briefing Paper, *Oversight of Non-U.S. Public Accounting Firms,* PCAOB Rel. No. 2003–020, at 1–2 (Oct. 28, 2003) (''[T]he PCAOB seeks to become partners with its international counterparts in the oversight of the audit firms that operate in the global capital markets. . . . [A]n arrangement based on mutual cooperation with other high quality regulatory systems respects the cultural and legal differences of the regulatory regimes that exist around the world.''); PCAOB Rel. No. 2003–024, at 8 (''The Board also believes its [cooperative] arrangements may reduce potential conflicts of law . . . .'').

[36] PCAOB Rel. No. 2003–020, at 5 (''The Board believes that it is appropriate that a cooperative approach respect the laws of other jurisdictions, to the extent possible. At the same time, every jurisdiction must be able to protect the participants in, and the integrity of, its capital markets as it deems necessary and appropriate.''); *accord Final Rules Relating to Oversight of Non-U.S. Firms,* PCAOB Rel. No. 2004–005, at 3, A2–17 (June 9, 2004).

[37] *See generally* PCAOB Rel. No. 2004–005.

[38] *See id.* at A2–15–A2–16.

[39] *Id.* at A2–16.

[40] *Id.* at A2–16–A2–17.

[41] See Order Approving Proposed Rules Relating to Oversight of Non-U.S. Registered Public Accounting Firms, SEC Exchange Act Release No. 34–50291, at 3 (Aug. 30, 2004).

[42] *See id.* at 3.

[43] PCAOB Rule 2105, *Conflicting Non-U.S. Laws,* permits a non-U.S. firm to withhold required information from its registration application based on an asserted conflict with non-U.S. law. That rule allows the Board to treat a registration application as complete if the firm, among other things, submits a copy of the purportedly conflicting non-U.S. law and an accompanying legal opinion. But Rule 2105 does not provide a vehicle for resolving conflicts of law during registration, nor does it apply ''to potential conflicts of law that may arise subsequent to registration.'' PCAOB Rel. No. 2004–005, at A2–16–A2–18; *see also* PCAOB Rule 2207, *Assertions of Conflicts with Non-U.S. Laws* (establishing a similar process for registered firms' annual and special reports to the Board).

[44] See, *e.g.,* Rules on Periodic Reporting by Registered Public Accounting Firms, PCAOB Rel. No. 2008–004, at 32 (June 10, 2008).

[45] *See, e.g., id.* at 41 (''The Board has consistently maintained that, although it will seek to work cooperatively with and through non-U.S. regulators, and although it is willing to accommodate a non-U.S. firm's reluctance (rooted in an asserted conflict of law) to provide the required written consent to cooperate, each firm ultimately has an obligation to cooperate with the Board to the extent that the Board requires cooperation. The Board does not view this statutory obligation as limited or qualified by non-U.S. legal restrictions.'').

(1) The Board must be able to conduct inspections and investigations consistent with its mandate; [46]

(2) The Board must be able to select the audit work and potential violations to be examined; [47] and

(3) The Board must have access to firm personnel, audit work papers, and other information and documents deemed relevant by Board staff.[48]

The Board has been able to accommodate the legal requirements of most non-U.S. jurisdictions without compromising on these three core principles, which the Board considers to be fundamental to its ability to inspect and investigate non-U.S. firms completely.

Building collaborative working relationships with international counterparts based on these principles has taken considerable time and substantial effort, but the Board believes that ''it is in the interests of the public and investors for the Board to develop efficient and effective cooperative arrangements with its non-U.S. counterparts.'' [49] The Board now has extensive experience with cooperative arrangements that successfully resolve conflicts and allow the PCAOB and its international counterparts to satisfy their respective oversight mandates.

Board Inspections of Non-U.S. Firms

Inspections of non-U.S. firms began in 2005,[50] and the Board quickly identified obstacles that required negotiation with its international counterparts. When a registered firm issuing audit reports for an issuer is located in a non-U.S. jurisdiction that has an auditor oversight authority of its own, the Board seeks to engage with that local regulator. The PCAOB conducts many inspections of non-U.S. firms jointly with local authorities, using approaches that take into consideration the laws and practices of the local jurisdiction. The Board also developed a specific regulatory framework for assessing the degree, if any, to which the Board may rely on the inspection work of the local regulator in an effort to reduce redundancy.[51] Even where the Board conducts its own inspection rather than a joint inspection with a local auditor oversight authority, the Board may communicate with its international counterpart regarding the Board's inspections in the jurisdiction.[52]

By December 2008, the Board had inspected non-U.S. firms in 24 jurisdictions.[53] But the Board also observed that home-country legal obstacles and sovereignty concerns were impeding the Board's ability to conduct inspections of some non-U.S. firms.[54] Given these obstacles, the Board, in 2009, adjusted the schedule for its first inspections of non-U.S. firms in certain jurisdictions so that the Board could continue its efforts to reach cooperative arrangements with those firms' home-country regulators.[55]

In so doing, however, the Board expressly rejected the suggestion that it should exempt from inspection non-U.S. firms ''that cannot cooperate with PCAOB inspections due to legal conflicts or sovereignty-based opposition from their local governments,'' finding that exempting such firms from inspections is not in the interests of investors or the public.[56] Instead, the Board reaffirmed the ultimate obligation of all registered firms, including non-U.S. firms, to be subject to inspection and to comply with the Board's inspection-related requests.[57]

The Commission, in approving the Board's extension of the deadline for the first inspections of certain non-U.S. firms, recognized that ''the adjustment would provide additional time [for the Board] to continue discussions on outstanding matters and work towards cooperation and coordination with authorities in all relevant jurisdictions.'' [58] And in connection with its approval of other adjustments to the inspection schedule of non-U.S. firms, the Commission stated that ''the PCAOB should continue to work toward cooperative arrangements with the appropriate local auditor oversight authorities where it is reasonably likely that appropriate cooperative arrangements can be obtained.'' [59]

By the end of 2009, the Board had conducted inspections of non-U.S. firms in an additional nine jurisdictions, bringing the cumulative total to 33 jurisdictions.[60] The Board, however,

[46] *See, e.g.,* Section 104(a)(1) of the Act (requiring a ''continuing program of inspections''); Section 104(b)(1) of the Act (establishing inspection frequency requirements); Section 104(c) of the Act (requiring identification of non-compliant acts, practices, or omissions to act, and providing for reporting of such conduct to the Commission and appropriate state regulatory authorities, when appropriate); Section 105(b)(1) of the Act (authorizing Board investigations); Section 105(b)(3) of the Act (authorizing the imposition of sanctions for noncooperation with an investigation); Section 105(b)(4) of the Act (requiring coordination with the Commission's Division of Enforcement and authorizing referrals of investigations in certain circumstances); Section 105(b)(5)(B)(i) of the Act (authorizing the Board to share with the Commission documents received in connection with an inspection or investigation).

[47] *See, e.g.,* Section 104(d)(1) of the Act (directing the Board to inspect and review audit and review engagements ''as selected by the Board''); Section 104(d)(3) of the Act (authorizing the Board to perform other testing of audit, supervisory, and quality control procedures as are necessary or appropriate in light of the purpose of the inspection and the responsibilities of the Board); Section 105(b)(1) of the Act (authorizing the Board to conduct an investigation of ''any'' act, practice, or omission to act by a registered firm or an associated person thereof that may violate ''any'' provision of the Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission under the Act, or professional standards).

[48] *See, e.g.,* Section 104(d)(1) of the Act (directing the Board to inspect and review audit and review engagements); Section 104(d)(2) of the Act (directing the Board to evaluate the sufficiency of a registered firm's quality control system, including the manner of the documentation and communication of that system); Section 105(b)(2)(A)–(B) of the Act (authorizing the Board to require the testimony of, and the production of audit work papers and any other documents or information from, registered firms and their associated persons, wherever domiciled, and to inspect the books and records of such firm or associated person to verify the accuracy of any documents or information supplied).

[49] PCAOB Rel. No. 2009–003, at 4–5.

[50] *See Rule Amendments Concerning the Timing of Certain Inspections of Non-U.S. Firms, and Other Issues Relating to Inspections of Non-U.S. Firms,* PCAOB Rel. No. 2008–007, at 4 (Dec. 4, 2008).

[51] *See* PCAOB Rel. No. 2009–003, at 5–6. Non-U.S. firms may formally request that the Board rely on a non-U.S. inspection to the extent deemed appropriate by the Board, and the Board will examine certain factors to determine the degree, if any, to which the Board may rely on the non-U.S. inspection. *See* PCAOB Rule 4011, *Statement by Foreign Registered Public Accounting Firms;* PCAOB Rule 4012, *Inspections of Foreign Registered Public Accounting Firms;* PCAOB Rel. No. 2009–003, at 5. In contrast to an exemption, reliance on a non-U.S. inspection pursuant to Rule 4012 is a cooperative approach that can be used when efficient and appropriate.

[52] *See* PCAOB Rel. No. 2009–003, at 5.

[53] *See* PCAOB Rel. No. 2008–007, at 4 & n.9 (inspections had been conducted in Argentina, Australia, Bermuda, Brazil, Canada, Chile, Colombia, Greece, Hong Kong, India, Indonesia, Ireland, Israel, Japan, Kazakhstan, Mexico, New Zealand, Panama, Peru, Singapore, South Africa, South Korea, Taiwan, and the United Kingdom).

[54] PCAOB Rel. No. 2009–003, at 5.

[55] *See id.* at 9.

[56] *See id.* at 8–9.

[57] *See id.* at 13–14 (''[F]irms must register with the Board in order to engage in certain professional activity directly related to, and affecting, U.S. financial markets, and all registered firms are subject to the Act and the rules of the Board irrespective of their location. A registered firm is subject to various requirements and conditions, including PCAOB Rule 4006's requirement to cooperate in an inspection. In addition, as reflected in Section 102(b)(3) of the Act, a firm's compliance with Board requests for information is a condition of the continuing effectiveness of the firm's registration with the Board.''). The Board also reiterated that it ''does not view non-U.S. legal restrictions or the sovereignty concerns of local authorities as a sufficient defense in a Board disciplinary proceeding . . . for failing or refusing to provide information requested in an inspection.'' *Id.* at 14; *accord* PCAOB Rel. No. 2008–007, at 16 n.35.

[58] Order Approving Proposed Amendment to Board Rules Relating to Inspections, SEC Exchange Act Release No. 34–59991, at 3 (May 28, 2009).

[59] *Id.* at 5.

[60] *See Jurisdictions in Which the PCAOB Has Conducted Inspections (as of Dec. 31, 2009)* (Feb.

Continued

was still prevented from inspecting registered firms in mainland China, Hong Kong (to the extent an audit encompassed a company's operations in mainland China), Switzerland, and the European countries required to follow the European Union's Directive on Statutory Auditors.[61]

The Board responded to these obstacles in several ways[62] and, since 2010, the Board has inspected non-U.S. firms in an additional 20 jurisdictions, bringing the total number of non-U.S. jurisdictions in which the PCAOB has conducted inspections to 53.[63] Where needed, the Board enters into formal bilateral cooperative agreements with non-U.S. regulators, and has done so with authorities in 25 jurisdictions.[64] The Board continues to publish its Denied Access List, which identifies the jurisdictions where the PCAOB cannot conduct inspections because foreign authorities have denied access, the auditors from those jurisdictions that issued audit reports filed with the Commission, and those auditors' non-U.S. public company clients.[65] The Board also still adheres to the registration approach it adopted in 2010 and maintains a public list of the jurisdictions whose applicants are subject to that approach.[66]

All told, more than 840 non-U.S. firms from more than 80 jurisdictions are registered with the Board. Over 200 of those firms, from more than 40 jurisdictions, are presently subject to PCAOB inspection on a triennial basis because they have chosen to audit issuers.[67] As of the date of this release, as reflected on the Board's website,[68] the Board can conduct inspections everywhere it needs to do so except in mainland China and Hong Kong.

Board Investigations of Non-U.S. Firms

The Board has conducted numerous investigations in which it appeared that an act, practice, or omission to act by a non-U.S. firm or its associated persons might have violated an applicable law, rule, or standard. In the course of those investigations, the Board has used a variety of tools, provided for in the Act and the Board's rules, to access relevant documents and information. Using those tools, the Board has requested and obtained audit work papers and other documents and information from non-U.S. firms and associated persons, and has conducted interviews and testimony of non-U.S. firm personnel.

In many of those instances, the Board coordinated its investigation with a non-U.S. regulator with which it had entered a bilateral cooperative arrangement. Those cooperative arrangements have allowed the Board and its international counterpart to communicate and share information, facilitating the Board's access to the documents and information it needed to conduct the investigation. In some but not all circumstances, in parallel with the Board's investigation, a non-U.S. regulator may conduct its own investigation of the same firm or associated persons for possible violations under the regulator's laws and standards.

Many of the Board's investigations of non-U.S. firms or their associated persons remain confidential, because Board investigations are non-public and cannot be disclosed unless they have resulted in the imposition of disciplinary sanctions.[69] The Board does, however, disclose its settled and adjudicated disciplinary orders imposing sanctions.[70] To date, the Board has sanctioned more than 50 non-U.S. registered firms and more than 60 associated persons of such firms, from 24 non-U.S. jurisdictions.[71] In addition to the investigations that resulted in the imposition of sanctions, the Board also has conducted investigations that did not result in sanctions in numerous other non-U.S. jurisdictions. Yet despite these results, the Board has been unable to complete some investigations of non-U.S. firms or their personnel because they refused to cooperate with an investigation based on a position taken

3, 2010), *available at https://pcaob-assets.azureedge.net/pcaob-dev/docs/default-source/inspections/documents/12-31_jurisdictions.pdf?sfvrsn=2c09bd73_0* (adding Belize, Bolivia, Cayman Islands, Norway, Papua New Guinea, Philippines, Russia, Ukraine, and United Arab Emirates).

[61] See PCAOB Publishes Updated Staff Guidance Related to Registration Process for Applicants from Certain Non-U.S. Jurisdictions (June 1, 2010), available at *https://org/events/news-releases/news-release-detail/pcaob-publishes-updated-staff-guidance-related-to-registration-process-for-applicants-from-certain-non-u-s-jurisdictions_289.*

[62] In 2009, the Board began publishing a list of registered firms whose first inspections were overdue, which identified the jurisdiction in which each firm was located. *See* PCAOB Rel. No. 2009–003, at 10–11. In 2010, the Board expanded the publication to include a list of non-U.S. public companies with securities traded in U.S. markets that had retained a registered firm the Board could not inspect because of asserted restrictions based on non-U.S. law or objections on grounds of national sovereignty (the ''Denied Access List''). *See PCAOB Publishes List of Issuer Audit Clients of Non-U.S. Registered Firms in Jurisdictions where the PCAOB is Denied Access To Conduct Inspections* (May 18, 2010), *available at https://pcaobus.org/news-events/news-releases/news-release-detail/pcaob-publishes-list-of-issuer-audit-clients-of-non-u-s-registered-firms-in-jurisdictions-where-the-pcaob-is-denied-access-to-conduct-inspections_284* (''The auditors of the issuers appearing on this list are located in [mainland] China, Hong Kong, Switzerland, and 18 European Union countries. The PCAOB continues to work to eliminate obstacles to inspections in these jurisdictions.'').

Also, in October 2010, the Board modified its approach to registration applications from firms in jurisdictions where there were unresolved obstacles to inspections, stating that ''its consideration of new applications from firms in those jurisdictions will no longer be premised on an expectation that those obstacles will be resolved without undue delay to any necessary PCAOB inspection of the firm.'' *Consideration of Registration Applications From Public Accounting Firms in Non-U.S. Jurisdictions Where There Are Unresolved Obstacles to PCAOB Inspections,* PCAOB Rel. No. 2010–007, at 2–3 (Oct. 7, 2010). A list of those jurisdictions is maintained on the PCAOB's website. *See* Frequently Asked Questions Regarding Issues Relating to Non-U.S. Accounting Firms (Apr. 20, 2021), *available at https://pcaobus.org/oversight/registration/non_us_registration_faq* (FAQ 6).

[63] *See Non-U.S. Jurisdictions Where the PCAOB has Conducted Oversight, available at https://pcaobus.org/oversight/international/international/pcaob-inspections-of-registered-non-u-s--firms* (adding Austria, Bahamas, Denmark, Finland, France, Germany, Hungary, Italy, Jamaica, Luxembourg, Malaysia, Netherlands, Nicaragua, Nigeria, Pakistan, Spain, Sweden, Switzerland, Thailand, and Turkey).

[64] *See* PCAOB Cooperative Arrangements with Non-U.S. Regulators, *available at https://pcaobus.org//international/regulatorycooperation.* Although a formal bilateral agreement is not necessarily a prerequisite to a PCAOB inspection in a non-U.S. jurisdiction, the PCAOB often enters into such agreements with foreign audit regulators to minimize administrative burdens and potential legal or other conflicts that non-U.S. firms might face in their home countries.

[65] *See* Audit Reports Issued by PCAOB-Registered Firms in Jurisdictions where Authorities Deny Access to Conduct Inspections, *available at https://pcaobus.org/oversight/international/denied-access-to-inspections* (identifying jurisdictions where the Board has been denied access to conduct inspections).

[66] *See* Frequently Asked Questions Regarding Issues Relating to Non-U.S. Accounting Firms (Apr. 20, 2021), *available at https://pcaobus.org/oversight/registration/non_us_registration_faq* (FAQ 6, identifying jurisdictions where obstacles to inspection exist). This list of jurisdictions is broader than the Denied Access List, because this list includes certain European jurisdictions where the Board presently does not need to conduct inspections because no registered firms in the jurisdiction are issuing audit reports, but where an agreement regarding inspections would need to be reached before any future inspections could take place.

[67] Currently, there are no non-U.S. firms that the PCAOB is required by the Act to inspect on an annual basis.

[68] *See* International, *available at https://pcaobus.org/oversight/international* (providing a map showing where the Board currently is able to conduct oversight of registered firms and where the Board currently is denied the necessary access to conduct oversight activities).

[69] *See* Section 105(b)(5)(A) of the Act.

[70] When the Board imposes sanctions, the Board's disciplinary action is stayed if the respondent applies for Commission review of the Board's order or if the Commission initiates such review on its own. In either situation, the Board's sanctions remain stayed (and non-public) unless and until the Commission lifts the stay. *See* Section 105(e)(1) of the Act. After the stay is lifted, the Board's order may be made public. *See* Section 105(d)(1)(C) of the Act.

[71] *See* Enforcement Actions, *available at https://pcaobus.org/oversight/enforcement/enforcement-actions.*

by non-U.S. authorities in their jurisdiction.[72]

The Holding Foreign Companies Accountable Act

Against this backdrop, Congress enacted the HFCAA. The HFCAA, which amends Section 104 of the Act, calls for the Board to determine whether it is unable to inspect or investigate completely registered firms located in a foreign jurisdiction because of a position taken by an authority in that jurisdiction.[73] The HFCAA, among other things, also mandates that after the Board makes such a determination, the Commission shall require covered issuers that retain firms subject to the Board's determination to make certain disclosures in their annual reports and, eventually, if certain conditions persist, shall prohibit trading in those issuers' securities.[74]

The Board's determinations under the HFCAA supplement, rather than supplant, the Board's other authorities under the Act. A registered firm's cooperation in and compliance with Board requests during inspections and investigations continues to be a condition to the continuing effectiveness of its registration with the Board. Failure to cooperate with a Board inspection or investigation still can result in the imposition of disciplinary sanctions, including civil money penalties and revocation of the firm's registration. Therefore, firms must consider their obligations to comply with PCAOB inspection and investigation demands when they choose to become and remain registered with the Board and when they accept or continue client engagements.

Discussion of the Proposed Rule

The HFCAA does not specify the procedure the Board should follow when making determinations. Nor does the HFCAA specify the content of the Board's determinations; the manner in which any such determination should be shared with the Commission; how, and in what format, any such determination should be made publicly available; the effective date or duration of any such determination; or the manner in which any such determination can be reaffirmed, modified, or vacated. The proposed rule establishes those facets of the Board's determination process.

Although the HFCAA does not expressly require the Board to adopt a rule governing the determinations it makes under the statute, the Board believes that a rule will inform investors, registered firms, issuers, audit committees, foreign authorities, and the public at large as to how the Board will perform its functions under the statute. Furthermore, a Board rule will promote consistency in the Board's processes regarding determinations under the HFCAA.[75] Commenters generally agreed that a rule governing the Board's determination process would promote transparency and consistency and reduce regulatory uncertainty.

Two Types of Board Determinations Under the HFCAA

The HFCAA requires that the Board determine whether it is unable to inspect or investigate completely registered public accounting firms that have a branch or office that is located in a foreign jurisdiction because of a position taken by one or more authorities in that jurisdiction. The proposed rule provides that the Board may make two types of determinations: Determinations as to a particular foreign jurisdiction and determinations as to a particular registered firm. Those two types of determinations are addressed in subparagraphs (a)(1) and (a)(2) of proposed Rule 6100.

Determinations as to Registered Firms Headquartered in a Particular Foreign Jurisdiction

The Board believes that firms headquartered in a foreign jurisdiction necessarily have a branch or office that is located in that jurisdiction. Taking that into account, subparagraph (a)(1) of the proposed rule provides that the Board may determine that it is unable to inspect or investigate completely registered firms [76] headquartered in a foreign jurisdiction because of a position taken by one or more authorities in that jurisdiction. In other words, a jurisdiction-wide determination under subparagraph (a)(1) would apply to all firms *headquartered* in that jurisdiction.

The Board adopted subparagraph (a)(1) as proposed. Commenters generally supported the Board's proposed approach to jurisdiction-wide determinations. Several commenters noted that jurisdiction-wide determinations would be consistent with the HFCAA or otherwise appropriate, and several other commenters stated that having such determinations apply to firms that are headquartered in the jurisdiction would likewise be appropriate. No commenter asserted that jurisdiction-wide determinations would be inconsistent with the HFCAA or otherwise inappropriate.

The Board believes that a jurisdiction-wide approach to its determinations under the HFCAA is consistent with the structure of the statute. The statute requires the Board's determinations to be based on ''a position taken by an authority in the foreign jurisdiction.'' It follows that if a foreign authority articulates or maintains a position that applies generally to PCAOB inspections or investigations in a foreign jurisdiction, that position could provide the basis for a jurisdiction-wide determination. Hence, the statute, in the Board's view, can reasonably be interpreted to allow the Board to make jurisdiction-wide determinations.[77]

Having a jurisdiction-wide approach at the Board's disposal is important for consistency and efficiency. When the obstacles to completing inspections and investigations are not specific to individual registered firms, but instead reflect threshold or general positions taken by a foreign authority, the Board believes that it should be able to address those obstacles on a jurisdiction-wide basis in a consistent manner and in a single determination. Under those circumstances, separate determinations as to each registered firm in the jurisdiction should not be required.

The proposed rule provides that jurisdiction-wide determinations would be limited to registered firms that are

[72] *See, e.g., Crowe Horwath (HK) CPA Limited,* PCAOB Rel. No. 105–2017–031 (July 25, 2017) (noncooperation with a Board investigation based on positions taken by Chinese authorities); *Kim Wilfred Ti,* PCAOB Rel. No. 105–2016–004 (Jan. 12, 2016) (same); *Derek Wan Tak Shing,* PCAOB Rel. No. 105–2016–003 (Jan. 12, 2016) (same); *Edith Lam Kar Bo,* PCAOB Rel. No. 105–2016–002 (Jan. 12, 2016) (same); *PKF [Hong Kong],* PCAOB Rel. No. 105–2016–001 (Jan. 12, 2016) (same).

[73] *See* HFCAA § 2(i)(2)(A), 15 U.S.C. 7214(i)(2)(A) (requiring that the Commission identify certain issuers that ''retain[ ] a registered public accounting firm that has a branch or office that . . . is located in a foreign jurisdiction . . . and . . . the Board is unable to inspect or investigate completely because of a position taken by an authority in [that] foreign jurisdiction . . . , as determined by the Board'').

[74] *See* HFCAA §§ 2(i)(2)(B), 2(i)(3), 3(b), 15 U.S.C. 7214(i)(2)(B), 7214(i)(3), 7214a(b).

[75] The Act states that ''[t]he rules of the Board shall, subject to the approval of the Commission[,] . . . provide for the operation and administration of the Board, the exercise of its authority, and the performance of its responsibilities under this Act.'' Section 101(g)(1) of the Act.

[76] The HFCAA refers to a firm's ''branch or office'' that the Board is unable to inspect or investigate completely. HFCAA § 2(i)(2)(A)(i), 15 U.S.C. 7214(i)(2)(A)(i). The Board does not inspect or investigate branches or offices. Rather, the Board inspects registered firms and investigates potential violations by registered firms or their associated persons. Accordingly, the proposed rule refers to the Board's inability to inspect or investigate registered firms.

[77] *See, e.g.,* 166 Cong. Rec. H6033 (daily ed. Dec. 2, 2020) (statement of Rep. Gonzalez) (''[T]he act should be read to apply to companies where the auditor that signs the audit report is located in a jurisdiction that does not permit PCAOB inspection access.'').

''headquartered'' in the jurisdiction. The Board believes that a position taken by a foreign authority will impact registered firms headquartered in the jurisdiction, but its impact on firms that are headquartered elsewhere can turn on multiple factors, including the extent of a firm's presence in the jurisdiction and the nature and extent of the audit work it performs in that jurisdiction. Limiting jurisdiction-wide determinations to firms that are headquartered in the jurisdiction is intended to ensure that these determinations are appropriately tailored and do not encompass firms that have a physical presence of any kind, or personnel of any number, in the jurisdiction. Consistent with the scope of the HFCAA, however, the proposed rule provides that the Board may make individualized determinations as to firms that have an ''office'' in a noncooperative jurisdiction but are headquartered elsewhere, as discussed below.

A firm is ''headquartered,'' as that term is used in the proposed rule, at its principal place of business (*i.e.,* where the firm's management directs, controls, and coordinates the firm's activities).[78] The Board would presume that a firm is headquartered at the physical address reported by the firm as its headquarters to the Board in the firm's required filings.[79] Absent an indication that the headquarters address reported by a firm may not be its principal place of business, the Board would use that address to determine where the firm is ''headquartered'' for purposes of the proposed rule. If questions arise as to whether a firm's reported headquarters address is the firm's principal place of business, however, the Board may consider other relevant and reliable information regarding the firm and may request additional information from the firm pursuant to the Board's rules when determining where a firm is headquartered.[80]

Several commenters stated that it was appropriate for the Board to look at a firm's required filings with the Board in the first instance for information as to where the firm is headquartered. One commenter suggested that the Board look beyond such filings and also consider a firm's filings with its home-country regulator as well as other facts and circumstances regarding the firm. As noted in the preceding paragraph, the Board retains the ability to request and consider additional information—including the information identified by the commenter—if any questions arise regarding the location of a firm's headquarters. Another commenter, contemplating that the Board might look to filings of Form AP for information as to where a firm is headquartered, cautioned that such forms may not be timely filed.[81] The Board intends to rely on annual reports on Form 2 rather than Form APs for such information, though the Board is not precluded from considering information on Form APs or any other relevant and reliable information.[82]

In some instances, a member firm of an international firm network might be headquartered in a jurisdiction that becomes subject to a jurisdiction-wide determination of the Board. In such a circumstance, if that member firm is a separate legal entity from the other member firms in the network and signs audit reports in its own name, the Board would not treat other member firms in the network as being ''located'' or having an ''office'' in that jurisdiction merely because they are part of the same network as a member firm subject to the jurisdiction-wide determination.[83] One commenter addressed this topic and agreed with this approach.

Based on its experience with inspections and investigations in foreign jurisdictions, the Board anticipates that most determinations made under proposed Rule 6100 would be jurisdiction-wide determinations under subparagraph (a)(1). Historically, the positions taken by foreign authorities have impaired the Board's ability to conduct inspections or investigations in the jurisdiction generally.

Some of the positions taken by foreign authorities have been based upon ''gatekeeper'' laws, which provide that a registered firm can transfer its audit work papers to the Board only via a local non-U.S. regulator. (By contrast, no audit oversight law in the U.S. requires foreign auditor oversight authorities to involve the PCAOB when seeking audit work papers from a U.S. firm.) As noted above, the Board has considerable experience resolving conflicts that arise from gatekeeper laws using bilateral arrangements, or statements of protocol, whereby the non-U.S. regulator facilitates the PCAOB's access to audit work papers and associated information that registered firms are obligated to provide to the Board upon request. The Board's ability to conduct inspections or investigations could become impaired in any of these jurisdictions, however, if such an arrangement were terminated; if non-performance under an arrangement were significant; or if, in the case of countries within the European Economic Area, an arrangement were rendered ineffective because the European Commission revoked or failed to renew its ''adequacy decision'' regarding the PCAOB.[84] The resulting impairment would have jurisdiction-wide impact, and thus could give rise to a jurisdiction-wide determination under subparagraph (a)(1) of the proposed rule. The Board believes that a jurisdiction-wide determination would be an efficient, appropriate response to such an impairment.

[78] *See, e.g., Hertz Corp.* v. *Friend,* 559 U.S. 77, 92–93 (2010) (defining ''principal place of business'' in the context of federal diversity jurisdiction, and further explaining that ''in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, *i.e.,* the 'nerve center,' and not simply an office where the corporation holds its board meetings'').

[79] When registering with the Board, an applicant must provide its ''HEADQUARTERS PHYSICAL ADDRESS'' in Item 1.2.1 of its application for registration on Form 1. Each year thereafter, in Item 1.2.a of its annual report on Form 2, a firm must provide the ''Physical address of the Firm's headquarters office.''

[80] *See* PCAOB Rule 4000(b) (''In furtherance of the Board's inspection process, the Board may at any time request that a registered public accounting firm provide to the Board additional information or documents relating to information provided by the firm in any report filed pursuant to Section 2 of these Rules, or relating to information that has otherwise come to the Board's attention.''). This approach aligns with the Board's decade-long practice when assessing registration applications from firms located in non-U.S. jurisdictions where there are obstacles to PCAOB inspections. This approach has been applied to applicants that are headquartered in such jurisdictions, and the Board has sought additional information from applicants when necessary to assess where they are headquartered.

[81] Item 3.1.7 of Form AP identifies the office (not the headquarters) of the firm that issued the audit report for the referenced audit engagement, but Item 4.1 of Form AP identifies the headquarters' office location of the other accounting firms that contributed 5% or more of the total audit hours.

[82] In any event, PCAOB Rule 3211, *Auditor Reporting of Certain Audit Participants,* already requires timely filing of accurate Form APs, and the failure to comply with that rule can provide the basis for inspection findings or disciplinary sanctions.

[83] *See* SEC Exchange Act Release No. 91364, at 4 n.8.

[84] Article 47 of the Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts requires that the European Commission issue an adequacy decision regarding a third country audit regulator (such as the PCAOB) and that regulator's ability to safeguard audit work papers and related confidential information before a European Union member state audit regulator can execute a working arrangement allowing firms to provide access to such information. *See* Directive 2014/56/EU, *available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0056.* The European Commission's July 2016 adequacy decision with respect to the PCAOB is set to expire in July 2022.

Apart from gatekeeper laws, foreign authorities' positions also may be based on other substantive laws (*e.g.,* personal data protection laws, state secrecy laws, banking secrecy laws, or commercial secrecy laws) that impair the Board's ability to conduct inspections or investigations by obstructing the Board's access to firm personnel, audit work papers, or other documents or information relevant to an inspection or investigation. The Board also has considerable experience working collaboratively with non-U.S. regulators to employ working practices that enable compliance with such non-U.S. laws without impairing the Board's ability to complete inspections or investigations. The proposed rule contemplates circumstances in which a cooperative resolution to those legal conflicts might not be achieved.

In those circumstances, the Board believes that investors and the public interest would be best served by making a jurisdiction-wide determination under the HFCAA, even if the foreign jurisdiction's law (or interpretation or application of that law) affects the Board's ability to inspect or investigate only certain types of audit engagements. For instance, a foreign jurisdiction might deny to the PCAOB access to critical parts of the audit work papers for entities operating in a particular business sector (*e.g.,* financial services) or with particular business models (*e.g.,* state-owned enterprises). In such a case, even if only a few registered firms in that jurisdiction presently are auditing issuers in that sector or with that business model, the Board would assess whether its access would be equally impaired should any registered firm in the jurisdiction perform the restricted engagements. If the foreign authority's position applies generally to firms within the jurisdiction, then it impairs the Board's ability to conduct inspections or investigations completely on a jurisdiction-wide basis, regardless of the differences among registered firms' client portfolios at the time of the Board's determination. No commenter challenged this reasoning, nor did any commenter suggest that investors or the public interest would be better served if the Board were to make determinations as to particular firms, rather than jurisdiction-wide determinations, in such circumstances.

In the situation described above, the Board does not believe that firm-by-firm determinations would be appropriate. While the Board could make a determination as to particular firms under subparagraph (a)(2) of the proposed rule based, for instance, on the composition of each firm's client portfolio at a moment in time, the Board believes that such an approach may not effectively accomplish the HFCAA's objectives. For instance, it might incentivize an issuer whose audit engagement cannot be inspected or investigated by the Board (a financial institution or state-owned enterprise in the example) to switch audit firms frequently. Specifically, if the issuer's audit firm were made subject to a Board determination under the HFCAA, the issuer could switch to another audit firm in the jurisdiction that had not previously handled a restricted engagement and, when the Board subsequently issued a determination under the HFCAA as to the issuer's new audit firm, the issuer could switch yet again. Such purposeful migration by issuers could trigger a perpetual cycle of Board determinations as to particular audit firms, while the issuers potentially evade some or all of the intended consequences of the HFCAA. A jurisdiction-wide determination, by contrast, would eliminate these concerns. No commenter disagreed with this analysis or the Board's rationale.

The jurisdiction-wide determinations contemplated by subparagraph (a)(1) of the proposed rule also comport with the historical practice of identifying publicly the jurisdictions where there are unresolved obstacles to Board inspections or investigations. Since 2010, information of this kind has been posted on the PCAOB's website, for two purposes: To notify investors and potential investors of the public companies whose audit reports were issued by firms from those jurisdictions, and to notify firms considering potential registration with the Board of the consequences of obstacles to inspections in their jurisdictions.[85]

Jurisdiction-wide determinations would rest, as the HFCAA directs, on whether the Board is able ''to inspect or investigate completely'' firms in the jurisdiction. The HFCAA, however, does not define what it means ''to inspect or investigate completely.'' The Board does not view that phrase as limited to instances where the Board started, but was unable to finish, an inspection or investigation of a registered firm, because foreign authorities' positions also can make it impossible or infeasible, as a practical matter, for the Board to attempt to commence such inspections or investigations in the first place. In other words, the Board may make a determination under the HFCAA under a range of circumstances, including when it is not able to commence an inspection or investigation or when, based on the Board's knowledge and experience, it has concluded that commencing an inspection or investigation would be futile as a result of the position taken by a foreign authority.

With that in mind, the proposed rule ties the Board's ability to ''inspect or investigate completely'' to the three core principles that guide the Board's framework for international cooperation. Specifically, the Board will consider whether it (1) can select the audits and audit areas it will review during inspections and the potential violations it will investigate; (2) has timely access to firm personnel, audit work papers, and other documents and information relevant to its inspections and investigations, and the ability to retain and use such documents and information; and (3) can otherwise conduct its inspections and investigations in a manner consistent with the Act and the Board's rules. For a further discussion of how these three principles would inform the Board's assessment of whether it can ''inspect or investigate completely,'' see below.

The Board's jurisdiction-wide determinations under the proposed rule would be based on ''a position taken by one or more authorities'' in the foreign jurisdiction. While the proposed rule refers to a singular ''position,'' that term encompasses all of the various positions taken by authorities in the jurisdiction that, when aggregated together, collectively constitute the position of authorities in the jurisdiction. In a similar vein, the proposed rule's reference to ''one or more authorities'' acknowledges that, in some jurisdictions, multiple authorities can take positions that impair the Board's ability to conduct inspections or investigations. Those ''authorities'' are not limited to a ''foreign auditor oversight authority,'' as that phrase is defined in the Act,[86] but rather include any authority whose position can obstruct the Board's oversight. Such authorities may include, for example, securities regulators, industry regulators, data protection authorities, national security bodies, foreign

[85] *See* Audit Reports Issued by PCAOB-Registered Firms in Jurisdictions where Authorities Deny Access to Conduct Inspections, *available at https://pcaobus.org/oversight/international/denied-access-to-inspections*; Frequently Asked Questions Regarding Issues Relating to Non-U.S. Accounting Firms (Apr. 20, 2021), *available at https://pcaobus.org/oversight/registration/non_us_registration_faq* (FAQ 6); *see also* International, *available at https://pcaobus.org/oversight/international/* (providing map showing where the Board currently can and cannot conduct oversight activities).

[86] *See* Section 2(a)(17) of the Act.

ministries, or authorities of political subdivisions (*e.g.,* a provincial authority).

Determinations as to a Particular Registered Firm With an Office in a Foreign Jurisdiction

Although the Board anticipates that most determinations under the proposed rule would be jurisdiction-wide determinations, the Board cannot anticipate every scenario that it might encounter when conducting oversight of firms in foreign jurisdictions. In light of that practical limitation, subparagraph (a)(2) of the proposed rule provides that the Board may determine that it is unable to inspect or investigate completely a particular registered firm that has an office [87] located in a foreign jurisdiction because of a position taken by one or more authorities in that jurisdiction. This provision would complement the Board's ability to make jurisdiction-wide determinations in two important respects.

First, if a foreign authority obstructs a Board inspection or investigation of a particular firm headquartered in the jurisdiction—but does not obstruct inspections or investigations in a more general manner that might apply to all firms in the jurisdiction—subparagraph (a)(2) provides the Board with an avenue for making a more tailored determination under the HFCAA when a jurisdiction-wide determination might be inappropriately broad.

Second, subparagraph (a)(2) allows the Board to make determinations under the HFCAA as to firms that are not headquartered in the foreign authority's jurisdiction but have an office located there. In this respect, a determination under subparagraph (a)(2) can supplement a jurisdiction-wide determination under subparagraph (a)(1) that applies to firms headquartered in the jurisdiction. Furthermore, the reach of subparagraph (a)(2) ensures that the Board's determinations under the proposed rule can match the scope of its mandate under the HFCAA.

The Board's approach to determining where a firm's offices are located is similar to the Board's approach to determining where a firm is headquartered. The Board will look principally to the firm's filings with the Board,[88] but if there is any uncertainty as to whether a firm has an office in a jurisdiction, the Board may consider other information regarding the firm and may request additional information from the firm pursuant to Rule 4000(b).

Apart from those two distinguishing features (namely, that determinations are directed to a particular firm and can reach firms that have an office in the foreign jurisdiction but are not headquartered there), subparagraph (a)(2) mirrors the operation of subparagraph (a)(1). The Board's inability ''to inspect or investigate completely'' is tied to the three principles that guide the Board's approach to international cooperation, as noted above and discussed further below. The phrase ''position taken by one or more authorities'' has the same meaning as in subparagraph (a)(1). Finally, if a member firm of an international firm network becomes subject to a Board determination under subparagraph (a)(2), and is a separate legal entity from the other member firms in the network and signs audit reports in its own name, the Board would not treat it as an ''office'' of other member firms within the network, and accordingly the other member firms would not be subject to that Board determination under subparagraph (a)(2).

The Board adopted subparagraph (a)(2) as proposed, except for one addition to the subparagraph's title.[89] Commenters generally supported the Board's proposed approach to determinations as to a particular registered firm and stated that the distinction between those determinations and the jurisdiction-wide determinations contemplated in subparagraph (a)(1) is clear. Several commenters also stated that it is appropriate for the Board to look at a firm's required filings with the Board in the first instance for information as to where the firm's offices are located, though two commenters suggested that the Board look beyond such filings to ascertain or validate the location of a firm's offices. As previously noted, the Board retains the ability to consider other relevant and reliable information, including the information identified by the commenters, when determining where a firm's offices are located.

One commenter requested guidance about the application of the proposed rule when a firm that is headquartered in a cooperative jurisdiction uses local personnel in a noncooperative jurisdiction to perform an audit for an issuer located in the noncooperative jurisdiction. In such a circumstance, the firm could not be subject to a jurisdiction-wide determination under subparagraph (a)(1) because it is not headquartered in a noncooperative jurisdiction, but it could be subject to a determination under subparagraph (a)(2) if it has an office in the noncooperative jurisdiction.

Timing of Board Determinations

Subparagraph (a)(3) of the proposed rule addresses the timing of the Board's determinations under the HFCAA. Promptly after the Board's proposed rule becomes effective upon the Commission's approval, the Board will make any determinations under subparagraph (a)(1) or (a)(2) that are appropriate. Thereafter, the Board will consider, at least annually, whether changes in facts and circumstances support any additional determinations under subparagraph (a)(1) or (a)(2). If so, the Board will make such additional determinations, as and when appropriate, to allow the Commission on a timely basis to identify covered issuers in accordance with the Commission's rules.

The Board is well positioned to assess the facts and circumstances surrounding its inspections and investigations and gauge whether and when a determination is appropriate under the proposed rule. The relevant circumstances in a jurisdiction can change quickly and unpredictably because foreign authorities can enact or amend laws, issue or modify rules or regulations, change their interpretation or application of those laws and rules, and otherwise take new positions with limited or no notice. The proposed rule allows the Board to make new determinations whenever appropriate, while acknowledging that the Board's timing will be informed by the Commission's process for timely identifying covered issuers and also establishing that the Board will consider whether new determinations are warranted at least once each year.

When considering whether changed facts or circumstances provide a sufficient basis for a new Board

[87] The HFCAA authorizes the Board to make determinations as to firms having a ''branch'' or ''office'' in a foreign jurisdiction where the Board is unable to inspect or investigate completely because of a position taken by an authority in that jurisdiction. HFCAA § 2(i)(2)(A), 15 U.S.C. 7214(i)(2)(A). Unlike in other contexts (such as banking), however, there is no commonly recognized distinction between a ''branch'' and an ''office'' with respect to accounting firms. Accordingly, the proposed rule refers only to an ''office,'' which is a term commonly used by the Board in connection with its oversight programs. A majority of the commenters who addressed this rationale agreed with it.

[88] Firms are required to identify all of their offices when they first register with the Board (in Item 1.5 of the application for registration on Form 1) and annually thereafter (in Item 5.1 of the annual report on Form 2).

[89] The phrase ''Particular Registered Firm in a Foreign Jurisdiction'' has been revised to ''Particular Registered Firm With an Office in a Foreign Jurisdiction'' to mirror more closely the text of subparagraph (a)(2), create a parallel structure between the titles of subparagraphs (a)(1) and (a)(2), and provide a clearer contrast between the scope of those two subparagraphs.

determination, the Board may confront a number of different scenarios. It is not possible to identify with specificity all the developments that might lead to a new determination, but they could include the enactment of a new law or regulation, a change in the interpretation or the application of an existing law or regulation, the termination of or failure to perform under an existing cooperative arrangement, and the failure to take or renew an administrative action necessary to facilitate the Board's oversight. The Board's experience in a particular inspection or investigation also could supply the grounds for a new Board determination in accordance with the proposed rule.

The Board adopted subparagraph (a)(3) substantially as proposed.[90] The majority of commenters who addressed this issue expressed support for the Board's approach to the timing of determinations.

One commenter emphasized that the Board's approach should be sufficiently flexible so that Board determinations do not conflict with the language and intent of the HFCAA. The Board believes that subparagraph (a)(3) provides such flexibility, insofar as it provides that the Board will make any appropriate determinations promptly after the proposed rule becomes effective and thereafter will make additional determinations as and when appropriate to allow the Commission to identify covered issuers on a timely basis.

Another commenter suggested that the Board require firms to file special reports on Form 3 to apprise the Board of headquarters or office location changes. Such changes already are reported to the Board annually on Form 2. The Board does not believe that a new Form 3 reporting obligation should be imposed. If a firm opts to expose its issuer clients to the potential consequences of the HFCAA by moving the firm's headquarters to a jurisdiction that is subject to a jurisdiction-wide determination, such a change could be captured through the Board's current reporting procedures.[91] Moreover, if a firm that is headquartered outside a noncooperative jurisdiction opens an office in a noncooperative jurisdiction, the Board would not anticipate making a determination as to that particular firm under subparagraph (a)(2) without evidence that the Board's ability to inspect and investigate the firm completely has become restricted as a result of the opening of the new office. Lastly, if a firm that is subject to a Board determination moves its headquarters out of or closes all of its offices in a noncooperative jurisdiction, the firm is required to notify the Board within five days of that development pursuant to subparagraph (e)(4) of the proposed rule, discussed below.

Factors for Board Determinations

Paragraph (b) provides factors for Board determinations under the proposed rule. When determining whether it can ''inspect or investigate completely'' under subparagraph (a)(1) as to a particular jurisdiction or subparagraph (a)(2) as to a particular firm, the Board will assess whether ''the position taken by the authority (or authorities)'' in the jurisdiction ''impairs the Board's ability to execute its statutory mandate with respect to inspections or investigations,'' as detailed above.

To make this assessment, the Board will evaluate three factors, which correlate to the three principles that guide the Board's approach to international cooperation. These factors embody the access the Board needs, and already experiences nearly worldwide, to fulfill its inspection and investigation mandates. Conceding on these factors in particular jurisdictions would dilute the Board's oversight in a selective, unequal manner and would be detrimental to the PCAOB's mission. In other words, this framework promotes a level playing field for U.S. and non-U.S. registered firms, in accordance with the Act's directive that non-U.S. registered firms are subject to the Act and the Board's rules in the same manner and to the same extent as U.S. registered firms.

No commenter suggested other benchmarks or factors that the Board should employ when making determinations, and one commenter stated that the factors set forth in paragraph (b) are appropriate and clear. The Board adopted paragraph (b) as proposed, except for one addition to subparagraph (b)(2)'s second factor, as discussed below.

The first factor is ''the Board's ability to select engagements, audit areas, and potential violations to be reviewed or investigated.'' The ability to make such selections is critical to the Board's oversight activities and is embedded in its statutory mandate.[92] This factor would encompass situations in which a foreign authority takes the position that certain engagements, or certain parts of engagements, cannot be reviewed during an inspection, or that the Board cannot decide when (*i.e.,* in which inspection year) certain engagements will be reviewed. It also would encompass situations in which a foreign authority takes the position that the Board cannot decide what potential violations it will investigate. No commenter expressed the view that this factor is unclear or inappropriate or sought further guidance about it.

The second factor is ''the Board's timely access, and the ability to retain and use, any document or information (including through conducting interviews and testimony) in the possession, custody, or control of the firm(s) or any associated persons thereof that the Board considers relevant to an inspection or investigation.'' The Board's access to firm personnel, documents, and information is pivotal to its inspections and investigations, and is built into its mandate to oversee the audits of issuers that avail themselves of the U.S. capital markets.[93]

One commenter suggested that the Board add ''timely'' to this factor so that it refers to ''timely access,'' and, after consideration, the Board has made that revision. The Board agrees with the commenter that the Board cannot inspect or investigate completely if its access to documents or information is not timely. Unreasonable delays in obtaining documents or information hinder the Board's ability to execute its statutory mandate [94] and therefore its ability to protect the interests of investors and further the public interest. No other commenter made any suggestions regarding this factor, and no commenter asserted that this factor is

[90] For clarity, in the second sentence of the subparagraph, ''changes in the facts and circumstances'' has been changed to ''changes in facts and circumstances.''

[91] For instance, whenever the business mailing address of a firm's primary contact with the Board changes, the firm must file a special report on Form 3 that supplies the new address in Item 7.2. *See* PCAOB Rule 2203, *Special Reports.* Additionally, if a firm obtains a new license or certification to engage in the business of auditing or accounting from a governmental or regulatory authority, the firm must file a special report on Form 3 that identifies, in Item 6.2, the name of the state, agency, board, or other authority that issued the new license or certification. *See id.* And if a firm changes the jurisdiction under the law of which it is organized, the firm may file a Form 4 to succeed to the registration status of its predecessor. *See* PCAOB Rule 2109, *Procedure for Succeeding to the Registration Status of a Predecessor.*

[92] *See, e.g.,* Sections 104(d) and 105(b)(1) of the Act.

[93] *See, e.g.,* Sections 104(d) and 105(b)(2) of the Act.

[94] *See, e.g.,* Section 104(b) of the Act (specifying inspection frequency requirements); Section 105(b)(2)(B) of the Act (authorizing the Board to require production of audit work papers and other documents or information); PCAOB Rule 5103(b) (providing that requests for documents or information shall set forth ''a reasonable time . . . for production'').

unclear or inappropriate or sought further guidance about it.

The third factor is ''the Board's ability to conduct inspections and investigations in a manner consistent with the provisions of the Act and the Rules of the Board, as interpreted and applied by the Board.'' This provision captures all of the other aspects of the Board's inspection and investigation mandates not already subsumed in the first and second factors. That includes the Board's ability to satisfy inspection frequency requirements,[95] to identify potentially violative acts during inspections,[96] to impose sanctions for noncooperation with an investigation,[97] and to share information with the Commission and other regulators.[98] No commenter indicated that this factor is unclear or inappropriate or sought further guidance about it.

Importantly, these three factors do not function as separate prerequisites for a Board determination. Instead, impairment in any one respect may be sufficient under the circumstances to support a Board determination. To underscore the disjunctive nature of this three-factor analysis, the proposed rule provides that the Board will assess whether its ability to execute its mandate has been impaired in ''one or more'' of these three respects. No commenter objected to, or expressed concerns about, this approach.

Additionally, to make a determination under the proposed rule, the Board does not need to conclude that it has been impaired as to both its inspections and its investigations. The HFCAA authorizes the Board to make a determination if the Board is unable to inspect ''or'' investigate completely, and the proposed rule uses ''or'' in similar fashion: It is enough that the Board is impaired in its ability to execute its mandate with respect to either inspections or investigations. This approach is consistent with the HFCAA, and no commenter suggested otherwise.

Basis for Board Determinations

Paragraph (c) of the proposed rule addresses the basis for a Board determination. This provision establishes, first and foremost, that when assessing whether its ability to execute its mandate has been impaired, the Board may consider ''any documents or information it deems relevant.'' From there, the proposed rule specifies, for the avoidance of doubt, three non-exclusive categories of documents and information that the Board can rely upon when making a determination. No commenter objected to this approach or expressed concern about the three non-exclusive categories identified in the proposed rule, and one commenter stated that paragraph (c) provides adequate and substantive guidance. The Board adopted paragraph (c) as proposed.

Subparagraph (c)(1) states that the Board may consider a foreign jurisdiction's laws, statutes, regulations, rules, and other legal authorities; in other words, the black-letter law of the foreign jurisdiction (and any political subdivisions thereof) in all of its varying forms. The Board also may consider relevant interpretations of those laws, whether by the promulgating authority or others, as well as real-world applications of those laws.

Subparagraph (c)(2) provides that the Board may consider the entirety of its efforts to reach and secure compliance with agreements with foreign authorities in the jurisdiction. In so doing, the Board can take into account whether an agreement was reached, the terms of any such agreement, and the foreign authorities' interpretation of and performance under any such agreement.

Subparagraph (c)(3) recognizes that the Board may consider its experience with foreign authorities' other conduct and positions relative to Board inspections or investigations. This allows the Board to consider the totality of a foreign authority's prior conduct and positions in all contexts, including public and private statements made, positions asserted, and actions taken. This provision also may encompass circumstances where a foreign authority precipitously changes its position regarding PCAOB access without making any change to its laws or demanding any form of cooperative agreement.

Together, these provisions establish that the Board can consider any relevant information (including, but not limited to, the three categories of information discussed above) when making a determination. As a corollary, paragraph (d) of the proposed rule establishes that the Board's determination need not depend on the Board's ''commencement of, but inability to complete, an inspection or investigation.'' The Board should not be expected to attempt to initiate inspections or investigations in a foreign jurisdiction that rejects the guiding principles for international cooperation, because such futile efforts would not advance the Board's mission of protecting investors and furthering the public interest in the preparation of informative, accurate, and independent audit reports. No commenter challenged the Board's reasoning or expressed the view that the Board must initiate an inspection or investigation as a prerequisite to making a determination under the HFCAA. Nor did any commenter indicate that the approach described in paragraph (d) is inappropriate. The Board adopted paragraph (d) as proposed.

Form and Publication of Board Determinations

Board Reports to the Commission

The HFCAA does not specify how the Board should communicate its determinations to the Commission. Subparagraph (e)(1) of the proposed rule establishes that process.

When the Board makes a determination, whether as to a particular jurisdiction under subparagraph (a)(1) or a particular firm under subparagraph (a)(2), the Board's determination will be issued in the form of a report to the Commission.[99] Such a reporting process is authorized under Sections 101(c)(5), 101(g)(1), and 101(f)(6) of the Act.[100]

The Board's report will describe its assessment of whether the position taken by the foreign authority (or authorities) impairs the Board's ability to execute its mandate with respect to inspections or investigations. The report will analyze the relevant factor(s) set forth in paragraph (b) and describe the basis for the Board's conclusions. The Board will identify the firm(s) subject to the Board's determination in two ways: by the name under which the firm is registered with the Board, and by the firm's identification number with the Board. No commenter identified any additional information that should be included in the Board's reports to the Commission.

The Board adopted subparagraph (e)(1) as proposed but with one modification: The Board will identify the firm(s) to which a determination applies in an appendix to the Board's report. Identifying such firms in a

[95] *See* Section 104(b) of the Act.

[96] *See* Section 104(c)(1) of the Act.

[97] *See* Section 105(b)(3)(A) of the Act.

[98] *See* Sections 104(c)(2) and 105(b)(4)–(5) of the Act.

[99] The Board will decide whether to conduct a public or non-public meeting to consider a potential determination under the HFCAA in accordance with the PCAOB bylaws. *See* Bylaw 5.1, *Governing Board Meetings.*

[100] *See* Section 101(c)(5) of the Act (the Board shall ''perform such other duties or functions as the Board . . . determines are necessary or appropriate . . . to carry out this Act''); Section 101(g)(1) of the Act (the Board's rules ''shall . . . provide for . . . the performance of its responsibilities under this Act''); Section 101(f)(6) of the Act (the Board is authorized to ''do any and all . . . acts and things necessary, appropriate, or incidental to . . . the exercise of its obligations . . . imposed'' by the Act).

separate appendix will facilitate the Board's efforts to keep the list of firms subject to the determination current, as discussed below.

Publication of Board Reports

Promptly after the Board issues a report to the Commission, a copy of the report will be made publicly available on the PCAOB's website. The Board expects that a copy of the report ordinarily will be prominently featured on the Board's website on or about the same day the Board issues its report to the Commission.

Subparagraph (e)(2) of the proposed rule specifies, however, that the content of the Board's publicly available report will be subject to two limitations. First, the Board will be bound by Section 105 of the Act, which provides, in pertinent part, that ''all documents and information prepared or received by or specifically for the Board . . . in connection with an inspection . . . or with an investigation . . . shall be confidential . . . , unless and until presented in connection with a public proceeding or released'' in accordance with Section 105(c) of the Act.[101] If the Board's report contains material encompassed by Section 105(b)(5)(A) of the Act, such material will be redacted from the publicly available version of the report posted on the PCAOB's website, in accordance with the Act.

Second, while the Board does not anticipate that such situations will frequently arise, the version of the Board's report posted on the PCAOB's website will be redacted if it contains proprietary, personal, or other information protected by applicable confidentiality laws. In this respect, the proposed rule aligns with the Act's treatment of registration applications and annual reports filed with the Board, which the Board may make publicly available subject to ''applicable laws relating to the confidentiality of proprietary, personal, or other information.'' [102]

Commenters generally supported redacting from the Board's publicly available reports any information that is subject to applicable confidentiality laws. One commenter suggested that redaction should not be limited to information covered by applicable confidentiality laws, but rather should be based on broader concepts of confidentiality. That commenter offered one example of such a concept, but that example—accountants' professional responsibilities of confidentiality—does not apply to the Board's performance of its oversight functions. Another commenter similarly suggested that redaction should extend to all confidential information whether explicitly covered by confidentiality laws or not, but that commenter did not suggest how to define this broader concept of confidential information or what categories of information it would encompass. Neither of these commenters identified any specific type of relevant information that is not subject to a confidentiality law but is nevertheless worthy of protection under a broader view of confidential information.

Besides one minor revision unrelated to redaction,[103] the Board adopted subparagraph (e)(2) as proposed. The Board believes that it is appropriate to limit redaction to confidential information protected by law. That approach comports with the Board's congressionally mandated treatment of registration applications and annual reports, which the Board also has extended to other reports filed with the Board. This approach also is more readily administrable than one that relies instead on broader, undefined concepts of confidentiality.

Transmittal of Board Reports to Subject Firms

The Board revised the proposed rule to add a new provision regarding the transmittal of reports to firms that are subject to a determination. While some commenters stated that posting Board reports on the Board's website would give sufficient notice of Board determinations to such firms, other commenters disagreed, and the Board has concluded that it would be prudent to transmit reports to those firms.

Subparagraph (e)(3) provides that promptly after the Board issues a report to the Commission under subparagraph (e)(1), a copy of the report will be sent by electronic mail to each registered public accounting firm that is listed in the appendix to that report (*i.e.,* each firm as to which the determination applies). The Board expects that the report will be transmitted to the subject firm(s) by electronic mail after it has been posted on the Board's website, though both actions will take place promptly after the issuance of the report. Such reports will be redacted to the extent required by confidentiality laws, and the electronic mail will be directed to the electronic mail address of the firm's primary contact with the Board.[104]

Two commenters suggested that the Board provide non-public advance notice of a forthcoming determination to firms that would be subject to that determination. One of those commenters indicated that firms could use this advance notice to initiate discussions with their issuer audit clients about the Board's forthcoming determination.

The Board does not believe that it is appropriate to provide non-public advance notice to firms. A firm headquartered in a noncooperative jurisdiction and performing audit work that subjects the firm to the PCAOB inspection requirement should know if it has not been inspected due to the PCAOB's inability to inspect such firm or firms in that jurisdiction.[105] Furthermore, as described above, the Board has long taken efforts to make known the access challenges it faces in certain jurisdictions. Although those disclosures are distinct from determinations under the proposed rule and predate the HFCAA's enactment, they underscore the Board's commitment to transparency about its oversight access. And if a firm-specific obstacle to Board inspections or investigations were to arise that might warrant a determination as to a particular registered firm pursuant to subparagraph (a)(2), the Board expects that it would have engaged with that firm about the Board's inability to inspect or investigate the firm completely before such a determination would be made.

In addition, providing non-public advance notice of a Board determination to firms would create information asymmetry in the marketplace: A forthcoming Board determination would be known to firms and to anyone with whom the firm elects to share that information (including not only the firm's issuer clients' management, but also potentially the issuers' directors, the issuers' outside counsel and other professional advisors, foreign government officials, and others), while

[101] Section 105(b)(5)(A) of the Act.

[102] Section 102(e) of the Act.

[103] For simplicity, the phrase ''Board report containing a determination pursuant to subparagraph (a)(1) or (a)(2)'' has been changed to ''Board report pursuant to subparagraph (e)(1).''

[104] When applying to register with the Board, firms provide an electronic mail address for their primary contact with the Board in Item 1.3.7 of Form 1. Thereafter, firms confirm the electronic mail address for their primary contact with the Board annually in Item 1.3 of Form 2. If that electronic mail address changes, the firm must notify the Board within 30 days of the new electronic mail address for its primary contact with the Board in Item 7.2 of Form 3.

[105] *See also, e.g.,* SEC Exchange Act Release No. 91364, at 26 (noting ''a highly similar type and pattern of disclosure regarding the PCAOB's inability to inspect those firms'' in Item 3 of Form 20–F and in Item 1A of Form 10–K).

the investing public would not be privy to the same information. The Board does not believe it would be in the public interest or the interests of investors to selectively preview its determinations in such a manner.

Several commenters also suggested that the Board establish a rule-based mechanism that would allow firms to submit information to the Board regarding a determination. Some of those commenters recommended that the Board provide by rule for such a submission process before a Board determination takes effect, while others expressed concern that such an approach could delay the timely implementation of the HFCAA. No commenter, however, identified any type of information that a firm might have that would be both relevant to a Board determination and previously unknown to the Board.

Because the Board believes that firms are unlikely to have new and relevant information regarding a determination, the Board is not establishing a rule-based process for firms to make such submissions. Board determinations turn on positions taken by authorities in foreign jurisdictions, and such positions, by virtue of having previously been ''taken'' by a foreign authority, necessarily will be known to the Board already. Indeed, the Board has extensive experience in this area and, over more than a decade, has engaged significantly with foreign authorities and registered firms regarding inspections and investigations of non-U.S. firms. Therefore, the Board knows, and will timely learn, relevant information about its ability to conduct inspections and investigations abroad. The Board's history of engagement and negotiations regarding such inspections and investigations is detailed above, and no commenter disputed the Board's description of that history.

By the same token, any Board determination would be based on the Board's judgment as to whether the extent of access available to it impairs its ability to conduct oversight in any of the three respects identified in paragraph (b). Consequently, the Board does not believe that firms will be able to contribute meaningfully to the mix of information available to the Board regarding foreign authorities' positions or the Board's experience-driven assessment of paragraph (b)'s three factors. Should a firm wish to communicate with the Board about its inspection or investigation experience, however, it can do so through existing channels for communicating with the Board's inspection and enforcement staff.

Updating the Appendix to a Board Report

Subparagraph (e)(4) addresses the Board's process for determining that the list of firms subject to a determination remains accurate. A few commenters expressed concern about potential developments that could render such a list inaccurate, and the Board believes that it is prudent to establish a process in the proposed rule to ensure the list is appropriately updated and accurate.

As provided in subparagraph (e)(1), the list of firms subject to a determination will be contained in an appendix to the Board's report. For a jurisdiction-wide determination under subparagraph (a)(1), the appendix will provide, for each firm, the name under which it is registered with the Board, its identification number with the Board, and the jurisdiction in which its headquarters is located. For a determination as to a particular firm under subparagraph (a)(2), the appendix will provide the name under which the firm is registered with the Board, its identification number with the Board, and the location of the office(s) the firm maintains in the foreign jurisdiction whose authorities have taken a position that results in the Board being unable to inspect or investigate the firm completely.

Subparagraph (e)(4) requires firms identified in an appendix to notify the PCAOB Secretary of any changes to the firm's information in the appendix within five days of such a change.[106] Firm names, identification numbers, headquarters locations, and office locations can change, and this requirement ensures that the Board will be alerted promptly to updated information.[107] Instructions regarding how to notify the Secretary of such a change will be provided in the appendix.

Subparagraph (e)(4) provides that the Board may issue an updated appendix at any time. This allows the Board to update its appendix to reflect changes reported by firms as required by subparagraph (e)(4). It also enables the Board to correct discrepancies or reflect changes identified by the Board or its staff through other means.[108] An updated appendix will bear the date on which it was issued by the Board.

The Board's issuance of an updated appendix would not constitute a reassessment of the Board's underlying determination. In other words, the Board can update an appendix without reanalyzing the three factors identified in paragraph (b). Whenever the Board issues an updated appendix, it will transmit that appendix to the Commission, make it publicly available in accordance with subparagraph (e)(2), and send it to firms that are identified in the appendix in accordance with subparagraph (e)(3).

Effective Date and Duration of Board Determinations

Paragraph (f) provides that a Board determination becomes effective on the date the Board issues its report to the Commission. Most commenters expressed support for this timing, though one commenter suggested that this timing would be appropriate only if firms received advance notice of a determination, and another commenter suggested that the Board delay the effectiveness of its determinations (*e.g.,* for 120 days) so that issuers have time to understand and plan for them.

The Board adopted paragraph (f) substantially as proposed.[109] For many of the same reasons that the Board does not believe that firms should receive advance notice of Board determinations (as discussed above), the Board does not believe that the effectiveness of its determinations should be delayed. Furthermore, delaying the effectiveness of a determination could frustrate the objectives of the HFCAA and, in the Board's view, impair the Commission's ability to identify covered issuers on a timely basis pursuant to its rules.

One commenter requested clarification regarding the date of issuance of a Board report. The date of issuance will be the date that appears on the report, which will correspond to the date upon which the Board's report is transmitted to the Commission.

[106] In practice, this five-day period would span at least seven calendar days. *See* PCAOB Rule 1002, *Time Computation* (providing that Saturdays, Sundays, and federal legal holidays are excluded from the computation of time when a prescribed period of time in a Board rule is seven days or less).

[107] For example, if a firm changes its name while remaining the same legal entity, the firm has 30 days to notify the Board of its name change in Item 7.1 of Form 3. But if a firm changes its name while also changing its legal entity due to a change to its legal form of organization or as the result of a business combination, the firm may (but is not required to) file a Form 4 that, among other things, would notify the Board of the name change in Item 1.1, and that filing would be due 14 days after the change or business combination, unless the Board permits the firm to file its form out of time.

[108] For instance, the list of firms in the appendix could be reduced if a firm withdraws from registration or has its registration revoked, and could be expanded if a registered firm moves its headquarters to a jurisdiction that is the subject of a jurisdiction-wide determination.

[109] For simplicity, at the beginning of the paragraph, ''When the Board makes a determination pursuant to subparagraph (a)(1) or (a)(2), the Board's determination becomes effective'' has been replaced by ''A determination pursuant to subparagraph (a)(1) or (a)(2) becomes effective.''

Paragraph (g) addresses the duration of Board determinations. The Board adopted paragraph (g) substantially as proposed,[110] save for one conforming change. As first proposed, the proposed rule provided that a Board determination would remain in effect ''unless and until'' it was modified or vacated. As discussed below, however, the Board has elected to reassess at least annually each determination that is in effect and to issue, at the conclusion of each reassessment, a report reaffirming, modifying, or vacating the determination. To conform to that approach, paragraph (g) has been revised to provide that a Board determination will remain in effect until it is reaffirmed, modified, or vacated by the Board.

Reassessment of Board Determinations

As first proposed, paragraph (h) created a two-step process through which the Board would annually monitor the continued justification for a Board determination. First, the Board would consider whether changes in facts and circumstances warrant a reassessment of a determination that is in effect. Then, if the Board concludes that a reassessment is warranted, the Board would analyze the three factors identified in paragraph (b) and decide whether to leave its determination undisturbed or issue a new report modifying or vacating the determination. Apart from that annual process, the Board also could reassess a determination on its own initiative or at the Commission's request at any time.

Commenters generally supported that proposed two-step annual process. A few commenters suggested that the result of a reassessment should be made public in all circumstances, even when a determination is left undisturbed, and one commenter indicated that such public reporting could provide audit firms and issuers with more detailed guidance and transparent information. Some commenters suggested that firms should be able to request reevaluation of a determination outside of the annual cycle, with one commenter asking the Board to confirm that it would reassess a determination anytime there was a potentially material development in the facts and circumstances.

The Board has revised paragraph (h) to reduce the two-step process to a one-step process by eliminating the ''annual consideration of changed facts and circumstances'' contemplated in the proposed rule. Instead of requiring the Board to conduct a threshold inquiry each year to decide whether changes in facts and circumstances merit reassessment of a determination, the proposed rule requires the Board to annually reassess each determination that is in effect. The Board believes that annual reassessment best aligns with the HFCAA's annual cycle, which includes the Commission's identification of covered issuers based on the filing of annual reports and its designation of non-inspection years.[111]

Apart from its mandatory annual reassessments, the Board, on its own initiative or at the Commission's request, may reassess a determination at any time. It is not possible to specify every development that might prompt the Board to reassess a determination outside of the annual reassessment cycle. In certain circumstances, the withdrawal of a law or the execution of a cooperative agreement might suffice, if, for example, the law or the absence of an agreement were the sole reason why the Board's access was impaired in one or more of the respects identified in paragraph (b). However, as a general matter, when a determination derives from the Board's prolonged inability to complete inspections or investigations in a particular jurisdiction or of a particular firm, the Board does not anticipate modifying or vacating such a determination—even if a cooperative agreement is in place—until it has concluded that the foreign authority has taken, and the Board can reasonably conclude that the authority will maintain, new positions that respond satisfactorily to the Board's access needs with respect to each of the factors identified in paragraph (b). In such instances of prolonged lack of access, the Board would expect to conclude inspections or investigations in that jurisdiction or of that firm before modifying or vacating a determination. The conclusion of an inspection or investigation, however, is not necessarily conclusive evidence that the conditions preventing the Board from inspecting or investigating completely firms located in the foreign jurisdiction have been resolved.

Together, the proposed rule's framework of mandatory annual reassessment and discretionary off-cycle reassessment gives the Board the opportunity to reassess a determination whenever facts and circumstances warrant, and will help ensure that the Commission's actions under the HFCAA are based on Board determinations that reflect the current status of the Board's ability to inspect and investigate firms completely. When conducting a reassessment, whether annual or off-cycle, the Board will reanalyze the three factors identified in paragraph (b), and at the conclusion of that reassessment, the Board will reaffirm, modify, or vacate its determination.

Two commenters suggested that the Board allow firms to request reevaluation of a determination outside of the Board's annual reassessment process. One commenter further suggested that reevaluation requests could be based on a triggering event, but did not provide any examples of such an event or explain how a firm would have knowledge of such an event that the Board would lack. As explained above, the Board believes that firms are unlikely to have new, relevant information about positions taken by foreign authorities vis-à-vis the Board, and firms already have other channels through which they can communicate with the Board's staff about inspection- and investigation-related developments. Furthermore, even without a rule-based mechanism through which firms could request reevaluation, the Board will reassess determinations to which any firm is subject at least once a year.

One commenter suggested that the Board allow ''jurisdictions'' to request reevaluation of determinations at any time. That commenter was not a foreign authority; indeed, no foreign authority submitted a comment asking for the ability to request reevaluation. Nor did the commenter explain why foreign authorities cannot communicate with the Board through existing channels. The Board believes that those customary channels for communication with foreign authorities, together with the Board's annual mandatory reassessments and discretionary off-cycle reassessments, suffice to provide the Board appropriate information to reexamine determinations as and when appropriate.

Reaffirmed, Modified, and Vacated Board Determinations

Paragraph (i) addresses reaffirmed, modified, and vacated Board determinations. The Board adopted paragraph (i) with several conforming changes that align paragraph (i) with other revisions to the proposed rule, including revisions regarding appendices to Board reports, the transmittal of Board reports by electronic mail, and annual reassessment of determinations that are in effect.

When the Board reaffirms, modifies, or vacates a determination, it will issue a report to the Commission describing its assessment and the basis for

[110] For simplicity, at the beginning of the paragraph, ''A determination made by the Board'' has been changed to ''A determination.''

[111] HFCAA § 2(i)(1)–(2), 15 U.S.C. 7214(i)(1)–(2).

reaffirming, modifying, or vacating the determination. In the case of a reaffirmed or modified determination, the Board will update the appendix to the report that identifies the firm(s) to which the determination applies. A copy of the report will be posted on the PCAOB's website and sent by electronic mail to each firm's primary contact with the Board, subject to the confidentiality limitations described above in connection with subparagraphs (e)(2) and (e)(3).

A reaffirmed or modified determination, or the vacatur of a determination, will become effective on the date that the Board issues its report to the Commission. A reaffirmed or modified determination will be subject to reassessment under paragraph (h): It must be reassessed at least annually; it may be reassessed at any time; and the Board's reassessment will consider the three factors identified in paragraph (b) and result in reaffirmation, modification, or vacatur. A reaffirmed or modified determination will remain in effect until it is reaffirmed, modified, or vacated.

D. Economic Considerations

The Board is mindful of the economic impacts of its rulemaking. This section discusses economic considerations related to the proposed rule, including the need for the rulemaking; a description of the baseline for evaluating the economic impacts of the proposed rule; consideration of the benefits, costs, and unintended consequences of the proposed rule; and alternatives considered by the Board.

The proposed rule does not require ''mandatory audit firm rotation or a supplement to the auditor's report in which the auditor would be required to provide additional information about the audit and the financial statements'' of issuers, nor does it impose any ''additional requirements'' on auditors.[112] Accordingly, the Board has concluded that Section 103(a)(3)(C) of the Act does not apply to this rulemaking, and no commenter suggested otherwise.

[112] Section 103(a)(3)(C) of the Act.

Need for Rulemaking

As discussed in Section C above, the HFCAA does not expressly require the Board to adopt a rule governing the determinations it makes under the statute. Rather, the HFCAA gives the Board discretion regarding the procedure for making those determinations and the content and format of the Board's reporting to the Commission. The Board elected to pursue a rulemaking to bring transparency and consistency to its determinations. Specifically, the Board believes that a rule would inform investors, registered firms, issuers, audit committees, foreign authorities, and the public at large as to how the Board will perform its functions to satisfy its obligations under the statute. It also would promote consistency in the Board's process regarding determinations.

Baseline

The Board has evaluated the potential benefits, costs, and unintended consequences of the proposed rule relative to a baseline that consists of the current regulatory framework and current market practices. Although the HFCAA requires the Board to make a determination about which audit firms located in a foreign jurisdiction it is unable to inspect or investigate completely because of a position taken by one or more authorities in that jurisdiction, the HFCAA does not expressly require the Board to adopt a rule governing the determinations it makes under the statute. Moreover, the PCAOB website has long identified the jurisdictions in which the Board lacks inspection access, as well as the registered firms located in those jurisdictions.[113] Measured against this baseline, the proposed rule builds on existing PCAOB practices and provides a framework for the Board's determinations under the HFCAA and, hence, should have limited economic impacts incremental to the impacts of the HFCAA and the Commission's actions to implement the HFCAA.

Under the HFCAA, issuers that retain firms that are subject to a Board determination to issue audit reports on their financial statements must make certain disclosures and submissions and, eventually, if certain conditions persist, the securities of those issuers may be subject to a prohibition on trading. The Commission has adopted interim final amendments to Forms 20–F, 40–F, 10–K, and N–CSR to implement the disclosure and submission requirements of the HFCAA.[114] Other aspects of the HFCAA, including the trading prohibition, will be addressed in subsequent Commission actions.[115] The economic impact of these aspects of the HFCAA, while tied to the Board's determinations about which audit firms it is unable to inspect or investigate completely, will depend on the implementation choices made by the Commission in carrying out its mandate under the HFCAA and thus are not considered as part of the economic analysis with respect to this rulemaking.

The baseline also takes into consideration the current international reach of the Board's oversight mandate. As of June 30, 2021, 851 non-U.S. firms, headquartered in 90 foreign jurisdictions, were registered with the Board.[116] Out of those 851 non-U.S. registered firms, 202 issued at least one audit report on financial statements filed by an issuer with the Commission in the 12-month period ended June 30, 2021, and, altogether, they issued 1,260 audit reports during that 12-month period.[117]

Exhibit 1 reports the jurisdictions with the highest number of audit reports issued by non-U.S. registered firms on financial statements filed by issuers with the Commission during the 12-month period ended June 30, 2021. The top 15 jurisdictions account for 84% of all audit reports issued by non-U.S. registered firms on financial statements filed by issuers during the 12-month period ended June 30, 2021.

[113] For an overview of this historical practice, see, for example, footnote 62.

[114] *See* SEC Exchange Act Release No. 91364. The interim final rule amendments became effective on May 5, 2021.

[115] See id.

[116] Source: PCAOB Registration, Annual, and Special Reporting (''RASR'') System and Audit Analytics.

[117] If a firm issued more than one audit report on financial statements filed by the same issuer during the 12-month period ended June 30, 2021, then only the most recent audit report is counted.

Exhibit 1. Top Fifteen Non-U.S. Jurisdictions by Number of Audit Reports Issued by Non-U.S. Registered Firms on Financial Statements Filed by Issuers During the 12-Month Period Ended June 30, 2021[118]

	Audit Reports Issued by Non-U.S. Registered Firms on Issuer Financial Statements		Market Capitalization		Number of Non-U.S. Registered Firms		Number of Non-U.S. Registered Firms Issuing Audit Reports on Issuer Financial Statements	
Jurisdiction	**#**	**%**	**$ Billions**	**%**	**#**	**%**	**#**	**%**
Canada	358	28.4%	1,979	15.9%	36	4.2%	24	11.9%
China (Excluding Hong Kong)	169	13.4%	1,709	13.7%	36	4.2%	9	4.5%
Israel	155	12.3%	231	1.8%	21	2.5%	10	5.0%
United Kingdom	76	6.0%	1,639	13.1%	47	5.5%	7	3.5%
Hong Kong	50	4.0%	734	5.9%	28	3.3%	8	4.0%
Brazil	41	3.3%	584	4.7%	18	2.1%	7	3.5%
India	28	2.2%	362	2.9%	66	7.8%	11	5.4%
Singapore	27	2.1%	155	1.2%	25	2.9%	8	4.0%
Malaysia	25	2.0%	3	0.0%	18	2.1%	3	1.5%
Argentina	24	1.9%	112	0.9%	16	1.9%	4	2.0%
France	24	1.9%	296	2.4%	24	2.8%	5	2.5%
Switzerland	23	1.8%	588	4.7%	6	0.7%	5	2.5%
Greece	22	1.7%	10	0.1%	8	0.9%	3	1.5%
Germany	19	1.5%	316	2.5%	31	3.6%	4	2.0%
Mexico	17	1.3%	191	1.5%	20	2.4%	6	3.0%
+ Other Non-US Jurisdictions	202	16.0%	3,563	28.6%	451	53.0%	88	43.6%
Total of All Non-US Jurisdictions	***1,260***	***100%***	***12,471***	***100%***	***851***	***100%***	***202***	***100%***

Source: RASR, Audit Analytics, and Standard & Poor's.

As discussed in Section C above, over the years, the Board has been able to work effectively with authorities in foreign jurisdictions to fulfill its mandate to oversee registered firms located outside the United States. With rare exceptions, foreign audit regulators have cooperated with the Board and allowed it to exercise its oversight authority as it relates to registered firms located within their respective jurisdictions. Authorities in a limited number of foreign jurisdictions, however, have taken positions that deny the Board access for oversight activities. The PCAOB's website identifies the jurisdictions that currently deny the Board such access.[119]

Considerations of the Benefits, Costs, and Unintended Consequences

Compared to the baseline of no PCAOB rulemaking, the proposed rule would have incremental benefits and costs. The proposed rule's scope is confined to establishing a framework for determinations that the Board is called upon by the HFCAA to make even absent a rulemaking. Additionally, neither the HFCAA nor the proposed rule gives the Board additional authority to take any action of legal consequence directly against a registered firm. Instead, the HFCAA contemplates that the Board would notify the Commission of its determinations, which may provide the predicate for other regulatory actions to be taken by the Commission if other conditions set forth in the HFCAA and the Commission's rules are met. This situation is in contrast to the direct impact of the Board's statutory mandate to register, set professional standards for, inspect, investigate, and discipline registered firms. One commenter stated that economic benefits and costs arise from the HFCAA, which the PCAOB cannot change and must implement.

The Board's analysis of the potential benefits, costs, and unintended consequences of the proposed rule does not presuppose any determination that the Board may make under the proposed rule, because the Board would determine whether to make any future determimations based on the facts and circumstances at that time. The Board's analysis discusses the economic impacts of four central features of the proposed rule: (1) The Board's ability to make determinations as to a particular foreign jurisdiction; (2) limiting those jurisdiction-wide determinations to firms headquartered in the jurisdiction; (3) the Board's complementary ability to make determinations as to a particular registered firm; and (4) the Board's publication of its determinations on its website. The analysis is qualitative in nature because of a lack of information and data necessary to provide reasonable quantitative estimates. Overall, the Board expects that the benefits of the proposed rule will justify

[118] For purposes of Exhibit 1, a firm's jurisdiction is the jurisdiction where it is headquartered. The number of audit reports issued on the financial statements of issuers and the number of registered firms that issued those reports are based on issuer filings during the 12-month period ended June 30, 2021. The market capitalization of those issuers and the number of registered firms in each jurisdiction are as of June 30, 2021. Due to a lack of data on the number of shareholders, some audit reports included in Exhibit 1 may have been issued on the financial statements of entities with fewer than 300 shareholders. If a firm issued more than one audit report on financial statements filed by the same issuer during the 12-month period ended June 30, 2021, then only the most recent audit report is counted.

[119] *See* Audit Reports Issued by PCAOB-Registered Firms in Jurisdictions where Authorities Deny Access to Conduct Inspections, *available at https://pcaobus.org/oversight/ational/denied-access-to-inspections.* The information contained on this web page does not constitute a Board determination under the HFCAA. The Board has not yet made any determinations under the HFCAA.

any costs and unintended negative effects.

Benefits

The Board believes that the proposed rule would inform investors, registered firms, issuers, audit committees, foreign authorities, and the public at large as to how the Board will perform its functions under the HFCAA. The improved transparency and reduced regulatory uncertainty might help market participants make more efficient investment decisions and, hence, enhance capital formation. Furthermore, the proposed rule will promote consistency in the Board's processes regarding determinations. It will also assist the Commission in its consistent implementation of the HFCAA and achieving the statute's intended objectives. These are the primary benefits of the proposed rule. Several commenters agreed that a Board rule governing HFCAA determinations can improve regulatory transparency and consistency and reduce regulatory uncertainty.

The Board believes that the proposed rule's jurisdiction-wide determinations would yield additional benefits. In the Board's experience, when foreign authorities take a position that impairs the Board's oversight access, the position applies generally to all firms within the jurisdiction. Consequently, jurisdiction-wide determinations would provide an efficient, effective means of making Board determinations under the HFCAA.

Jurisdiction-wide determinations would be beneficial even when a foreign authority limits the Board's ability to inspect or investigate *certain types* of issuer audit engagements. Typically, the foreign authority's position applies to any firm in the jurisdiction that performs that type of engagement. If the Board were unable to make jurisdiction-wide determinations and instead were required to single out for determination only the specific audit firms handling those issuer engagements at a particular time, those issuers potentially could evade the consequences of the HFCAA by routinely changing audit firms in response to each successive firm-specific determination issued by the Board.[120] Beyond that, issuing a jurisdiction-wide determination in such a scenario would help ensure that foreign authorities cannot, in essence, choose which firms within their jurisdiction the Board may inspect or investigate.

Limiting jurisdiction-wide determinations to firms headquartered in the jurisdiction would generate its own benefits. It would reduce the risk that a jurisdiction-wide determination sweeps too broadly by encompassing firms that merely have a physical presence or personnel in the jurisdiction but are headquartered elsewhere. Although a position taken by a foreign authority can naturally be understood to impact registered firms headquartered in the jurisdiction, its impact on firms that are headquartered elsewhere can turn on many factors, including the extent of the firm's presence in the jurisdiction and the nature and extent of the audit work it performs there. With that in mind, the proposed rule provides that the Board could choose to make individualized determinations with respect to firms that are headquartered elsewhere but have an office in such a jurisdiction.

Determinations as to a particular registered firm would complement the Board's jurisdiction-wide determinations by providing an additional option when the Board concludes that an across-the-board jurisdiction-wide determination is not appropriate. Such a provision recognizes that although the Board generally expects to make jurisdiction-wide determinations, it cannot anticipate every scenario it might encounter in the future. If a position taken by a foreign authority applies solely to one firm, which is expected to happen infrequently, the Board's ability to make a determination as to that firm would be a critical tool for fulfilling the HFCAA's objectives. Additionally, by providing an avenue for the Board to make determinations as to registered firms that are headquartered in a cooperating jurisdiction but have an office in a noncooperating jurisdiction, this provision would help ensure that the Board's flexibility under the proposed rule matches its mandate under the HFCAA.

The Board has also considered the potential benefits of making Board determinations public on its website. Such publication would inform investors, registered firms, issuers, audit committees, foreign authorities, and the public regarding Board determinations, thus promoting transparency and reducing regulatory uncertainty. Market participants may benefit from being informed of Board determinations promptly, rather than waiting for the Commission's identification of covered issuers.

Costs and Unintended Consequences

The Board has also considered the potential costs and unintended consequences of the proposed rule. The Board expects any such costs and consequences to be limited, as the proposed rule merely establishes a framework for the Board to perform the responsibilities imposed upon it by the HFCAA.

The Board has evaluated the potential costs and unintended consequences of making jurisdiction-wide determinations. As explained in Section C above, such determinations treat all registered firms headquartered in the jurisdiction alike when the positions taken by authorities in the jurisdiction apply equally to any firm performing the same audit work for issuers, whether or not a particular registered firm happens to be doing such work when the Board makes a determination. To mitigate any perceived overinclusiveness or underinclusiveness of a jurisdiction-wide determination, the proposed rule limits those determinations to registered firms headquartered in the jurisdiction, while also permitting the Board, when appropriate, to supplement a jurisdiction-wide determination with a determination as to a particular firm that has an office in the jurisdiction but is not headquartered there.[121] This approach, in the Board's view, would be unlikely to impose incremental additional costs or lead to unintended consequences relative to the baseline, which consists of, among other things, the historical practice of identifying publicly the jurisdictions where there are unresolved obstacles to Board inspections and investigations.

The Board does not expect that the second central feature of the proposed rule—limiting jurisdiction-wide determinations to firms headquartered in the jurisdiction—would lead to

[120] If the Board were to make only firm-by-firm determinations based on each firm's then-current client portfolio, the Board might need to establish a process requiring all registered firms to report auditor changes to the Board in real time so that the Board could monitor such changes and promptly make new determinations in response. Presently, the Board's rules require firms to report their issuer clients to the Board only after the firm's audit report on the issuer has been issued. *See* PCAOB Rule 3211(b), *Auditor Reporting of Certain Audit Participants* (Form AP must be filed within 35 days after the audit report is first included in a filing with the Commission, except that Form AP must be filed within 10 days if the audit report is included in a registration statement under the Securities Act). One commenter noted that jurisdiction-wide determinations would appear to be more efficient for the PCAOB's operations than determinations as to particular registered firms.

[121] Additionally, the Board has general residual exemption authority, subject to Commission approval, under Section 106(c) of the Act, and such authority could be used to address any potential overinclusiveness of a jurisdiction-wide determination.

additional costs or unintended consequences.

Related to the third central feature of the proposed rule—the Board's ability to make determinations as to particular firms with an office in a foreign jurisdiction—one commenter encouraged the Board to consider the potential adverse impact on competition when assessing a potential future determination, and further encouraged the Board to provide equivalent treatment to similarly-situated firms. While any future determinations under the proposed rule as to particular registered firms may potentially have an impact on competition, such determinations, as noted in Section C above, are expected to be infrequent. Moreover, the magnitude of any impact would depend on many factors, such as the number of firms within the jurisdiction, the size of the firm as to which the determination is made, and how the foreign authority's obstruction of the Board's inspections or investigations has already affected competition in the jurisdiction.

Separately, the Board has evaluated the potential costs and unintended consequences of making its determinations public. The Board believes that the incremental costs of such publication will likely be minimal because similar information has historically been available on the Board's website for approximately a decade.[122] Moreover, many issuers currently disclose in their annual reports the PCAOB's inability to inspect their auditor, as the Commission recently observed.[123]

Alternatives Considered

As an alternative to a rulemaking, the Board considered issuing guidance related to its process or establishing a non-public process for making its determinations. The Board has determined, however, that a rule would reduce regulatory uncertainty for market participants by providing transparency and promoting consistency as to how the Board would perform its functions under the statute. Commenters generally agreed that a rule governing the Board's determination process would promote transparency and consistency and reduce regulatory uncertainty.

The Board also considered whether the proposed rule should be limited to determinations as to particular registered firms. Without jurisdiction-wide determinations, however, the Board would have to make determinations only as to particular firms under subparagraph (a)(2) of the proposed rule, potentially based on the present composition of each firm's client portfolio. The Board believes that such an approach would incentivize an issuer whose audit engagement cannot be inspected or investigated by the Board to switch audit firms frequently, possibly frustrating the intent of the HFCAA and potentially necessitating a new process for real-time reporting of auditor changes to the Board so that Board determinations could be made or reassessed on a timely basis.

The Board also considered whether to extend its jurisdiction-wide determinations to all firms that have an office in the jurisdiction, rather than only those headquartered there. The Board elected not to do so, based on its oversight experience, because the impact of a position taken by a foreign authority on a firm headquartered elsewhere can vary based on the particulars of the firm's presence, audit work, and issuer clients in the jurisdiction.

When prescribing the grounds upon which a determination may rest, the Board considered whether the Board's commencement and subsequent inability to finish an inspection or investigation should be a prerequisite to a determination. The Board has not adopted that approach because the position taken by a foreign authority can frustrate the initiation of, or the ability to complete, an inspection or investigation. Moreover, commencing inspections or investigations in the face of such obstacles would be costly and fruitless, not only for the Board, but also for registered firms.

Lastly, although it can exercise exemption authority under Section 106(c) of the Act with the Commission's approval,[124] the Board considered whether the proposed rule should include a procedure for the Board to grant exceptions from a jurisdiction-wide determination. The Board did not include such a mechanism in the proposed rule for five principal reasons:

- An exception procedure would be inconsistent with the rationale for jurisdiction-wide determinations, namely, that the foreign authority has taken a position of such general scope and application that it obstructs the Board's ability to complete inspections or investigations in that jurisdiction.
- To the extent that exception arguments would be based on the composition of a firm's client portfolio at a moment in time, entertaining such arguments would require speculation as to whether the foreign authority would impede the Board's ability to inspect or investigate those audits and would create a moving target as the firm gains and loses clients over time.
- Exceptions might increase the risk of a ''shell game.'' If a firm becomes subject to a Board determination because the Board cannot inspect certain types of issuer audit engagements it performed, those issuers might simply migrate to an excepted firm, triggering the need for the Board to monitor auditor changes constantly and then modify its determinations or revise its exceptions.
- An exception procedure might encourage foreign authorities to manipulate the determination process by cherry-picking certain firms that the PCAOB can inspect, thereby casting doubt on the justification for the Board's jurisdiction-wide determination.
- Allowing firms to seek exceptions could effectively transform the Board's jurisdiction-wide approach to a firm-by-firm approach that consumes substantial Board resources and fails to protect investors.

One commenter indicated that the Board's existing exemption authority is adequate and expressed concern that granting exceptions could transform the Board's jurisdiction-wide approach into a firm-by-firm approach that consumes substantial resources and fails to protect investors. The Board agrees with this commenter and has not created a procedure for granting exceptions from a jurisdiction-wide determination.

III. Date of Effectiveness of the Proposed Rule and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Board consents, the Commission will:

[122] *See, e.g.,* Audit Reports Issued by PCAOB-Registered Firms in Jurisdictions where Authorities Deny Access to Conduct Inspections, *available at https://pcaobus.org/over/international/denied-access-to-inspections.*

[123] *See* SEC Exchange Act Release No. 91364, at 26 (noting ''a highly similar type and pattern of disclosure regarding the PCAOB's inability to inspect those firms included in the majority of the potential Commission-Identified Issuers' Item 3 (for Form 20–F filers) and Item 1A (for Form 10–K filers) discussion of risk factors'').

[124] *See* Section 106(c) of the Act (''[T]he Board, subject to the approval of the Commission, may, by rule, regulation, or order, and as [the Board] determines necessary or appropriate in the public interest or for the protection of investors, either unconditionally or upon specified terms and conditions exempt any foreign public accounting firm, or any class of such firms, from any provision of this Act or the rules of the Board . . . issued under this Act.'').

(A) By order approve or disapprove such proposed rule; or

(B) institute proceedings to determine whether the proposed rule should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule is consistent with the requirements of Title I of the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/pcaob.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File No. PCAOB–2021–01 on the subject line.

Paper Comments

- Send paper comments in triplicate to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File No. PCAOB–2021–01. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's website (*http://www.sec.gov/rules/pcaob.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule that are filed with the Commission, and all written communications relating to the proposed rule between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549–1090, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings will also be available for inspection and copying at the principal office of the PCAOB. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. All submissions should refer to File No. PCAOB–2021–01 and should be submitted on or before October 19, 2021.

For the Commission, by the Office of the Chief Accountant, by delegated authority.[125]

Vanessa A. Countryman,

Secretary.

[FR Doc. 2021–21056 Filed 9–23–21; 4:15 pm]

BILLING CODE 8011–01–P

[125] 17 CFR 200.30–11(b)(1) and (3).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93102; File No. SR–OCC–2021–007]

Self-Regulatory Organizations; the Options Clearing Corporation; Order Granting Approval of Proposed Rule Change Concerning the Options Clearing Corporation's Governance Arrangements

September 22, 2021.

I. Introduction

On July 30, 2021, the Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change SR–OCC–2021–007 (''Proposed Rule Change'') pursuant to Section 19(b) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 [2] thereunder to provide OCC's Board of Directors (''Board'') with the discretion to elect either an Executive Chairman or a Non-Executive Chairman to preside over the Board, provide the Board and stockholders with the discretion to elect a Management Director, clarify the respective authority and responsibility of any Executive Chairman or Non-Executive Chairman, and make other clarifying, conforming, and administrative changes to OCC's rules.[3] The Proposed Rule Change was published for public comment in the **Federal Register** on August 11, 2021.[4] The Commission has received no comments regarding the Proposed Rule Change. This order approves the Proposed Rule Change.

II. Background [5]

Article III, Section I of OCC's By-Laws currently requires that the Board be composed of nine Member Directors,[6] five Exchange Directors,[7] five Public Directors,[8] and an Executive Chairman (who also serves as a Management Director [9]). OCC's Executive Chairman is responsible for managing the Board while also being involved with the ''day-to-day'' management decisions of OCC. By contrast, a ''Non-Executive Chairman'' is typically not an employee of the company and focuses solely on leading and supporting its board of directors.

As described in more detail below, OCC proposes to revise its governing documents, including its By-Laws, Rules, Board of Directors Charter and Corporate Governance Principles (''Board Charter''), Audit Committee Charter, Compensation and Performance Committee Charter, Governance and Nominating Committee Charter, Risk Committee Charter, Technology Committee Charter (such committee charters collectively being the ''Board Committee Charters''), and Amended and Restated Stockholders Agreement (''Stockholders Agreement''), to give the Board discretion to elect either an Executive or Non-Executive Chairman to preside over the Board. The Proposed Rule Change would also provide the Board and stockholders with discretion to elect Management Directors from OCC's management, which would be necessary if OCC does not have an Executive Chairman. OCC notes that the Proposed Rule Change would provide clarity around the authority and responsibilities of an Executive Chairman versus a Non-Executive Chairman.[10] OCC also proposes to make additional clarifying, conforming, and administrative changes to the documents listed above. OCC believes that the Proposed Rule Change would provide appropriate flexibility to the Board to evaluate OCC's governance arrangements, including whether OCC should have an Executive or Non-

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Notice of Filing *infra* note 4, 86 FR 44105.

[4] Securities Exchange Act Release No. 92584 (Aug. 5, 2021), 86 FR 44105 (Aug. 11, 2021) (File No. SR–OCC–2021–007) (''Notice of Filing'').

[5] Capitalized terms used but not defined herein have the meanings specified in OCC's Rules and By-Laws, available at *https://www.theocc.com/about/publications/bylaws.jsp.*

[6] Member Directors include Clearing Members or representatives of a Clearing Member. OCC endeavors to achieve balanced representation among Clearing Members on the Board of Directors to assure that (i) not all Member Directors are representatives of the largest Clearing Member organizations based on the prior year's volume, and (ii) the mix of Member Directors includes representatives of Clearing Member organizations that are primarily engaged in agency trading on behalf of retail customers or individual investors. *See* Article III, Section 5 of the OCC By-Laws.

[7] Exchange Directors represent the equity exchanges that are holders of Class B Common Stock of the OCC. Exchange Directors need not be Clearing Members or be associated with a Clearing Member organization. *See* Article III, Section 6 of the OCC By-Laws.

[8] Public Directors are independent directors who are not affiliated with any national securities exchange or national securities association or with any broker or dealer. *See* Article III, Section 6A of the OCC By-Laws.

[9] Management Directors also serve as employees of OCC. *See* Article III, Section 7 of the OCC By-Laws.

[10] *See* Notice of Filing *supra* note 4, 86 FR 44106.

Executive Chairman, and adjust the composition of the Board and leadership structure more quickly in response to changing business conditions and personnel and the knowledge, skills, and experience of its various Board members and senior officers.[11]

Proposed Changes Relating to the Chairman Role and Responsibilities. Under OCC's current By-Laws, the individual elected by the Board to be responsible for certain control functions of OCC and to preside at all meetings of the Board and stockholders is defined as the''Executive Chairman.'' [12] OCC believes that as a result of this specificity, the Board likely would not consider Non-Executive Chairman candidates unless the By-Laws state explicitly that the Board has the ability to do so.[13] Therefore, OCC proposes to revise Article III, Section 9 (currently Reserved) and Article IV, Sections 1 and 6 of its By-Laws to give its Board the discretion to elect either an Executive or Non-Executive Chairman. OCC believes that revising its By-Laws to provide this discretion would increase the potential pool of qualified candidates for the position and enable the Board to select the Chairman with the most suitable experience and skill set for OCC at any given time.[14]

OCC also proposes to update Article III, Section 9 to provide that, upon the nomination of the Governance and Nominating Committee, the Board shall elect from among its members a Chairman of the Board (as opposed to an Executive Chairman), and if the Chairman is elected from among the employees of OCC, such Chairman would be an ''Executive Chairman'' for purposes of OCC's By-Laws and Rules. OCC proposes to revise Article I of its By-Laws to add a definition for the term ''Chairman,'' which would be defined to mean the individual elected by the Board as the Chairman of the Board pursuant to Article III, Section 9 of the By-Laws and that may be, but would not be required to be, an Executive Chairman.

OCC also proposes to revise Article III, Section 9 of the By-Laws to provide the Board with additional flexibility to define the Chairman's role and responsibilities. The proposed language would be a general statement that the Chairman would have powers and perform such duties as the Board may designate.[15] OCC asserts that the Proposed Rule Change would provide appropriate flexibility for the Board to assign or remove responsibilities of the Chairman based on whether such Chairman is an Executive or Non-Executive Chairman and based upon the needs of OCC at any given point in time.[16]

OCC proposes to revise the following sections of its By-Laws so that any Chairman (whether Executive or Non-Executive) would retain the following authority and responsibility currently given to the Executive Chairman: Article II, Sections 2 and 4 concerning the authority to call and provide notice of meetings of OCC's stockholders; Article III, Section 10 concerning the authority to receive notice of resignation of a member of the Board; Article III, Section 14 concerning the authority to call special meetings of the Board; Article III, Section 15 concerning the authority to exercise emergency powers and call special meetings of the Board during such an emergency; Article IV, Sections 2, 3, 9 and 13 concerning the authority to appoint officers, fix the salaries of any appointed officers, and remove such officers; Article VIIB, Section 1, Interpretation and Policy .01 concerning the responsibility to promptly provide Non-Equity Exchanges with information the Chairman considers to be of competitive significance to such Non-Equity Exchanges that was disclosed to Exchange Directors at or in connection with any meeting or action of the Board or one of its committees; Article IX, Section 12 concerning the authority to sign certificates for shares of OCC; and Article IX, Section 14 concerning the authority to suspend the rules of OCC in emergency circumstances. OCC wants the Chairman, whether Executive or Non-Executive, to retain these authorities and responsibilities which OCC believes relate to governance matters appropriately assigned to any Chairman of the Board.[17]

The Proposed Rule Change would revise the following Rules so that any Chairman (whether Executive or Non-Executive) would retain the following authority and responsibility currently given to the Executive Chairman: Rule 505 concerning the authority to extend settlement times upon a determination that an emergency or force majeure condition exists; Rule 609A concerning the authority to waive margin deposits in limited circumstances; Rule 1006(f) concerning the authority to use Clearing Fund assets to borrow or otherwise obtain funds from third parties; Rule 1104, Interpretation and Policy .02 concerning the authority to elect to use one or more private auctions to liquidate collateral, open positions and/or exercised/matured contracts of a suspended Clearing Member; and Rule 1110 concerning the authority to appoint an appeals panel to considered and decided appeals by suspended Clearing Members. OCC believes that updating these Rules to allow the Chairman to retain these critical responsibilities would help to ensure the efficient management and operation of OCC in emergency or exigent circumstances where other authorized officers are absent or otherwise unable to perform their duties.[18]

Proposed Changes Relating to Responsibilities of Other Senior Officers. OCC proposes to make conforming changes to Article IV, Section 8 of the By-Laws to clarify that OCC's Chief Executive Officer (''CEO'') would be responsible for all aspects of OCC's business and for its day-to-day affairs, except for those that may report directly to the Chairman, as determined by the Board.

OCC proposes to revise several By-Law sections to transfer certain responsibilities currently belonging to the Executive Chairman to the CEO. OCC proposes to revise Article VI, Section 11 of the By-Laws to assign to the CEO the responsibility for participating in the Securities Committee and panels thereof for purposes of contract adjustments. OCC also proposes similar changes to its By-Laws concerning the fixing of: (i) Underlying interest values of binary and range options (Article XIV, Section 5), (ii) exercise settlement amounts of yield-based Treasury options (Article XVI, Section 4), (iii) exercise settlement amounts of cash-settled securities options other than OTC index options (Article XVII, Section 4), (iv) exercise settlement amounts of cash-settled foreign currency options in circumstances where certain prices or values are determined to be unavailable or inaccurate for the contracts in question (Article XXII, Section 4), and (v) the Closing Price for BOUNDs contracts (Article XXIV). OCC believes that these responsibilities are best assigned to the CEO familiar with OCC's day-to-day operations, rather than to a

[11] *See* Notice of Filing *supra* note 4, 86 FR 44106–07.

[12] *See* Article IV, Section 6 of the OCC By-Laws.

[13] *See* Notice of Filing *supra* note 4, 86 FR 44107.

[14] *Id.*

[15] The proposed language would replace Article IV, Section 6, which currently states that the Executive Chairman is responsible for certain control functions of OCC, including internal audit and public affairs and government relations, and has supervision of the officers and agents appointed by him.

[16] *See* Notice of Filing *supra* note 4, 86 FR 44107.

[17] *Id.*

[18] *See* Notice of Filing *supra* note 4, 86 FR 44108.

Chairman who may or may not possess that familiarity.[19]

OCC also proposes conforming changes to its Rules concerning the following responsibilities, which would remain with an Executive Chairman (as well as the CEO and the Chief Operating Officer) if one has been elected by the Board: Rule 1104(b) concerning the authority to delay the immediate liquidation of a suspended Clearing Member's margin deposits and to use such deposits to borrow or otherwise obtain funds from third parties; Rule 1106(e) concerning the authority to determine not to close out a suspended Clearing Member's unsegregated long positions or short positions in options or BOUNDs, or long or short positions in futures; and Rule 1106(f) concerning the authority to execute hedging transactions to reduce the risk associated with any collateral or positions not immediately liquidated or closed out pursuant to Rules 1104(b) and 1006(e). OCC believes that these responsibilities do not rise to the level of emergency or exigent circumstances, and should therefore remain with senior executives more closely familiar with the day-to-day operations of OCC. As a result, OCC would not substantively change the requirements in these existing rules.[20]

Proposed Changes Relating to OCC's Board and Committees. OCC proposes to revise Article III, Section I of the By-Laws to provide that the Board may have no less than five Public Directors, as opposed to the current requirement that OCC have exactly five Public Directors. The Proposed Rule Change would allow OCC to have a sixth Public Director serving on its Board if there is a Public Director serving as Chairman.[21] The Chairman would preside at all meetings of the Board of Directors, be responsible for carrying out the policies of the Board, have general supervision over the Board and its activities, and provide overall leadership to the Board of Directors.

OCC proposes to revise Article VIIA, Section 3 of the By-Laws and Sections 2 and 3 of the Stockholder Agreement to provide the Board and stockholders with the discretion to elect a Management Director if the Board has elected a Non-Executive Chairman. OCC also proposes to revise Article III, Section 12 of the By-Laws to reflect that any vacancy in the position of Management Director may be filled by the Board until the next meeting of the stockholders. In addition, OCC proposes to revise Article IV, Sections 1 and 7 of the By-Laws to relocate certain provisions concerning the election of the Vice Chairman of the Board.

OCC proposes to revise Article III, Section 4 of the By-Laws to remove specific references to various Board committees and their compositions. OCC notes that each of the Board Committee Charters are filed with the Commission as rules of OCC, and as a result, this information is unnecessarily duplicated in OCC's By-Laws.[22] OCC would relocate from the By-Laws to each of the Board Committee Charters the requirement that committee members are selected by the Board from among the directors recommended by the then-constituted Governance and Nominating Committee after consultation with the Chairman and serve at the pleasure of the Board.

OCC proposes to make conforming changes to its Board Charter. First, OCC would remove the qualifier ''Executive'' before most occurrences of ''Executive Chairman'' throughout the charter. OCC would revise the Board Charter to clarify that those provisions relating to management structure, evaluation, and succession would be applicable only to any Executive Chairman. The Proposed Rule Change would clarify that, with respect to employee compensation, the Board would be responsible for the compensation, incentive, and benefit programs and evaluating the performance of any Executive Chairman. OCC also proposes to revise the Board Charter to reflect that the election of a Management Director would be at the discretion of the Board and provide that a Management Director would no longer be eligible to serve if he or she ceases to hold a senior officer position at OCC, by virtue of which he or she was elected as a Management Director. OCC also proposes to revise the Board Charter to include the Regulatory Committee in the list of charters required to be established by the Board.[23] In addition, OCC proposes to revise its Board Charter to remove specific requirements around the composition of the Governance and Nominating Committee, which would align with proposed changes to the Governance and Nominating Committee.

OCC proposes changes to its Audit Committee Charter regarding the functional and administrative reporting lines for the Chief Audit Executive (''CAE'') and Chief Compliance Officer (''CCO'') and the review and oversight of OCC's Internal Audit and Compliance functions to accommodate the proposed changes to OCC's By-Laws. OCC would revise the Audit Committee Charter to state that the CAE would continue to report functionally to the Audit Committee and report administratively to a member of the Management Committee designated by the Audit Committee. The proposed rule change is intended to provide appropriate flexibility for the administrative reporting line of the CAE and in the officers that the committee may consult in their review of the Internal Audit function.[24] OCC also proposes similar changes to the functional and administrative reporting lines of the CCO, who currently reports functionally to the Audit Committee and administratively to the CEO, and to the consultation requirements in reviewing the performance of the CCO and Compliance Department. OCC believes that these changes would provide for a consistent approach and similar flexibility for the Audit Committee's oversight of OCC's Compliance function.[25]

OCC proposes to revise its Compensation and Performance Committee Charter to conform to the proposed changes to OCC's By-Laws. Specifically, the proposed revisions would reflect that the committee's responsibilities for reviewing the performance and compensation of OCC's management team, including the executive officers of OCC, would extend to any Executive Chairman of OCC.

OCC proposes to revise its Governance and Nominating Committee Charter to conform to the proposed changes to OCC's By-Laws by clarifying that the Governance and Nominating Committee would consult with any Chairman in its oversight and advising responsibilities to the Board.

[19] *See* Notice of Filing *supra* note 4, 86 FR 44107.

[20] *See* Notice of Filing *supra* note 4, 86 FR 44108.

[21] OCC notes that the proposed change, along with the potential election of a Management Director that is not an Executive Chairman (discussed below), could result in the Board having up to 21 total directors as opposed to its current 20 directors. OCC also notes that if the Board elects a Non-Executive Chairman that is determined to be an independent Public Director, such a Chairman would be eligible to serve as the chair of any of OCC's Board Committees pursuant to the requirements of each Board Committee Charter. OCC does not believe that the potential addition of a Public Director to its Board, increasing the overall Board size by one director, would materially impact the composition, representation, or decision-making process of the Board. *See* Notice of Filing *supra* note 4, 86 FR 44107.

[22] *See* Notice of Filing *supra* note 4, 86 FR 44108.

[23] *See* Securities Exchange Act Release No. 87577 (November 20, 2019), 84 FR 65202 (November 26, 2019) (SR–OCC–2019–008).

[24] *See* Notice of Filing *supra* note 4, 86 FR 44109.

[25] *Id.*

OCC proposes changes to its Risk Committee Charter regarding the functional and administrative reporting lines for the Chief Risk Officer (''CRO''). Currently, the Risk Committee Charter provides that the CRO reports functionally to the Risk Committee and administratively to the CEO and that the Risk Committee consults with the CEO and other committees as appropriate in reviewing the CRO's performance. OCC proposes to revise the Risk Committee Charter to state that the CRO would continue to report functionally to the Risk Committee and would report administratively to a member of the Management Committee designated by the Committee. The proposed change is intended to provide flexibility for the administrative reporting line of the CRO and the particular officers and committees the Risk Committee may consult in their review of the CRO's performance depending on the Board's allocation of responsibilities at a given point in time.[26]

Finally, OCC proposes to revise its Technology Committee Charter to require that the chair of the committee be a Public Director. The proposed change would align the Technology Committee Charter with OCC's other Board Committee Charters, which also require that a Public Director serves as committee chair. OCC notes that the proposed change would not result in any practical change to the Technology Committee as it is currently chaired by a Public Director.[27]

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Exchange Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to such organization.[28] After carefully considering the Proposed Rule Change, the Commission finds that the proposal is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to OCC. More specifically, the Commission finds that the proposal is consistent with Section 17A(b)(3)(A) of the Exchange Act,[29] and Rule 17Ad–22(e)(2) [30] thereunder, as described in detail below.

A. Consistency With Section 17A(b)(3)(A) of the Exchange Act

Section 17A(b)(3)(A) of the Exchange Act requires, among other things, that a clearing agency is so organized and has the capacity to be able to facilitate the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts, and transactions for which it is responsible.[31]

Based on its review of the record, and for the reasons described below, the Commission believes that the proposed changes to revise OCC's governing documents to provide Board discretion to elect either an Executive or Non-Executive Chairman is consistent with being organized to facilitate the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts, and transactions for which OCC is responsible. By providing the Board with discretion to choose a Chairman from a broader set of candidates, the Board would gain greater flexibility to select someone with the best and most appropriate experience for the role at any given point in time, whether as part of OCC's day-to-day operations or otherwise. The proposed changes allow the Board to reassign certain day-to-day responsibilities to other senior officers, depending on whether the Board elects a Chairman that is an Executive Chairman. Similarly, the proposed changes to provide the Board with greater flexibility to elect an additional Public Director under certain circumstances and to preserve the authority of the Board and stockholders to elect a Management Director are consistent with being organized to facilitate prompt and accurate clearance and settlement practices. This greater degree of flexibility would leave OCC better prepared to adjust its Board composition to changing market conditions and emerging business concerns, so that it can continue to successfully facilitate the prompt and accurate clearing and settlement of securities transactions and other transactions for which OCC is responsible.

OCC also proposes to change to its Audit and Risk Committee Charters to adjust the administrative reporting lines for the CAE, CCO, and CRO so that they each report administratively to a member of the Management Committee designated by the Board Committee to which they report functionally. These proposed changes are consistent with facilitating prompt and accurate clearing and settlement practices, as the changes would provide OCC with the flexilibity to adjust these administrative reporting lines depending on the existing skill sets of the officers serving on OCC's Management Committee. This could in turn strengthen OCC's administrative review processes and ensure greater accountability from the CAE, CCO, and CRO roles, which would support the facilitation of prompt and accurate clearing and settlement of transactions for which OCC is responsible.

The Commission believes, therefore, that the proposal to provide OCC's Board with the discretion to elect either an Executive Chairman or a Non-Executive Chairman, provide the Board and stockholders with the discretion to elect a Management Director, clarify the respective authority and responsibility of any Executive Chairman or Non-Executive Chairman, and make other clarifying, conforming, and administrative changes to OCC's rules is consistent with the requirements of Section 17A(b)(3)(A) of the Exchange Act.[32]

B. Consistency With Rule 17Ad–22(e)(2) Under the Exchange Act

Rule 17Ad–22(e)(2)(i), (iv), (v), and (vi) under the Exchange Act require covered clearing agencies to have governance arrangements that are clear and transparent, establish that the board of directors and senior management have appropriate experience and skills to discharge their duties and responsibilities, specify clear and direct lines of responsibility, and consider the interests of participants' customers, securities issues and holders, and other relevant stakeholders of the covered clearing agency.[33]

Based on its review of the record, and for the reasons described below, the Commission believes that the proposed changes described above are consistent with Rule 17Ad–22(e)(2)(i) under the Exchange Act, in that the Proposed Rule Change increases the clarity and transparency of OCC's governance arrangements. In recognizing that there may be a number of ways to address compliance with Rule 17Ad–22(e)(2), the Commission has stated that a covered clearing agency generally should consider, when establishing and maintaining policies and procedures that address governance, whether the roles and responsibilities of management have been clearly

[26] *Id.*

[27] *Id.*

[28] 15 U.S.C. 78s(b)(2)(C).

[29] 15 U.S.C. 78q–1(b)(3)(A).

[30] 17 CFR 240.17Ad–22(e)(2).

[31] 15 U.S.C. 78q–1(b)(3)(A).

[32] 15 U.S.C. 78q–1(b)(3)(A).

[33] 17 CFR 240.17Ad–22(e)(2)(i), (iv), (v), and (vi).

specified.[34] The proposal to update OCC's By-Laws to state explicitly that the Board may choose either a Non-Executive Chairman or an Executive Chairman rectifies current concerns that the Board likely would not consider Non-Executive Chairman candidates if the ability to do so were not already in the By-Laws.[35] The Proposed Rule Change clarifies that the Board need not disregard non-Executive Chairman candidates, and that it actually has the option to elect either an Executive Chairman who is closely involved in the day-to-day responsibilities of running OCC, or a Non-Executive Chairman primarily focused on the running of the Board. Additionally, OCC's proposal to relocate from the By-Laws to each of the Board Committee Charters the requirement that committee members are selected by the Board from among the directors recommended by the then-constituted GNC after consultation with the Chairman and serve at the pleasure of the Board is consistent with increasing the clarity and transparency of OCC's governance arrangements, as it would eliminate unnecessary duplication in the governing documents, since OCC already files each of the Board Committee Charters as OCC rules with the Commission. These proposed changes are thus consistent with Rule 17Ad–22(e)(2)(i).

The Commission believes that based on its review of the record and for the reasons described below, the proposed changes are consistent with Rule 17Ad–22(e)(2)(iv) under the Exchange Act, in that they help to ensure that the Board and senior management have the appropriate experience and skills to discharge their duties and responsibilities. Specifically, OCC proposed changes to its By-Laws to ensure that the Board and stockholders retain the discretion to elect a Management Director to its Board if the Chairman is a Non-Executive Chairman, as well as to ensure that the Board has the discretion to elect an additional Public Director to its Board if the elected Chairman is a Public Director. These changes would provide the Board with the ability to increase the size of the Board by one Director to ensure that it continues to have members with the appropriate skills and incentives to fulfill the Board's multiple roles, by either replacing or supplementing the elected Chairman's skills and background depending on his or her competing demands.

The Commission believes that the Proposed Rule Change is also consistent with Rule 17Ad–22(e)(2)(v) under the Exchange Act, in that the Proposed Rule Change does provide clear and direct lines of responsibility. The Commission has previously stated that covered clearing agencies should have policies and procedures that generally entail documenting the responsibilities of the board of directors and senior management, which could help foster accountability and complement requirements that address the qualifications of the board and management. This requires the covered clearing agency to further specify the roles that each individual would fulfill and the lines of responsibility that would exist within the board and within management.[36] In the current instance, the Proposed Rule Change clarifies which authorities and responsibilities remain with the Chairman, whether Executive or Non-Executive, and which authorities and responsibilities are transferred to other senior officers such as the CEO or COO if the elected Chairman is Non-Executive.

Finally, the Commission believes that the Proposed Rule Change is also consistent with Rule 17Ad–22(e)(2)(vi) under the Exchange Act, in that the Proposed Rule Change provides for governance arrangements that consider the interests of participants' customers, securities issues and holders, and other relevant stakeholders of the covered clearing agency. In recognizing that there may be a number of ways to address compliance with Rule 17Ad–22(e)(2), the Commission has stated that a covered clearing agency generally should consider, when establishing and maintaining policies and procedures that address governance, whether the major decisions of the covered clearing agency reflect appropriately the legitimate interests of its direct and indirect participants and other relevant stakeholders.[37] OCC's proposed changes to its Technology Charter to require an independent director as the chair of the committee would help to ensure that the interests of direct and indirect participants are considered as part of Technology Committee determinations, and also makes the Technology Charter consistent with the other Board Committee Charters.

The Commission believes, therefore, that the proposal to provide OCC's Board with the discretion to elect either an Executive Chairman or a Non-Executive Chairman, provide the Board and stockholders with the discretion to elect a Management Director, clarify the respective authority and responsibility of any Executive Chairman or Non-Executive Chairman, and make other clarifying, conforming, and administrative changes to OCC's rules is consistent with the requirements of Rule 17Ad–22(e)(2)(i), (iv), (v), and (vi) under the Exchange Act.[38]

IV. Conclusion

On the basis of the foregoing, the Commission finds that the Proposed Rule Change is consistent with the requirements of the Exchange Act, and in particular, the requirements of Section 17A of the Exchange Act[39] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[40] that the Proposed Rule Change (SR–OCC–2021–007) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[41]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–20969 Filed 9–27–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: 4:30 p.m. on Monday, September 27, 2021.

PLACE: The meeting will be held via remote means and/or at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters also may be present.

In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's website at *https://www.sec.gov.*

The General Counsel of the Commission, or his designee, has

[34] *See* Securities Exchange Act Release 78961, 81 FR 70786, 70806 (Oct. 13, 2016) (File No. S7–03–14).

[35] *See supra* note 4 at 44107.

[36] *See supra* note 34 at 70804.

[37] *Id.* at 70806–07.

[38] 17 CFR 240.17Ad–22(e)(2)(i), (iv), (v), and (vi).

[39] In approving this Proposed Rule Change, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[40] 15 U.S.C. 78s(b)(2).

[41] 17 CFR 200.30–3(a)(12).

certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matters at the closed meeting.

The subject matter of the closed meeting will consist of the following topic:

Other matters relating enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting agenda items that may consist of adjudicatory, examination, litigation, or regulatory matters.

CONTACT PERSON FOR MORE INFORMATION: For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

Dated: September 23, 2021.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2021–21118 Filed 9–24–21; 11:15 am]

BILLING CODE 8011–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. 2022–2091]

Petition for Exemption; Summary of Petition Received; Country Club Lawn & Tree Specialist, LLC

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

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before October 18, 2021.

ADDRESSES: Send comments identified by docket number FAA–2021–0231 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at (202) 493–2251.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *https://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.dot.gov/privacy.*

Docket: Background documents or comments received may be read at *https://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jake Troutman, (202) 683–7788, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC.

Timothy R. Adams,

Acting Executive Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2021–0231.

Petitioner: Country Club Lawn & Tree Specialist, LLC.

Sections of 14 CFR Affected: 61.3(a)(1)(i); 91.7(a); 91.119(c); 91.121; 91.151(b); 91.405(a); 91.407(a)(1); 91.409(a)(1) & (2); 91.417(a) & (b); 137.19(c), (d), (e)(2)(ii), (e)(2)(iii), & (e)(2)(v); 137.31; 137.33; 137.41(c); 137.41(c); & 137.42.

Description of Relief Sought: Country Club Lawn & Tree Specialist, LLC seeks relief to operate the AG–122 unmanned aircraft system (UAS), with a maximum takeoff weight of 143.3 pounds, for simultaneous operation of up to three UAS to conduct agricultural operations and vegetation control.

[FR Doc. 2021–20997 Filed 9–27–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No.–2022–2101]

Petition for Exemption; Summary of Petition Received; IVM Solutions, LLC

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

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, FAA's exemption process. Neither publication of this notice nor the inclusion nor omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before October 18, 2021.

ADDRESSES: Send comments identified by docket number FAA–2020–0765 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at (202) 493–2251.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jake Troutman, (202) 683–7788, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC.

Timothy R. Adams,

Acting Executive Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2020–0765.
Petitioner: IVM Solutions, LLC.
Section(s) of 14 CFR Affected: §§ 61.3(a)(1)(i); 91.7(a); 91.119(c); 91.121; 91.151(b); 91.405(a); 91.407(a)(1); 91.409(a)(1) & (2); 91.417(a) & (b); 137.19(c), (d), (e)(2)(ii), (e)(2)(iii), & (e)(2)(v); 137.31; 137.33; 137.41(c); & 137.42.

Description of Relief Sought: IVM Solutions, LLC, proposes to operate the HSE–UAV M6A Pro G200, DJI AGRAS T–16, and the DJI AGRAS T–20 unmanned aircraft systems, each weighing over 55 pounds (lbs.), but no more than 88.3 lbs., 97.2. lbs., and 100.75 lbs. respectively, at night, closer than 500 feet from vessels, vehicles, and structures for various agricultural operations and vegetation control.

[FR Doc. 2021–20998 Filed 9–27–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. 2021–0007]

Petition for Exemption; Summary of Petition Received; Ohana Drone

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

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion nor omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before October 18, 2021.

ADDRESSES: Send comments identified by docket number FAA–2021–0043 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at (202) 493–2251.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Sean O'Tormey, telephone number 202–267–4044, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC.

Timothy R. Adams,

Acting Executive Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2021–0043.
Petitioner: Ohana Drone.
Sections of 14 CFR Affected: §§ 61.3(a)(1)(i), 91.7(a), 91.119(c), 91.121, 91.151(b), 91.405(a), 91.407(a)(1), 91.409(a)(1), 91.409(a)(2), 91.417(a), 91.417(b), 137.19(c), 137.19(d), 137.19(e)(2)(ii), 137.19(e)(2)(iii), 137.19(e)(2)(v), 137.31, 137.33, 137.41(c), and 137.42.

Description of Relief Sought: Ohana Drone is petitioning to operate two unmanned aircraft systems (UAS) simultaneously by a single pilot with each UAS weighing over 55 pounds, but no more than 97.2 pounds, for the purposes of vegetation control for electrical utility, pipeline, and railroad right of ways as well as row crop applications. Ohana Drone is petitioning to conduct these UAS operations at night and closer than 500 feet from vessels, vehicles, and structures.

[FR Doc. 2021–20996 Filed 9–27–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. 2022–2096]

Petition for Exemption; Summary of Petition Received; 417 Drone Imaging LLC

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

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, FAA's exemption process. Neither publication of this notice nor the inclusion nor omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before October 18, 2021.

ADDRESSES: Send comments identified by docket number FAA–2021–0439 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow

the online instructions for sending your comments electronically.

- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at (202) 493–2251.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jake Troutman (202) 683–7788, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC.

Timothy R. Adams,

Acting Executive Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2021–0439.
Petitioner: 417 Drone Imaging LLC.
Section(s) of 14 CFR Affected: 107.36.
Description of Relief Sought: 417 Drone Imaging LLC is petitioning the FAA for the relief from 107.36 only to the extent of operating a small unmanned aircraft system, weighing under 55 pounds, carrying fireworks and pyrotechnic devises to perform aerial lighting displays for public entertainment.

[FR Doc. 2021–20999 Filed 9–27–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway Projects in Texas

AGENCY: Texas Department of Transportation (TxDOT), Federal Highway Administration (FHWA), Department of Transportation.

ACTION: Notice of limitation on claims for judicial review of actions by TxDOT and federal agencies.

SUMMARY: This notice announces actions taken by TxDOT and Federal agencies that are final. The environmental review, consultation, and other actions required by applicable Federal environmental laws for these projects are being, or have been, carried-out by TxDOT pursuant to an assignment agreement executed by FHWA and TxDOT. The actions relate to various proposed highway projects in the State of Texas. These actions grant licenses, permits, and approvals for the projects.

DATES: By this notice, TxDOT is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of TxDOT and Federal agency actions on the highway projects will be barred unless the claim is filed on or before the deadline. For the projects listed below, the deadline is 150 days from the date of publication. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such a claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Patrick Lee, Environmental Affairs Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701; telephone: (512) 416–2358; email: *Patrick.Lee@txdot.gov.* TxDOT's normal business hours are 8:00 a.m.–5:00 p.m. (central time), Monday through Friday.

SUPPLEMENTARY INFORMATION: The environmental review, consultation, and other actions required by applicable Federal environmental laws for these projects are being, or have been, carried-out by TxDOT pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated December 9, 2019, and executed by FHWA and TxDOT.

Notice is hereby given that TxDOT and Federal agencies have taken final agency actions by issuing licenses, permits, and approvals for the highway projects in the State of Texas that are listed below.

The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion (CE), Environmental Assessment (EA), or Environmental Impact Statement (EIS) issued in connection with the projects and in other key project documents. The CE, EA, or EIS and other key documents for the listed projects are available by contacting the local TxDOT office at the address or telephone number provided for each project below.

This notice applies to all TxDOT and Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109].
2. *Air:* Clean Air Act [42 U.S.C. 7401–7671(q)].
3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303]; Landscaping and Scenic Enhancement (Wildflowers) [23 U.S.C. 319].
4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536], Marine Mammal Protection Act [16 U.S.C. 1361], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)], Migratory Bird Treaty Act [16 U.S.C. 703–712].
5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [54 U.S.C. 300101 *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–11]; Archeological and Historic Preservation Act [54 U.S.C. 312501 *et seq.*]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].
6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].
7. *Wetlands and Water Resources:* Clean Water Act [33 U.S.C. 1251–1377] (Section 404, Section 401, Section 319); Land and Water Conservation Fund (LWCF) [16 U.S.C. 4601–4604]; Safe Drinking Water Act (SDWA) [42 U.S.C. 300(f)–300(j)(6)]; Rivers and Harbors Act of 1899 [33 U.S.C. 401–406]; Wild and Scenic Rivers Act [16 U.S.C. 1271–1287]; Emergency Wetlands Resources Act [16 U.S.C. 3921, 3931]; TEA–21 Wetlands Mitigation [23 U.S.C. 103(b)(6)(m), 133(b)(11)]; Flood Disaster Protection Act [42 U.S.C. 4001–4128].
8. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species. (Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction.)

The projects subject to this notice are:

1. Hi-Line Road, from Cage Boulevard (US 281) to Veterans Road (I Road), Hidalgo County, Texas. The purpose of the project is to improve safety and connectivity by reconstructing and widening Hi-Line Road from Cage Boulevard to Veterans Road from a two-lane rural roadway with 12-foot wide travel lanes and roadside ditches to a three-lane urban roadway with 14-foot wide travel lanes and a 16-foot wide center left-turn lane, with curb and gutter drainage system, for approximately 1.03 miles. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on June 23, 2021, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Pharr District Office at 600 W Interstate 2, Pharr, TX 78577; telephone (956) 702–6100.

2. The US 287 project from the Union Pacific Railroad (UPRR) to south of Lone Star Rd, Tarrant and Johnson Counties, Texas. The project includes the construction of frontage roads (northbound and southbound) within the existing US 287 right of way. U-Turn lanes would be provided at the north and south ends of the project. Bike lanes would be included along the frontage roads to accommodate cyclists. Continuous sidewalks and shoulders would be constructed along the frontage roads to accommodate pedestrians as well as curb-and-gutter and drainage structures. A short segment of Lone Star Road would be reconstructed and widened from two lanes to six lanes from BUS 287 (South Main Street) to the main driveway leading to Texas Health Mansfield. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on July 10, 2021, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Fort Worth District Office at 2501 SW Loop 820, Fort Worth, Texas 76133; telephone: (817) 370–6744.

3. FM Spur 121, from CR 60 to FM 121, Grayson County, Texas. The purpose of the project is to improve connectivity by constructing a new-location two-lane rural roadway with 12-foot wide travel lanes, 10-foot wide shoulders, and roadside ditches, for approximately 4.2 miles. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on July 16, 2021, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Paris District Office at 1365 N Main St., Paris, Texas 75460; telephone (903) 737–9300.

4. The SH 183 at Union Pacific Railroad (UPRR) widening and bridge replacement project, Tarrant County, Texas. The project includes replacement of the existing UPRR underpass on SH 183 and the widening of the existing SH 183 roadway to accommodate left- and right-turn lanes at the intersections. Improvements will also include retaining walls, shared use paths, grading, illumination, and storm system improvements. The project limits are SH 183 from approximately 850 feet west of North Nichols Street to approximately 630 feet east of Decatur Avenue, including both rail and roadway sections. Overall, the proposed improvements would extend approximately 0.475 mile along SH 183. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on July 28, 2021, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Fort Worth District Office at 2501 SW Loop 820, Fort Worth, Texas 76133; telephone: (817) 370–6744.

5. SH 5 from south of CR 275 to south of Melissa Road in Collin County, Texas. The proposed improvements would include the reconstruction and widening of SH 5 within the project limits. SH 5 from CR 275 to south of Melissa Road would be reconstructed from a 2-lane rural roadway to a 4-lane (6-lane ultimate) divided urban roadway with raised curb and a variable-width median. SH 121, from south of the intersection of SH 121 and CR 338 to the Union Pacific Railroad (UPRR), would be reconstructed from a 4-lane divided rural roadway with depressed median to a 4-lane (6-lane ultimate) divided urban roadway with a variable-width median. The total project length is approximately 2.5 miles. The purpose of the proposed project along SH 5 is to improve safety and mobility, and update the roadway to current design and safety standards. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on August 3, 2021, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Dallas District Office at 4777 E Highway 80, Mesquite, TX 75150; telephone: (214) 320–6200.

6. FM 1173 from FM 156 to IH 35 in Denton County, Texas. The proposed improvements would include constructing a new six-lane urban highway with sidewalks on both sides. The reconstruction of FM 1173 would be approximately 5,400 feet in length; the new construction portion of FM 1173 would be approximately 3,200 feet and the reconstruction of the existing Barthold Road would be approximately 10,400 feet in length. The total project length is approximately 3.6 miles. The purpose of the proposed project is to provide infrastructure options to reduce traffic congestion on the existing roadways, to increase mobility (including pedestrian and bicycle accommodations), and to address design deficiencies. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on August 25, 2021, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Dallas District Office at 4777 E Highway 80, Mesquite, TX 75150; telephone (214) 320–6200.

7. SH 359 from approximately four miles east of SL 20 to approximately ten miles east of SL 20 in Webb County, Texas. The project will widen SH 359 from the existing two-lane roadway with a continuous left turn lane to a four-lane roadway with a continuous left turn lane for approximately three miles, and a four-lane divided highway for approximately three miles. The total distance for this project will be approximately six miles and will accommodate the increase of traffic in the area with added safety features added to this roadway. This will serve the adjacent subdivisions and the commuters passing through from surrounding areas as well as the transportation of goods. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on August 31, 2021, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Laredo District Office at 1817 Bob Bullock Loop, Laredo, Texas 78043; telephone: 956–712–7400.

8. SL 195, from FM 755 to US 83, Starr County, Texas. The purpose of the project is to increase mobility by providing an additional route for traffic traveling through southern Starr County between the cities of Rio Grande City and Roma. The proposed project would involve the construction of a new-location 4-lane divided highway connecting FM 755 to US 83 for approximately 17.24 miles. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Environmental Assessment (EA), the Finding of No Significant Impact (FONSI) issued on June 8, 2021, and other documents in the TxDOT project file. The EA, FONSI, and other documents in the TxDOT project file are available by contacting the TxDOT Pharr District Office at 600 W Interstate 2, Pharr, Texas 78577; telephone: (956) 702–6100.

9. US 271/SL 485 from FM 16 to the Gregg/Upshur County line in Smith and Gregg Counties, Texas. The purpose of the proposed project is to improve safety and connectivity on US 271/SL 485 between the cities of Gladewater and Tyler by widening the road to a four-lane highway with two 12-foot travel lanes in each direction, a variable center median, shoulders, with bicycle accommodations and curb and gutter in portions of the project. The proposed project length is approximately 10.4 miles in length. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Environmental Assessment (EA), the Finding of No Significant Impact (FONSI) issued on July 27, 2021, and other documents in the TxDOT project file. The EA, FONSI, and other documents in the TxDOT project file are available by contacting the TxDOT Tyler District Office at 2709 W Front St., Tyler, Texas 75702; telephone (903) 510–9100.

10. US 87 Expansion Project from east of the US 385 Interchange near Hartley, to FM 2589 west of Dumas, in Moore and Hartley Counties, Texas. The proposed project includes expanding the roadway from the current two-lane with super-two passing lanes configuration to a four-lane divided highway. This project is approximately 20 miles long. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Environmental Assessment (EA), the Finding of No Significant Impact (FONSI) issued on July 29, 2021, and other documents in the TxDOT project file. The EA, FONSI, and other documents in the TxDOT project file are available by contacting the TxDOT Amarillo District Office at 5715 Canyon Drive, Amarillo, Texas 79110; telephone: (806) 356–3256.

11. US 281 from SH 186/FM 1017 to FM 3066, in Hidalgo and Brooks Counties, Texas. The purpose of the project is to upgrade US 281 to interstate standards and improve mobility to meet projected traffic demand. The proposed project would involve widening and reconstruction of the main lanes, as well as addition of frontage roads and overpasses throughout portions of the project area, for approximately 41.9 miles. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Environmental Assessment (EA), the Finding of No Significant Impact (FONSI) issued on September 13, 2021 and other documents in the TxDOT project file. The EA, FONSI, and other documents in the TxDOT project file are available by contacting the TxDOT Pharr District Office at 600 W Interstate 2, Pharr, Texas 78577; telephone: (956) 702–6100.

Authority: 23 U.S.C. 139(l)(1).

Michael T. Leary,

Director, Planning and Program Development, Federal Highway Administration.

[FR Doc. 2021–20916 Filed 9–27–21; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2021–0012]

Agency Information Collection Activities; Notice and Request for Comment; Fatal Crash Seat Belt Use Reporting and Awareness

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice and request for comments on a request for approval of a new information collection.

SUMMARY: The National Highway Traffic Safety Administration (NHTSA) invites public comments about our intention to request approval from the Office of Management and Budget (OMB) for a new information collection. Before a Federal agency can collect certain information from the public, it must receive approval from OMB. Under procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatements of previously approved collections. This document describes a collection of information for which NHTSA intends to seek OMB approval on Fatal Crash Seat Belt Use Reporting and Awareness.

DATES: Comments must be submitted on or before November 29, 2021.

ADDRESSES: You may submit comments identified by the Docket No. NHTSA–2021–0012 using any of the following methods:

- *Electronic submissions:* Go to the Federal eRulemaking Portal at *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail or Hand Delivery:* Docket Management, U.S. Department of Transportation, 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. To be sure someone is there to help you, please call (202) 366–9322 before coming.

Instructions: All submissions must include the agency name and docket number for this notice. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *https://www.transportation.gov/privacy.*

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or the street address listed above. Follow the online instructions for accessing the dockets via internet.

FOR FURTHER INFORMATION CONTACT: For additional information or access to background documents, contact Jordan A. Blenner, JD, Ph.D., Office of Behavioral Safety Research (NPD–320), (202) 366–9982, National Highway Traffic Safety Administration, W46–470, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), before an agency submits a proposed collection of information to OMB for approval, it must publish a document in the **Federal Register** providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulation (at 5 CFR 1320.8(d)), an agency must ask for public comment on the following: (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) how to enhance the quality, utility, and clarity of the information to be collected; and (d) how to minimize the burden of the collection of information on those who are to respond, including 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. In compliance with these requirements, NHTSA asks for public comments on the following proposed collection of information for which the agency is seeking approval from OMB.

Title: Fatal Crash Seat Belt Use Reporting and Awareness.

OMB Control Number: New.

Form Numbers: NHTSA Forms 1599, 1600, 1601, and 1604.

Type of Request: Approval of a new information collection.

Type of Review Requested: Regular.

Requested Expiration Date of Approval: 3 years from date of approval.

Summary of the Collection of Information: The National Highway Traffic Safety Administration (NHTSA) of the U.S. Department of Transportation is seeking approval to collect information from 1,500 participants from two seat belt user groups, 750 who are full-time and 750 who are occasional or non-users, for a one-time voluntary experiment to understand whether the inclusion of seat belt status in a fatal crash news report could affect seat belt use. NHTSA

will contact a sample of 20,850 potential participants from a marketing research firm's panel with an invitation email and screening questions to identify adult volunteers who regularly drive a passenger vehicle. Recruiting participants for the experiment has an estimated burden of 348 hours for the invitation email and 70 hours for the screening questions. (An estimated 20% of the invited potential participants will be interested in participating in the study and will complete the screener form, *i.e.,* 4,170 potential participants.) An estimated 1,668 potential participants will read the consent form with an estimated burden of 139 hours. The 1,500 participants will complete the experiment with an estimated burden of 500 hours. The experiment involves a 40-question online survey that participants will complete in their own homes using their personal computers. Participants will read one of three fictitious news reports of crashes (some of which involve fatalities) to gauge whether including seat belt use in news reports has the potential to increase belt use by occasional and non-seat belt users. After reading the news report, participants will report their recollection of belt use in the news report they read, self-reported seat belt use, intentions to use belts, attitudes about seat belts, and demographic information. The total estimated burden associated with reporting is 1,057 hours. The collection does not involve recordkeeping or disclosure. An approved Institutional Review Board (IRB), Advarra, has reviewed the study and determined that the research project is exempt from IRB oversight. NHTSA will summarize the results of the collection using aggregate statistics in a final report to be distributed to NHTSA program and regional offices, State Highway Safety Offices, and other traffic safety stakeholders. This collection will inform the development of countermeasures, particularly in the areas of communications and outreach, for increasing seat belt use and reducing fatalities and injuries associated with the lack of seat belt use.

Description of the Need for the Information and Proposed Use of the Information: NHTSA was established to reduce deaths, injuries, and economic losses resulting from motor vehicle crashes on the Nation's highways. As part of this statutory mandate, NHTSA is authorized to conduct research for the development of traffic safety programs. Title 23, United States Code, Section 403 gives the Secretary of Transportation (NHTSA by delegation) authorization to use funds appropriated to conduct research and development activities, including demonstration projects and the collection and analysis of highway and motor vehicle safety data and related information, with respect to all aspects of highway and traffic safety systems and conditions relating to vehicle, highway, driver, passenger, motorcyclist, bicyclist, and pedestrian characteristics; accident causation and investigations; and human behavioral factors and their effect on highway and traffic safety.

In 2018, 22,697 occupants of passenger vehicles (passenger cars, pickup trucks, vans, and SUVs) died in motor vehicle crashes in the United States. Of those killed where restraint status was known, 47% were unrestrained at the time of the fatal crash. NHTSA estimates that seat belts saved the lives of 14,955 passenger vehicle occupants age 5 and older in 2017 (latest data available), and, if all passenger vehicle occupants age 5 and older had worn seat belts, an additional 2,549 lives could have been saved.[1]

This project supports NHTSA's efforts to increase occupant protection by examining factors related to seat belt use. Previous research in this area indicated that news organizations may not report seat belt use in many of the driving fatalities they cover.[2] That said, the research conducted previously involved data from 1999 through 2002, which may be out of date with current practices. Many stakeholders assume that increased reporting of seat belt usage in fatal crashes, especially when seat belts were not worn, could increase seat belt use. In addition, when seat belt status has been reported in a news report, it is not clear individuals are paying attention. Improving awareness of seat belt status, particularly involving unbelted fatalities, may be an effective countermeasure that may encourage individuals to wear seat belts.

The information from this collection will assist NHTSA in (a) planning seat belt program activities; (b) supporting groups involved in improving public safety; and (c) identifying countermeasure strategies that are most acceptable and effective in increasing seat belt use.

Affected Public: Participants will be U.S. adults (18 years and older, except for those from Nebraska or Alabama (who will need to be 19 years or older), or those from Mississippi (who will need to be 21 years or older)) with fluency in reading and writing in English, who have driven a passenger vehicle (car, van, SUV, or pickup truck) at least once in the past month, and whose main form of transportation is a passenger vehicle.

Estimated Number of Respondents: 20,850 total respondents, with 1,500 participating in the full experiment.

The experiment will invite up to 20,850 people to participate. The number of invitations is based on the need to recruit 1,500 participants, 750 of whom are either non- or part-time seat belt users. Based on corporate experience with online panels, the marketing research firm providing access to their panel of participants estimates a participation rate of 20%. Furthermore, NHTSA research has shown that while most drivers reported wearing their seat belts every time they drive, approximately 20% are either non-users or part-time users.[3] Finally, NHTSA estimates that 90% who qualify and read the consent form will provide consent and complete the study. To obtain a sample of 750 consenting participants in the non/part user group, requires a universe of 20,850 potential respondents. Of the 20,850 invited panelists, we expect 20% or 4,170 volunteers who are interested and qualify. Of the 4,170 who are interested, we expect 20% or 834 volunteers will be non- or part-time seat belt users. Of the 834 volunteers who are non- or part-time seat belt users, we expect 90% or 750 to consent and complete the study. The marketing research firm will provide a link to the consent form to the first 834 non- or part-time seat belt users and to the first 834 full-time seat belt users who are interested and qualify. (Once the firm reaches 750 completions from full-time users, which is expected to occur before the 750 completions from non- or part-time users, they will no longer provide links to the informed consent to qualified full-time users.)

Frequency: This study is a one-time information collection, and there will be no recurrence.

Estimated Total Annual Burden Hours: The total estimated burden associated with this collection is 1,057

[1] National Center for Statistics and Analysis. (2020). *Occupant protection in passenger vehicles: 2018 data* (Traffic Safety Facts. Report No. DOT HS 812 967). National Highway Traffic Safety Administration. *https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812967.*

[2] Connor, S.M., & Wesolowski, K. (2004). Newspaper framing of fatal motor vehicle crashes in four Midwestern cities in the United States, 1999–2000. *Inj Prev. 10*(3), 149–153. *http://dx.doi.org/10.1136/ip.2003.003376.* Rosales, M., & Stallones, L. (2008). Coverage of motor vehicle crashes with injuries in U.S. newspapers, 1999–2002. *Journal of Safety Research, 39*(5), 477–82. *https://doi.org/10.1016/j.jsr.2008.08.001.*

[3] National Highway Traffic Safety Administration. (2019, December). *The 2016 motor vehicle occupant safety survey: Seat belt report* (Report No. DOT HS 812 798). Author. *https://rosap.ntl.bts.gov/view/dot/43608.*

hours. The sample of potential participants will receive an email invitation from Schlesinger Group, a marketing research firm that specializes in providing sampling pools of panelists, with screening questions to determine eligibility. The 20,850 potential participants are expected to spend 1 minute each in reading the invitation email for an estimated 348 hours. Those who are interested (estimated to be 20%, or 4,170 individuals) are expected to spend 1 minute each in completing the screener form for an estimated 70 hours. Schlesinger will provide electronic links to the consent form to the first 834 full-time seat belt users and to the first 834 part-time/non-users who qualify based on the screening questions. The 1,668 eligible participants are expected to spend 5 minutes each reading and completing the consent form for an estimated 139 hours. The estimated 1,500 consenting participants will each spend 20 minutes completing the experiment for an estimated 500 hours. The total burden is the sum of the burden across the invitation/screening, consenting, and completing the experiment for a total estimate of 1,057 hours. The details are presented in Table 1 below.

TABLE 1—ESTIMATED BURDEN HOURS BY FORM

Form	Description	Participants	Estimated minutes per participant	Total estimated burden hours per form
Form 1599	Invitation Email	20,850	1	348
Form 1604	Screener Form	4,170	1	70
Form 1600	Informed Consent Form	1,668	5	139
Form 1601	Experiment Form	1,500	20	500
Total				1,057

Estimated Total Annual Burden Cost: NHTSA estimates that there are no costs to respondents beyond the time spent participating in the study.

Public Comments Invited: You are asked to comment on any aspects of this information collection, including (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (b) the accuracy of the Department's estimate of the burden of the proposed information collection; (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 respondents, including the use of automated collection techniques or other forms of information technology.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended; 49 CFR 1.49; and DOT Order 1351.29.

Issued in Washington, DC.

Nanda Narayanan Srinivasan,

Associate Administrator, Research and Program Development.

[FR Doc. 2021–21040 Filed 9–27–21; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Multiple Alcohol and Tobacco Tax and Trade Bureau Information Collection Requests

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The public is invited to submit comments on these requests.

DATES: Comments must be received on or before October 28, 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: Copies of the submissions may be obtained from Molly Stasko by emailing *PRA@treasury.gov,* calling (202) 622–8922, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Alcohol and Tobacco Tax and Trade Bureau (TTB)

1. Title: Volatile Fruit-Flavor Concentrate Plans-Applications and Related Records.

OMB Control Number: 1513–0006.

Type of Review: Extension of a currently approved collection.

Description: Volatile fruit-flavor concentrates contain alcohol when made from the mash or juice of a fruit by an evaporative process. Under the Internal Revenue Code (IRC) at 26 U.S.C. 5511, alcohol excise taxes and most other provisions of chapter 51 of the IRC do not apply to such concentrates if their manufacturers file applications, keep records, and meet certain other requirements prescribed by regulation. Under that IRC authority, the TTB regulations in 27 CFR part 18 require volatile fruit-flavor concentrate manufacturers to register using form TTB F 5520.3, file amendments to their registrations using that form or a letterhead application (depending on circumstances), and maintain a record file of all approved registrations and related supporting documents. TTB uses the collected information to identify concentrate manufacturers and their operations to ensure that the tax provisions of the IRC are appropriately applied.

Form Number: TTB F 5520.3.

Recordkeeping Number: TTB REC 5520/2.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 55.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 55.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 110 hours.

2. Title: Volatile Fruit-Flavor Concentrate Manufacturers—Annual Report, and Usual and Customary Business Records.

OMB Control Number: 1513–0022.

Type of Review: Extension of a currently approved collection.

Description: Volatile fruit-flavor concentrates contain alcohol when made from the mash or juice of a fruit by an evaporative process. Under the IRC at 26 U.S.C. 5511, alcohol excise taxes and most other provisions of chapter 51 of the IRC do not apply to such concentrates if their manufacturers keep records and meet certain other requirements prescribed by regulation. Under that IRC authority, the TTB regulations in 27 CFR part 18 require volatile fruit-flavor concentrate manufacturers to submit an annual summary report, using form TTB F 5520.2, accounting for all such products produced, removed, or made unfit for beverage use. Such manufacturers compile this report from usual and customary business, which, under the regulations, respondents must retain for 3 years. TTB uses the collected information to ensure that the tax provisions of the IRC are appropriately applied.

Form Number: TTB F 5520.2.

Recordkeeping Number: TTB REC 5520/1.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 55.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 55.

Estimated Time per Response: 20 minutes.

Estimated Total Annual Burden Hours: 18 hours.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: September 22, 2021.

Molly Stasko,

Treasury PRA Clearance Officer.

[FR Doc. 2021–20977 Filed 9–27–21; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Multiple Internal Revenue Service Information Collection Requests

AGENCY: Departmental Offices, Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The public is invited to submit comments on these requests.

DATES: Comments must be received on or before October 28, 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: Copies of the submissions may be obtained from Molly Stasko by emailing *PRA@treasury.gov,* calling (202) 622–8922, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Internal Revenue Service (IRS)

1. Title: Reduction of Tax Attributes Due to Discharge of Indebtedness.

OMB Control Number: 1545–0046.

Type of Review: Extension of a currently approved collection.

Description: Internal Revenue Code (IRC) section 108 allows taxpayers to exclude from gross income amounts attributable to discharge of indebtedness in title 11 cases, insolvency, or a qualified farm indebtedness. Section 1081(b) allows corporations to exclude from gross income amounts attributable to certain transfers of property. The data is used to verify adjustments to basis of property and reduction of tax attributes.

Form Number: IRS Form 982.

Affected Public: Individuals or households; Businesses or other for-profits.

Estimated Number of Respondents: 667.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 667.

Estimated Time per Respondent: 11 hours 23 minutes.

Estimated Total Annual Burden Hours: 7,491 hours.

2. Title: Declaration and Signature for Electronic and Magnetic Media Filing.

OMB Control Number: 1545–0967.

Type of Review: Extension of a currently approved collection.

Description: The IRS is actively engaged in encouraging e-filing and electronic documentation. These forms are used to secure taxpayer signatures and declarations in conjunction with electronic or magnetic media filing of income tax returns. Form 8453–FE is used to authenticate the electronic Form 1041, *U.S. Income Tax Return for Estates and Trusts.* Form 8453–EMP is used to authenticate an electronic employment tax form, authorize the electronic return originator (ERO). Form 8879–EMP is used to authenticate an electronic employment tax return or request for refund, authorize an ERO or ISP to transmit via a third-party, and authorize an electronic funds withdrawal for payment of employment taxes owe. Form 8879–F is used by an electronic return originator when the fiduciary wants to use a personal identification number to electronically sign an estate's or trust's electronic income tax return, and if applicable consent to electronic funds withdrawal.

Form Number: IRS Forms 8879–F, 8453–FE, 8453–EMP, and 8879–EMP.

Affected Public: Individuals or households; Businesses and other for-profit organizations; and Not-for-profit institutions.

Estimated Number of Respondents: 21,000,881.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 21,000,881.

Estimated Time per Response: 2 hours 34 minutes.

Estimated Total Annual Burden Hours: 53,783,747 hours.

3. Title: Procedural Rules for Excise Taxes Currently Reportable on Form 720.

OMB Control Number: 1545–1296.

Type of Review: Extension of a currently approved collection.

Description: Treasury Decision (T.D.) 8685 contains the regulations addressing persons required to make deposits of excise taxes. Internal Revenue Code (IRC) Section 4251 imposes a tax on amounts paid for certain communications services. IRC Section 4261 imposes various taxes on amounts paid for the transportation of persons by air. IRC Section 4271 imposes a tax on amounts paid for the air transportation of property. T.D. 8442 provides guidance for reporting excise taxes on Form 720. Section 6302(c) authorizes the Secretary to prescribe the time, manner, and conditions under which taxes imposed under internal revenue laws may be received at government depositories.

Regulation Project Number: T.D. 8685 and T.D. 8442.

Affected Public: Individuals or households; Businesses and other for-

profit organizations; and Not-for-profit institutions.

Estimated Number of Respondents: 10,500.

Frequency of Response: On Occasion.

Estimated Total Number of Annual Responses: 10,500.

Estimated Time per Response: 23 hours 5 minutes.

Estimated Total Annual Burden Hours: 242,350 hours.

4. Title: Application Procedures for Qualified Intermediary Status Under Section 1441; Final Qualified Intermediary Withholding Agreement.

OMB Control Number: 1545–1597.

Type of Review: Extension of a currently approved collection.

Description: Internal Revenue Code (IRC) Section 1441 (Withholding of tax on nonresident aliens), states any nonresident alien individual or of any foreign partnership shall deduct and withhold from such items a tax equal to 30 percent or 14 percent depending on circumstances. Revenue Procedure 2017–15 sets forth the final qualified intermediary (QI) withholding agreement (QI agreement) entered under Treasury Regulation 1.1441–1(e)(5). The QI agreement allows foreign persons to enter into an agreement with the IRS to simplify their obligations as withholding agents and as payors for amounts paid to their account holders.

The reporting requirements are set out in Section 5.01 of this Revenue Procedure. A prospective QI must submit an application (Form 14345) to become a QI. A prospective QI must submit the information specified in Form 14345 through the QI/WP/WT Application and Accounts Management System. An application must also include any additional information and documentation requested by the IRS.

Form 14345 is an application form for foreign financial institutions requesting Qualified Intermediary Agreement with the IRS.

Regulation Project Number: Revenue Procedure 2017–15.

Form Number: IRS Form 14345.

Affected Public: Businesses and other for-profit organizations.

Estimated Number of Respondents: 88,504.

Frequency of Response: On Occasion.

Estimated Total Number of Annual Responses: 1,097,991.

Estimated Time per Response: 16 minutes—12 hours.

Estimated Total Annual Burden Hours: 301,018 hours.

5. Title: Employee Retention Credit for Employers Affected by Qualified Disasters.

OMB Control Number: 1545–1978.

Type of Review: Extension of a currently approved collection.

Description: Form 5884–A is used to figure certain credits for disaster area employers. These credits typically include employee retention credits for eligible employers who conducted an active trade or business in certain disaster areas. The credit is equal to 40 percent of qualified wages for each eligible employee (up to a maximum of $6,000 in qualified wages per employee).

Form Number: IRS Forms 5884–A.

Affected Public: Businesses and other for-profit organizations.

Estimated Number of Respondents: 250,000.

Frequency of Response: On Occasion.

Estimated Total Number of Annual Responses: 250,000.

Estimated Time per Response: 2.55 hours.

Estimated Total Annual Burden Hours: 637,500 hours.

6. Title: Employer's Annual Employment Tax Return.

OMB Control Number: 1545–2007.

Type of Review: Revision of a currently approved collection.

Description: Form 944 is used by employers with an estimated annual employment tax liability of $1,000 or less for the entire calendar year. Form 944(SP) is the Spanish version of the Form 944. Form 944–X and Form 944–X(SP) are used to correct errors made on Form 944.

Form Number: IRS Forms 944, 944(SP), 944–X, and 944–X(SP).

Affected Public: Individuals or households; Businesses and other for-profit organizations; Not-for-profit institutions; and State, Local and Tribal governments.

Estimated Number of Respondents: 135,884.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 135,884.

Estimated Time per Response: 23 hours 31 minutes.

Estimated Total Annual Burden Hours: 3,196,031 hours.

7. Title: Voluntary Disclosure Program (VDP) and Streamlined Filing Compliance Procedures.

OMB Control Number: 1545–2241.

Type of Review: Revision of a currently approved collection.

Description: The IRS has two different compliance paths for two different populations of taxpayers. First, the Voluntary Disclosure Practice is a longstanding practice of IRS Criminal Investigation (CI). CI takes timely, accurate, and complete voluntary disclosures under consideration when determining whether to recommend criminal prosecution. A voluntary disclosure will not automatically guarantee immunity from prosecution; however, a voluntary disclosure may result in prosecution not being recommended. Form 14457 is used for all voluntary disclosures. This redesigned form is to be used by taxpayers to apply for the IRS–CI Voluntary Disclosure Practice (VDP). The form is submitted by the taxpayer in two parts. Part I is a preclearance request. Once a taxpayer receives preclearance from IRS–CI, they will submit Part II, the voluntary disclosure application. Versions prior to March 2019 were used by taxpayers to apply for the IRS Offshore Voluntary Disclosure Program (OVDP) that closed on September 28, 2018.

Second, the Streamlined Filing Compliance Procedures are available to eligible taxpayers who can truthfully certify that their failure to report foreign financial assets and pay all tax due in respect of those assets resulted from non-willful conduct. Forms 14653, 15023, and 14654 relate to the Streamlined Filing Compliance Procedures.

The IRS uses the data on Form 14457 in administering Criminal Investigation's Voluntary Disclosure Practice.

Form Number: IRS Forms 14457, 14653, 14654, and 15023.

Affected Public: Individuals or households; Businesses or other for-profit institutions; Not-for-profit institutions.

Estimated Number of Respondents: 16,569.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 16,569.

Estimated Time per Response: 2 hours up to 80 hours.

Estimated Total Annual Burden Hours: 411,138 hours.

8. Title: IRS Customer Satisfaction Surveys.

OMB Control Number: 1545–2250.

Type of Review: Revision of a currently approved collection.

Description: Surveys conducted under this clearance are used by the Internal Revenue Service to determine levels of customer satisfaction as well as determining issues that contribute to customer burden. This information will be used to make quality improvements to products and services. Collecting, analyzing, and using customer opinion data is a vital component of IRS's Balanced Measures Approach, as mandated by Internal Revenue Service Reform and Restructuring Act of 1998 and Executive Order 12862.

Form Number: Not applicable.

Affected Public: Individuals or households; Businesses and other for-profit organizations.

Estimated Number of Respondents: 135,000.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 135,000.

Estimated Time per Response: Varies, up to 9 minutes.

Estimated Total Annual Burden Hours: 20,000 hours.

9. Title: Credit for Oil and Gas Production From Marginal Wells.

OMB Control Number: 1545–2278.

Type of Review: Extension of a currently approved collection.

Description: Public Law 108–357, Title III, Subtitle C, section 341(a) instructs the IRS to develop a credit for oil and gas production from marginal wells, which is reflected on Form 8904 and its instructions. Tax year 2017 will be the first year Form 8904 and its instructions will be released. The credit for natural gas production will be available for taxable years beginning in calendar year 2020; a new notice published in the Internal Revenue Bulletin on June 7, 2021. The credit for oil production remains unavailable.

Form Number: IRS Forms 8904.

Affected Public: Individuals or households; Businesses and other for-profit organizations; Not-for-profit institutions; and State, Local and Tribal governments.

Estimated Number of Respondents: 20,000.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 20,000.

Estimated Time per Response: 2 hours 58 minutes.

Estimated Total Annual Burden Hours: 59,200 hours.

10. Title: Employee Retention Credit for Certain Tax-Exempt Organizations Affected by Qualified Disasters.

OMB Control Number: 1545–2298.

Type of Review: Extension of a currently approved collection.

Description: Under section 303(d) of the Taxpayer Certainty and Disaster Tax Relief Act 2020, a qualified Tax-Exempt Organization (including certain governmental entities) that continued to pay or incur wages after activities of the organization (treated as an active trade or business for this purpose) became inoperable because of damage from a qualified disaster may be able to use Form 5884–D to claim the 2020 qualified disaster employee retention credit against certain payroll taxes. The credit is equal to 40 percent of qualified wages for each eligible employee (up to a maximum of $6,000 in qualified wages per employee).

Form Number: IRS Form 5884–D.

Affected Public: Not-for-profit institutions; State, Local and Tribal governments.

Estimated Number of Respondents: 26,300.

Frequency of Response: Once.

Estimated Total Number of Annual Responses: 26,300.

Estimated Time per Response: 2.23 hours.

Estimated Total Annual Burden Hours: 58,649 hours.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: September 23, 2021.

Molly Stasko,

Treasury PRA Clearance Officer.

[FR Doc. 2021–21075 Filed 9–27–21; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Fiscal Service Schedule of Excess Risks

AGENCY: Departmental Offices, Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The public is invited to submit comments on these requests.

DATES: Comments should be received on or before October 28, 2021 to be assured of consideration.

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: Copies of the submissions may be obtained from Molly Stasko by emailing *PRA@treasury.gov,* calling (202) 622–8922, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Fiscal Service (FS)

Title: Schedule of Excess Risks.

OMB Control Number: 1530–0062.

Type of Review: Extension without change of a currently approved collection.

Description: This information is collected from insurance companies to assist the Treasury Department in determining whether a certified or applicant company is solvent and able to carry out its contracts, and whether the company is in compliance with Treasury excess risk regulations for writing Federal surety bonds.

Form: FS Form 285–A.

Affected Public: Businesses and for-profit institutions.

Estimated Number of Respondents: 20 new applications, 263 renewals.

Frequency of Response: Once, Quarterly.

Estimated Total Number of Annual Responses: 20 new applications, 1,052 renewals.

Estimated Time per Response: 20 hours for new applications, 5 hours for renewals.

Estimated Total Annual Burden Hours: 5,660 hours.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: September 22, 2021.

Molly Stasko,

Treasury PRA Clearance Officer.

[FR Doc. 2021–20968 Filed 9–27–21; 8:45 am]

BILLING CODE 4810–AS–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0752]

Agency Information Collection Activity Under OMB Review: uSPEQ® Consumer Experience Survey (Rehabilitation)

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Health Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice 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. Refer to ''OMB Control No. 2900–0752.''

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 1717 H Street NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0752'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: 44 U.S.C. 3501–21.

Title: uSPEQ® Consumer Experience Survey (Rehabilitation), VA Form 10–0467.

OMB Control Number: 2900–0752.

Type of Review: Reinstatement of a previously approved collection.

Abstract: The Department of Veterans Affairs (VA) rehabilitation programs are committed to adopting the uSPEQ® Consumer Experience 2.0 Universal Questionnaire, VA Form 10–0467, to assess outcome measures related to patient perceptions and perspectives regarding rehabilitation experiences. The uSPEQ® (pronounced *you speak*) is a confidential, anonymous, and scientifically tested consumer reporting system that gives persons served a voice in their services. A majority of VA rehabilitation program offices serving special emphasis populations have indicated an interest in using the uSPEQ® document as a survey of rehabilitation consumer experiences in their local, regional, and national programs. The uSPEQ survey will be used to gather input from veterans regarding their satisfaction with VA's rehabilitation programs. VA will use the data collected to continue quality improvement, informed programmatic development, and to identify rehabilitation program strengths and weaknesses.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 86 FR 123 on June 30, 2021, pages 34844 and 34845.

Affected Public: Individuals or Households.

Estimated Annual Burden: 32,000.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 384,000.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration, Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2021–21017 Filed 9–27–21; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

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Part II

Department of Homeland Security

8 CFR Parts 106, 236, and 274a
Deferred Action for Childhood Arrivals; Proposed Rule

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 106, 236, and 274a

[CIS No. 2691–21; DHS Docket No. USCIS–2021–0006]

RIN 1615–AC64

Deferred Action for Childhood Arrivals

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: On June 15, 2012, the U.S. Department of Homeland Security (DHS) established the Deferred Action for Childhood Arrivals (DACA) policy. The policy—which describes the Secretary of Homeland Security's (Secretary's) exercise of her prosecutorial discretion in light of the limited resources that DHS has for removal of undocumented noncitizens—directed U.S. Citizenship and Immigration Services (USCIS) to create a process to defer removal of certain noncitizens who years earlier came to the United States as children, meet other criteria, and do not present other circumstances that would warrant removal. Since that time, more than 825,000 people have applied successfully for deferred action under this policy. On January 20, 2021, President Biden directed DHS, in consultation with the Attorney General, to take all appropriate actions to preserve and fortify DACA, consistent with applicable law. On July 16, 2021, the U.S. District Court for the Southern District of Texas vacated the June 2012 memorandum that created the DACA policy and what the court called the ''DACA program,'' and it permanently enjoined DHS from ''administering the DACA program and from reimplementing DACA without compliance with'' the Administrative Procedure Act (APA). However, the district court temporarily stayed its vacatur and injunction with respect to most individuals granted deferred action under DACA on or before July 16, 2021, including with respect to their renewal requests. The district court's vacatur and injunction were based, in part, on its conclusion that the June 2012 memorandum announced a legislative rule that required notice-and-comment rulemaking. The district court further remanded the ''DACA program'' to DHS for further consideration. DHS has appealed the district court's decision. Pursuant to the Secretary's broad authorities to administer and enforce the immigration laws, consistent with the district court's direction to consider a number of issues on remand, and after careful consideration of the arguments and conclusions on which the district court's decision is based, DHS puts forward for consideration the following proposed rule. DHS invites public comments on the proposed rule and possible alternatives.

DATES: Written comments and related material must be submitted on or before November 29, 2021.

ADDRESSES: You may submit comments on the entirety of this proposed rulemaking package, identified by DHS Docket No. 2021–0006, through the Federal eRulemaking Portal at *https://www.regulations.gov.* Follow the website instructions for submitting comments.

Comments submitted in a manner other than the one listed above, including emails or letters sent to DHS or USCIS officials, will not be considered comments on the proposed rule and may not receive a response from DHS. Please note that DHS and USCIS cannot accept any comments that are hand-delivered or couriered. In addition, USCIS cannot accept comments contained on any form of digital media storage devices, such as CDs/DVDs and USB drives. USCIS also is not accepting mailed comments at this time. If you cannot submit your comment by using *https://www.regulations.gov,* please contact Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by telephone at (240) 721–3000 for alternate instructions.

For additional instructions on sending comments, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Andria Strano, Acting Chief, Office of Policy and Strategy, Division of Humanitarian Affairs, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, Camp Springs, MD 20746; telephone (240) 721–3000.

SUPPLEMENTARY INFORMATION:

Table of Contents

List of Abbreviations

APA Administrative Procedure Act
AST Autonomous Surveillance Tower
BLS Bureau of Labor Statistics
CBP U.S. Customs and Border Protection
CEQ Council on Environmental Quality
CFR Code of Federal Regulations
CLAIMS Computer-Linked Application Information Management System
CPI–U Consumer Price Index for All Urban Consumers
DACA Deferred Action for Childhood Arrivals
DAPA Deferred Action for Parents of Americans and Lawful Permanent Residents
DED Deferred enforced departure
DHS Department of Homeland Security
DOJ Department of Justice
DREAM Act Development, Relief, and Education for Alien Minors Act
EAD Employment authorization document
ELIS Electronic Immigration System
E.O. Executive Order
EOIR Executive Office for Immigration Review
EPS Egregious public safety
EVD Extended voluntary departure
FAIR Federation for American Immigration Reform
FLCRAA Farm Labor Contractor Registration Act Amendments of 1974

FR Federal Register
FY Fiscal Year
GED General Education Development
ICE U.S. Immigration and Customs Enforcement
IIRIRA Illegal Immigration Reform and Immigrant Responsibility Act of 1996
IMMACT 90 Immigration Act of 1990
INA Immigration and Nationality Act of 1952
INS Immigration and Naturalization Service
IRCA Immigration Reform and Control Act of 1986
MPI Migration Policy Institute
NEPA National Environmental Policy Act
NOA Notice of action
NOIT Notice of intent to terminate
NTA Notice to appear
OCFO Office of the Chief Financial Officer
OI Operations Instructions
OIRA Office of Information and Regulatory Affairs
OIS Office of Immigration Statistics
OMB Office of Management and Budget
OPQ Office of Performance and Quality
PRA Paperwork Reduction Act of 1995
PRWORA Personal Responsibility and Work Opportunity Reconciliation Act of 1996
Pub. L. Public Law
RFA Regulatory Flexibility Act
RIA Regulatory Impact Analysis
RIN Regulation Identifier Number
RTI Referral to ICE
SBREFA Small Business Regulatory Enforcement Fairness Act of 1996
Secretary Secretary of Homeland Security
SORN System of Record Notice
Stat. U.S. Statutes at Large
TPS Temporary Protected Status
UMRA Unfunded Mandates Reform Act of 1995
U.S.C. United States Code
USCIS U.S. Citizenship and Immigration Services
VAWA Violence Against Women Act of 1994
VPC Volume Projection Committee
VTVPA Victims of Trafficking and Violence Protection Act of 2000

I. Public Participation

DHS invites all interested parties to participate in this rulemaking by submitting written data, views, comments, and arguments on all aspects of this proposed rule. DHS also invites comments that relate to the economic, environmental, or federalism effects of this proposed rule. Comments must be submitted in English, or an English translation must be provided. Comments that will provide the most assistance to USCIS in implementing these changes will refer to a specific portion of the proposed rule; explain the reason for any recommended change; and include data, information, or authority that supports such recommended change. Comments submitted in a manner other than the one listed above, including emails or letters sent to DHS or USCIS officials, will not be considered comments on the proposed rule and may not receive a response from DHS.

Instructions: If you submit a comment, you must include the agency name (U.S. Citizenship and Immigration Services) and the DHS Docket No. USCIS–2021–0006 for this rulemaking. All comments or materials submitted in the manner described above will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make to DHS. DHS may withhold from public viewing information provided in comments that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Notice available at *https://www.regulations.gov/privacy-notice.*

Docket: For access to the docket and to read background documents or comments received, go to *https://www.regulations.gov,* referencing DHS Docket No. USCIS–2021–0006. You also may sign up for email alerts on the online docket to be notified when comments are posted or a final rule is published.

II. Executive Summary

A. Purpose of the Regulatory Action

On June 15, 2012, then-Secretary Janet Napolitano issued a memorandum providing new guidance for the exercise of prosecutorial discretion with respect to certain young people who came to the United States years earlier as children, who have no current lawful immigration status, and who were already generally low enforcement priorities for removal.[1] The Napolitano Memorandum states that DHS will consider granting ''deferred action,'' on a case-by-case basis, for individuals who:

1. Came to the United States under the age of 16;

2. Continuously resided in the United States for at least 5 years preceding June 15, 2012, and were present in the United States on that date;

3. Are in school, have graduated from high school, have obtained a General Education Development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;

4. Have not been convicted of a felony offense, a significant misdemeanor offense, or multiple misdemeanor offenses, or otherwise do not pose a threat to national security or public safety; and

5. Were not above the age of 30 on June 15, 2012.[2]

Individuals who request relief under this policy, meet the criteria above, and pass a background check may be granted deferred action.[3] Deferred action is a longstanding practice by which DHS and the former Immigration and Naturalization Service (INS) have exercised their discretion to forbear or assign lower priority to removal action in certain cases for humanitarian reasons, administrative convenience, or other reasonable prosecutorial discretion considerations.[4]

In establishing this policy, known as DACA, then-Secretary Napolitano emphasized that for the Department to use its limited resources in a strong and sensible manner, it necessarily must exercise prosecutorial discretion. Then-Secretary Napolitano observed that these ''young people . . . were brought to this country as children and know only this country as home'' and as a general matter ''lacked the intent to violate the law,'' reasoning that limited enforcement resources should not be expended to ''remove productive young people to countries where they may not have lived or even speak the language.'' [5] The Napolitano Memorandum also instructs that the individual circumstances of each case must be considered and that deferred action should be granted only where justified.[6]

Since 2012, more than 825,000 people have applied successfully for deferred action under the DACA policy.[7] On average, DACA recipients arrived in the United States in 2001 and at the age of 6.[8] In addition, 38 percent of recipients

[1] Memorandum from Janet Napolitano, Secretary, DHS, to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection (CBP), et al. (June 15, 2012), *https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf* (hereinafter Napolitano Memorandum).

[2] *Id.*

[3] *Id.*

[4] *See, e.g., Reno* v. *Am.-Arab Anti-Discrimination Comm.,* 525 U.S. 471, 484 (1999) (*AADC*); 8 CFR 274a.12(c)(14).

[5] Napolitano Memorandum.

[6] *Id.*

[7] *See* USCIS, DACA Quarterly Report (FY 2021, Q1), *https://www.uscis.gov/sites/default/files/document/data/DACA_performancedata_fy2021_qtr1.pdf.* As of the end of CY 2021, there were over 636,00 active DACA recipients in the United States. *See* USCIS, Count of Active DACA Recipients By Month of Current DACA Expiration (Dec. 31, 2020), *https://www.uscis.gov/sites/default/files/document/data/Active_DACA_Recipients%E2%80%93December31%2C2020.pdf.*

[8] DHS, USCIS, Office of Performance and Quality (OPQ), Electronic Immigration System (ELIS) and

Continued

arrived before the age of 5.[9] For many, this country is the only one they have known as home. In the nearly 10 years since this policy was announced, DACA recipients have grown into adulthood and built lives for themselves and their loved ones in the United States. They have gotten married and had U.S. citizen children. Over 250,000 children have been born in the United States with at least one parent who is a DACA recipient, and about 1.5 million people in the United States share a home with a DACA recipient.[10] DACA recipients have obtained driver's licenses and credit cards, bought cars, and opened bank accounts.[11] In reliance on DACA, its recipients have enrolled in degree programs, started businesses, obtained professional licenses, and purchased homes.[12] Depending on the health insurance that their deferred action allowed them to obtain through employment or State-sponsored government programs, DACA recipients have received improved access to health insurance and medical care and have sought treatment for long-term health issues.[13] For DACA recipients and their family members, the conferral of deferred action has increased DACA recipients' sense of acceptance and belonging to a community, increased their sense of hope for the future, and given them the confidence to become more active members of their communities and increase their civic engagement.[14]

The DACA policy has encouraged its recipients to make significant investments in their careers and education. Many DACA recipients report that deferred action—and the employment authorization that DACA permits them to request—has allowed them to obtain their first job or move to a higher paying position more commensurate with their skills.[15] DACA recipients are employed in a wide range of occupations, including management and business, education and training, sales, office and administrative support, and food preparation; thousands more are self-employed in their own businesses.[16] They have continued their studies, and some have become doctors, lawyers, nurses, teachers, or engineers.[17] About 30,000 are health care workers, and many of them have helped care for their communities on the frontlines during the COVID–19 pandemic.[18] In 2017, 72 percent of the top 25 Fortune 500 companies employed at least one DACA recipient.[19]

As a result of these educational and employment opportunities, DACA recipients make substantial contributions in taxes and economic activity.[20] According to one estimate, as of 2020, DACA recipients and their households pay about $5.6 billion in annual Federal taxes and about $3.1 billion in annual State and local taxes.[21] In addition, through their employment, they make significant contributions to Social Security and Medicare funds.[22] Approximately two-thirds of recipients purchased their first car after receiving DACA,[23] and an estimated 56,000 DACA recipients own homes and are directly responsible for $566.7 million in annual mortgage payments.[24] DACA recipients also are estimated to pay $2.3 billion in rental payments each year.[25] Because of this, the communities of DACA recipients—who reside in all 50 States and the District of Columbia [26]—in addition to the recipients themselves, have grown to rely on the economic contributions this policy facilitates.[27] In

Computer-Linked Application Information Management System (CLAIMS) 3 Consolidated (queried Mar. 2021).

[9] *Id.*

[10] Nicole Prchal Svajlenka and Philip E. Wolgin, *What We Know About the Demographic and Economic Impacts of DACA Recipients: Spring 2020 Edition,* Center for American Progress (Apr. 6, 2020), *https://www.americanprogress.org/issues/immigration/news/2020/04/06/482676/know-demographic-economic-impacts-daca-recipients-spring-2020-edition* (hereinafter Svajlenka and Wolgin (2020)).

[11] *See* Roberto G. Gonzales and Angie M. Bautista-Chavez, *Two Years and Counting: Assessing the Growing Power of DACA,* American Immigration Council (June 2014); Zenén Jaimes Pérez, *A Portrait of Deferred Action for Childhood Arrivals Recipients: Challenges and Opportunities Three Years Later,* United We Dream (Oct. 2015), *https://unitedwedream.org/wp-content/uploads/2017/10/DACA-report-final-1.pdf* (hereinafter Jaimes Pérez (2015)); Tom K. Wong, et al., *Results from Tom K. Wong et al., 2020 National DACA Study, https://cdn.americanprogress.org/content/uploads/2020/10/02131657/DACA-Survey-20201.pdf* (hereinafter Wong (2020)).

[12] *See* Roberto G. Gonzales, et al., *The Long-Term Impact of DACA: Forging Futures Despite DACA's Uncertainty,* Immigration Initiative at Harvard (2019), *https://immigrationinitiative.harvard.edu/files/hii/files/final_daca_report.pdf* (hereinafter Gonzales (2019)); Wong (2020).

[13] Gonzales (2019).

[14] Gonzales (2019); Jaimes Pérez (2015); Wong (2020).

[15] Roberto G. Gonzales, et al., *Becoming DACAmented: Assessing the Short-Term Benefits of Deferred Action for Childhood Arrivals (DACA),* 58 Am. Behav. Scientist 1852 (2014); Wong (2020); *see also* Nolan G. Pope, *The Effects of DACAmentation: The Impact of Deferred Action for Childhood Arrivals on Unauthorized Immigrants,* 143 J. of Pub. Econ. 98 (2016), *http://www.econweb.umd.edu/~pope/daca_paper.pdf* (hereinafter Pope (2016)) (finding that DACA increased participation in the labor force for undocumented immigrants).

[16] Nicole Prchal Svajlenka, *What We Know About DACA Recipients in the United States,* Center for American Progress (Sept. 5, 2019), *https://www.americanprogress.org/issues/immigration/news/2019/09/05/474177/know-daca-recipients-united-states;* Jie Zong, et al., *A Profile of Current DACA Recipients by Education, Industry, and Occupation,* Migration Policy Institute (Nov. 2017), *https://www.migrationpolicy.org/sites/default/files/publications/DACA-Recipients-Work-Education-Nov2017-FS-FINAL.pdf* (hereinafter Zong (2017)).

[17] *See* Gonzales (2019); Nicole Prchal Svajlenka, *A Demographic Profile of DACA Recipients on the Frontlines of the Coronavirus Response,* Center for American Progress (April 6, 2020), *https://www.americanprogress.org/issues/immigration/news/2020/04/06/482708/demographic-profile-daca-recipients-frontlines-coronavirus-response* (hereinafter Svajlenka (2020)); Wong (2020); Zong (2017).

[18] Svajlenka (2020). DACA recipients who are health care workers also are helping to alleviate a shortage of health care professionals in the United States and they are more likely to work in underserved communities where shortages are particularly dire. Angela Chen, et al., *PreHealth Dreamers: Breaking More Barriers Survey Report* at 27 (Sept. 2019) (presenting survey data showing that 97 percent of undocumented students pursuing health and health-science careers planned to work in an underserved community); Andrea N. Garcia, et al., *Factors Associated with Medical School Graduates' Intention to Work with Underserved Populations: Policy Implications for Advancing Workforce Diversity,* Acad. Med. (Sept. 2017), *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5743635* (finding that underrepresented minorities graduating from medical school are nearly twice as likely as white students and students of other minorities to report an intention to work with underserved populations).

[19] Tom K. Wong, et al., *DACA Recipients' Economic and Educational Gains Continue to Grow,* Center for American Progress (Aug. 28, 2017), *https://www.americanprogress.org/issues/immigration/news/2017/08/28/437956/daca-recipients-economic-educational-gains-continue-grow* (hereinafter Wong (2017)).

[20] Please see the Regulatory Impact Analysis (RIA) for this proposed rule, which can be found in Section V.A. The RIA includes analysis and estimates of the costs, benefits, and transfers that DHS expects this rule to produce. Please note that the estimates presented in the RIA are based on the specific methodologies described therein. Figures may differ from those presented in the sources discussed here. As noted below, USCIS welcomes input on the methodologies employed in the RIA, as well as any other data, information, and views related to the costs, benefits, and transfers associated with this rulemaking.

[21] Svajlenka and Wolgin (2020). *See also* Misha E. Hill and Meg Wiehe, *State & Local Tax Contributions of Young Undocumented Immigrants,* Institute on Taxation and Economic Policy (Apr. 2017) (analyzing the State and local tax contributions of DACA-eligible noncitizens in 2017).

[22] Jose Magaña-Salgado and Tom K. Wong, *Draining the Trust Funds: Ending DACA and the Consequences to Social Security and Medicare,* Immigrant Legal Resource Center (Oct. 2017); *see also* Jose Magaña-Salgado, *Money on the Table: The Economic Cost of Ending DACA,* Immigrant Legal Resource Center (Dec. 2016) (analyzing the Social Security and Medicare contributions of DACA recipients in 2016).

[23] Wong (2017).

[24] Svajlenka and Wolgin (2020).

[25] *Id.*

[26] USCIS, *Deferred Action for Childhood Arrivals (DACA) Quarterly Report (Fiscal Year 21, Q1)* 6, *https://www.uscis.gov/sites/default/files/document/data/DACA_performancedata_fy2021_qtr1.pdf.*

[27] Reasonable reliance on the existence of the DACA policy is distinct from reliance on a grant of DACA to a particular person. Individual DACA grants are discretionary and may be terminated at any time but communities, employers, educational

sum, despite the express limitations in the Napolitano Memorandum, over the 9 years in which the DACA policy has been in effect, the good faith investments recipients have made in both themselves and their communities, and the investments that their communities have made in them, have been, in the Department's judgment, substantial.

This proposed rule responds to President Biden's memorandum of January 20, 2021, ''Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA),'' [28] in which President Biden stated:

> DACA reflects a judgment that these immigrants should not be a priority for removal based on humanitarian concerns and other considerations, and that work authorization will enable them to support themselves and their families, and to contribute to our economy, while they remain.[29]

This proposed rule embraces the consistent judgment that has been maintained by the Department—and by three presidential administrations since the policy first was announced—that DACA recipients should not be a priority for removal.[30] It is informed by the Department's experience with the policy over the past 9 years and the ongoing litigation concerning the policy's continued viability. It is particularly meant to preserve legitimate reliance interests in the continued implementation of the nearly decade-long policy under which deferred action requests will be considered, while emphasizing that individual grants of deferred action are, at bottom, an act of enforcement discretion to which recipients do not have a substantive right.

The proposed rule recognizes that enforcement resources are limited, that sensible priorities must necessarily be set, and that it is not generally the best use of those limited resources to remove productive young people to countries where they may not have lived since early childhood and whose languages they may not even speak. It recognizes that, as a general matter, DACA recipients, who came to this country many years ago as children, lacked the intent to violate the law, have not been convicted of any serious crimes, and remain valued members of our communities. It reflects the conclusion that, while they are in the United States, they should have access to a process that, operating on a case-by-case basis, may allow them to work to support themselves and their families, and to contribute to our economy in multiple ways. This proposed rule also accounts for the momentous decisions DACA recipients have made in ordering their lives in reliance on and as a result of this policy, and it seeks to continue the benefits that have accrued to DACA recipients, their families, their communities, and to the Department itself that have been made possible by the policy. DHS emphasizes that the DACA policy as proposed in this rule is not a permanent solution for the affected population and does not provide lawful status or a path to citizenship for noncitizens who came to the United States many years ago as children. Legislative efforts to find such a solution remain critical. On July 16, 2021, the U.S. District Court for the Southern District of Texas vacated the 2012 DACA policy, finding, among other things, that it was contrary to the Immigration and Nationality Act of 1952 (INA).[31] DHS is carefully and respectfully considering the analysis in that decision and its conclusions about DACA's substantive legality and invites comment on how, if correct, those conclusions should affect this rulemaking.

B. Summary of Major Provisions of the Regulatory Action

This proposed rule would preserve and fortify DHS's DACA policy for the issuance of deferred action to certain young people who came to the United States many years ago as children, who have no current lawful immigration status, and who are generally low enforcement priorities. The proposed rule would include the following provisions of the DACA policy from the Napolitano Memorandum and longstanding USCIS practice:

- *Deferred Action.* The proposed rule would provide a definition of deferred action as a temporary forbearance from removal that does not confer any right or entitlement to remain in or re-enter the United States, and that does not prevent DHS from initiating any criminal or other enforcement action against the DACA recipient at any time.
- *Threshold Criteria.* The proposed rule would include the following longstanding threshold criteria: That the requestor must have (1) come to the United States under the age of 16; (2) continuously resided in the United States from June 15, 2007, to the time of filing of the request; (3) been physically present in the United States on both June 15, 2012, and at the time of filing of the DACA request; (4) not been in a lawful immigration status on June 15, 2012, as well as at the time of request; (5) graduated or obtained a certificate of completion from high school, obtained a GED certificate, currently be enrolled in school, or be an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; (6) not been convicted of a felony, a misdemeanor described in the rule, or three or more other misdemeanors not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct, or otherwise pose a threat to national security or public safety; and (7) been born on or after June 16, 1981, and be at least 15 years of age at the time of filing, unless the requestor is in removal proceedings, or has a final order of removal or a voluntary departure order. The proposed rule also would state that deferred action under DACA may be granted only if USCIS determines in its sole discretion that the requestor meets the threshold criteria and otherwise merits a favorable exercise of discretion.
- *Procedures for Request, Terminations, and Restrictions on Information Use.* The proposed rule would set forth procedures for denial of a request for DACA or termination of a grant of DACA, the circumstances that would result in the issuance of a notice to appear (NTA) or referral to U.S. Immigration and Customs Enforcement (ICE) (RTI), and the restrictions on use of information contained in a DACA request for the purpose of initiating immigration enforcement proceedings.

In addition to proposing the retention of longstanding DACA policy and procedure, the proposed rule includes the following changes:

- *Filing Requirements.* The proposed rule would modify the existing filing process and fees for DACA by making the request for employment authorization on Form I–765, Application for Employment Authorization, optional and charging a fee of $85 for Form I–821D, Consideration of Deferred Action for Childhood Arrivals. DHS would maintain the current total cost to DACA requestors who also file Form I–765 of

institutions, and State and local governments have come to rely on the existence of the policy itself and its potential availability to those individuals who qualify.

[28] 86 FR 7053 (hereinafter Biden Memorandum).

[29] *Id.*

[30] *See id.;* Sept. 5, 2017 Statement from President Donald J. Trump, *https://trumpwhitehouse.archives.gov/briefings-statements/statement-president-donald-j-trump-7* (''I have advised [DHS] that DACA recipients are not enforcement priorities unless they are criminals, are involved in criminal activity, or are members of a gang.''); Napolitano Memorandum.

[31] *Texas* v. *United States,* No. 1:18–cv–00068, 2021 WL 3025857 (S.D. Tex. July 16, 2021) (*Texas II* July 16, 2021 memorandum and order).

$495 ($85 for Form I–821D plus $410 for Form I–765).

• *Employment Authorization.* The proposed rule would create a DACA-specific regulatory provision regarding eligibility for employment authorization for DACA deferred action recipients in a new paragraph designated at 8 CFR 274a.12(c)(33). The new paragraph would not constitute any substantive change in current policy; it merely would create a DACA-specific provision in addition to the existing provision dealing with deferred action recipients more broadly. Like that provision, this one would continue to specify that the noncitizen [32] must have been granted deferred action and must establish economic need to be eligible for employment authorization.

• *Automatic Termination of Employment Authorization.* The proposed rule would automatically terminate employment authorization granted under 8 CFR 274.12(c)(33) upon termination of a grant of DACA.

• ''*Lawful Presence.*'' Additionally, the proposed rule reiterates USCIS' codification in 8 CFR 1.3(a)(4)(vi) of agency policy, implemented long before DACA, that a noncitizen who has been granted deferred action is considered ''lawfully present''—a specialized term of art that does not in any way confer authorization to remain in the United States—for the discrete purpose of authorizing the receipt of certain Social Security benefits consistent with 8 U.S.C. 1611(b)(2). The proposed rule also would reiterate longstanding policy that a noncitizen who has been granted deferred action does not accrue ''unlawful presence'' for purposes of INA sec. 212(a)(9) (imposing certain admissibility limitations for noncitizens who departed after having accrued certain periods of unlawful presence in the United States).

[32] For purposes of this discussion, USCIS uses the term ''noncitizen'' to be synonymous with the term ''alien'' as it is used in the INA.

C. Costs and Benefits

The proposed rule would result in new costs, benefits, and transfers. To provide a full understanding of the impacts of DACA, DHS considers the potential impacts of this proposed rule relative to two baselines. The first baseline, the No Action Baseline, represents a state of the world under the current DACA policy; that is, the policy initiated by the guidance in the Napolitano Memorandum in 2012. For reasons explained in Section V.A.4.a.(1) below, this baseline does not directly account for the July 16, 2021 district court decision. The second baseline, the Pre-Guidance Baseline, represents a state of the world where the DACA policy does not exist, a world as it existed before the guidance in the Napolitano Memorandum. DHS emphasizes that the Pre-Guidance Baseline gives clarity about the impact of the DACA policy as such, and that it is, therefore, the more useful baseline for understanding the costs and benefits of that policy. Relative to that baseline, the monetized benefits, including above all income earnings, greatly exceed the monetized costs. DHS also notes that the Pre-Guidance Baseline analysis also can be used to better understand the state of the world under the July 16, 2021 district court decision, should the stay of that decision ultimately be lifted.

Table 1 provides a detailed summary of the proposed provisions and their potential impacts relative to the No Action Baseline. Table 2 provides a detailed summary of the proposed provisions and their potential impacts relative to the Pre-Guidance Baseline.

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Table 1. Summary of Major Changes to Provisions and Estimated Impacts of the Proposed Rule, FY 2021–FY 2031 (Relative to the No Action Baseline)

Proposed Provision	Description of Proposed Provision	Estimated Impact of Proposed Provision
Amending 8 CFR 106.2(a)(38). Fees.	The fee for Form I-821D, Consideration of Deferred Action for Childhood Arrivals, will change from $0 to $85.	**Quantitative:** Cost Savings Part of the DACA requestor population might choose only to request deferred action through Form I-821D, thus forgoing the cost of applying for an EAD through Form I-765: • Annual undiscounted cost savings for no longer filing the Form I-765 for employment authorization could range from $0 to $43.9 million, depending on how many individuals choose this option. • Total cost savings over a 11-year period could range from: o $0 to $483.6 million for undiscounted cost savings; o $0 to $422.2 million at a 3-percent discount rate; and o $0 to $359.0 million at a 7-percent discount rate. Transfer Payments Part of the DACA requestor population may choose only to request deferred action through Form I-821D. This would result in a transfer from USCIS to DACA requestors as requestors filing only the Form I-821D would now pay less in filing fees than the current filing fee cost for both Forms I-821D and I-765: • Annual undiscounted transfer payments could range from $0 to $34.9 million. • Total transfers over a 11-year period could range from: o $0 to $384.1 million undiscounted; o $0 to $335.4 million at a 3-percent discount rate; and
Amending 8 CFR 236.21(c)(2). Applicability.	DACA recipients who can demonstrate an economic need may apply to USCIS for employment authorization pursuant to 8 CFR 274a.13 and 274a.12(c)(33).	
Amending 8 CFR 236.23(a)(1). Procedures for request.	If a request for DACA does not include a request for employment authorization, employment authorization still may be requested subsequent to approval, but not for a period of time to exceed the grant of deferred action.	

		○ $0 to $285.1 million at a 7-percent discount rate. **Qualitative:** Benefits • Having the option to file Form I-765 could incentivize requests by reducing some of the financial barriers to entry for some requestors who do not need employment authorization but who will still file Form I-821D for deferred action. • The proposed rule allows the active DACA-approved population to continue enjoying the advantages of the policy and also have the option to request renewal of DACA in the future if needed. • For DACA recipients and their family members, the proposed rule would contribute to (1) a reduction of fear and anxiety, (2) an increased sense of acceptance and belonging to a community, (3) an increased sense of family security, and (4) an increased sense of hope for the future, including by virtue of mitigating the risk of litigation resulting in termination of the DACA program.
Source: USCIS analysis. Note: The No Action Baseline refers to a state of the world under the current DACA program in effect under the guidance of the Napolitano Memorandum.		

Table 2. Summary of Major Changes to Provisions and Estimated Impacts of the Proposed Rule, FY 2012–FY 2031 (Relative to the Pre-Guidance Baseline)

Proposed Provision	Description of Proposed Provision	Estimated Impact of Proposed Provision
Amending 8 CFR 106.2(a)(38). Fees.	The fee for Form I-821D, Consideration of Deferred Action for Childhood Arrivals, will be $85.	**Quantitative:** Benefits Income earnings of the employed DACA-approved requestors due to obtaining an approved EAD dependent on the degree to which DACA recipients are substituted for other workers in the U.S. economy: • Annual undiscounted benefits could be $22.8 billion. • Total benefits over a 20-year period could be: o $455.5 billion for undiscounted benefits; o $424.8 billion at a 3-percent discount rate; and o $403.6 billion at a 7-percent discount rate. Costs Costs to requestors associated with a DACA request, including filing Form I-821D, Form I-765, and Form I-765WS: • Annual undiscounted costs could range from $385.6 million to $476.1 million. • Total costs over a 20-year period could range from: o $7.7 billion to $9.5 billion for undiscounted costs; o $7.3 billion to $9.1 billion at a 3-percent discount rate; and o $7.2 billion to $8.8 billion at a 7-percent discount rate. Transfer Payments Part of the DACA requestor population may choose only to request deferred action through Form I-821D. This would
Amending 8 CFR 236.21(c). Applicability, regarding forbearance, employment authorization, and lawful presence.	DACA approved requestors receive a time-limited forbearance from removal. Those who can demonstrate an economic need may apply to USCIS for employment authorization pursuant to 8 CFR 274a.13 and 274a.12(c)(33) and are considered lawfully present and not unlawfully present for certain purposes.	
Amending 8 CFR 236.23(a)(1). Procedures for request.	If a request for DACA does not include an application for employment authorization, employment authorization still may be requested subsequent to approval, but not for a period of time to exceed the grant of deferred action.	

		result in a transfer from USCIS to DACA requestors as requestors filing only the Form I-821D would now pay less in filing fees than the current filing fee cost for both Forms I-821D and I-765: • Annual undiscounted transfer payments could range from $0 to $30.9 million. • Total transfers over a 20-year period could range from: o $0 to $619.8 million undiscounted; o $0 to $589.9 million at a 3-percent discount rate; and o $0 to $574.9 million at a 7-percent discount rate. Employment taxes from the employed DACA recipients and their employers to the Federal Government dependent on the degree to which DACA recipients are substituted for other workers in the U.S. economy: • Annual undiscounted transfers could be $3.8 billion. • Total transfers over a 20-year period could be: o $75.5 billion undiscounted; o $70.4 billion at a 3-percent discount rate; and o $66.9 billion at a 7-percent discount rate. **Qualitative:** <u>Cost Savings</u> DACA program simplifies many encounters between DHS and certain noncitizens, reducing the burden upon DHS of vetting, tracking, and potentially removing DACA recipients. <u>Benefits</u> • The proposed rule results in more streamlined enforcement encounters and decision making, as well as avoided

		costs associated with enforcement action against low-priority noncitizens. • The proposed rule allows the DACA-approved population to enjoy the advantages of the policy and also have the option to request renewal of DACA in the future if needed. • For DACA recipients and their family members, the proposed rule would contribute to (1) a reduction of fear and anxiety, (2) an increased sense of acceptance and belonging to a community, (3) an increased sense of family security, and (4) an increased sense of hope for the future.
Source: USCIS analysis. Note: The Pre-Guidance Baseline refers to a state of the world as it was before the guidance of the Napolitano Memorandum.		

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III. Background, Authority, and Purpose

Section 102 of the Homeland Security Act of 2002 [33] and section 103 of the INA [34] generally charge the Secretary with the administration and enforcement of the immigration and naturalization laws of the United States.[35] The INA further authorizes the Secretary to ''establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of'' the INA.[36] In the Homeland Security Act of 2002, Congress also provided that the Secretary ''shall be responsible for . . . [e]stablishing national immigration enforcement policies and priorities.'' [37] The Homeland Security Act also provides that the Secretary, in carrying out their authorities, must ''ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland.'' [38]

The Secretary proposes in this rule to establish specified guidelines for considering requests for deferred action submitted by certain individuals who came to the United States many years ago as children. This proposed rule would help appropriately focus the Department's limited immigration enforcement resources on threats to national security, public safety, and border security where they are most needed. In doing so, the proposed rule also would serve the significant humanitarian and economic interests animating and engendered by the DACA policy. In addition, the proposed rule would preserve not only DACA recipients' serious reliance interests, but also those of their families, schools, employers, faith groups, and communities.[39] Above all, DHS is committed to a rulemaking process and outcome that is entirely consistent with the broad authorities and enforcement discretion conferred upon the Secretary in the INA and the Homeland Security Act.

As the head of the Department, and the official responsible for ''the administration and enforcement'' of the nation's immigration laws, the Secretary is directed to set national immigration enforcement policies and priorities.[40] While other officials, such as the Directors of ICE and USCIS and the Commissioner of CBP, may set policies within their respective spheres, and individual immigration officers are able to make case-by-case enforcement discretion decisions in the course of their duties, the Secretary holds the ultimate responsibility and authority for establishing the Department's priorities and for setting the parameters for other officials' exercise of discretion. Unlike officers in the field, the Secretary is uniquely positioned to make informed judgments regarding the humanitarian, public safety, border security, and other implications of national immigration enforcement policies and priorities. The Secretary is ultimately accountable for

[33] Public Law 107–296, sec. 102(a)(3), 116 Stat. 2135, 2143 (codified at 6 U.S.C. 112(a)(3)).

[34] Public Law 82–414, 66 Stat. 163 (as amended).

[35] INA sec. 103(a)(1), 8 U.S.C. 1103(a)(1). The INA also vests certain authorities in the President, Attorney General, and Secretary of State, among others. *See id.*

[36] INA sec. 103(a)(3), 8 U.S.C. 1103(a)(3).

[37] Public Law 107–296, sec. 402(5), 116 Stat. 2135, 2178 (codified at 6 U.S.C. 202(5)).

[38] 6 U.S.C. 111(b)(1)(F).

[39] *See DHS* v. *Regents of the Univ. of Cal.,* 140 S. Ct. 1891, 1914 (2020) (*Regents*) (''DACA recipients have 'enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance' on the DACA program. The consequences of the rescission, respondents emphasize, would 'radiate outward' to DACA recipients' families, including their 200,000 U.S.-citizen children, to the schools where DACA recipients study and teach, and to the employers who have invested time and money in training them. In addition, excluding DACA recipients from the lawful labor force may, they tell us, result in the loss of $215 billion in economic activity and an associated $60 billion in federal tax revenue over the next ten years. Meanwhile, States and local governments could lose $1.25 billion in tax revenue each year.'' (internal citations omitted)).

[40] INA sec. 103(a)(1), 8 U.S.C. 1103(a)(1); *see also* 6 U.S.C. 202(5).

appropriately using the resources available to the Department as a whole and for taking a comprehensive view of the enforcement landscape. A regulation codifying a national enforcement discretion policy for the DACA population would reinforce the Department's focusing its resources on those noncitizens who pose a threat to national security, public safety, and border security.

Of course, there are many tools available to the Secretary to execute such policy choices. Historically, DHS has implemented deferred action policies with respect to identified groups via general statements of policy and rules of agency organization, procedure, or practice. Such policies are not legally binding on any private parties (and do not bind the agency from making changes), do not constitute legislative rules, and are not codified in the Code of Federal Regulations. In the case of DACA, DHS proposes to promulgate regulations to reflect the Secretary's enforcement priorities and implement the deferred action policy with respect to the DACA population. DHS has decided to propose this rule in consideration of the important reliance interests of DACA beneficiaries, their employers, and their communities; in response to the President's direction to take all actions appropriate to preserve and fortify DACA; and in light of the various issues and concerns raised in ongoing litigation challenging DACA.

DHS's decision to proceed by rulemaking, rather than the less formal procedures typically associated with the creation of policy guidance, represents a departure from previous practice in light of current circumstances. DHS emphasizes that its approach here has important benefits, such as providing a more formal opportunity for public participation. DHS also recognizes that the use of less formal procedures, and the absence of notice-and-comment rulemaking, has been challenged in court, in some cases successfully. But the approach here should not be interpreted as suggesting that DHS itself doubts the legality of the 2012 DACA policy or any other past, present, or future deferred action policy. It is consistent with section 553 of the APA, and a longstanding principle, that an agency may use non-binding, non-legislative guidance, lacking the force of law, ''to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.'' [41] DHS has consistently maintained, and continues to maintain here, that it has such discretionary power with respect to deferred action.[42]

The proposed rule also would aid DHS's enforcement branches in identifying classes of noncitizens whose removal Congress has signaled should be prioritized [43] and focus a greater portion of their limited time, space, and funds on these higher risk situations that pose a threat to public safety or national security. While a grant of deferred action may have additional consequences under other provisions of law and regulation, including State law, at its core it reflects a decision made by the Executive to forgo removal against an individual for a limited period while the individual remains a low priority. It reflects a policy of forbearance. It is well within the Department's authority, and consistent with historical practice, for DHS to create a nationwide policy for efficiently allocating limited enforcement resources.[44]

A. History of Discretionary Reprieves From Removal

Since at least 1956, DHS and the former INS have issued policies under which groups of individuals without lawful status may receive a discretionary, temporary, and nonguaranteed reprieve from removal, even outside the context of immigration proceedings.[45] These policies have been implemented through a range of measures, including, but not limited to, extended voluntary departure (EVD) and deferred enforced departure (DED), indefinite voluntary departure, parole, and deferred action.[46] From at least the early 1980s, each such measure resulted in not only the termination of immigration proceedings, but also the availability of collateral ''benefits'' such as work authorization. A brief history of some such policies follows.

1. Extended Voluntary Departure and Deferred Enforced Departure

Beginning in the Eisenhower administration, a string of executive actions authorized various classes of noncitizens to stay in the United States and work under the rubric of EVD. From 1956 to 1972, the INS offered EVD to certain noncitizen professionals and those with exceptional ability in the sciences or arts who were otherwise subject to deportation due to visa quotas applicable to natives of the Eastern Hemisphere.[47] Through this policy, although a noncitizen's lawful status might have lapsed, ''[d]eportation, or even departure from the United States, was . . . entirely avoided.'' [48] And beginning in 1978, the INS offered EVD to certain former H–1 nurses whose ''lack of lawful immigration status [was] due only to the nurse's having changed employer without authority, or to his/her having failed the licensure examination.'' [49] From at least 1960

[41] *See Chrysler Corp.* v. *Brown,* 441 U.S. 281, 302 n.31 (1979) (quoting *Attorney General's Manual on the Administrative Procedure Act* (1947)).

[42] That DHS has determined voluntarily to use notice-and-comment procedures does not reflect any legal determination by the executive branch that it must do so or that it will be required to do so in the future. *See, e.g., Hoctor* v. *U.S. Dep't of Agric.,* 82 F.3d 165, 171–72 (7th Cir. 1996) (observing that courts should ''attach no weight to [an agency]'s inconsistency'' in deciding whether to use notice-and-comment procedures for similar rules and that ''there is nothing in the [APA] to forbid an agency to use the notice and comment procedure in cases in which it is not required to do so''); *Indep. Living Res.* v. *Oregon Arena Corp.,* 982 F. Supp. 698, 744 n.62 (D. Or. 1997) (''There are many reasons why an agency may voluntarily elect to utilize notice and comment rulemaking: The proposed rule may constitute a material amendment to the old rule, the agency may wish to avoid potential litigation over whether the new rule is legislative or interpretive, or the agency may simply wish to solicit public comment.''); *cf. Perez* v. *Mort. Bankers Ass'n,* 575 U.S. 92, 101 (2015) (''Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule.'').

[43] *See, e.g.,* INA sec. 235(b)(1), 8 U.S.C. 1225(b)(1) (establishing ''expedited removal'' for certain noncitizens arriving in the United States); INA sec. 236(c), 8 U.S.C. 1226(c) (providing mandatory detention for certain criminal noncitizens); INA sec. 236A, 8 U.S.C. 1226a (providing mandatory detention of suspected terrorists); *see also, e.g.,* Public Law 114–113, 129 Stat. 2241, 2497 (providing that ''the Secretary . . . shall prioritize the identification and removal of aliens convicted of a crime by the severity of that crime''); Public Law 113–76, 128 Stat. 5, 251 (same); Public Law 113–6, 127 Stat. 198, 347 (same).

[44] *See Regents of the Univ. of Cal.* v. *DHS,* 908 F.3d 476, 487 (9th Cir. 2018) (deferred action ''arises . . . from the Executive's inherent authority to allocate resources and prioritize cases''), *aff'd,* 140 S. Ct. 1891 (2020).

[45] *See generally* Ben Harrington, *An Overview of Discretionary Reprieves from Removal: Deferred Action, DACA, TPS, and Others,* Congressional Research Service, No. R45158 (Apr. 10, 2018) (hereinafter CRS Report on Discretionary Reprieves from Removal). *See also* American Immigration Council, *Executive Grants of Temporary Immigration Relief, 1956–Present* (Oct. 2, 2014), *https://www.americanimmigrationcouncil.org/research/executive-grants-temporary-immigration-relief-1956-present* (identifying 39 examples of temporary immigration relief); Sharon Stephan, *Extended Voluntary Departure and Other Grants of Blanket Relief from Deportation,* Congressional Research Service, No. 85–599 EPW (Feb. 23, 1985) (hereinafter CRS Report on EVD).

[46] *See* CRS Report on Discretionary Reprieves from Removal (cataloguing types of discretionary reprieves from removal, including reprieves that are generally only available in conjunction with the removal process, such as voluntary departure, stays of removal, orders of supervision, and administrative closure). *See also generally* Geoffrey Heeren, *The Status of Nonstatus,* 64 Am. U. L. Rev. 1115 (2015).

[47] *See United States ex rel. Parco* v. *Morris,* 426 F. Supp. 976, 979–80 (E.D. Pa. 1977).

[48] *Id.* at 980.

[49] *See, e.g.,* 43 FR 2776 (Jan. 19, 1978) (announcing a period of discretionary ''extended voluntary departure'' or ''deferred departure'' for

until 1990, executive agencies granted EVD to nationals of at least 14 countries.[50] EVD was invoked repeatedly to allow discretionary reprieves from removal for groups of individuals without lawful status.

The use of EVD abated following the passage of the Immigration Act of 1990 (IMMACT 90), which expressly authorized the Attorney General (whose authorities in this respect are now assigned to the Secretary), following consultation with the Secretary of State, to designate a foreign country for Temporary Protected Status (TPS) in certain circumstances.[51] But even after 1990, Presidents of both parties have extended similar treatment to nationals of certain countries under the rubric of DED.[52]

2. Indefinite ''Voluntary Departure'' Under the ''Family Fairness'' Policies

In 1987, the INS announced a policy known as ''family fairness'' to allow for indefinite residence in the United States and work authorization [53] for spouses and children of certain noncitizens who had been made eligible for legal immigration in the Immigration Reform and Control Act of 1986 (IRCA).[54] In IRCA, Congress made millions of noncitizens eligible for temporary residency, lawful permanent residency, and eventually naturalization,[55] but it did not similarly provide for such noncitizens' spouses and children who had arrived too recently or were otherwise ineligible.[56] Notwithstanding the apparently intentional gap in eligibility,[57] the INS provided for a discretionary reprieve from removal for many such spouses and children.[58] Under the policy, the INS announced that it would ''indefinitely defer deportation'' for (1) ineligible spouses and children who could show compelling or humanitarian factors; and (2) ineligible unmarried minor children who could show that both parents (or their only parent) had achieved lawful temporary resident status.[59] Those individuals also could obtain work authorization.[60] Ultimately such spouses and children might be able to benefit from an immediate relative petition filed on their behalf.

The INS expanded the family fairness policy in 1990, ''to assure uniformity in the granting of voluntary departure and work authorization for the ineligible spouses and children of legalized aliens,'' and ''to respond to the needs'' of legalized noncitizens and their family members ''in a consistent and humanitarian manner.'' [61] As expanded, the policy provided indefinite voluntary departure for any ineligible spouse or minor child of a legalizing noncitizen who showed that they (1) had been residing in the country by the date of IRCA's 1986 enactment; (2) were otherwise inadmissible; (3) had not been convicted of a felony or three misdemeanors; and (4) had not assisted in persecution.

Estimates of the potentially eligible population varied, but many were very large.[62] The INS Commissioner testified that 1.5 million people were estimated to be eligible.[63] Congress ultimately responded by ratifying the family fairness program and by authorizing an even broader group to obtain lawful status beginning 1 year thereafter.[64] Congress stated that this 1-year delay ''shall not be construed as reflecting a Congressional belief that the existing family fairness program should be modified in any way before such date.'' [65]

3. Deferred Action

Beginning as early as 1959, INS Operations Instructions (OI) referred to ''nonpriority'' cases—a category that later became known as ''deferred action.'' [66] In 1959, such instructions identified top priorities for investigative case assignments and provided that, ''[i]n every case involving appealing humanitarian factors, appropriate measures must be taken to insure that action taken by [INS] will not subject the law, its administration, or the Government of the United States to public ridicule. Form G–312 shall be used to report each such nonpriority

certain H–1 nurses who no longer had lawful immigration status); 44 FR 53582 (Sept. 14, 1979) (extension of same).

[50] *See* Adam B. Cox and Cristina M. Rodríguez, *The President and Immigration Law Redux,* 125 Yale L.J. 104, 122–24 (2015) (discussing the origins and various applications of EVD); *see also* CRS Report on EVD; Lynda J. Oswald, Note, *Extended Voluntary Departure: Limiting the Attorney General's Discretion in Immigration Matters,* 85 Mich. L. Rev. 152, 152 n.1 (1986) (cataloguing grants of EVD based on nationality).

[51] *See* Public Law 101–649, sec. 302, 104 Stat. 4978, 5030–36 (codified as amended at 8 U.S.C. 1254a). In fact, in establishing TPS in IMMACT 90, Congress understood that the Attorney General (now Secretary) had continuing authority to establish such policies on grounds other than the individuals' nationality, providing that TPS would be the exclusive authority for the Attorney General to permit otherwise removable aliens to remain temporarily in the United States ''because of their particular nationality.'' INA sec. 244(g), 8 U.S.C. 1254a(g); *see* Statement by President George H.W. Bush upon Signing S. 358, 26 Weekly Comp. Pres. Doc. 1946 (Dec. 3, 1990), 1990 U.S.C.C.A.N. 6801 (Nov. 29, 1990) (expressing concern with INA sec. 244(g) because it would impinge on the Executive's prosecutorial discretion).

[52] *See, e.g.,* 57 FR 28700 (June 26, 1992) (President George H.W. Bush directing DED for certain Salvadorans); 86 FR 6845 (Jan. 25, 2021) (President Trump directing DED for certain Venezuelans); 86 FR 43587 (Aug. 10, 2021) (President Biden directing DED for certain Hong Kong residents).

[53] The family fairness policies referred to this reprieve as indefinite voluntary departure or voluntary departure.

[54] *See* Alan C. Nelson, Commissioner, INS, *Legalization and Family Fairness—An Analysis* (Oct. 21, 1987) (hereinafter 1987 Family Fairness Memorandum), *reprinted in* 64 No. 41 Interpreter Releases 1191, App. I (Oct. 26, 1987); *see also* Memorandum to INS Regional Commissioners from Gene McNary, Commissioner, INS, *Re: Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens* (Feb. 2, 1990) (hereinafter 1990 Family Fairness Memorandum).

[55] *See* 1987 Family Fairness Memorandum.

[56] *See* S. Rep. No. 132, 99th Cong., 1st Sess., at 16 (1985) (''It is the intent of the Committee that the families of legalized aliens will obtain no special petitioning rights by virtue of the legalization.'').

[57] *See* Paul W. Schmidt, Acting General Counsel, INS, *Legal Considerations On The Treatment Of Family Members Who Are Not Eligible For Legalization* (May 29, 1987) (''[IRCA] does not cover spouses and children of legalized aliens. . . . The legislative history on this issue is crystal clear.''). Two weeks prior to the announcement of the family fairness policy, Senator John Chafee proposed a legislative path to legalization for the spouses and children excluded from IRCA; however, the proposal was rejected. *See* Record Vote No. 311, S. Amend. 894 to S. 1394, 100th Cong. (1987), *https://www.congress.gov/amendment/100th-congress/senate-amendment/894/actions.* A narrower effort to block funding for deportations of such individuals was introduced soon after the 1987 Family Fairness Memorandum but also did not become law. *See* H.J. Res. 395, 100th Cong. § 110 (as introduced Oct. 29, 1987); Act of Dec. 22, 1987, Public Law 100–202, 101 Stat. 1329; *see also* 133 Cong. Rec. 12,038–43 (1987) (statement of Rep. Roybal).

[58] *See* 1987 Family Fairness Memorandum.

[59] *See id.*

[60] *See* Recent Developments, 64 No. 41 Interpreter Releases 1191, App. II, at 1206 (Oct. 26, 1987).

[61] *See* 1990 Family Fairness Memorandum. *See also* Record Vote No. 107, S. Amend. 244 to S. 358, 101st Cong. (1989), *https://www.congress.gov/amendment/101st-congress/senate-amendment/244/actions;* IRCA Amendments of 1989, H.R. 3374, 101st Cong. (1989), *https://www.congress.gov/bill/101st-congress/house-bill/3374/all-actions* (reflecting subcommittee hearings held as last action on the bill).

[62] *See, e.g.,* Recent Developments, 67 No. 8 Interpreter Releases 201, 206 (Feb. 26, 1990); *see also, e.g.,* 55 FR 6058 (Feb. 21, 1990) (anticipating requests from ''approximately one million'' people); J.A. 646 (internal INS memorandum estimating ''greater than one million'' people ''will file''); J.A. 642 (''potentially millions''); 67 No. 8 Interpreter Releases 206 (''no more than 250,000''); Tim Schreiner, ''INS Reverses Policy That Split Alien Families,'' S.F. Chron., Feb. 3, 1990, at A15 (''more than 100,000 people'' estimated to file); Paul Anderson, ''New Policy on Illegal Immigrants,'' Phila. Inquirer, Feb. 3, 1990, at A10 (it ''may run to a million'').

[63] *Immigration Act of 1989: Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary,* 101st Cong., 2d Sess. Pt. 2, at 49, 56 (1990).

[64] *See* IMMACT 90, Public Law 101–649, sec. 301(g), 104 Stat. 4978, 5030 (1990).

[65] *Id.*

[66] *See AADC,* 525 U.S. at 484.

case.'' [67] In 1972, the INS OI provided that

> [i]n every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for nonpriority. . . . If the recommendation is approved the alien shall be notified that no action will be taken by [INS] to disturb his immigration status, or that his departure from the United States has been deferred indefinitely, whichever is appropriate.[68]

A 1975 version of the same policy called for interim or biennial reviews of each case in deferred action status, and further provided, inter alia, that

> [w]hen determining whether a case should be recommended for deferred action category, consideration should include the following: (1) advanced or tender age; (2) many years presence in the United States; (3) physical or mental condition requiring care or treatment in the United States; (4) family situation in the United States—effect of expulsion; (5) criminal, immoral or subversive activities or affiliations—recent conduct.[69]

In short, from at least 1959 until the late 1990s,

> deferred-action decisions were governed by internal INS guidelines which considered, *inter alia,* such factors as the likelihood of ultimately removing the alien, the presence of sympathetic factors that could adversely affect future cases or generate bad publicity for the INS, and whether the alien had violated a provision that had been given high enforcement priority.[70]

Although such internal guidelines were moved to the INS's Interim Enforcement Procedures in June 1997, the following year the Supreme Court noted that ''there is no indication that the INS has ceased making this sort of determination on a case-by-case basis.'' [71] On the contrary, by the time of the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[72] ''the INS had been engaging in a regular practice (which had come to be known as 'deferred action') of exercising [enforcement] discretion for humanitarian reasons or simply for its own convenience.'' [73]

4. More Recent Deferred Action Policies

In recent years, the INS and DHS have established a number of specific policies for consideration of deferred action requests by members of certain groups. For instance, in 1997, the INS established a deferred action policy for self-petitioners under the Violence Against Women Act of 1994 (VAWA).[74] The INS policy required immigration officers who approved a VAWA self-petition to assess, ''on a case-by-case basis, whether to place the alien in deferred action'' while the noncitizen waited for a visa to become available.[75] The INS noted that, ''[b]y their nature, VAWA cases generally possess factors that warrant consideration for deferred action.'' [76] Under this policy, from 1997 to 2000, no approved VAWA self-petitioner was removed from the country.[77] In the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Congress expanded the availability of this type of deferred action, providing that children who could no longer self-petition under VAWA because they were over the age of 21 would nonetheless be ''eligible for deferred action and work authorization.'' [78]

In 2001, the INS instituted a similar deferred action policy for applicants for nonimmigrant status made available under the VTVPA's new nonimmigrant classifications for certain victims of human trafficking and their family members (T visas) and certain victims of other crimes and their family members (U visas).[79] The INS issued a memorandum directing immigration officers to locate ''possible victims in the above categories,'' and to use ''[e]xisting authority and mechanisms such as parole, deferred action, and stays of removal'' to prevent those victims' removal ''until they have had the opportunity to avail themselves of the provisions of the VTVPA.'' [80] The INS later instructed officers to consider deferred action for ''all [T visa] applicants whose applications have been determined to be bona fide,'' [81] as well as for all U visa applicants ''determined to have submitted *prima facie* evidence of [their] eligibility.'' [82] In 2002 and 2007, INS and DHS promulgated regulations implementing similar policies.[83]

These policies, as well, were later ratified by Congress. In 2008, when Congress authorized DHS to grant an administrative stay of removal to a T or U visa applicant whose application sets forth a prima facie case for approval, Congress ratified the existing deferred action policies by clarifying that the denial of a request for an administrative stay of removal under this new authority would ''not preclude the alien from applying for a stay of removal, deferred action, or a continuance or abeyance of removal proceedings under any other provision of the immigration laws of the United States.'' [84] And Congress also required DHS to submit a report to Congress covering, inter alia, ''[i]nformation on the time in which it takes to adjudicate victim-based immigration applications, including the issuance of visas, work authorization and deferred action in a timely manner consistent with the safe and competent processing of such applications, and steps taken to improve in this area.'' [85]

In 2005, following Hurricane Katrina, DHS issued another deferred action policy applicable to foreign students who lost their lawful status as F–1 nonimmigrant students by virtue of failing to pursue a ''full course of study'' following the disaster.[86] Eligible F–1

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[67] INS OI 103.1(a)(1) (Jan. 15, 1959).

[68] INS OI 103.1(a)(1)(ii) (Apr. 5, 1972).

[69] INS OI 103.1(a)(1)(ii) (Dec. 31, 1975).

[70] *See AADC,* 525 U.S. at 484 n.8 (citing 16 C. Gordon, S. Mailman, and S. Yale-Loehr, *Immigration Law and Procedure* § 242.1 (1998)).

[71] *Id.* The INS began rescinding OI on an ongoing basis as it moved to a Field Manual model for policies and procedures for officers. *See INS Field Manual Project to Eventually Replace Operations Instructions;* 77 No. 3 Interpreter Releases 93 (Jan. 14, 2000). The OI on deferred action were rescinded when the procedures were moved to the Interim Enforcement Procedures in June 1997, though the procedures remained substantively the same. *See Interim Enforcement Procedures: Standard Operating Procedures for Enforcement Officers: Arrest, Detention, Processing and Removal* (June 5, 1997) (accessed via USCIS historical archive).

[72] Public Law 104–208, 110 Stat. 3009.

[73] *See AADC,* 525 U.S. at 483–84.

[74] Public Law 103–322, tit. IV, 108 Stat. 1796.

[75] *See* Memorandum to INS Regional Directors, et al., from Paul W. Virtue, Acting Executive Associate Commissioner, INS, *Re: Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* at 3 (May 6, 1997).

[76] *Id.*

[77] *See Battered Women Immigrant Protection Act: Hearings on H.R. 3083 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary,* 106th Cong., at 43 (July 20, 2000).

[78] *See* Public Law 106–386, sec. 1503(d), 114 Stat. 1464, 1521–22.

[79] *See* 8 U.S.C. 1101(a)(15)(T)(i) and (U)(i).

[80] *See* Memorandum for Michael A. Pearson, INS Executive Associate Commissioner, from Michael D. Cronin, Acting Executive Associate Commissioner, INS, *Re: Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2—''T'' and ''U'' Nonimmigrant Visas* at 2 (Aug. 30, 2001).

[81] Memorandum for Johnny N. Williams, INS Executive Associate Commissioner, from Stuart Anderson, INS Executive Associate Commissioner, *Re: Deferred Action for Aliens with Bona Fide Applications for T Nonimmigrant Status* at 1 (May 8, 2002) (hereinafter Williams Memorandum).

[82] *See* Memorandum for the Director, Vermont Service Center, INS, from USCIS Associate Director of Operations William R. Yates, *Re: Centralization of Interim Relief for U Nonimmigrant Status Applicants* (Oct. 8, 2003).

[83] *See* 67 FR 4784 (Jan. 31, 2002) (providing for deferred action for certain T visa applicants) (codified as amended at 8 CFR 214.11(j)); 72 FR 53014 (Sept. 17, 2007) (same for certain U visa applicants) (codified as amended at 8 CFR 214.14(d)).

[84] *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Public Law 110–457, sec. 204, 122 Stat. 5044, 5060 (codified as amended at 8 U.S.C. 1227(d)).

[85] *See id.* at sec. 238(b)(7), 122 Stat. at 5085.

[86] USCIS, *Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina: Frequently Asked Questions*

students were allowed to request deferred action individually by letter, which was required to include a written affidavit or unsworn declaration confirming that the applicant met eligibility requirements.

In 2009, DHS implemented a deferred action policy for (1) surviving spouses of U.S. citizens whose U.S. citizen spouse died before the second anniversary of the marriage and who are unmarried and residing in the United States; and (2) their qualifying children who are residing in the United States.[87] USCIS explained that ''no avenue of immigration relief exists for the surviving spouse of a deceased U.S. citizen if the surviving spouse and the U.S. citizen were married less than 2 years at the time of the citizen's death'' and USCIS had not yet adjudicated an immigrant petition on the spouse's behalf.[88] Congress subsequently eliminated the requirement that a noncitizen be married to a U.S. citizen ''for at least 2 years at the time of the citizen's death'' to retain their eligibility for lawful immigration status.[89] USCIS later withdrew its guidance and treated all pending applications for deferred action under this policy as widow(er)s' petitions.[90]

In sum, for more than 60 years, executive agencies have issued policies under which deserving groups of individuals without lawful status may receive a discretionary, temporary, and nonguaranteed reprieve from removal. Many of these policies, including all the deferred action policies, resulted in collateral ''benefits,'' such as eligibility to apply for work authorization. Many of these policies, including those involving the use of deferred action, also were subsequently ratified by Congress. The policy in this proposed rule is another such act of enforcement discretion and is similarly within the Executive's authority to implement.[91]

B. Litigation History

When DACA was first implemented in 2012, 10 ICE officers and the State of Mississippi challenged both the Napolitano Memorandum and then-ICE Director John Morton's previously issued memorandum on prosecutorial discretion, ''Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens'' (Morton Memorandum).[92] The plaintiffs in those cases were found to lack standing.[93]

In 2014, DHS sought to implement the policy Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) and to expand DACA to a larger population by removing the age cap for filing, providing grants of deferred action for a longer period of time, and making certain other adjustments (Expanded DACA).[94] The State of Texas and 25 other States brought an action for injunctive relief to prevent implementation of DAPA and Expanded DACA, alleging that they violated the APA, the Take Care Clause of the Constitution, and the INA.[95] On February 16, 2015, the U.S. District Court for the Southern District of Texas entered a nationwide preliminary injunction barring implementation of the policies in the 2014 DAPA Memorandum, which included both DAPA and Expanded DACA. On November 9, 2015, the Fifth Circuit affirmed the preliminary injunction, finding that the plaintiff States were substantially likely to establish that (1) DAPA and Expanded DACA required notice-and-comment rulemaking; and (2) DAPA and Expanded DACA violated the INA.[96] On June 23, 2016, an equally divided Supreme Court affirmed, leaving the nationwide injunction in place.[97] In the summer of 2017, Texas and the other plaintiff States voluntarily dismissed *Texas I*.

On September 5, 2017, then-Acting Secretary Elaine Duke issued a memorandum rescinding and beginning a wind-down of the 2012 DACA policy, citing the Supreme Court and Fifth Circuit decisions in *Texas I* and a letter from then-Attorney General Jefferson Sessions recommending rescission and an orderly wind-down of the 2012 DACA policy as it was likely to receive a similar decision in ''imminent litigation.'' [98] In response to the Duke Memorandum, the Regents of the University of California, several States, a county, city, union, and individual DACA recipients brought suit in the U.S. District Court for the Northern District of California challenging the rescission as arbitrary and capricious under the APA, claiming that the rescission of DACA required notice and comment, violated the Regulatory Flexibility Act, and denied plaintiffs equal protection and due process.[99] Other groups of plaintiffs filed similar challenges, or amended existing lawsuits, in the U.S. District Courts for the Eastern District of New York,[100] the District of Columbia,[101] the Southern District of Florida,[102] and the District of Maryland.[103]

In two separate orders in January 2018, in *Regents* v. *DHS,* the U.S. District Court for the Northern District of California denied the Government's motion to dismiss, and, finding plaintiffs had a likelihood of success in proving the rescission was arbitrary and capricious, entered a preliminary nationwide injunction requiring DHS to maintain the DACA policy largely as it

(FAQ) at 1 (Nov. 25, 2005) (quoting 8 CFR 214.2(f)(6)).

[87] Memorandum to USCIS Field Leadership from Donald Neufeld, Acting Associate Director, USCIS Office of Domestic Operations, *Re: Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children* at 4 (June 15, 2009).

[88] *Id.* at 1.

[89] *See* Department of Homeland Security Appropriations Act, 2010, Public Law 111–83, sec. 568(c), 123 Stat. 2142, 2186–87.

[90] *See* Memorandum to USCIS Executive Leadership from Donald Neufeld, Acting Associate Director, USCIS Office of Domestic Operations, *Re: Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children (REVISED)* at 3, 10 (Dec. 2, 2009).

[91] *See* Section II.A above for a description of DACA's creation.

[92] *See Crane* v. *Napolitano,* 920 F. Supp. 2d 724, (N.D. Tex. 2013).

[93] *See Crane* v. *Johnson,* 783 F.3d 244, 255 (5th Cir. 2015).

[94] Memorandum from Jeh Johnson, Secretary, DHS, to León Rodriguez, Director, USCIS, et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014) (hereinafter 2014 DAPA Memorandum). The policy memorandum was rescinded on June 15, 2017. Memorandum from John Kelly, Secretary, DHS, to Kevin McAleenan, Acting Commissioner, CBP, et. al., *Rescission of November 20, 2014 Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)* (June 15, 2017).

[95] *See Texas* v. *United States,* 86 F. Supp. 3d 591 (S.D. Tex. 2015) (*Texas I*).

[96] *Texas* v. *United States,* 809 F.3d 134 (5th Cir. 2015) (*Texas I*). The Fifth Circuit included the directives of Expanded DACA as part of DAPA for purposes of its decision. *See id.* at 147 n.11.

[97] *United States* v. *Texas,* 136 S. Ct. 2271 (2016) (per curiam).

[98] *Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)* from Elaine Duke, Acting Secretary, DHS (Sept. 5, 2017), *https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca* (hereinafter Duke Memorandum); *see also Letter from Attorney General Sessions to Acting Secretary Duke on the Rescission of DACA* (Sept. 4, 2017), *https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf.*

[99] *Regents of the Univ. of Cal.* v. *DHS,* No. 17–cv–5211 (N.D. Cal. 2017) (*Regents* v. *DHS*).

[100] *See Batalla Vidal* v. *Nielsen,* No. 16–cv–4756 (E.D.N.Y.). Mr. Batalla Vidal's original complaint challenged DHS's revocation of the 3-year EAD issued under Expanded DACA and the Government's application of the *Texas I* preliminary injunction to New York residents such as himself. Compl., *Vidal* v. *Baran,* No. 16–cv–4756 (E.D.N.Y.) (Aug. 25, 2016).

[101] *See NAACP* v. *Trump,* No. 17–cv–1907 (D.D.C.).

[102] *See Diaz* v. *DHS,* No. 17–cv–24555 (S.D. Fla.).

[103] *See Casa de Maryland* v. *DHS,* No. 17–cv–2942 (D. Md.).

was in effect prior to rescission.[104] The injunction did not require the Government to accept requests from individuals who had never received DACA before, nor to provide advance parole to DACA recipients. In February 2018, in *Batalla Vidal* v. *Nielsen,* the U.S. District Court for the Eastern District of New York also entered a nationwide preliminary injunction on the basis that DHS's rescission of the DACA policy was likely arbitrary and capricious.[105]

In April 2018, in *NAACP* v. *Trump,* the U.S. District Court for the District of Columbia granted plaintiffs partial summary judgment on one of their APA claims, finding the Government failed to explain the rescission adequately. The court vacated the Duke Memorandum, but it stayed its order for 90 days so that DHS could provide additional explanation of its action.[106] Then-Secretary Kirstjen Nielsen issued a second memorandum (Nielsen Memorandum) further explaining DHS's decision to rescind DACA.[107] Upon consideration of the Nielsen Memorandum, the *NAACP* v. *Trump* court declined to reconsider its order vacating the Duke Memorandum, again finding the rescission arbitrary and capricious under the APA.[108]

The Government appealed the orders to the U.S. Courts of Appeals for the Ninth, Second, and D.C. Circuits. While awaiting those courts' decisions, the Government petitioned the Supreme Court for a writ of certiorari before judgment in each case,[109] asking the Court to grant similar petitions and consolidate the rescission cases.[110] Before the Supreme Court acted on the Government's petitions, the Ninth Circuit affirmed the preliminary injunction in *Regents,* and the Supreme Court granted certiorari in that case and certiorari before judgment in the Second Circuit and D.C. Circuit cases. Over the course of the litigation, DHS continued to adjudicate DACA requests from previous DACA holders as required by the nationwide injunctions.

The Supreme Court heard the consolidated rescission cases to determine the issues of (1) whether the rescission was reviewable; (2) whether it was arbitrary and capricious under the APA; and (3) whether it violated the equal protection principles of the Fifth Amendment's Due Process Clause.[111] On June 18, 2020, the Court issued its decision and found the policy's rescission reviewable under the APA.[112] The Court found that the decision to rescind DACA was arbitrary and capricious under the APA because then-Acting Secretary Duke had not adequately considered alternatives to rescission, nor had she considered the reliance interests of DACA recipients. The Court held that plaintiffs failed to state a cognizable equal protection claim. And the Court declined to consider the Nielsen Memorandum. Ultimately, the Court remanded the matter to DHS ''to consider the problem anew.'' [113] In a letter to then-Acting Secretary Chad Wolf, then-Attorney General William Barr withdrew the September 4, 2017 Sessions letter, in order to ''facilitate that consideration.'' [114]

Subsequently, then-Acting Secretary Chad Wolf issued a memorandum limiting grants of DACA to those individuals who had previously held DACA and reducing the grant from 2- to 1-year increments, while DHS considered the future of the policy.[115] The Wolf Memorandum also required rejection of all pending and future advance parole applications from DACA recipients and a refund of the associated fees, absent ''exceptional circumstances.'' [116] The plaintiffs in *Batalla Vidal* v. *Nielsen* and *New York* v. *Trump* amended their complaints to challenge the Wolf Memorandum.[117] The U.S. District Court for the Eastern District of New York vacated the Wolf Memorandum after finding that Mr. Wolf had not been lawfully serving as the Acting Secretary under the Homeland Security Act at the time of the memorandum's issuance.[118] The court ordered DHS to post public notice on DHS and USCIS websites that it was accepting initial DACA requests and applications for advance parole documents under the terms in place prior to the September 5, 2017 rescission, as well as to notify and provide a remedy to those applicants affected by processing under the now-vacated Wolf Memorandum.[119] USCIS then returned to operating DACA in accordance with the Napolitano Memorandum, as a result of the *Batalla Vidal* court's order.[120]

Meanwhile, in May 2018 and prior to the Supreme Court's decision in *Regents,* Texas and nine other States filed suit in the U.S. District Court for

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[104] The Northern District of California previously consolidated the following cases: *California* v. *DHS,* No. 17–cv–5235 (N.D. Cal.); *Garcia* v. *United States,* No. 17–cv–5380 (N.D. Cal.); *City of San Jose* v. *Trump,* No. 17–cv–5329 (N.D. Cal.); *Regents* v. *DHS;* and *County of Santa Clara* v. *Trump,* No. 17–cv–5813 (N.D. Cal.).

[105] *See Batalla Vidal* v. *Nielsen,* 279 F. Supp. 3d 401 (E.D.N.Y. 2018); *see also Batalla Vidal* v. *Trump,* No. 18–485 (2d Cir.) (consolidating appeals from *New York* v. *Trump,* No. 17–cv–5228 (E.D.N.Y.) and *Batalla Vidal* v. *Baran,* No. 16–4756 (E.D.N.Y.)).

[106] *NAACP* v. *Trump,* 298 F. Supp. 3d 209, 249 (D.D.C. 2018).

[107] Memorandum from Kirstjen M. Nielsen, Secretary, DHS (June 22, 2018).

[108] *NAACP* v. *Trump,* 315 F. Supp. 3d 457, 474 (D.D.C. 2018).

[109] The Ninth Circuit later affirmed the district court's preliminary injunction, 908 F.3d 476 (9th Cir. 2018), and the Government converted its petition to a petition for a writ of certiorari. *DHS* v. *Regents of the Univ. of Cal.,* No. 18–587 (Supreme Court) (petition for writ of certiorari before judgment filed Nov. 5, 2018; request to convert to petition for writ of certiorari filed Nov. 19, 2018).

[110] *McAleenan* v. *Vidal,* No. 18–589 (Supreme Court) (petition for writ of certiorari before judgment filed Nov. 5, 2018); *Batalla Vidal* v. *Trump,* No. 18–485 (2d Cir.) (consolidating appeals from *New York* v. *Trump,* 17–cv–5228 (E.D.N.Y.) and *Batalla Vidal* v. *Baran,* No. 16–04756 (E.D.N.Y.)) (appeal filed Feb. 20, 2018); *Trump* v. *NAACP,* No. 18–588 (Supreme Court) (petition for writ of certiorari before judgment filed Nov. 5, 2018); *Trustees of Princeton Univ.* v. *United States,* No. 18–5245 (D.C. Cir.) (appeal filed Aug. 13, 2018) (*Trustees of Princeton Univ.* v. *United States,* No. 17–cv–2325 (D.D.C.) consolidated with *NAACP* v. *Trump,* No. 17–cv–1907 (D.D.C.)). Although the district court granted the Government's motion for summary judgment in part in *Casa de Maryland,* the Fourth Circuit reversed, vacating the Duke Memorandum, though it stayed its order, and the Supreme Court denied cert. *DHS* v. *Casa De Maryland,* 18–1469 (petition for writ of certiorari); *Casa de Maryland* v. *DHS,* 18–1521 (4th Cir. May 17, 2019) (appeal and cross-appeal filed May 8, 2018) *(Casa de Maryland* v. *DHS,* No. 17–cv–2942 (D. Md.)).

[111] *Regents,* 140 S. Ct. 1891 (2020).

[112] *Id.* at 1907, 1910.

[113] *Id.* at 1916.

[114] *Attorney General William P. Barr's letter to Acting Secretary Chad F. Wolf on DACA* (June 30, 2020), *https://www.dhs.gov/sites/default/files/publications/20_0630_doj_aj-barr-letter-as-wolf-daca.pdf.*

[115] *See Reconsideration of the June 15, 2012 Memorandum Entitled ''Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,''* Memorandum from Chad F. Wolf, Acting Secretary, to heads of immigration components of DHS, dated July 28, 2020, at p. 7 (hereinafter Wolf Memorandum).

[116] *Id.* at p. 8.

[117] Plaintiffs in the previously consolidated cases in *Regents* v. *DHS* likewise filed amended complaints in the Northern District of California, challenging the Wolf Memorandum and the subsequent implementing guidance (Joseph Edlow, Deputy Director of Policy, USCIS, to Associate Directors and Program Office Chiefs, *Implementing Acting Secretary Chad Wolf's July 28, 2020 Memorandum, ''Reconsideration of the June 15, 2012 Memorandum 'Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children'''* (Aug. 21, 2020)) on the basis that the memoranda were ultra vires and violated the APA, and also challenging then-Acting Secretary Wolf's appointment. *See, e.g.,* Pls.' First Am. Compl. For Declaratory and Injunctive Relief, *Regents* v. *DHS,* No. 17–cv–5211, 2020 WL 8270391 (N.D. Cal. Nov. 2, 2020). The parties stipulated to stay proceedings pending DHS's actions pursuant to the Biden Memorandum.

[118] *Batalla Vidal* v. *Wolf,* 501 F. Supp. 3d 117, 129–33 (E.D.N.Y. 2020).

[119] *See Batalla Vidal* v. *Wolf,* No. 16–cv–4756, 2020 WL 7121849 (E.D.N.Y. Dec. 4, 2020).

[120] DHS expects that the proposed rule would supersede both the Napolitano Memorandum and, to the extent necessary, the vacated Wolf Memorandum.

the Southern District of Texas, challenging the legality of the Napolitano Memorandum [121] (which, despite the rescission, remained in place due to numerous court orders [122]). As the States had waited 6 years to file suit, the court declined to enter a preliminary injunction against DACA ''due to their delay.'' [123] The court explained that the plaintiff States could not show irreparable harm from continuation of the policy during the litigation.[124] But the court found that the States had a likelihood of success on the merits on their substantive and procedural APA claims.[125] After discovery, the court stayed the case awaiting the then-forthcoming decision in *DHS* v. *Regents.*

Following the Supreme Court's decision in *Regents,* and after additional discovery, the parties in *Texas II* filed cross-motions for summary judgment. On July 16, 2021, the court in *Texas II* issued its memorandum and order on the motions for summary judgment, holding that the Napolitano Memorandum is contrary to the APA's rulemaking requirements and the INA, and vacating the Napolitano Memorandum.[126] The court remanded the Napolitano Memorandum to DHS for further consideration. The court further issued a permanent injunction prohibiting DHS's continued administration and reimplementation of DACA without compliance with the APA, but temporarily stayed the vacatur and permanent injunction as to most individuals granted DACA on or before July 16, 2021, including with respect to renewal requests. The *Texas II* court also held that while DHS may continue to accept both DACA initial and renewal filings, DHS is prohibited from granting initial DACA requests and accompanying requests for employment authorization.

Currently, termination of an individual's grant of deferred action under DACA must adhere to the requirements of the nationwide preliminary injunction issued by the U.S. District Court for the Central District of California in *Inland Empire-Immigrant Youth Collective* v. *Nielsen.*[127] The *Inland Empire* court certified a limited class of DACA recipients whose DACA grants had been or would be terminated without notice under particular circumstances, and it required USCIS to reinstate their deferred action under DACA and provide advance notice and an opportunity to respond prior to terminating a class member's grant of DACA. In accordance with the preliminary injunction and modified class definition and implementation procedures, USCIS is required to issue a notice of intent to terminate (NOIT) if it decides to terminate an individual's DACA grant, unless the individual (1) has a criminal conviction that is disqualifying for DACA; (2) has a charge for a crime that falls within the egregious public safety (EPS) grounds referenced in the USCIS 2011 NTA policy memorandum; [128] (3) has a pending charge for certain terrorism and security crimes described in 8 U.S.C. 1182(a)(3)(B)(iii) and (iv) or 8 U.S.C. 1227(a)(4)(A)(i); (4) departed the United States without advance parole; (5) was physically removed from the United States pursuant to an order of removal, voluntary departure order, or voluntary return agreement; or (6) maintains a nonimmigrant or immigrant status. As the *Inland Empire* class does not include these categories of DACA recipients, a NOIT is not required to terminate DACA. DHS is preliminarily enjoined from terminating a grant of DACA based solely on the issuance of an NTA that charges the individual as overstaying an authorized period of admission or being present without inspection and admission. DHS appealed the preliminary injunction to the U.S. Court of Appeals for the Ninth Circuit, which heard oral arguments on the appeal on June 13, 2019. The Ninth Circuit placed the case in abeyance on April 7, 2021, pending the present rulemaking.[129]

C. Forbearance From Enforcement Action

In every area of law enforcement—both civil and criminal—executive agencies exercise enforcement discretion.[130] When, as is the norm, legislatures provide law enforcement agencies with only enough resources to arrest, detain, or prosecute a fraction of those who are suspected of violating the law, these agencies must establish priorities. DHS and its predecessor agencies have long exercised enforcement discretion, prioritizing national security, border security, and public safety mandates over civil infractions that do not represent a similar threat to the United States and its citizens.[131] Given DHS's limited resources to pursue immigration enforcement and the approximately 11 million noncitizens estimated to reside in the United States without legal status,[132] the use of discretion and prioritization is a necessary element of fulfilling the DHS mission.

In Fiscal Year (FY) 2016–FY 2020, DHS resources appropriated by Congress allowed ICE to conduct an

[121] *Texas* v. *United States,* 328 F. Supp. 3d 662 (S.D. Tex. 2018) (*Texas II* denial of motion for preliminary injunction).

[122] *See, e.g., NAACP* v. *Trump,* 315 F. Supp. 3d 457, 474 (D.D.C. 2018).

[123] *See Texas II* denial of motion for preliminary injunction at 740.

[124] *Id.*

[125] *Id.* at 736.

[126] *Texas II* July 16, 2021 memorandum and order.

[127] Order Granting Preliminary Injunction and Class Certification, *Inland Empire-Immigrant Youth Collective* v. *Nielsen,* 17–cv–2048, 2018 WL 1061408 (C.D. Cal. Feb. 26, 2018), *modified by* Modified Class Definition and Implementation Procedures—Corrected, *Inland Empire-Immigrant Youth Collective* v. *Nielsen,* 17–cv–2048 (C.D. Cal. Mar. 20, 2018).

[128] For an individual with an EPS charge for a crime of violence, as set forth in section IV(A)(1)(d) of the USCIS 2011 NTA policy memorandum, the minimum sentence for that charge must be at least 1 year of imprisonment before the individual will be deemed excluded from the class definition in *Inland Empire. See id.,* Modified Class Definition and Implementation Procedures—Corrected, at pp. 2–3.

[129] Order Holding Appeal in Abeyance, *Inland Empire-Immigrant Youth Collective* v. *Mayorkas,* 18–55564 (9th Cir. Apr. 7, 2021).

[130] *See Heckler* v. *Chaney,* 470 U.S. 821, 831 (1985).

[131] While the priorities have shifted between administrations, DHS and its components have issued enforcement priority and prosecutorial discretion policy memoranda since at least 1976, including in 2017 and 2021. *See, e.g.,* Sam Bernsen, General Counsel, INS, *Legal Opinion Regarding [Immigration and Naturalization] Service Exercise of Prosecutorial Discretion* (July 15, 1976); John Kelly, Secretary, DHS, *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017); Memorandum from Acting Secretary David Pekoske to Senior Official Performing the Duties of the CBP Commissioner, et al., *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021) (hereinafter Pekoske Memorandum); Acting ICE Director Tae D. Johnson, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021). On September 15, 2021, the U.S. Court of Appeals for the Fifth Circuit partially stayed a preliminary injunction issued by the U.S. District Court for the Southern District of Texas with respect to the latter two policies. *See State of Texas* v. *United States,* No. 21–40618 (5th Cir. Sept. 15, 2021).

[132] *See* DHS, Office of Immigration Statistics (OIS), *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2015–January 2018* (Jan. 2021), *https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Pop_Estimate/UnauthImmigrant/unauthorized_immigrant_population_estimates_2015_-_2018.pdf (hereinafter OIS Report)* (''*DHS estimates that 11.4 million unauthorized immigrants were living in the United States on January 1, 2018, roughly unchanged from 11.4 million on January 1, 2015*''*);* Randy Capps, et al., *Unauthorized Immigrants in the United States: Stable Numbers, Changing Origins,* Migration Policy Institute (2020), *https://www.migrationpolicy.org/sites/default/files/publications/mpi-unauthorized-immigrants-stablenumbers-changingorigins_final.pdf* (hereinafter Capps (2020)) (''As of 2018 . . . there were 11 million unauthorized immigrants in the country, down slightly from 12.3 million in 2007.'').

average of 235,120 removals of noncitizens per fiscal year, a small proportion of the roughly 11 million undocumented noncitizens present in the United States.[133] Because of this mismatch between available resources and the number of potential enforcement targets, DHS must prioritize those that pose the greatest risk to public safety, national security, and border security. For instance, in FY 2020, 92 percent of the noncitizens that ICE removed after arrest by ICE Enforcement and Removal Operations (as opposed to those arrested by CBP at or near the border) had criminal convictions or pending criminal charges.[134] By contrast, USCIS data released in 2019 on arrests of DACA recipients reflect that just 10 percent of DACA recipients had ever been so much as arrested or apprehended for a criminal or immigration-related civil offense. Of those arrests, the most common offenses were non-DUI-related driving offenses and immigration-related civil or criminal offenses.[135] This suggests that even in the absence of the DACA policy, the vast majority of DACA recipients would not be enforcement targets and likely would remain in the country without becoming the subject of enforcement action.

ICE is currently further focusing resources on the identification of those individuals with serious criminal convictions and those individuals who pose a threat to national security, border security, and public safety.[136] DHS's focus on high-priority cases generally, as well as the DACA policy in particular, provides additional reassurance to people who present low or no risk to the United States, their families, and their communities. (This, in turn, has larger societal benefits, as discussed in Section V.A.4.b.(6) and elsewhere in this proposed rule.)

Adopting the proposed regulatory provisions would fortify DHS's prioritized approach to immigration and border enforcement by allowing DHS to continue to realize the efficiency benefits of the DACA policy. USCIS' determination that an individual meets the DACA guidelines and merits a favorable exercise of discretion assists law enforcement activities in several areas by streamlining the review required when officers encounter a DACA recipient. For example, when a CBP law enforcement officer encounters a DACA recipient in the course of their activities, they can see that USCIS confirmed that the noncitizen did not recently cross the border and had no significant criminal history at the time of the most recent DACA adjudication. Rather than conducting a full review of the DACA recipient's immigration and criminal history, in some circumstances, such as at the primary inspection booth at a checkpoint, the officer may be able to make a determination without necessitating further investigation (such as secondary inspection)—an effort that could involve multiple officers, with time costs ranging from minutes to hours.[137] Additionally, while officers must exercise their judgment based on the facts of each individual case, the prior vetting of DACA recipients provides a baseline that can streamline an enforcement officer's review of whether a DACA recipient is otherwise an enforcement priority.

Similarly, when ICE encounters a DACA recipient in the course of operations, ICE may review that person's history to ascertain if a disqualifying conviction has been rendered against them since the granting or renewal of DACA and proceed with an appropriate law enforcement resolution in each case. As appropriate, a law enforcement action, such as an arrest or immigration detainer being issued, may be avoided if someone is a DACA recipient or eligible individual and has no disqualifying convictions subsequent to the granting or renewal of DACA and continues to merit a favorable exercise of prosecutorial discretion.

In either scenario, DACA helps save time and resources, which then could be spent on priority matters. At the same time, the DACA recipient could avoid time in DHS custody, resulting in lower costs for the DACA recipients and greater resource availability for DHS.

Likewise, ICE relies on the fact that a noncitizen has received DACA in determining whether to place the noncitizen into removal proceedings or, if the noncitizen is already in removal proceedings, in determining whether to agree to continue, administratively close, or dismiss the removal proceedings without prejudice.[138] Depending on the surrounding circumstances, such decisions could allow priority cases to move through the overloaded immigration courts more quickly, reduce resource burdens on ICE attorneys and the immigration courts, provide more immediate respite to those who present low or no risk to the country, or avoid costs associated with detaining and ultimately removing a noncitizen.

As was the case when the DACA policy was first established in 2012, DHS recognizes that it is unable now, or in the foreseeable future, to take enforcement action against every noncitizen who resides in the United States without legal status. Given this reality, it is necessary for DHS to focus its resources and efforts on higher priority cases, such as those individuals who present a threat to national or border security. DHS policy long has reflected a determination that strong humanitarian and practical considerations make these noncitizens, who entered the United States as children and were not aware of, or in control of, the manner or means of their entry, excellent candidates for designation as low enforcement priorities. Enforcement actions against this population are not aligned with a prioritization of border or national security or public safety, or with DHS's commitment to values-based enforcement policies.

[133] ICE, *Fiscal Year 2020 Enforcement and Removal Operations Report* 4 (2020); ICE, *Fiscal Year 2019 Enforcement and Removal Operations Report* 19 (2019); ICE, *Fiscal Year 2018 Enforcement and Removal Operations Report* 10 (2018); ICE, *Fiscal Year 2017 Enforcement and Removal Operations Report* 12 (2017); ICE, *Fiscal Year 2016 Enforcement and Removal Operations Report* 2 (2016).

[134] *See ICE Annual Report: Fiscal Year 2020, https://www.ice.gov/doclib/news/library/reports/annual-report/iceReportFY2020.pdf.* ICE's interior enforcement operations are most likely to encounter the DACA-eligible population because DACA recipients must have been continuously physically present in the United States since June 15, 2012, and, therefore, generally are not encountered by CBP's border security actions.

[135] *See* USCIS, *DACA Requestors with an IDENT Response* (Nov. 2019), *https://www.uscis.gov/sites/default/files/document/data/DACA_Requestors_IDENT_Nov._2019.pdf.*

[136] *See* Acting ICE Director Tae D. Johnson, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021). As noted above, on September 15, 2021, the U.S. Court of Appeals for the Fifth Circuit partially stayed a preliminary injunction issued by the U.S. District Court for the Southern District of Texas with respect to this policy. *See State of Texas* v. *United States,* No. 21–40618 (5th Cir. Sept. 15, 2021).

[137] In the U.S. Border Patrol (USBP) context, subject-matter experts estimate that potential time savings could range from 30 minutes to 2 hours, depending on the circumstances of the encounter and available staff and resources. Time savings would accrue to the agent in the field as well as radio operators who work to confirm identity. Specific data on this point are not available because USBP does not separately collect data on this type of encounter.

[138] DHS cannot quantify the frequency with which ICE makes such decisions, because ICE does not track enforcement discretion decisions made based on DACA. Source: Enforcement and Removal Operations; Office of the Principal Legal Advisor. In addition, such decisions also can be affected by other policies (*e.g.,* overall enforcement priorities), such that in some cases, the decision to forbear from enforcement action could be attributed to either DACA or those other policies. But even when DHS is operating under enforcement priorities that generally would produce the same decision to forbear from enforcement action, ICE benefits from being able to rely on the fact that USCIS already has vetted the noncitizen via the DACA framework.

Therefore, in accordance with relevant statutory provisions, DHS's duty to enforce the immigration laws, and a long history of court decisions upholding acts of prosecutorial discretion, DHS is proposing this rule to continue and fortify its policy of exercising its enforcement discretion to defer removal as to a particular, identified class of noncitizens, so as to allow limited appropriated resources to be applied to higher priority cases.[139]

1. The Secretary Is Authorized by Statute To Establish This Deferred Action Policy

When Congress created DHS in 2002, it gave the Secretary authority over most immigration matters and placed both ICE and CBP, the two agencies responsible for immigration enforcement, under the Secretary's direction.[140] Section 103(a)(1) of the INA states that ''the [Secretary] shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens.'' [141] This sweeping grant includes authority to issue enforcement discretion policies such as the one proposed here.[142] Congress also explicitly charged that ''the Secretary shall be responsible for . . . [e]stablishing national immigration enforcement policies and priorities,'' recognizing that the Secretary must provide guidance on the proper exercise of the Department's immigration enforcement authorities and on the allocation of scarce resources.[143]

The review of historical practice above shows that deferred action has played an important role in immigration enforcement for more than 60 years. Congress has affirmatively encouraged its use in various settings. In INA sec. 204(a)(1)(D)(i)(II) and (IV), 8 U.S.C. 1154(a)(1)(D)(i)(II) and (IV), for example, Congress called attention to deferred action as a remedy for certain domestic violence victims and their children, by expressly providing that children who no longer could self-petition under VAWA because they were over the age of 21 nonetheless would be ''eligible for deferred action and work authorization.'' Similarly, in INA sec. 237(d)(2), 8 U.S.C. 1227(d)(2), Congress clarified that a denial of a request for a temporary stay of removal does not preclude deferred action for pending T and U nonimmigrant applicants. And through IMMACT 90, Congress provided post-hoc ratification of the use of indefinite voluntary departure in the family fairness policy, stating that a delay in the effective date ''shall not be construed as reflecting a Congressional belief that the existing family fairness program should be modified in any way before such date.'' [144] Provisions like these reflect Congress' recognition—acting after the executive branch already has implemented such a policy—that identifying classes of individuals who may be eligible for deferred action, as an act of enforcement discretion,[145] is both lawful and appropriate.[146] Moreover, numerous regulations refer to deferred action, some which have been in force for nearly 40 years, and Congress has allowed them to remain in force.[147]

[139] There are roughly 636,410 active DACA recipients and an estimated total of 1.3 million individuals who could meet the criteria set out in this proposed rule. Migration Policy Institute, *DACA Recipients & Eligible Population by State, https://www.migrationpolicy.org/programs/data-hub/deferred-action-childhood-arrivals-daca-profiles.* Even if all such individuals are granted deferred action, that number represents only a small portion of the estimated 11 million undocumented noncitizens present in the United States and the available appropriated resources would remain grossly inadequate to the task of prosecuting and removing the estimated remaining 9.7 million undocumented individuals. This means that the proposed rule will not prevent DHS from continuing to enforce the immigration laws to the full extent that the resources Congress has given it will permit; to the contrary, as discussed below, these policies will facilitate still more effective use of the Department's finite resources.

[140] *See* Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2136.

[141] *See* 8 U.S.C. 1103(a)(1).

[142] *See Ariz. Dream Act Coal.* v. *Brewer,* 855 F.3d 957, 967 (9th Cir. 2017) (''[T]he INA explicitly authorizes the [Secretary] to administer and enforce all laws relating to immigration and naturalization. INA 103(a)(1), 8 U.S.C. 1103(a)(1). As part of this authority, it is well settled that the Secretary can exercise deferred action, a form of prosecutorial discretion . . . .'').

[143] 6 U.S.C. 202(5).

[144] *See* IMMACT 90 sec. 301(g). As noted above, *supra* note 57, the 1987 Family Fairness Memorandum was promulgated against a backdrop of a failed legislative effort to provide a pathway to legalization for IRCA-excluded spouses and children. The 1990 Family Fairness Memorandum came amidst rejection of protection from deportation in a House bill mirroring a Senate provision. *See supra* note 61. As such, while Congress later ratified INS's administrative practice, there was little to no apparent prospect for legislative action prompting the family fairness policies at the time they were promulgated in 1987 and 1990. *But see Texas I,* 809 F.3d at 185 (''Although the 'Family Fairness' program did grant voluntary departure to family members of legalized aliens while they 'waited for a visa preference number to become available for family members,' that program was interstitial to a statutory legalization scheme. DAPA is far from interstitial: Congress has repeatedly declined to enact the Development, Relief, and Education for Alien Minors Act ('DREAM Act'), features of which closely resemble DACA and DAPA.'') (footnotes omitted); *Texas II* July 16, 2021 memorandum and order at 66 (citing *Texas I,* 809 F.3d at 185) (''Family Fairness was 'interstitial to a statutory legalization scheme,' because its purpose was to delay prosecution until Congress could enact legislation providing the same benefits, which it did when it passed [IMMACT 90].''). To whatever extent the 1990 Family Fairness Memorandum can be described as ''interstitial'' due to earlier passage of the Senate provision, DACA now occupies a similar interstitial space—the American Dream and Promise Act of 2021 passed the House in March 2021, and the bill is currently under consideration in the Senate. *See* H.R. 6, 117th Cong., American Dream and Promise Act of 2021 (as passed by House, Mar. 18, 2021), *https://www.congress.gov/bill/117th-congress/house-bill/6* (last visited Sept. 16, 2021). The Department maintains, however, that the DACA policy fits within the longstanding administrative practice of deferred action and is authorized by statute regardless of whether it is ''interstitial'' to a bill that is under active consideration by Congress.

[145] In the *Texas II* district court's July 16, 2021 memorandum and order, the court distinguished between ''prosecutorial discretion'' and ''adjudicative discretion,'' citing a past statement in congressional testimony by Secretary Napolitano and a memorandum from an INS General Counsel. DHS respectfully disagrees with the court's interpretation of those statements—which do not draw the distinction made by the district court—and also disagrees with the court's legal conclusions on this point. It is true, of course, that under the proposed rule, DHS does not simply forbear from initiating proceedings; it also creates a process by which applicants must seek forbearance through an adjudicative proceeding. But that process is designed to answer one question: is forbearance appropriate? Whenever an agency decides to exercise forbearance, it must engage in some kind of process. The process in the proposed rule is more formal and structured than many exercises of prosecutorial discretion, but that is deliberate and serves important goals; it ensures appropriate, consistent, and efficient consideration of the equities deemed most relevant by the Secretary.

[146] For other statutory references to deferred action, *see, e.g.,* REAL ID Act of 2005, Public Law 109–13, div. B, sec. 202(c)(2)(B)(viii), 119 Stat. 231, 313 (49 U.S.C. 30301 note) (including deferred action recipients among the classes of individuals with ''lawful status'' eligible for REAL ID-compliant driver's licenses or identification cards); National Defense Authorization Act for Fiscal Year 2004, Public Law 108–136, sec. 1703(c)(1)(A) and (2), 117 Stat. 1693, 1694–95 (2003) (providing that the spouse, parent, or child of a U.S. citizen who died as a result of honorable service in combat and who was granted posthumous citizenship may self-petition for permanent residence and ''shall be eligible for deferred action, advance parole, and work authorization'').

[147] *See, e.g.,* 8 CFR 109.1(b)(7) (1982); 8 CFR 274a.12(c)(14) (2014); 8 CFR 1.3(a)(4)(vi) (including noncitizens granted deferred action among categories of those deemed ''lawfully present in the United States'' for purposes of eligibility for benefits under title II of Social Security Act); 8 CFR 214.11(m)(2) (deferred action for trafficking victims who are provisionally approved for T nonimmigrant status and on waiting list for available visa number); 8 CFR 214.14(d)(2) and (3) (same for U nonimmigrant status); 8 CFR 245.24(a)(3) (''U Interim Relief means deferred action and work authorization benefits provided by USCIS or [INS] to applicants for U nonimmigrant status deemed prima facie eligible for U nonimmigrant status prior to publication of the U nonimmigrant status regulations.''); 8 CFR 245a.2(b)(5) (including among noncitizens eligible for adjustment to temporary resident status those who were granted deferred action before 1982); 28 CFR 1100.35(b) (encouraging the granting of deferred action and other forms of ''continued presence'' for victims of severe forms of trafficking in persons who are potential witnesses to that trafficking); 45 CFR 152.2 (noncitizens ''currently in deferred action status'' —except those ''with deferred action under [DHS's] deferred action

Continued

Finally, the fact that Congress has repeatedly considered but failed to enact legislative proposals to give legal status to a population that substantially overlaps with the population eligible for DACA does not call into question the Secretary's statutory authority to establish this deferred action policy. As the Supreme Court often has made clear, Congress can legislate only by following the constitutional procedure for enactment of law.[148] The non-actions of a subsequent Congress, including its failure to do something significantly different from an agency action, are not themselves legislation, and they are ''a hazardous basis for inferring the intent of an earlier one,'' particularly with respect to determining whether the agency action is authorized by statutes that an earlier Congress enacted.[149] When Congress does not act, it might be for a wide variety of reasons, including competing priorities and the sheer press of business.[150] In any case, the DREAM Act [151] is a substantially different policy from DACA. The DREAM Act proposed to grant individuals lawful status, first conditional and then permanent, which DHS cannot do and is not proposing here. By declining to enact the DREAM Act, then, Congress has not rejected or otherwise spoken to the Secretary's authority to establish the DACA policy. It bears repeating that, though well aware of DHS's longstanding administrative practice, including the Napolitano Memorandum, Congress has not taken any action to override or prohibit this use of deferred action.[152]

2. The Courts Have Long Recognized the Executive's Authority To Establish Enforcement Priorities and Grant Deferred Action

It long has been recognized that executive agencies are entitled to exercise their discretion in setting enforcement priorities when they have limited resources. The Supreme Court explicitly recognized that authority in *Heckler* v. *Chaney,* when the Food and Drug Administration declined to proceed against an allegedly unlawful use of a particular drug for lethal injections.[153] The decision whether to enforce was, the Court held, ''committed to agency discretion by law'' within the meaning of the APA.[154] The Court said: ''This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.'' [155] The Court added that

> an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall priorities, and, indeed, whether the agency has enough resources to undertake the action at all.[156]

Regarding immigration enforcement, in *Arizona* v. *United States,* the Supreme Court relied on the Federal Government's broad immigration enforcement discretion to declare several provisions of an Arizona immigration enforcement statute unconstitutional.[157] The Court described the scope of that enforcement discretion in sweeping terms: ''A principal feature of the removal system is the broad discretion exercised by immigration officials. . . . Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.'' [158] Over a decade earlier, the Court emphasized that even after choosing to initiate enforcement action, immigration officials may ''abandon the endeavor'' of immigration enforcement ''at each stage'' of the process.[159] Several Federal courts of appeals have made similar statements, recognizing that the Executive has extremely broad discretionary authority when deciding how to allocate enforcement resources, including when to forbear removal on humanitarian grounds.[160]

Indeed, for more than 20 years the Supreme Court specifically has recognized deferred action—that is, the decision to temporarily forbear from pursuing the removal of a noncitizen—as a core feature and ''regular practice'' of the Executive's discretionary authority.[161] The Court confirmed this understanding in the context of the 2012 DACA policy, stating that ''[t]he defining feature of deferred action is the decision to defer removal (and to notify the affected alien of that decision).'' [162] One Federal court aptly described deferred action this way:

> [T]he executive branch has long used an enforcement tool known as ''deferred action'' to implement enforcement policies and priorities, as authorized by statute. Deferred action is simply a decision by an enforcement agency not to seek enforcement of a given statutory or regulatory violation for a limited period of time. In the context of the immigration laws, deferred action represents a decision by DHS not to seek the removal of an alien for a set period of time. In this sense, eligibility for deferred action represents an acknowledgment that those qualifying individuals are the lowest priority for enforcement.[163]

The Court in *Arizona* recognized the Federal Government's appropriate focus on just the type of criteria for forbearance policies found in the 2012 DACA policy and in this proposed rule:

> Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including . . . long ties to the community, or a record of distinguished

for childhood arrivals process, as described in the [Napolitano Memorandum]''—are deemed ''lawfully present'' for purposes of the Pre-Existing Condition Insurance Plan Program).

[148] *See, e.g., INS* v. *Chadha,* 462 U.S. 919, 951 (1983).

[149] *Mackey* v. *Lanier Collection Agency & Serv., Inc,* 486 U.S. 825, 840 (1988) (quoting *United States* v. *Price,* 361 U.S. 304, 313 (1960)); *see also, e.g., Cal. Div. of Labor Stds. Enf.* v. *Dillingham Constr., N.A.,* 519 U.S. 316, 331 n.8 (1997).

[150] *See, e.g., Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 187 (1994).

[151] The DREAM Act was first introduced in 2001 (*see* DREAM Act, S. 1291, 107th Cong., 1st Sess. (2001)) and subsequently has been reintroduced several times.

[152] Indeed, Congress has taken up, but never passed, bills to defund DACA processing by DHS. *See, e.g.,* H.R. 5160, 113th Cong. (2014).

[153] 470 U.S. 821 (1985) (*Chaney*).

[154] 5 U.S.C. 701(a)(2).

[155] *Chaney,* 470 U.S. at 831.

[156] *Id.*

[157] 132 S. Ct. 2492 (2012).

[158] *Id.* at 2499, citing Brief for Former Commissioners of the United States Immigration and Naturalization Service as Amici Curiae 8–13.

[159] *AADC,* 525 U.S. at 483–84.

[160] *See AADC,* 525 U.S. at 483–84 (''[A]t the time IIRIRA was enacted the INS had been engaging in a regular practice (which had come to be known as 'deferred action') of exercising that discretion for humanitarian reasons or simply for its own convenience.''); *Regents of the Univ. of Cal.* v. *DHS,* 908 F.3d 476, 487 (9th Cir. 2018) (''Deferred action refers to an exercise of administrative discretion by the [immigration agency] under which [it] takes no action to proceed against an apparently deportable alien based on a prescribed set of factors generally related to humanitarian grounds.'' (internal quotation marks omitted)); *Arpaio* v. *Obama,* 797 F.3d 11, 16 (D.C. Cir. 2015) (''Whether to initiate removal proceedings and whether to grant relief from deportation are among the discretionary decisions the immigration laws assign to the executive.''); *Crane* v. *Johnson,* 783 F.3d 244, 247 (5th Cir. 2015) (''Under the INA, the [Secretary] is 'charged with the administration and enforcement of the INA and all other laws relating to the immigration and naturalization of aliens. . . .' Although the [Secretary] is charged with enforcement of the INA, 'a principal feature of the removal system is the broad discretion exercised by immigration officials.' In fact, the Supreme Court has recognized that the concerns justifying criminal prosecutorial discretion are 'greatly magnified in the deportation context.' '' (internal brackets and citations omitted)).

[161] *See AADC,* 525 U.S. at 483–84.

[162] *Regents,* 140 S. Ct. at 1911.

[163] *Arpaio* v. *Obama,* 27 F. Supp. 3d 185, 192–93 (D.D.C. 2014), *aff'd,* 797 F.3d 11 (D.C. Cir. 2015).

military service. . . . Returning an alien to his own country may be deemed inappropriate even where he . . . fails to meet the criteria for admission.[164]

The Supreme Court's 8–1 decision in *AADC,* cited above, is noteworthy. Emphasizing the breadth of the Executive power to decide whether to grant deferred action, the Court observed that ''[a]t each stage the Executive has discretion to abandon [the removal process], and at the time IIRIRA was enacted the INS had been engaging in a regular practice (which had come to be known as 'deferred action') of exercising that discretion for humanitarian reasons or simply for its own convenience.'' [165]

The lower courts have described this specific form of enforcement discretion in equally broad terms. In *Regents of the Univ. of Cal.* v. *DHS,* the U.S. Court of Appeals for the Ninth Circuit stated that ''[d]eferred action is a decision by Executive Branch officials not to pursue deportation proceedings against an individual or class of individuals otherwise eligible for removal from this country.'' [166] It likewise found that ''it is well settled that the Secretary can exercise deferred action, a form of prosecutorial discretion whereby [DHS] declines to pursue the removal of a person unlawfully present in the United States.'' [167] The Fifth and Eleventh Circuits also have acknowledged deferred action as an appropriate exercise of enforcement discretion.[168] Indeed, the courts' acceptance of this type of policy announcing enforcement discretion long predates DACA, including several cases that refer to deferred action by name (or in some cases by its earlier name, ''non-priority status'') as a nonreviewable exercise of immigration enforcement discretion.[169]

Of course, as explained above, the DAPA and Expanded DACA policies were subjected to court challenges and ultimately were not implemented, and the Napolitano Memorandum recently was vacated by a district court. But to the extent that courts have found substantive flaws in those policies, they have not found that DHS may not forbear from removing certain noncitizens, or identifying policy considerations and criteria relevant to such forbearance, because forbearance from removal is so strongly rooted in long-recognized executive enforcement discretion authorities.[170] In focusing on those individuals who came to the country many years ago as children, have grown up here, have gone to school here, in some cases have served honorably in the Armed Forces, and do not pose a threat to public safety, national security, or border security, the DACA policy appropriately affords deferred action to some of the lowest priority removable noncitizens in the immigration system.

3. This Deferred Action Policy Conforms to Legal Limitations on the Executive's Enforcement Discretion

DHS recognizes that the Executive's enforcement discretion is not unlimited. Respect for Article I of the Constitution, the bedrock principles of separation of powers, and the rule of law compels careful consideration of the legal limits on all executive action, including enforcement discretion. After careful consideration, DHS proposes a rule that fully respects those limits.[171]

One limit, as the Supreme Court has observed, is that an agency may not ''disregard legislative direction in the statutory scheme that the agency administers. Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue.'' [172]

The proposed rule does not ''disregard'' legislative direction; it affirmatively effectuates it. As the Court pointed out in *Chaney,* Congress can limit executive discretion by ''setting substantive priorities.'' With respect to immigration enforcement, Congress in fact has directed the Secretary to prioritize three missions: National security, public safety through the removal of serious criminal offenders (by level of severity of the crime), and border security.[173] Those are precisely the central priorities that the proposed rule expressly incorporates. Nor does any statutory provision attempt to ''limit [DHS's] exercise of enforcement power'' by ''otherwise circumscribing [DHS's] power to discriminate among issues or cases it will pursue.''

Further, as noted earlier, INA sec. 103(a), 8 U.S.C. 1103(a), confers broad powers on the Secretary in connection with ''the administration and enforcement'' of the immigration laws, and section 402(5) of the Homeland Security Act, 6 U.S.C. 202(5), charges the Secretary with the more specific duty of ''establishing national immigration enforcement policies and priorities.'' In discharging that responsibility to establish immigration enforcement policies and priorities, the Secretary exercises their ''control, direction, and supervision'' over DHS employees, INA sec. 103(a)(2), 8 U.S.C. 1103(a)(2), and may ''establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority,'' INA sec. 103(a)(3), 8 U.S.C. 1103(a)(3). The proposed rule is thus consistent with another important congressional policy—the decision to entrust the optimal allocation of finite immigration enforcement resources to the Secretary's broad discretion.

As discussed above, the enforcement priorities that animate the proposed rule include national security, public safety through the removal of serious criminal

[164] *Arizona,* 132 S. Ct. at 2499. *See also Casa de Maryland* v. *DHS,* 924 F.3d 684, 691 (4th Cir. 2019) (''Because of the 'practical fact,' however, that the government can't possibly remove all such noncitizens, the Secretary has discretion to prioritize the removal of some and to deprioritize the removal of others.'').

[165] *AADC,* 525 U.S. at 483–84.

[166] 908 F.3d at 487.

[167] *Ariz. Dream Act Coal.* v. *Brewer,* 818 F.3d 901 (9th Cir. 2016).

[168] *Pasquini* v. *Morris,* 700 F.2d 658, 662 (11th Cir. 1983) (granting or withholding deferred action ''is firmly within the discretion of the INS'' and, therefore, can be granted or withheld ''as [the relevant official] sees fit, in accord with the abuse of discretion rule when any of the [then] five determining conditions is present''); *Soon Bok Yoon* v. *INS,* 538 F.2d 1211, 1213 (5th Cir. 1976) (''The decision to grant or withhold non-priority status [the former name for deferred action] therefore lies within the particular discretion of the INS, and we decline to hold that the agency has no power to create and employ such a category for its own administrative convenience without standardizing the category and allowing applications for inclusion in it.'').

[169] *See, e.g., AADC,* 525 U.S. at 483–84; *Botezatu* v. *INS,* 195 F.3d 311, 314 (7th Cir. 1999); *Mada-Luna v. Fitzpatrick,* 813 F.2d 1006, 1008 (9th Cir. 1987); *Pasquini* v. *Morris,* 700 F.2d 658, 661 (11th Cir. 1983); *David* v. *INS,* 548 F.2d 219, 223 (8th Cir. 1977); *Soon Bok Yoon* v. *INS,* 538 F.2d 1211, 1213 (5th Cir. 1976).

[170] *See Texas I* at 655–56. *Texas* v. *United States,* 787 F.3d 733 (5th Cir. 2015), *aff'd by equally divided Court,* 136 S. Ct. 2271 (2016); *see also Texas II* July 16, 2021 memorandum and order at 74.

[171] Other cogent discussions of the legal constraints on enforcement discretion in immigration reach analogous conclusions. *See* Written Testimony of Stephen H. Legomsky, Washington University School of Law, in *Unconstitutionality of Obama's Executive Actions on Immigration: Hearing Before the House Comm. on the Judiciary,* 114th Cong., at 74–76 (2015), *https://www.govinfo.gov/content/pkg/CHRG-114hhrg93526/pdf/CHRG-114hhrg93526.pdf.*

[172] *Chaney,* 470 U.S. at 833.

[173] A mandate to prioritize the removal of criminal offenders, taking into account the severity of the crime, has been included in every annual DHS appropriations act since 2009. *See, e.g.,* Consolidated Appropriations Act, 2014, Public Law 113–76, div. F, tit. II, 128 Stat. 5, 251; Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Public Law 110–329, div. D, tit. II, 122 Stat. 3574, 3659 (2008); *see also* INA secs. 235(b)(1) and (c) and 236(c)(1)(D), 8 U.S.C. 1225(b)(1) and (c) and 1226(c)(1)(D) (prioritizing national security and border security).

offenders based on the severity of the particular crimes, and border security. At the same time, when resources do not permit universal enforcement, prioritizing some goals requires deprioritizing others. The proposed rule deprioritizes the removal of those individuals who came to the United States many years ago as children; have lived in the United States peacefully and productively for substantial periods; and have been or are likely to be productive contributors to American society, via education, employment, and national service.

The use of deferred action as the particular vehicle for exercising this enforcement discretion is equally rational. This proposed deferred action policy would (1) encourage undocumented noncitizens to come forward, identify and present themselves to the Department, provide their addresses and other personal information, and supply fingerprints that will permit background checks; (2) enable USCIS—using funds raised by fees, provided in part by the deferred action requestors themselves—periodically to identify and investigate a large class of undocumented noncitizens who do not pose a threat to national security, border security, or public safety, thus permitting the DHS immigration enforcement agencies to focus their resources on the remaining higher priority individuals; (3) make communities safer by further enabling undocumented noncitizens who are crime victims or witnesses to report crimes to the police without fear of being arrested, detained, and removed; (4) significantly increase tax revenues as the wages and tax filing rates of deferred action recipients rise; and (5) protect the reliance interests of current DACA recipients—as well as their family members, employers, and educational institutions, among others—who have built lives and structured programs based on the existence of a national enforcement discretion program for this low-priority population.[174]

A second limit, to quote the Supreme Court's *Chaney* decision once more, is that an agency's enforcement policy cannot amount to an ''abdication of its statutory responsibilities.'' [175] The proposed rule comes nowhere close to an abdication, given the enormous resources that the Department would continue to dedicate toward immigration enforcement during implementation of the proposed rule, and the basic practical reality that Congress has not appropriated sufficient resources for DHS to pursue all immigration enforcement that is available.[176] Indeed, the proposed rule would not prevent DHS from continuing to use all the resources Congress has appropriated for immigration enforcement. There can thus be no suggestion of abdication; DHS will continue to enforce the immigration laws as fully as its appropriated resources allow.

In view of these two limits, the Department does not believe that it could grant deferred action to every noncitizen in the United States who lacks lawful status, whether all at once or ''in smaller numbers, group-by-group.'' [177] But the proposed rule, limited in nature and scope, would stop far short of such drastic action. And after careful consideration, the Department believes it does possess the authority to adopt the deferred action policy reflected in the proposed rule.[178]

D. Employment Authorization

Since the inception of DACA in 2012, DACA recipients—like all other deferred action recipients—have been eligible for employment authorization under 8 CFR 274a.12(c)(14), a decades-old regulation that allows noncitizens who are provided deferred action from immigration enforcement the opportunity to apply for such authorization and receive an EAD if they establish an economic necessity for employment.[179] ''Economic necessity'' is based on the Federal Poverty Guidelines at 45 CFR 1060.2, and existing regulations at 8 CFR 274a.12(e) define the criteria necessary to establish the noncitizen's economic need to work. This proposed rule would not change the eligibility of DACA recipients to apply for work authorization or alter the existing general rule for establishing economic necessity. This rule proposes to codify DACA-related employment authorization in a new paragraph designated 8 CFR 274a.12(c)(33).[180] As with 8 CFR 274a.12(c)(14), the new paragraph (c)(33) would continue to specify that the noncitizen must have been granted deferred action and must establish economic need to be eligible for employment authorization.

This rule also proposes a relatively modest change to existing DACA practice, which requires all DACA requestors to submit the Form I–765,

[174] *See Regents,* 140 S. Ct. at 1914 (''DACA recipients have 'enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance' on the DACA program. The consequences of the rescission, respondents emphasize, would 'radiate outward' to DACA recipients' families, including their 200,000 U.S.-citizen children, to the schools where DACA recipients study and teach, and to the employers who have invested time and money in training them. In addition, excluding DACA recipients from the lawful labor force may, they tell us, result in the loss of $215 billion in economic activity and an associated $60 billion in federal tax revenue over the next ten years. Meanwhile, States and local governments could lose $1.25 billion in tax revenue each year.'' (internal citations omitted)).

[175] *Chaney,* 470 U.S. at 833 n.4.

[176] The ''abdication'' standard was tested in *Texas* v. *United States,* 106 F.3d 661 (5th Cir. 1997). The State of Texas sued the Federal Government, alleging that the Government had failed to control undocumented immigration and that the State had incurred economic costs as a result. A unanimous panel of the U.S. Court of Appeals for the Fifth Circuit dismissed the claim. The court held: ''We reject out-of-hand the State's contention that the federal defendants' alleged systemic failure to control immigration is so extreme as to constitute a reviewable abdication of duty.'' 106 F.3d at 667. The claim failed because ''[t]he State does not contend that federal defendants are doing nothing to enforce the immigration laws or that they have consciously decided to abdicate their enforcement responsibilities. Real or perceived inadequate enforcement of immigration laws does not constitute a reviewable abdication of duty.'' *Id.; see also id.* (''The State candidly concedes . . . that [INA sec. 103] places no substantive limits on the Attorney General and commits enforcement of the INA to her discretion.'').

[177] *Texas II* July 16, 2021 memorandum and order at 64.

[178] The district court in *Texas II* also concluded that ''DACA is an unreasonable interpretation of the law because it usurps the power of Congress to dictate a national scheme of immigration laws and is contrary to the INA.'' The Department respectfully disagrees and reiterates that its authority to create and implement DACA is vested in the Secretary's broad authority under the INA and the Homeland Security Act of 2002 to administer the immigration laws of the United States and establish national immigration enforcement policies and priorities, as explained above.

Relying on a Supreme Court case, *Arizona* v. *United States,* 567 U.S. 387, 406 (2012), the *Texas II* court concluded that the Department's interpretation of its authority is unreasonable because ''Congress intended to completely preempt further regulation in the area of immigration,'' including regulation by the Department with respect to employment authorization of noncitizens. In the Department's view, the *Texas II* court's reliance on *Arizona* was misplaced. There, the Court held that an Arizona statute that made it a criminal offense for a noncitizen without work authorization to seek or engage in employment was preempted by Federal law because ''it would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens.'' The DACA policy gives rise to no such interference. DACA is not a State statute that impinges or usurps Congress' plenary power over the ''field'' of immigration. Rather, DACA is a policy created by a department of the executive branch of government that, under Federal law, is vested with the authority to act on immigration matters.

[179] As discussed below, such discretionary employment authorization for individuals provided deferred action has been codified in similar regulations since publication of the predecessor regulation at 8 CFR 109.1(b)(6) in 1981. *See Employment Authorization to Aliens in the United States,* 46 FR 25079 (May 5, 1981).

[180] Although currently issued under 8 CFR 274a.12(c)(14), a DACA-related EAD does not have the ''C–14'' code on its face, but rather ''C–33'' to assist DHS in distinguishing DACA recipients' EADs for operational and statistical tracking purposes.

Application for Employment Authorization, and the Form I–765WS, Employment Authorization Worksheet. DHS proposes instead to make it optional for each DACA requestor to apply for employment authorization and an EAD. DHS proposes as well to modify the Form I–821D, Consideration of Deferred Action for Childhood Arrivals, to contain a place for the requestor to indicate whether they also are filing the Form I–765 and the Form I–765WS concurrently. A DACA requestor may also wait until after receiving a DACA approval notice before applying for employment authorization. A DACA requestor or recipient who chooses to request employment authorization must file Form I–765 and Form I–765WS and pay all associated fees.[181] This rule does not propose any changes to the existing general rule for establishing economic necessity, which will continue to be determined on a case-by-case basis pursuant to 8 CFR 274a.12(e). This rule further proposes that the termination of a noncitizen's DACA, in accordance with 8 CFR 274a.14(a), would result in the automatic termination of any DACA-related employment authorization and employment authorization documentation obtained by the noncitizen.

Since at least the 1970s, the INS and later DHS have made employment authorization available for noncitizens without lawful immigration status who nevertheless are provided deferred action or certain other forms of prosecutorial discretion.[182] Although there was no general Federal prohibition on employing noncitizens without work authorization until the enactment of IRCA in 1986,[183] working without authorization nevertheless could cause certain categories of nonimmigrants to violate their status. INS thus had a long practice of notating the I–94 of a nonimmigrant provided such authorization,[184] and it continued the practice for certain categories of noncitizens without nonimmigrant status.[185] In 1972, Congress made work authorization a prerequisite for certain noncitizens to obtain a Social Security number.[186] Congress ratified the INS's position that it had discretion under the INA to authorize noncitizens to work in enacting the Farm Labor Contractor Registration Act Amendments of 1974 (FLCRAA).[187] The FLCRAA made it unlawful for farm labor contractors to employ knowingly any ''alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment.'' [188]

In 1975, INS's General Counsel explained that INS authorized certain noncitizens to work in cases ''when we do not intend or are unable to enforce the alien's departure . . . .'' [189] The broad authority in section 103(a) of the INA, 8 U.S.C. 1103(a), charging the ''Attorney General'' and, ever since 2003, the Secretary, with ''the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens'' consistently has been interpreted to allow for the granting of such discretionary employment authorization to noncitizens.[190]

By the late 1970s, INS work authorizations commonly were issued. In 1979, the INS published a proposed rule that for the first time sought to codify its existing employment authorization practices.[191] In the preamble, the INS stated that ''[t]he Attorney General's authority to grant employment authorization stems from section 103(a) of the Immigration and [Nationality] Act[,] which authorizes him to establish regulations, issue instructions, and perform any actions necessary for the implementation and administration of the Act.'' [192] The INS also noted additional recognition by Congress of this authority in the enactment of an amendment that barred from adjustment of status to permanent residence any noncitizen (with certain exceptions) who after January 1, 1977, engages in unauthorized employment prior to filing an application for adjustment of status.[193] The preamble further noted that employment authorization could be obtained by noncitizens who were prima facie entitled to an immigration benefit such as adjustment of status, suspension of deportation, or asylum, as well as

> [a]n alien who, as an exercise of [INS's] prosecutorial discretion, has been allowed to remain in the United States for an indefinite or extended period of time . . . . The proposed regulation states that the application for employment authorization may be granted if the alien establishes that he is financially unable to maintain himself during the applicable period.[194]

When the final rule was published in 1981 as new part 109 to title 8 of the Code of Federal Regulations,[195] it not only enabled various classes of noncitizens authorized by specific statutes to work, but also permitted discretionary work authorization for certain other noncitizens without lawful status, such as those who (1) had pending applications for asylum, adjustment of status, or suspension of deportation; (2) had been granted voluntary departure; or (3) had been recommended for deferred action.[196] The new 8 CFR 109.1(b)(6) published in 1981 specifically listed the following as a class of noncitizens who could apply for work authorization to the INS district director for the district in which the noncitizen resided:

> Any alien in whose case the district director recommends consideration of deferred action, an act of administrative convenience to the government which gives some cases lower priority: Provided, the alien

[181] *See* discussion of fees at Section IV.A below.

[182] *See generally* Sam Bernsen, *Employment Rights of Aliens Under the Immigration Laws, In Defense of the Alien,* Vol. 2 (1979), at pp. 21, 32–33 (collecting former INS OI on employment authorization), *reprinted at https://www.jstor.org/stable/23142996.* For example, the former INS's OI in 1969 allowed for discretionary employment authorization to be issued to individuals who were provided voluntary departure, which permitted certain deportable noncitizens to remain in the United States until an agreed-upon date at which point they had to leave at their own expense but without the INS needing to obtain an order of removal. *See* INS OI 242.10(b) (Jan. 29, 1969).

[183] Public Law 99–603, 100 Stat. 3359.

[184] *See, e.g.,* INS OI 214.2(j) (Nov. 16, 1962) and 214.2(f) (Aug. 15, 1958). *See generally* Sam Bernsen, *Lawful Work for Nonimmigrants,* 48 No. 21 Interpreter Releases, 168 (June 21, 1971) (noting that nonimmigrants were not subject to numerical limitations but were subject to work restrictions).

[185] *See supra* note 182.

[186] *See* Social Security Amendments of 1972, Public Law 92–603, sec. 137, 86 Stat. 1329, 1364–65 (codified as amended at 42 U.S.C. 405(c)(2)(B)(i)(I) (1979)); *see also* Sam Bernsen, *Leave to Labor,* 52 No. 35 Interpreter Releases 291, 294 (Sept. 2, 1975).

[187] Public Law 93–518, sec. 11(a)(3), 88 Stat. 1652, 1655.

[188] 7 U.S.C. 1045(f) (Supp. IV 1974); *see* 7 U.S.C. 2044(b) (1970 and Supp. IV 1974) (contractor's license could be revoked on same basis).

[189] Sam Bernsen, *Leave to Labor;* 52 No. 35 Interpreter Releases 291, 294–95 (Sept. 2, 1975).

[190] *See Proposed Rules for Employment Authorization for Certain Aliens,* 44 FR 43480 (July 25, 1979) (first regulation collecting employment authorization policies). These provisions grant the Secretary broad discretion to determine the most effective way to administer the laws. *See Narenji* v. *Civiletti,* 617 F.2d 745, 747 (D.C. Cir. 1979) (observing that the INA ''need not specifically authorize each and every action taken by the Attorney General [(now Secretary)], so long as his action is reasonably related to the duties imposed upon him'').

[191] 44 FR 43480 (July 25, 1979).

[192] *Id.* (further noting that the Attorney General had delegated the authority to the Commissioner of the INS).

[193] *Id.* (citing Pub. L. 94–571, sec. 6, 90 Stat. 2703, 2705–06 (1976), which amended INA sec. 245(c) regarding adjustment of status to permanent resident—the INS mistakenly cited the law as ''Pub. L. 95–571'').

[194] *Id.*

[195] In 1980, the INS had issued a second proposed rule for notice and comment after modifying the initial rule based on public comments. *See Employment Authorization,* 45 FR 19563 (March 26, 1980) (preamble continued to note that INA sec. 103(a) provides legal authority for issuance of employment authorization).

[196] *See Employment Authorization to Aliens in the United States,* 46 FR 25079 (May 5, 1981).

establishes to the satisfaction of the district director that he/she is financially unable to maintain himself/herself and family without employment.[197]

In November 1981, the INS moved the employment authorization provision for individuals granted deferred action to 8 CFR 109.1(b)(7) when it further expanded the categories of noncitizens who could be granted employment authorization to include paroled noncitizens and deportable noncitizens granted voluntary departure, either prior to or at the conclusion of immigration proceedings.[198]

When Congress passed IRCA in 1986,[199] making it unlawful for the first time for employers knowingly to hire ''an unauthorized alien'' for employment, Congress was well aware of the INS's longstanding practice of granting employment authorization to noncitizens, including the regulations permitting the agency to provide employment authorization to certain categories of noncitizens who had no lawful immigration status.[200] During the extensive legislative deliberations leading to IRCA, the INS also was considering a petition for rulemaking from the Federation for American Immigration Reform (FAIR) that directly challenged the 1981 employment authorization regulations as ultra vires, particularly INS's authority to provide such authorization to noncitizens who had not been specifically authorized by statute to work, which the INS had published for public comment.[201] FAIR's petition sought to have the INS rescind 8 CFR 109.1(b) through a new rulemaking.

Before the agency acted on FAIR's petition, Congress intervened and ratified the INS's interpretation of its legal authority to provide employment authorization by providing in IRCA that:

> the term ''unauthorized alien'' means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by [the INA] or by the Attorney General.[202]

At the very same time that Congress made it unlawful for an employer knowingly to hire a person who is unauthorized to work, Congress recognized that a person could be authorized to work by the Attorney General.

After publishing proposed regulations to implement IRCA and soliciting extensive public comment, including extending the comment period on the still-pending FAIR petition, the INS ultimately denied that petition.[203] In its denial, the INS noted both its broad authority in section 103(a) of the INA, 8 U.S.C. 1103(a), to administer the immigration laws and the new definition of ''unauthorized alien'' in section 274A(h)(3) of the INA, 8 U.S.C. 1324a(h)(3), by explaining that

> the only logical way to interpret this phrase is that Congress, being fully aware of the Attorney General's authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined ''unauthorized alien'' in such fashion as to exclude aliens who have been authorized employment by the Attorney General through the regulatory process, in addition to those who are authorized employment by statute.[204]

This contemporaneous interpretation—which has remained undisturbed by Congress for nearly 35 years—is entitled to considerable weight.

The final IRCA regulations incorporated the statutory definition of ''unauthorized alien'' from section 274a(h)(3) of the INA, 8 U.S.C. 1324a(h)(3), for employment purposes at 8 CFR 274a.1. The rules also redesignated the employment authorization regulations in part 109, with amendments, as part 274a, subpart B, in title 8 of the Code of Federal Regulations, with work authorization made available for noncitizens with deferred action who establish an economic necessity in 8 CFR 274a.12(c)(14).[205] In 8 CFR 274a.12(d) (1987), the rules further described the basic criteria and procedures to establish ''economic necessity'' as based on the Federal Poverty Guidelines. The new rules also included employment authorization for noncitizens who were members of a nationality group granted EVD, a form of prosecutorial discretion described in greater detail above.[206]

In the years following the enactment of IRCA and promulgation of the employment authorization regulations, the provisions relating to employment authorization for noncitizens with deferred action have remained substantively the same. As noted above, under subsequent administrations since the 1987 promulgation of 8 CFR 274a.12(c)(14), the INS and then DHS have continued to provide deferred action to individuals who are members of specific groups and to grant them eligibility for employment authorization on a case-by-case basis.[207]

After IRCA, Congress made certain limited amendments to the employment-related provisions in the INA,[208] but Congress never has modified INA sec. 274a(h)(3), 8 U.S.C. 1324a(h)(3), the provision that recognizes that the Attorney General (now the Secretary) may authorize noncitizens to be lawfully employed.[209] Congress also periodically has limited the classes of noncitizens who may receive employment authorization,[210]

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[197] *Id.* at 25081.

[198] *See Employment Authorization; Revision to Classes of Aliens Eligible,* 46 FR 55920 (Nov. 13, 1981).

[199] Public Law 99–603, 100 Stat. 3359.

[200] *See* 8 U.S.C. 1324a(a)(1).

[201] *See Employment Authorization,* 51 FR 39385, 39386–39387 (Oct. 28, 1986).

[202] *See* IRCA sec. 101(a)(1), 100 Stat. 3359, 3368 (codified at INA sec. 274a(h)(3), 8 U.S.C. 1324a(h)(3)).

[203] *See Employment Authorization; Classes of Aliens Eligible,* 51 FR 45338 (Dec. 18, 1986); *Control of Employment of Aliens,* 52 FR 8762 (Mar. 19, 1987); and *Employment Authorization; Classes of Aliens Eligible,* 52 FR 46092 (Dec. 4, 1987) (denial of FAIR petition).

[204] *See Employment Authorization; Classes of Aliens Eligible,* 52 FR at 46093 (Dec. 4, 1987).

[205] *See* 52 FR 16216 (May 1, 1987).

[206] *See* 8 CFR 274a.12(a)(11) (1987). *See also* general discussion above of EVD and its successor, DED. After the term EVD became obsolete, the employment authorization provision was amended to cover noncitizens provided DED pursuant to a directive from the President to the Secretary and under the conditions established by the Secretary in accord with the presidential directive. *See* current 8 CFR 274a.12(a)(11).

[207] *See, e.g.,* Memorandum for Regional Directors, et al., INS, from Paul W. Virtue, Acting Executive Associate Commissioner, INS, *Re: Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* (May 6, 1997) (directing individualized determinations of deferred action for pending self-petitioners under VAWA); *USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina,* press release, dated Nov. 25, 2005; Memorandum from Donald Neufeld, Acting Associate Director, USCIS Office of Domestic Operations, *Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children* (Sept. 4, 2009) (directing deferred action and employment authorization for widows and widowers whose immigrant petitions had not been decided before their spouses died); Napolitano Memorandum (establishing DACA and directing that determinations be made as to whether eligible individuals qualify for work authorization during their period of deferred action).

[208] *See, e.g.,* IMMACT 90, Public Law 101–649, tit. V, subtit. C, 104 Stat. 4978 (1990) (codified as amended at various sections of 8 U.S.C. 1324a and 1324b—additional provisions related to employer sanctions and anti-discrimination in employment of noncitizens); IIRIRA, Public Law 104–208, div. C, tit. IV, 110 Stat. 3009, 3009–655–3009–670 (codified as amended at various sections of 8 U.S.C. 1324a and 1324b—adding provisions for pilot programs on identity and employment eligibility verification, amendments regarding employer sanctions, and amendments regarding unfair immigration-related employment practices).

[209] Section 274A(h)(3)(B) of the INA, 8 U.S.C. 1324a(h)(3)(B), recognizes that employment may be authorized by statute or by the Secretary. *See, e.g., Ariz. Dream Act Coal.* v. *Brewer,* 757 F.3d 1053, 1062 (9th Cir. 2014) (''Congress has given the Executive Branch broad discretion to determine when noncitizens may work in the United States.''); *Perales* v. *Casillas,* 903 F.2d 1043, 1050 (5th Cir. 1990) (noting the broad, discretionary employment authorization authority in INA sec. 274A(h)(3) and the implementing EAD regulations).

[210] *See, e.g.,* 8 U.S.C. 1158(d)(2) (asylum applicants not otherwise eligible for employment

but it never has altered the policy in existence since at least the 1970s (and codified in regulations since 1981) that noncitizens granted deferred action may apply for and obtain discretionary employment authorization. In fact, as noted above, Congress has enacted statutes that recognized and adopted existing USCIS deferred action practices for certain noncitizens, such as pending T and U nonimmigrant applicants and petitioners, without altering 8 CFR 274a.12(c)(14), which provided for their ability to apply for employment authorization.[211]

The Department has carefully considered, but respectfully disagrees with, the *Texas II* court's decision finding that it is unlawful to provide employment authorization to persons who receive deferred action under DACA.[212] The *Texas II* court found that DACA recipients are not in the categories of noncitizens whom Congress specifically has authorized to be employed, nor in the categories of noncitizens for whom Congress has allowed DHS to provide discretionary employment authorization.[213] The Department believes that the court's conclusion is inconsistent with the long history of Congress' recognition of the former INS's and DHS's practice of providing discretionary employment authorization to individuals granted deferred action both before and after IRCA, as described earlier in this section, and the best interpretation of the Secretary's broad authorities under INA sec. 103(a)(3), 8 U.S.C. 1103(a)(3), and INA sec. 274A(h)(3), 8 U.S.C. 1324a(h)(3), which indicates that with respect to employment, an ''unauthorized alien'' may be eligible and authorized to work either by the INA or ''by the Attorney General,'' now the Secretary. Nothing in INA sec. 274A(h)(3), 8 U.S.C. 1324a(h)(3), indicates that there must be some underlying statute that separately provides the Secretary with discretion to authorize employment for a given category of noncitizens before the Secretary may exercise the discretion that is provided directly to the Secretary through INA sec. 274A(h)(3), 8 U.S.C. 1324a(h)(3).[214] In addition to individuals granted deferred action, DHS notes that DHS, and the Department of Justice (DOJ) before it, long has authorized employment for many categories of noncitizens for whom no additional statute expressly provides for employment authorization.[215] Although these categories of noncitizens whom the Attorney General and later the Secretary have authorized for employment eligibility have been placed into regulations at various times, many of them were in the 1981 codification of the former INS employment authorization rules, while others were added later.[216] The regulatory employment authorization categories have continued to exist to this day. Were DHS to adopt the interpretation of the *Texas II* court, many of these other employment authorization categories that also rely on the Secretary's broad authorities under INA secs. 103(a)(3) and 274a(h)(3) might be called into question. DHS respectfully declines to adopt such a restrictive interpretation. In noting that DACA also applies to individuals in removal proceedings, the *Texas II* court interpreted INA sec. 236(a)(3), 8 U.S.C. 1226(a)(3), as making ''aliens not lawfully admitted for permanent residency with pending removal proceedings . . . *ineligible* for work authorization.'' [217] But the last clause of INA sec. 236(a)(3), 8 U.S.C. 1226(a)(3), recognizes such an individual may have employment authorization even if they have not been afforded lawful permanent resident status:

> [The Secretary] . . . may not provide the alien with work authorization (including an ''employment authorized'' endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence *or otherwise would (without regard to removal proceedings) be provided such authorization.* (Emphasis added)

The Department interprets the last clause of INA sec. 236(a)(3), 8 U.S.C. 1226(a)(3), to represent a further recognition by Congress that noncitizens who are not permanent residents also can be authorized to work by other means, and that there must necessarily be categories of noncitizens other than lawful permanent residents who can obtain work authorization under these circumstances. Moreover, the *Texas II* court's reading would render superfluous provisions of the INA that explicitly bar employment authorization for certain categories of noncitizens in the United States without lawful status.[218] Read as a whole, the INA most naturally would permit work authorization for those individuals covered either by statute specifically or as authorized by the Secretary pursuant to INA sec. 103(a)(3), 8 U.S.C.

authorization shall not be eligible for employment authorization prior to 180 days after filing asylum application if regulations authorize such employment); 8 U.S.C. 1226(a)(3) (detained noncitizen may not be provided work authorization, even if released, unless the noncitizen is lawfully admitted for permanent residence or otherwise would—without regard to removal proceedings—be provided such authorization); 8 U.S.C. 1231(a)(7) (limiting circumstances in which noncitizens ordered removed may be eligible to receive employment authorization). Indeed, those provisions restricting employment authorization reasonably can be construed as reflecting Congress' general understanding that the Attorney General, now the Secretary, otherwise has statutory authority to provide employment authorization to noncitizens, including those who do not have a lawful immigration status, except where expressly proscribed in the INA.

[211] *See, e.g.,* INA sec. 237(d)(2), 8 U.S.C. 1227(d)(2) (law enacted in 2008 following INS policy of using deferred action and other measures to forbear removing individuals who demonstrate eligibility for T or U nonimmigrant status).

[212] *See Texas II* July 16, 2021 memorandum and order at 76–77 (granting summary judgment to plaintiff States and enjoining administration and implementation of DACA, but staying injunction with respect to DACA renewal requestors). *See also* Section III.B above.

[213] *Texas II* July 16, 2021 memorandum and order at 54–55.

[214] The *Texas II* court relied heavily on the opinion of the U.S. Fifth Circuit Court of Appeals decision in *Texas I,* which was based in part on that court's views that INA sec. 274A(h)(3), 8 U.S.C. 1324a(h)(3), would not support DAPA and its attendant employment authorization. *See Texas*. v. *United States,* 809 F.3d 134, 179–86 (5th Cir. 2015), *aff'd by equally divided court, United States* v. *Texas,* 136 S. Ct. 2271 (2016) (*Texas I*). The Department has considered the Fifth Circuit's opinion, and for the reasons stated in this section, the Department respectfully disagrees with this single appellate court. In particular, the Fifth Circuit's view that INA sec. 274A(h)(3) was a miscellaneous definitional provision (*i.e.,* a provision that could not plausibly grant DHS the authority to grant work authorization) is contradicted by the statutory context recited above. That definition was added as part of the IRCA reforms (*i.e.,* reforms to make it unlawful to knowingly employ unauthorized aliens). In that context, the definition of ''unauthorized alien'' is an essential feature on which Congress acted with intentionality.

[215] *See, e.g.,* 8 CFR 274a.12(a)(11) (noncitizens provided DED pursuant to a presidential directive); 8 CFR 274a.12(c)(9) (certain pending applicants for adjustment of status); 8 CFR 274a.12(c)(1) (foreign national spouses or unmarried dependent children of foreign government officials present on A–1, A–2, G–1, G–3, or G–4 visas); 8 CFR 274a.12(c)(3)(i)(B) (nonimmigrant students present on an F–1 visa seeking Optional Practical Training); 8 CFR 274a.12(c)(10) (noncitizens provided suspension of deportation/Cancellation of Removal (including NACARA)); 8 CFR 274a.12(c)(11) (noncitizens paroled in the public interest); 8 CFR 274a.12(c)(16) (foreign nationals who have filed ''application[s] for creation of record'' of lawful admission for permanent residence); 8 CFR 274a.12(c)(21) (S nonimmigrants who assist law enforcement in prosecuting certain crimes); and 8 CFR 274a.12(c)(26) (certain H–4 nonimmigrant spouses of H–1B nonimmigrants). This is a nonexhaustive list only.

[216] *See* 46 FR 15079 (May 5, 1981) (final rule codifying categories of employment-authorized noncitizens in former 8 CFR part 109, later moved, as amended, to 8 CFR 274a.12).

[217] *Texas II* July 16, 2021 memorandum and order at 55 (emphasis in original).

[218] *See, e.g.,* 8 U.S.C. 1226(a)(3) (barring employment authorization for noncitizens released on bond or recognizance during removal proceedings); 8 U.S.C. 1231(a)(7) (barring employment authorization for noncitizens released on orders of supervision after final order of removal).

1103(a)(3), and INA sec. 274A(h)(3), 8 U.S.C 1324a(h)(3).

To be clear, however, under the proposed rule DACA recipients would not ''have the 'right''' to employment authorization.[219] While DACA recipients are eligible to request employment authorization, they never have been in the category of individuals who are automatically authorized to work ''incident to status,'' such as asylees, TPS beneficiaries, and other groups identified in 8 CFR 274a.12(a) whose employment authorization is a component of their immigration status. DACA recipients have no lawful immigration status and have always been within the categories of noncitizens who apply for a discretionary grant of employment authorization under 8 CFR 274a.12(c). The *Texas II* court also was influenced by the fact that DACA requestors thus far have been required to apply for employment authorization when they seek DACA.[220] However, the Department is proposing to change that practice in this rule by no longer making it compulsory for a DACA requestor to apply for employment authorization. Under the proposed rule, an application for employment authorization would be optional. A DACA recipient would need to apply for and be granted employment authorization in order to work lawfully.

Although DHS believes that the INA directly authorizes the Secretary to provide employment authorization to persons who receive deferred action under DACA, to the extent there is any ambiguity, humanitarian concerns, reliance interests, economic concerns, and other relevant policy concerns strongly weigh in favor of DHS continuing to make discretionary employment authorization available for individual DACA recipients who establish economic necessity. Existing DACA recipients have relied on deferred action and employment authorization for years, and planned their lives—and, in many cases, their families' lives—around them. Without work authorization, many DACA recipients would have no lawful way to support themselves and their families and contribute fully to society and the economy. At the same time, to make DACA recipients ineligible for work authorization would squander the important economic and social contributions that many DACA recipients are making as a result of their authorization to work (including by working in frontline jobs during the ongoing coronavirus emergency).[221] In addition, it would increase the likelihood that they no longer would be able to support their families, including U.S. citizen children, or perhaps that they might perceive no alternative but to work without authorization. This proposed rule therefore seeks to serve an assortment of important public policy goals by providing discretionary employment authorization to DACA recipients who demonstrate an economic necessity to work, and by allowing employers to lawfully hire DACA recipients. The ability to work lawfully provides numerous benefits to DACA recipients, their families, and their communities, and contributes to the collection of income tax and other payroll taxes at the Federal, State, and local levels, where applicable under law.[222]

E. Lawful Presence

Various Federal statutes draw distinctions between noncitizens who are ''lawfully present'' in the United States and those who are not. The INA does not contain a general definition of ''lawfully present'' or related statutory terms for purposes of Federal immigration law.[223] The statutory provisions that use ''lawfully present'' and related terms (*e.g.,* ''unlawfully present'') likewise leave those terms undefined, and they do not expressly address whether and in what sense individuals subject to a period of deferred action are to be considered ''lawfully present'' or ''unlawfully present'' in the United States during that period for purposes of various statutes.

Eligibility for certain Federal benefits depends in part on whether a noncitizen is ''lawfully present'' in the United States. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) [224] generally provides that noncitizens who are not ''qualified aliens'' are not eligible for ''federal public benefits.'' [225] However, PRWORA includes an exception to this ineligibility rule for retirement and disability benefits under title II of the Social Security Act for ''an alien who is lawfully present in the United States as determined by the Attorney General'' (now the Secretary).[226] The Balanced Budget Act of 1997 [227] amended PRWORA to add similar exceptions for Medicare and railroad retirement and disability benefits.[228]

PRWORA also limits the provision of ''state and local public benefits'' to noncitizens who are ''qualified'' noncitizens, nonimmigrants, or parolees, but it provides that States may affirmatively enact legislation making noncitizens ''who [are] not lawfully present in the United States'' eligible for such benefits.[229] Moreover, IIRIRA limits the availability of residency-based State post-secondary education benefits for individuals who are ''not lawfully present.'' [230]

In addition to making persons who are ''lawfully present'' potentially eligible for certain Federal public benefits for which they otherwise would be disqualified, and restricting eligibility for certain benefits under State law of persons who are ''not lawfully present,'' Congress has incorporated a formulation of the term ''lawful presence'' into the rules governing admissibility.[231] IIRIRA provides that a noncitizen who departs the United States after having been ''unlawfully present'' for specified periods is not eligible for admission for 3 or 10 years after the date of departure, depending on the duration of unlawful presence.[232] IIRIRA further provides that, with certain exceptions, an individual who has been ''unlawfully present'' for more than 1 year and who enters or attempts to re-enter the United States without being admitted is inadmissible.[233]

''For purposes of'' the 3-year and 10-year inadmissibility bars, IIRIRA provides that an individual is ''deemed to be unlawfully present'' if they are ''present in the United States after the expiration of the period of stay authorized by the Attorney General'' or are ''present in the United States without being admitted or paroled.'' [234] But apart from that provision, which is limited by its terms to that paragraph of the statute, Congress has not attempted to prescribe the circumstances in which persons are or should be deemed to be ''lawfully present'' or ''unlawfully

[219] *Texas II* July 16, 2021 memorandum and order at 38.

[220] *See id.* at 55–56.

[221] Svajlenka (2020).

[222] *See* Cong. Budget Office, ''Budgetary Effects of Immigration-Related Provisions of the House-Passed Version of H.R. 240, An Act Making Appropriations for the Department of Homeland Security'' (Jan. 29, 2015) (estimating that blocking deferral of removal for certain noncitizens would cost the Federal Government $7.5 billion from 2015 to 2025), *https://www.cbo.gov/publication/49920;* Wong (2020).

[223] *See* 8 U.S.C. 1101.

[224] Public Law 104–193, 110 Stat. 2105.

[225] 8 U.S.C. 1611(a).

[226] 8 U.S.C. 1611(b)(2); *see also* 8 U.S.C. 1641(b) (defining ''qualified alien'').

[227] Public Law 105–33, 111 Stat. 251.

[228] 8 U.S.C. 1611(b)(3) and (4).

[229] 8 U.S.C. 1621(d).

[230] 8 U.S.C. 1623(a).

[231] *See generally* 8 U.S.C. 1182.

[232] 8 U.S.C. 1182(a)(9)(B)(i).

[233] 8 U.S.C. 1182(a)(9)(C).

[234] 8 U.S.C. 1182(a)(9)(B)(ii).

present.'' [235] Instead, Congress has left the definition of those terms under Federal laws to the executive branch. In some instances, it has done so explicitly, such as with respect to Social Security, Medicare, and railroad retirement benefits.[236] In others, it has done so implicitly, such as with respect to restrictions on State and local public benefits and residency-based State post-secondary education benefits, by using the terms without defining them or addressing their applicability to particular circumstances.[237]

The executive branch has not previously promulgated an overarching and unified definition of ''lawfully present'' and related terms for the various Federal laws that use those terms. On several occasions, however, the executive branch has addressed whether persons who are subject to a period of deferred action should be deemed to be ''lawfully present'' or ''unlawfully present'' not generally or in the abstract, but for the specific purposes of certain of those provisions. These phrases are terms of art, with specialized meanings for those purposes, as explained in more detail below.

Shortly after Congress enacted PRWORA in 1996, and prior to the enactment of IIRIRA and the Balanced Budget Act of 1997, the Attorney General exercised her express authority under 8 U.S.C. 1611(b)(2) to define ''lawfully present'' for purposes of eligibility for Social Security benefits. The Attorney General issued an interim regulation that defines the term to include, inter alia, ''[a]liens currently in deferred action status.'' [238] Following the Attorney General's administrative interpretation of the term ''lawfully present'' to include deferred action recipients for purposes of Social Security eligibility, Congress added the provisions in 8 U.S.C. 1611(b)(3) and (4) that permit the Attorney General to exercise the same authority with respect to eligibility for Medicare and railroad retirement benefits.

Subsequent administrative interpretations have taken a similar approach. The Government has interpreted ''lawfully present'' to include persons with a period of deferred action for purposes of other Federal programs.[239] In addition, the Government has interpreted the deeming provision in 8 U.S.C. 1182(a)(9)(B)(ii) to mean that persons should not be deemed ''unlawfully present'' during ''period[s] of stay authorized by the Attorney General,'' including periods of deferred action.[240]

Although the Federal Government has not adopted a comprehensive definition of ''lawfully present'' and related statutory terms, and although the implementation of those terms will depend on the specific statutory context in which they are used, the positions discussed above reflect certain more general views about the meaning of ''lawfully present.''

As a general matter, DHS understands the phrase ''lawfully present'' as a term of art—not in a broad sense, or to suggest that presence is in all respects ''lawful,'' but to encompass situations in which the executive branch tolerates an individual being present in the United States at a certain, limited time or for a particular, well-defined period. The term is reasonably understood to include someone who is (under the law as enacted by Congress) subject to removal, and whose immigration status affords no protection from removal (again, under the law as enacted by Congress), but whose temporary presence in the United States the Government has chosen to tolerate, including for reasons of resource allocation, administrability, humanitarian concern, agency convenience, and other factors.[241] In the case of persons with deferred action, because DHS has made a non-binding decision to forbear from taking enforcement action against them (for a limited period), those individuals' presence has been tolerated by the officials executing the immigration laws.

''Lawful presence'' is a ''distinct concept'' from the much broader concept of ''lawful status,'' which refers to an immigration status granted pursuant to a provision of the INA, such as lawful permanent residence, a nonimmigrant student status, or asylum.[242] Lawful status can be conferred only pursuant to statute because it provides a legally enforceable right to remain in the United States. Lawful presence, as understood and implemented by DHS, confers no such right. As noted by the court in *Texas II,* Congress has defined who is and is not entitled to lawful immigration status in the detailed provisions of the INA. DHS agrees that it is bound by those provisions and, except to the extent the INA itself includes a discretionary element in certain adjudications, does not have the ability to confer or deny lawful status beyond the terms laid out by Congress.[243] By contrast, according persons a period of deferred action and regarding them as ''lawfully present'' confers no substantive defense to removal or independent pathway to citizenship, and deferred action may be revoked at any time.

After careful consideration and with respect, DHS believes that the *Texas II* court erred in conflating the two concepts of ''lawful presence'' and ''lawful status.'' As the U.S. Court of Appeals for the Fifth Circuit put it, ''lawful status'' implies a ''right [to be in the United States] protected by law'' while lawful presence ''describes an exercise of discretion by a public official.'' [244] The statutory concept of lawful presence covers those individuals who may not have lawful status but whose presence the Federal Government has elected to tolerate. It is merely a recognition of the fact that DHS has decided to tolerate the presence of a noncitizen in the United States temporarily, under humanitarian or other particular circumstances, and that the individual is known to immigration officials and will not be removed for the time being.

The Napolitano Memorandum does not address lawful presence and does

[235] On this question DHS disagrees with the court in *Texas II,* which cited a number of statutory provisions in finding that ''the INA specifies several particular groups of aliens for whom lawful presence is available.'' *Texas II* July 16, 2021 memorandum and order at 53. However, these provisions confer lawful status, an entirely separate concept to lawful presence, and one that DHS agrees it does not have the authority to grant in this proposed rule.

[236] *See, e.g.,* 8 U.S.C. 1611(b)(2) through (4) (''lawfully present in the United States as determined by the Attorney General''); 42 U.S.C. 402(y) (same).

[237] *See, e.g.,* 8 U.S.C. 1621(d) and 1623(a).

[238] 61 FR 47039 (Sept. 6, 1996) (codified as transferred at 8 CFR 1.3(a)(4)(vi)); *see also* 76 FR 53778 (Aug. 29, 2011) (transferring the rule from 8 CFR 103.12 to 8 CFR 1.3).

[239] *See, e.g.,* 42 CFR 417.422(h) (eligibility for Medicare health maintenance organizations and competitive medical plans).

[240] *See* Memorandum to Field Leadership from Donald Neufeld, Acting Associate Director, USCIS Office of Domestic Operations, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* at 42 (May 6, 2009); Williams Memorandum; USCIS Adjudicator's Field Manual ch. 40.9.2(b)(3)(J).

[241] *See AADC,* 525 U.S. at 483–84.

[242] *Chaudhry* v. *Holder,* 705 F.3d 289, 292 (7th Cir. 2013); *see also* 8 CFR 245.1(d)(1) (defining ''lawful immigration status'' as any one of several types of immigration status granted pursuant to the INA). *See also Texas II* July 16, 2021 memorandum and order at 53.

[243] As noted above, however, the REAL ID Act of 2005 provides that deferred action serves as acceptable evidence of ''lawful status'' for purposes of eligibility for a REAL ID-compliant driver's license or identification card. *See* 49 U.S.C. 30301 note. In the regulations implementing the REAL ID Act, DHS clarified its view that this definition does not affect other definitions or requirements that may be contained in the INA or other laws. *See* 6 CFR 37.3.

[244] *See Dhuka* v. *Holder,* 716 F.3d 149, 156 (5th Cir. 2013).

not itself prescribe how DACA recipients are to be treated in the various arenas in which ''lawful presence'' is germane. However, DHS has treated persons who receive a period of deferred action under DACA like other deferred action recipients for these purposes. Thus, for example, DACA recipients are included in the Department's definition of ''lawfully present'' at 8 CFR 1.3(a)(4)(vi) for purposes of eligibility for Social Security benefits under 8 U.S.C. 1611(b)(2), and DHS has not regarded their time in deferred action as ''unlawful presence'' for purposes of inadmissibility determinations.[245]

As noted above, the executive branch has not previously proposed a singular definition of ''lawfully present'' that applies across the board to all statutes that include that and related terms. DHS recognizes that the statutory terms ''lawfully present'' and ''unlawfully present,'' and the distinction between ''lawful presence'' and ''lawful status,'' have caused significant confusion in debate about and litigation over the legality of the 2012 DACA policy and related DAPA policy. Questions have been raised about whether it is appropriate for persons with deferred action under DACA to be treated as ''lawfully present'' for purposes of statutes governing eligibility for Federal benefits.[246]

For the reasons discussed above, DHS believes that it is authorized to deem DACA recipients and other persons subject to deferred action to be ''lawfully present,'' as defined here, under these circumstances for the particular purposes in 8 U.S.C. 1611(b)(2) and 1182(a)(9). The proposed rule addresses two specific instances in which the term is used: eligibility for certain public benefits under 8 U.S.C. 1611(b)(2), and the accrual of ''unlawful presence'' for purposes of admissibility under 8 U.S.C. 1182(a)(9)(B). Section 1611(b)(2) expressly refers to the Secretary's determination of who is lawfully present for the specific purpose of that provision, and longstanding agency regulations and policies treat persons with deferred action as lawfully present for purposes of both provisions. In the intervening 25 years since the Attorney General issued her rule, Congress has not offered any indication to question or countermand that determination that the specified categories of noncitizens are eligible for Social Security benefits, and in fact, Congress only has enacted other similar provisions indicating that the Attorney General's determinations as to lawful presence for certain individuals make those individuals eligible for public benefits.[247]

The provisions of the proposed rule relating to lawful presence would not extend the benefits of lawful status to DACA recipients. From the beginning of the DACA policy (based on longstanding policies and regulations that far predate DACA), DHS has made clear that deferred action cannot and does not convey lawful status and, therefore, does not contradict the boundaries on lawful status that Congress has enacted via the INA. As then-Secretary Jeh Johnson said, ''[d]eferred action does not confer any form of legal status in this country, much less citizenship; it simply means that, for a specified period of time, an individual is permitted to be lawfully present in the United States.'' [248] Indeed, being treated as ''lawfully present'' or not ''unlawfully present'' for purposes of one or more of these statutes does not confer on noncitizens whose presence Congress has deemed unlawful the right to remain lawfully in the United States. They remain subject to removal proceedings at the Government's discretion, and they gain no defense to removal.

F. Fees

The INA authorizes DHS to establish and collect fees for adjudication and naturalization services to ''ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants.'' [249] Through the collection of fees established under that authority, USCIS is funded primarily by immigration and naturalization fees charged to applicants, petitioners, and other requestors.[250] Fees collected from individuals and entities filing immigration requests are deposited into the Immigration Examinations Fee Account and used to fund the cost of providing immigration requests.[251] Consistent with that authority and USCIS' reliance on fees for its funding, and as discussed in greater detail below, this rule would amend DHS regulations to require a fee for Form I–821D, Consideration of Deferred Action for Childhood Arrivals.

G. Advance Parole

The INA authorizes the Attorney General, now the Secretary, ''in his discretion [to] parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien.'' [252] On a case-by-case basis, and under appropriate circumstances consistent with the statute, DHS exercises its discretion to authorize advance parole, so that a noncitizen may leave the United States and then be paroled back in. The access of DACA recipients to ''advance parole'' under 8 CFR 212.5(f) raises questions of both law and policy that were discussed by the *Texas II* district court in its July 16, 2021 memorandum and order. DHS emphasizes that the same statutory standard, ''for urgent humanitarian reasons or significant public benefit,'' applies to all noncitizens, including DACA recipients, and that this statutory standard does not depend on whether an individual is a DACA recipient. DHS reiterates that under the proposed rule, it would continue its adherence to that standard.

Likewise, the INA lays out a comprehensive scheme for eligibility for adjustment of status to that of a lawful permanent resident. There are several relevant statutory provisions and requirements, including those laid out

[245] *See Consideration of Deferred Action for Childhood Arrivals: Frequently Asked Questions,* Questions 1 and 5, *https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions* (hereinafter DACA FAQs).

[246] *Cf. Texas* v. *United States,* 809 F.3d 134, 184 (5th Cir. 2015) (*Texas I*) (holding that, for purposes of DAPA, ''the INA flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits''), *aff'd by equally divided Court,* 136 S. Ct. 2271 (2016).

[247] *See* 8 U.S.C. 1611(b)(3) and (4).

[248] 2014 DAPA Memorandum.

[249] INA sec. 286(m), 8 U.S.C. 1356(m).

[250] *See* INA sec. 286(m) and (n), 8 U.S.C. 1356(m) and (n); 8 CFR 103.7(b)(1)(i) (Oct. 1, 2020) (current USCIS fees). On August 3, 2020, DHS published a final rule, *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements* (hereinafter 2020 Fee Schedule Final Rule), which was to be effective October 2, 2020. 85 FR 46788 (Aug. 3, 2020). The 2020 Fee Schedule Final Rule, among other things, established a new USCIS fee schedule and effectively transferred the USCIS fee schedule from 8 CFR 103.7(b) to the new 8 CFR part 106 at 8 CFR 106.2, Fees. However, before the 2020 Fee Schedule Final Rule took effect it was enjoined. *See Immigr. Legal Resource Ctr.* v. *Wolf,* 491 F. Supp. 3d 520 (N.D. Cal. Sept. 29, 2020); *Nw. Immigrant Rts. Proj.* v. *USCIS,* 496 F. Supp. 3d 21 (D.D.C. Oct. 8, 2020). At this time, DHS is complying with the terms of these orders and is not enforcing the regulatory changes set out in the 2020 Fee Schedule Final Rule, including the specific fees found in 8 CFR 106.2. 86 FR 7493 (Jan. 29, 2021). Nothing in this proposed rule proposes any change to that ongoing compliance.

[251] *See* 81 FR 73292, 73292 (Oct. 24, 2016).

[252] 8 U.S.C. 1182(d)(5)(A); *see also* 8 U.S.C. 1103(a), 8 CFR 212.5.

at 8 U.S.C. 1255(a), which requires, among other things, that applicants for adjustment of status be eligible for an immigrant visa and be admissible under 8 U.S.C. 1182,[253] and that applicants were ''inspected and admitted or paroled'' into the United States. The parole authority at 8 U.S.C. 1182(d)(5), when read together with the adjustment of status provisions at 8 U.S.C. 1255(a), creates a statutory pathway to adjustment of status for individuals who meet all the other adjustment criteria, including eligibility for an immigrant visa, but entered without inspection. Congress clearly intended that parole be available to a subset of noncitizens, and that such parole would affect eligibility for adjustment of status in these limited ways. These effects of parole are entirely separate from DACA, and do not depend on any executive actions not explicitly authorized by statute. So long as DHS acts within the limits on its parole authority in 8 U.S.C. 1182(d)(5), which as discussed above DHS believes the DACA-based advance parole guidance does, there is no conflict with Congress' expressed intent for eligibility for adjustment of status.

H. Further Analysis, Alternatives, and Call for Comments

As noted by the *Texas II* district court in its July 16, 2021 memorandum and order, the above features of the proposed rule—forbearance from enforcement action, employment authorization, and lawful presence—are amenable to further analysis. DHS takes seriously the district court's suggestion that it may enact a forbearance-only policy, and that features of the DACA policy may be modified through the rulemaking process. DHS anticipates that presenting the full DACA policy in the notice-and-comment process, and giving full consideration to public comments, will enable it to determine whether such an alternative (or other alternative policies) is warranted.

Further analysis of these features of the proposed rule, including an assessment of regulatory alternatives, also can be found in Section V. Specifically—

- Section V.A.4 contains estimates of wages earned and certain tax transfers by DACA recipients;
- Section V.A.4.d discusses the proposed rule's potential labor market impacts;
- Section V.A.4.f discusses a range of reliance interests and certain potential effects of the DACA policy identified by the *Texas II* district court (such as certain fiscal effects and effects on migration flows); and
- Section V.A.4.h discusses regulatory alternatives, including the alternatives of (1) implementing a policy of forbearance without employment authorization and lawful presence; and (2) implementing a policy of forbearance with employment authorization, but without lawful presence.

With respect to the alternatives relating to employment authorization and lawful presence in particular, DHS welcomes comments on whether there is any basis or reason for treating deferred action under DACA differently from other instances of deferred action in these respects, as well as any suggestions for alternatives. And with respect to lawful presence in particular, DHS invites comments on whether persons who receive deferred action pursuant to the proposed rule should be regarded as ''lawfully present'' or ''unlawfully present'' for purposes of eligibility for specified Federal public benefits under 8 U.S.C. 1611(b) and admissibility under 8 U.S.C. 1182(a)(9), respectively.

IV. Provisions of Proposed Rule

In this section, DHS describes the DACA policy contained in the proposed rule. DHS proposes to amend 8 CFR part 236 by adding new subpart C, Deferred Action for Childhood Arrivals. Proposed 8 CFR 236.21 through 236.23 establish the applicability, guidelines, and procedures for requests for DACA. Proposed 8 CFR 236.24 and 236.25 incorporate provisions on severability and no private rights. Nothing in this proposed rule diminishes DHS's authority to issue deferred action policies through subregulatory or other means, or otherwise exercise its authorities to administer and enforce the immigration laws of the United States.

DHS welcomes comments on all aspects of the proposed policy, including potential changes to maximize the rule's net benefits and provide necessary clarity to DHS officials and the public. For instance, DHS welcomes comment on whether specific provisions of the proposed rule should be changed; whether additional aspects of the existing DACA FAQs should be incorporated into the final rule; and whether any other aspect of the proposed rule could be improved materially.

A. Section 106.2—Fees

Under current practice, DACA requestors must file a Form I–765, Application for Employment Authorization, and the Form I–765WS, Employment Authorization Worksheet, with the filing of their Form I–821D, Consideration of Deferred Action for Childhood Arrivals. The current total fee for DACA requests is $495, which reflects the $410 fee for Form I–765 and the $85 biometrics services fee; the total fee is not waivable.[254] This proposed rule would modify existing practice for requesting DACA by making the request for employment authorization optional.[255] Although USCIS did not provide a policy rationale for its 2012 decision to require Form I–765 for all DACA requestors, DHS believes that, overall, this policy change will benefit DACA requestors. It recognizes that some DACA requestors may not need employment authorization or the accompanying EAD and should be given the option either to apply for DACA alone or to apply for both DACA and employment authorization. In addition, this change allows DACA requestors who so desire to learn first whether they are approved for DACA before they file the Form I–765 and pay the fee for employment authorization. While providing the choice to delay filing the Form I–765 means the EAD arrives later than the DACA approval notice, it potentially could provide some cost savings to those requestors who are found ineligible for DACA and previously would have been required to pay the filing fee for the Form I–765.

To cover some of the costs associated with reviewing DACA requests that USCIS will continue to incur in the absence of an I–765 filing, DHS proposes to charge a fee of $85 for Form I–821D and remove the discrete biometrics fee from the fees required to file Form I–765 under the (c)(33) eligibility category. This rule does not propose any changes to the fees for Form I–765; therefore, the DHS proposal of an $85 fee for the Form I–821D request for DACA means that the

[253] Parole also satisfies the admissibility requirement at 8 U.S.C. 1182(a)(6)(A)(i). Additionally, many of the inadmissibility provisions at 8 U.S.C. 1182 are waivable, including 8 U.S.C. 1182(a)(9)(B). *See* 8 U.S.C. 1182(a)(9)(B)(v).

[254] *See* USCIS, ''I–821D, Consideration of Deferred Action for Childhood Arrivals,'' *https://www.uscis.gov/i-821d*.

[255] *See* proposed 8 CFR 106.2(a)(38) and 236.23(a). This rule proposes to implement a fee for the Form I–821D, Consideration of Deferred Action for Childhood Arrivals. *See* proposed 8 CFR 106.2(a)(38). This proposed amendment will be made in a section of the regulation DHS is not currently implementing. As noted above, through this rulemaking process, DHS is proposing to codify a new fee where one did not exist before. *See* 8 CFR 106.2(a)(38). The fee for the Form I–821D is not germane to either lawsuit, it was not included in the enjoined 2020 Fee Schedule Final Rule, and the basis for the fee is explained in this proposed rule. If DHS ultimately codifies the new Form I–821D fee as part of this rulemaking, 8 CFR 106.2(a)(38) would provide the fee for the Form I–821D independent of other portions of 8 CFR part 106 that DHS is not enforcing at this time.

current total cost to DACA requestors who also file the optional Form I–765 remains at $495 ($85 for Form I–821D plus $410 for Form I–765) as of the time of this proposed rule.[256] Individuals who choose to request DACA by filing Form I–821D but do not file Form I–765 would pay $85, which is $410 less than under the current fee structure for DACA. Should the fee for Form I–765 for employment authorization change in a separate DHS fee rulemaking, then DACA requestors who choose to file that form would pay the same filing fee for the Form I–765 as all other applicants for employment authorization who are required to pay the fee. DHS proposes no changes to the existing DACA fee exemptions, which would continue to apply to both the proposed Form I–821D fee and the Form I–765 fee if the requestor also seeks employment authorization.[257]

Under this proposed model, a DACA requestor or recipient who believes they can demonstrate economic need on the Form I–765WS, Employment Authorization Worksheet, may apply to USCIS for employment authorization on the Form I–765, Application for Employment Authorization, with the required fee.[258] Under the current USCIS fee schedule, the fee for Form I–765 is $410. This rule proposes to modify the existing total fee for DACA with the following new fee structure:

- Required Form I–821D, Consideration of Deferred Action for Childhood Arrivals, $85 fee
- Optional Form I–765, Application for Employment Authorization, $410 fee (current fee as of date of publication)

Form	Required	Current Form Fee	Current Biometrics Fee	Proposed Form Fee in this Rule	Proposed Biometrics Fee	Fee Waiver Eligibility
I-821D	Yes	$0	$0	$85	$0	No
I-765	No	$410	$85	$410	$0	No

USCIS is funded primarily by immigration and naturalization benefit request fees charged to applicants and petitioners. DHS believes that the proposed I–821D fee of $85 balances the need to recover some of the costs of reviewing DACA requests filed without Form I–765, including the costs of biometric services, with the humanitarian needs of the DACA-eligible population. Many DACA recipients are young adults who are vulnerable because of their lack of immigration status and may have little to no means to pay the fee for the request for deferred action. DHS therefore proposes to hold the fee for Form I–821D, Consideration of Deferred Action for Childhood Arrivals, below the estimated full cost of adjudication. DHS estimates that the full cost of adjudicating Form I–821D, including the cost of providing biometric services and indirect activities that support adjudication, is approximately $332, based on initial budget and volume projections for FY 2022 and FY 2023.[259] [260] DHS proposes a fee of $85 for Form I–821D because it maintains the current total cost for DACA requestors who choose to file Form I–765, at its current fee level, to apply for employment authorization. Based on the estimated Form I–821D full cost of adjudication of approximately $332 and the proposed Form I–821D fee of $85, USCIS estimates that it would charge $247 ($332 minus $85) less than the full cost of adjudication for each Form I–821D filing. For budgetary purposes, at the time USCIS conducted its cost analysis for the proposed rule, the projected average number of Form I–821D filings was 379,500 for FY 2022 and FY 2023.[261] This implies that USCIS would charge, on average, approximately $93,736,500 [262] less than the estimated full cost of adjudication for Form I–821D annually in FY 2022 and FY 2023.

As the agency that administers this country's immigration system, USCIS has the expertise to assess on a case-by-case basis whether a DACA requestor has met the threshold criteria and warrants a favorable exercise of discretion in a uniform manner. Moreover, because USCIS operations are fee-funded, funds spent on DACA adjudications do not take any resources away from DHS's enforcement branches. Finally, DHS has an interest in encouraging eligible DACA requestors to come forward and apply for deferred action (aided by a low fee), because it allows DHS to proactively identify noncitizens who may be a low priority for removal should they be encountered by ICE or CBP in the field. For these reasons, DHS believes that USCIS' adjudication of DACA requests with the proposed $85 fee is reasonable.

We invite public comments on how DHS should structure fees for the required Form I–821D, Consideration of Deferred Action for Childhood Arrivals, and the optional Form I–765,

[256] The current fee for the Form I–765 is based upon the USCIS fee schedule that USCIS currently is following. 8 CFR 103.7(b)(1)(i)(II) (Oct. 1, 2020). Any future fees, including the fee for the Form I–821D or the Form I–765, may be affected by adjustments to the USCIS fee schedule.

[257] USCIS data suggest there is a negligible workload difference between adjudicating Form I–821D alone and the combined Forms I–821D/I–765 DACA adjudicative action. This is because the primary adjudicative decision is issued on Form I–821D. The adjudicative decision is conferred to the EAD, as the Form I–765 will be denied if the Form I–821D is denied, and approved if the Form I–821D is approved and the requestor demonstrates an economic need to work. Because current policy requires that these forms be filed together, the Form I–765 DACA action is adjudicated in tandem with Form I–821D. Workload data suggest that the difference equals the I–765 DACA decision and/or issuance of an EAD card upon benefit adjudication.

[258] *See* proposed 8 CFR 236.21(c)(2).

[259] Historically, USCIS excludes DACA volumes, costs, and revenues from its fee calculations. *See* 81 FR 73312. To estimate the projected full cost of adjudication for Form I–821D for the FY 2022/FY 2023 biennial period, USCIS included projected DACA volumes, costs, and revenues, as well as a completion rate activity-driver, in its activity-based costing model. At its January 2021 meetings, the USCIS Volume Projection Committee forecasted an average Form I–821D filing volume of 379,500 annually for FY 2022 and FY 2023. USCIS attributed the following activities to the adjudication of Form I–821D in its activity-based cost model: Intake; Inform the Public; Conduct TECS Check; Fraud Detection and Prevention; Perform Biometric Services; Make Determination; Management and Oversight; and Records Management. Based on the activity-based cost model, USCIS estimates that the full cost of adjudication for Form I–821D is approximately $332 for FY 2022 and FY 2023. Because the USCIS activity-based cost model relies on budget and volume projections, the estimated cost to adjudicate Form I–821D may change based on revisions to the budget or volume projections.

[260] OMB Circular A–25 defines ''full cost'' to mean the sum of direct and indirect costs that contribute to the output, including the costs of supporting services provided by other segments and entities. Available at *https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-025.pdf.*

[261] This projection is used for budgetary planning purposes and is determined by USCIS' Volume Projection Committee (VPC). The quantitative and qualitative methodologies used by the VPC differ from the methodologies used in projecting future application volumes as part of the RIA for this proposed rule, which makes different volume projections based on the methodologies described therein. As noted below, USCIS welcomes input on the methodologies employed to estimate the size and nature of the population likely to be affected by this rule.

[262] Calculation: (Estimated annual average I–821D filing volume of 379,500) * (Estimated gap between adjudication cost and fee of $247) = $93,736,500.

Application for Employment Authorization.

B. Section 236.21—Applicability

Paragraph (a) of proposed 8 CFR 236.21 makes clear that the proposed new subpart C would apply to requests for deferred action under the DACA policy only. Proposed subpart C would not apply to or govern any other request for or grant of deferred action or any other DHS deferred action policy. This provision is consistent with the exceptional circumstances giving rise to this rulemaking, as described above. This rulemaking is not intended to address issues that relate to deferred action more broadly and would not affect other deferred action policies and procedures.

Proposed paragraph (b) provides that the provisions that govern benefit requests within 8 CFR part 103 would not apply to requests for DACA except as specifically provided in this proposed rule. DHS proposes to include this provision because, as discussed, a request for deferred action is a temporary forbearance from removal and is not a ''benefit request'' as defined in 8 CFR 1.2. Benefit requests are subject to the provisions of 8 CFR part 103, which provides regulatory guidance on filings, evidence and processing, denials, appeals, precedent decisions, certifications, and motions to reopen and reconsider. Because deferred action is an exercise of prosecutorial discretion and not a benefit, these provisions do not apply to DACA requests.

Proposed paragraph (c) explains that the Secretary has broad authority to establish national immigration enforcement policies and priorities under 6 U.S.C. 202(5) and section 103 of the INA. Deferred action is a temporary, favorable exercise of immigration enforcement discretion that gives some cases lower priority for enforcement action in order to permit DHS to focus its limited enforcement resources on those cases that are higher priorities for removal.[263] As explained in the existing regulations, deferred action is ''an act of administrative convenience to the government which gives some cases lower priority.'' [264] In exercising its discretionary authority to forbear a noncitizen's removal, DHS is recognizing that the noncitizen is, for a temporary period, not an immigration enforcement priority. The temporary forbearance from removal does not confer any right or entitlement to remain in or re-enter the United States, nor does it prevent DHS or any other Federal agency from initiating any criminal or other enforcement action against the DACA requestor at any time if DHS determines in its sole and unreviewable discretion not to continue to exercise favorable enforcement discretion with respect to the individual.[265]

In the Napolitano Memorandum, the Secretary determined that certain children and young adults without lawful immigration status or parole who came to this country years ago as children were low-priority cases and warranted, for humanitarian and other reasons, a favorable exercise of enforcement discretion.[266] The memorandum explains that these vulnerable individuals ''know only this country as home'' and generally ''lacked the intent to violate the [immigration] law[s].'' [267]

During the period of forbearance from removal, a DACA recipient is considered ''lawfully present'' for purposes of 8 CFR 1.3(a)(4)(vi) and does not accrue ''unlawful presence'' for purposes of INA sec. 212(a)(9). DACA recipients may apply for employment authorization based on economic necessity.[268] The provision of employment authorization and consideration of ''lawful presence'' for DACA recipients is pursuant to longstanding and independent DHS regulations and implementing guidance promulgated for all recipients of deferred action, as discussed elsewhere in this proposed rule.[269] Deferred action, however, is not a lawful immigration status and does not cure previous or subsequent periods of unlawful presence.

C. Section 236.22—Discretionary Determination

Section 236.22 contains the proposed provisions governing DHS's discretionary determination of requests for DACA. As explained, deferred action is a temporary, favorable exercise of immigration enforcement discretion that gives some cases lower priority for enforcement action. A pending request for deferred action does not authorize or confer any immigration benefits such as employment authorization or advance parole.[270] Deferred action requests submitted under this section would be determined on a case-by-case basis.[271]

The proposed rule lays out several threshold discretionary criteria that USCIS would assess on a case-by-case basis as part of a review of the totality of the circumstances. Even if all the threshold criteria are found to have been met, USCIS would examine the totality of the circumstances in the individual case to determine whether there are negative factors that make the grant of deferred action inappropriate or outweigh the positive factors presented by the threshold criteria or by any other evidence. Under the proposed rule, even if the adjudicator finds that an individual meets all the enumerated guidelines, the adjudicator has the discretion to deny deferred action after supervisory review and concurrence if, in the adjudicator's judgment, the case presents negative factors that make the grant of deferred action inappropriate or that outweigh the positive factors.

Although DHS could issue a policy from which individual adjudicators have no discretion to depart, and thus create something like a firm rule for adjudicators to apply,[272] DHS recognizes that (1) case-by-case assessment is a longstanding feature of deferred action policies; and (2) case-by-case assessments can yield important benefits in cases where the balance of the circumstances and relevant equities suggests a result that could not have been codified in an ex ante policy. Nonetheless, DHS recognizes that there could be costs associated with maintaining adjudicator discretion to deny a request notwithstanding

[263] Proposed 8 CFR 236.21(c)(1).

[264] 8 CFR 274a.12(c)(14).

[265] *See* Proposed 8 CFR 236.21(c)(1).

[266] *See* Napolitano Memorandum at 1.

[267] *Id.*

[268] *See* proposed 8 CFR 236.21(c) and 274a.12(c)(33).

[269] *See* 8 CFR 274a.12(c)(14); 8 CFR 1.3(a)(4)(vi).

[270] Proposed 8 CFR 236.22(a)(2).

[271] Proposed 8 CFR 236.22(c).

[272] *See, e.g., Lopez* v. *Davis,* 531 U.S. 230, 243–44 (2001) (observing that, '' 'even if a statutory scheme requires individualized determinations,' . . . 'the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority' '' and that such categorical applications or rules help to order the exercise of discretion, avoiding ''favoritism, disunity, and inconsistency'' (quoting *Am. Hosp. Ass'n* v. *NLRB,* 499 U.S. 606, 612 (1991))); *Fook Hong Mak* v. *INS,* 435 F.2d 728, 730 (2d Cir. 1970) (holding that there is no legal principle ''forbidding an [agency], vested with discretionary power, to determine,'' in a manner consistent with the APA, ''that he will or will not use it in favor of a particular class on a case-by-case basis'' and that the agency ''could select one characteristic as entitling a group to favorable treatment despite minor variables''); *see also Reno* v. *Flores,* 507 U.S. 292, 313 (1993) (observing that although the Attorney General's discretion in making immigration custody determinations required ''some level of individualized determination,'' the INS need not ''forswear use of reasonable presumptions and generic rules''); *id.* at 313–14 (''In the case of each detained alien juvenile, the INS makes those determinations that are specific to the individual and necessary to accurate application of the regulation,'' which established a ''blanket'' presumption against release to custodians other than parents, close relatives, and guardians, and ''[t]he particularization and individuation need go no further . . . .'').

satisfaction of the eligibility guidelines in the proposed rule. DHS believes that its proposed approach maintains the right mix of guidelines and discretion, but it welcomes comments on that approach.[273]

In this section of the proposed rule, as well as in 8 CFR 236.23 (which is discussed below), DHS has chosen generally to adhere to the threshold criteria for eligibility for DACA from the Napolitano Memorandum and as applied by DHS since 2012. DHS proposes to retain the threshold criteria of the DACA policy in part for reasons previously discussed and in part due to recognition of the significant reliance interests of individuals who have previously received DACA grants, as well as those similarly situated who have not yet requested DACA. This focus on reliance interests and preservation of the primary features of the policy is consistent with the President's direction to preserve and fortify DACA, as well as the Supreme Court's decision in *Regents,* as described above. This approach also is informed by DHS's assessment that the policy contained in the Napolitano Memorandum successfully advances DHS's important enforcement mission and reflects the practical realities of a defined class of undocumented noncitizens who are for strong policy reasons unlikely to be removed in the near future and who contribute meaningfully to their families, their communities, their employers, and the United States generally, as discussed elsewhere in this proposed rule. Moreover, the establishment and continued application of threshold discretionary criteria, while allowing for the residual exercise of discretion to account for other relevant considerations, serves to promote consistency and avoid arbitrariness in these determinations.

DHS believes that the proposed rule is drafted at an appropriate level of specificity, but it anticipates the need for further guidance, along the lines of the current DACA FAQs, to interpret the regulations and guide adjudicators in the exercise of their duties. DHS welcomes comment on whether other aspects of the DACA FAQs should be codified in the final rule.

1. Threshold Criteria and Burden of Proof

As proposed in this rule, and subject to the discretionary considerations described below, USCIS would consider requests for DACA from individuals who meet the following threshold criteria:

- Came to the United States before reaching their 16th birthday;
- Have continuously resided in the United States since June 15, 2007, to the time of filing of the request;
- Were physically present in the United States on June 15, 2012, and at the time of making their request for consideration of deferred action with USCIS;
- Had no lawful immigration status on June 15, 2012, as well as at the time of filing of the request for DACA;
- Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a GED certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- Have not been convicted of a felony, a misdemeanor described in the rule, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety; and
- Were born on or after June 16, 1981, and are at least 15 years of age at the time of filing their request, unless, at the time of filing their request, they are in removal proceedings, have a final order of removal, or have a voluntary departure order.

The burden would be on the DACA requestor to demonstrate that they meet the threshold criteria by a preponderance of the evidence.[274] Under the preponderance of the evidence standard, the sufficiency of each piece of evidence would be examined for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.[275]

Consistent with current practice, DHS would accept either primary or secondary evidence to determine whether the DACA requestor meets the threshold criteria. As used in the proposed rule, primary evidence would mean documentation, such as a birth certificate, that, on its face, proves a fact. Secondary evidence would mean other documentation that is more circumstantial and could lead the reviewer to conclude that it is more likely than not that the fact sought to be proven is true. Examples of secondary evidence include baptismal records issued by a church showing that the DACA requestor was born at a certain time or rental agreements in the name of the DACA requestor's parents to demonstrate periods of residence in the United States. Secondary evidence may require corroboration with other evidence submitted by the requestor.

DHS would evaluate the totality of all the evidence to determine if the other threshold criteria have been met. Consistent with practice under the Napolitano Memorandum, affidavits submitted in lieu of primary or secondary evidence would generally not be sufficient on their own to demonstrate that a requestor meets the DACA threshold criteria, except in certain circumstances as discussed in this proposed rule.

2. Arrival in the United States Under the Age of 16

Under proposed 8 CFR 236.22(b)(1), a noncitizen requesting DACA would be required to demonstrate that they arrived in the United States when they were under 16 years of age. This is a codification of the requirement in the Napolitano Memorandum that the noncitizen ''came to the United States under the age of sixteen.'' [276] Retaining this threshold requirement is also reflective of DHS's desire to limit DACA to those individuals who came to the United States as children and, as a result, present special considerations that may merit assigning lower priority for removal action due to humanitarian and other reasons, as described elsewhere in this proposed rule.

3. Continuous Residence in the United States From June 15, 2007

A DACA requestor would be required to demonstrate that they have continuously resided in the United States since at least June 15, 2007.[277] This criterion is taken directly from the Napolitano Memorandum, such that the population of potentially eligible

[273] DHS notes that, historically, DACA requests have been approved at a relatively high rate. *See* USCIS, DACA Quarterly Report (FY 2021, Q1). DHS believes this is likely because DACA requestors generally have self-selected based on their belief that they qualify based on the Napolitano Memorandum criteria and public-facing guidance. *See Texas* v. *United States,* 809 F.3d 134, 174 (5th Cir. 2015) (*Texas I*). Accurate self-selection has advantages for requestors, who may wish to pay a fee only if they are relatively certain that they will obtain deferred action, and DHS believes it likely that a similar approval rate would continue under the proposed rule, although it is possible that the rate will decline if more noncitizens with borderline cases choose to apply for DACA once Form I–765 (and accompanying filing fee) is not also required. In either case, DHS does not believe that a relatively high approval rate raises legal or policy concerns, because the proposed rule would continue to provide clear guidance to potential requestors while maintaining DHS's ability to deny those requests that do not meet the enumerated criteria or that otherwise do not merit a favorable exercise of prosecutorial discretion.

[274] *See* proposed 8 CFR 236.22(a)(3).

[275] *Matter of Chawathe,* 25 I&N Dec. 369, 376 (AAO 2010).

[276] Napolitano Memorandum at 1.

[277] Proposed 8 CFR 236.22(b)(2).

noncitizens would remain substantially the same under the proposed rule. Applying this same continuous residence criterion in the codified DACA policy is in line with DHS's longstanding message that DACA is not available to individuals who have not continuously resided in the United States since at least June 15, 2007. Border security is a high priority for the Department, and we do not believe that codifying the DACA policy, with the continuous residence requirement included, would undermine DHS's enforcement messaging.

To provide further clarity on the meaning of this requirement, DHS proposes to define ''residence'' for the purpose of 8 CFR 236.22(b)(2) to mean ''the principal, actual dwelling place in fact, without regard to intent,'' which aligns with the INA definition of ''residence'' at section 101(a)(33), 8 U.S.C. 1101(a)(33). The proposed regulatory text also explains that the term ''residence'' is ''specifically [the] country of actual dwelling place.'' [278]

As has been longstanding DHS policy generally, any brief, casual, and innocent absences from the United States prior to August 15, 2012, would not result in a break of continuous residence for the purpose of this requirement.[279] Any travel outside of the United States on or after August 15, 2012, without prior DHS authorization, such as advance parole, would be considered an interruption in continuous residence.[280] Section 236.22 delineates the circumstances under which absences prior to August 15, 2012, would be considered brief, casual, and innocent. An absence would be considered brief, casual, and innocent if:

- The absence was short and reasonably calculated to accomplish the purpose for the absence;
- the absence was not because of a post-June 15, 2007 order of exclusion, deportation, or removal;
- the absence was not because of a post-June 15, 2007 order of voluntary departure, or an administrative grant of voluntary departure before the requestor was placed in exclusion, deportation, or removal proceedings; and
- the purpose of the trip, and the requestor's actions while outside the United States, were not contrary to law.[281]

This definition of continuous residence is rooted in case law and has been codified in other contexts, such as TPS and the Legal Immigration Family Equity Act legalization provisions.[282] As discussed, affidavits in lieu of primary or secondary evidence would generally not be sufficient on their own to demonstrate that a requestor meets the DACA threshold criteria. However, affidavits may be used to support evidence that the requestor meets the continuous residence requirement if there is a gap in documentation for the requisite periods and primary and secondary evidence is not available. DHS requests comments on whether affidavits should be considered acceptable evidence of the start of the continuous residence period for new initial requestors for DACA who may have been very young at the time of entry to the United States and may have difficulty obtaining primary or secondary evidence to establish this threshold requirement.

4. Physical Presence in the United States

For the same reasons described in the section on continuous presence immediately above, this proposed rule would codify the requirement from the Napolitano Memorandum and longstanding DACA policy that the requestor must demonstrate that they were physically present in the United States on June 15, 2012, which is the date of the issuance of the Napolitano Memorandum, as well as on the date of filing the DACA request.[283] As with the other guidelines, DHS would generally not accept affidavits alone as proof of satisfying the physical presence requirement.

5. Lack of Lawful Immigration Status

As discussed above, the proposed rule is intended to codify the DACA policy without significantly changing the potentially eligible population. It is longstanding DHS policy that to be considered for DACA, the requestor must demonstrate that they were not in a lawful immigration status on June 15, 2012.[284] This explicit guideline was not in the Napolitano Memorandum issued on June 15, 2012, but it is implicit in the memorandum's reference to children and young adults who are subject to removal because they lack lawful immigration status. This requirement is consistent with the underlying purpose of the policy, inasmuch as it limits the availability of the program to those individuals who were subject to removal at the time the memorandum was issued. Individuals also must be without lawful immigration status at the time of the request for DACA in order to be eligible for deferred action from removal.

DHS is proposing to codify this guideline by requiring that the requestor must not have been in a lawful immigration status on June 15, 2012, as well as at the time of filing of the request for deferred action under this section. If the requestor was in lawful immigration status at any time before June 15, 2012, or at any time after June 15, 2012, and before the date of the request, they would be required to submit evidence that that lawful status had expired prior to those dates.[285] For purposes of this proposed rule, the requirement regarding lack of lawful immigration status would mean either that the requestor never had a lawful immigration status, or that any lawful immigration status that they obtained prior to June 15, 2012, had expired before June 15, 2012, and likewise any lawful immigration status acquired after June 15, 2012, must have expired before the date of filing the request for DACA. If the requestor was admitted for duration of status, USCIS would not consider the requestor to be a person who is not in lawful immigration status for purposes of eligibility for DACA, unless the Department of Justice, Executive Office for Immigration Review (EOIR), terminated their status by issuing a final order of removal against them or their status is listed as ''terminated'' in the Student and Exchange Visitor Information System on or before June 15, 2012. Requestors who were admitted for duration of status as dependent nonimmigrants who aged out of their nonimmigrant status on or before June 15, 2012, could be considered for deferred action under the proposed rule.

6. Education

In accordance with longstanding DHS policy and the Napolitano Memorandum, DHS is proposing to codify the guideline that a DACA requestor must be currently enrolled in school, have graduated or received a certificate of completion from high school, have obtained a GED, or be an honorably discharged veteran of the Coast Guard or Armed Forces of the United States.[286] This guideline is reflective of DHS's recognition of the importance of education and military service, as well as of the significant contributions to this country of noncitizen youth who have been educated in and/or served in the Coast

[278] *See* proposed 8 CFR 236.22(b)(2).

[279] *See* DACA FAQs.

[280] Proposed 8 CFR 236.22(b)(2).

[281] Proposed 8 CFR 236.22(b)(2)(i) through (iv).

[282] *See* 8 CFR 244.9(a)(2) and 245a.16(b).

[283] Proposed 8 CFR 236.22(b)(3).

[284] DACA FAQs.

[285] Proposed 8 CFR 236.22(b)(4).

[286] Proposed 8 CFR 236.22(b)(5).

Guard or Armed Forces of the United States.

To be considered currently enrolled in school, under longstanding DHS policy, as of the date of the request, the DACA requestor must be enrolled in:

- A public, private, or charter elementary school, junior high or middle school, high school, secondary school, alternative program, or homeschool program that meets State requirements;
- an education, literacy, or career training program (including vocational training) that has a purpose of improving literacy, mathematics, or English, or is designed to lead to placement in postsecondary education, job training, or employment and where the requestor is working toward such placement; or
- an education program assisting students either in obtaining a regular high school diploma or its recognized equivalent under State law (including a certificate of completion, certificate of attendance, or alternate award), or in passing a GED exam or other State-authorized exam (*e.g.,* HiSet or TASC) in the United States.[287]

Such education, literacy, or career training programs (including vocational training), or education programs assisting students in obtaining a regular high school diploma or its recognized equivalent under State law, or in passing a GED exam or other State-authorized exam in the United States, include programs funded, in whole or in part, by Federal, State, county, or municipal grants, or administered by non-profit organizations. Under longstanding policy, which DHS currently intends to maintain (but could revise to the extent consistent with law at a future date), programs funded by other sources would qualify if they are programs of demonstrated effectiveness.[288] DHS does not consider enrollment in a personal enrichment class (such as arts and crafts) or a recreational class (such as canoeing) to be an alternative educational program. Therefore, enrollment in such a program would not be considered to meet the ''currently enrolled in school'' guideline for purposes of this proposed rule.

As noted above, DHS proposes to codify the longstanding policy that a DACA requestor also can meet the educational guideline if they have graduated from high school or received a GED.[289] To meet this component of the educational guideline, consistent with longstanding policy, the DACA requestor would need to show that they have graduated or obtained a certificate of completion from a U.S. high school or have received a recognized equivalent of a high school diploma under State law; have passed a GED test or other equivalent State-authorized exam in the United States; or have graduated from a public or private college, university, or community college.[290]

As proposed, and consistent with longstanding policy, in lieu of being currently enrolled in school, having graduated from high school, or having received a GED, a DACA requestor may be an honorably discharged veteran of the Coast Guard or Armed Forces of the United States.[291] This may include reservists who were honorably discharged. Current or ongoing service in the Coast Guard or Armed Forces of the United States would not qualify under this component of the guideline.

7. Criminal History/Public Safety

Under the proposed rule, and consistent with longstanding policy, in order to be eligible for DACA, the requestor must not have been convicted of a felony, a misdemeanor described in § 236.22(b)(6) of the proposed rule,[292] or three or more other misdemeanors not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct, or otherwise pose a threat to national security or public safety.[293] DHS currently uses the following definitions for each type of offense, and it would continue to rely on such definitions under the proposed rule as they have been effective at ensuring that those individuals who are a high priority for removal are not eligible for DACA while allowing for an individualized, case-by-case determination about whether to grant deferred action to each requestor:

- A ''felony'' is a Federal, State, or local criminal offense punishable by imprisonment for a term exceeding 1 year;
- a ''misdemeanor'' is a Federal, State, or local criminal offense for which the maximum term of imprisonment authorized is 1 year or less but greater than 5 days; and
- a misdemeanor described in § 236.22(b)(6) of this proposed rule refers to a misdemeanor that is an offense of domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, or driving under the influence; or is one for which the individual was sentenced to time to be served in custody of more than 90 days.

The time to be served in custody does not include any time served beyond the sentence for the criminal offense based on a State or local law enforcement agency honoring a detainer issued by ICE. Immigration-related offenses characterized as felonies or misdemeanors under State laws would not be treated as disqualifying crimes for the purpose of considering a request for consideration of deferred action pursuant to this process. Other offenses, such as foreign convictions and minor traffic offenses, would generally not be treated as a felony or misdemeanor, but they may be considered under a review of the totality of the circumstances. Under current policy, cases involving foreign convictions should be elevated for supervisory review. DHS does not currently anticipate changing this practice. DHS welcomes comments on whether a more detailed definition of these offenses, including ''minor traffic offenses,'' should be added to the rule (and if so, how the offenses should be defined) or whether the matter remains appropriate for subregulatory guidance.

If the evidence establishes that an individual has been convicted of a felony, a misdemeanor described in § 236.22(b)(6) of the proposed rule, or three or more other misdemeanors not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct, USCIS would deny the request for deferred action. As discussed throughout this rule, the decision whether to defer action in a particular case is an individualized one, and thus would take into account the totality of the circumstances, including the nature and severity of the underlying criminal, national security, or public safety concerns. USCIS would retain the discretion to determine that an individual does not warrant deferred action on the basis of, for instance, a single criminal offense for which the individual was sentenced to time in custody of 90 days or less, or an arrest for an extremely serious crime where criminal proceedings are ongoing. Additionally, to the extent that the DACA guidelines may not align with other current or future DHS enforcement

[287] DACA FAQs.

[288] *Id.*

[289] Proposed 8 CFR 236.22(b)(5).

[290] USCIS considers graduation from a public or private college, university, or community college as sufficient proof of meeting the educational guideline because a college or university generally would require a high school diploma, GED certificate, or equivalent for enrollment.

[291] Proposed 8 CFR 236.22(b)(5).

[292] Under the Napolitano Memorandum, this concept is described as a ''significant misdemeanor.'' Because some stakeholders have expressed confusion regarding this term, DHS proposes to revise this terminology as part of the rulemaking. The substantive policy would remain the same.

[293] Proposed 8 CFR 236.22(b)(6); DACA FAQs.

discretion guidance, USCIS may consider that guidance when determining whether to deny or terminate DACA even where the DACA guidelines are met. Therefore, the absence or presence of a criminal history would not necessarily be determinative, but it would be a factor to be considered.

8. Age at Time of Request

To simplify the guideline from the Napolitano Memorandum and longstanding DHS policy that the requestor must have been under the age of 31 on June 15, 2012, DHS is clarifying that the requestor must have been born on or after June 16, 1981.[294] DHS also proposes to incorporate the longstanding guideline that a DACA requestor must be over the age of 15 at the time of filing the request, unless they are in removal proceedings, have a final removal order, or have a voluntary departure order.[295] As noted above, these proposed provisions are in line with the Department's goal of preserving and fortifying the DACA policy as it currently exists.

D. Section 236.23—Procedures for Request, Terminations, and Restrictions on Information Use

1. USCIS Jurisdiction

Consistent with longstanding policy, proposed § 236.23 would provide that USCIS has exclusive jurisdiction over requests for DACA for non-detained individuals.[296] Individuals who are in immigration detention may request DACA but may not be approved for DACA unless they are released from detention by ICE prior to USCIS' decision on the DACA request.[297] A noncitizen in removal proceedings would be allowed to apply for deferred action regardless of whether those proceedings have been administratively closed. And a voluntary departure order or a final order of exclusion, deportation, or removal would not bar a noncitizen from requesting DACA under this subpart.[298]

USCIS would notify the requestor, and if applicable, the requestor's attorney of record or accredited representative, of the decision to approve or deny the request for DACA in writing.[299] Continuing with current practice, this rule proposes that a grant of DACA generally will be provided for an initial period of 2 years.[300] Consistent with longstanding policy and given the nature of deferred action as an exercise of prosecutorial discretion and not a benefit, USCIS is not proposing any new requirements to issue a request for evidence or a notice of intent to deny if the requestor does not meet the eligibility guidelines or if USCIS denies the request as a matter of discretion.[301] Nor would USCIS be required to indicate the reasons for the denial, provide for the right to file an administrative appeal, or allow for the filing of a motion to reopen or motion to reconsider.[302] USCIS would be permitted to reopen or reconsider either an approval or a denial of such a request on its own initiative, however, and in addition a denied requestor would be allowed to submit another DACA request on the required form and with the requisite fees or apply for any form of relief or protection under the immigration laws.[303]

2. Issuance of a Notice To Appear or Referral to ICE

USCIS' policy for issuance of an NTA or RTI for denied DACA requests has remained unchanged since the inception of DACA in 2012, and DHS proposes to retain the essential elements of that policy in this rule.[304] USCIS would not issue an NTA or RTI for possible enforcement action against a DACA requestor as part of a denial unless the requestor meets DHS's criteria for enforcement action as proposed in this rule.[305] Current DHS policy for DACA as described under the DACA FAQs provides that if a requestor's case is denied, they will not be referred to ICE for purposes of removal proceedings unless their case involves a criminal offense, fraud, a threat to national security or public safety, or where DHS determines there are exceptional circumstances.[306] In this proposed rule, DHS intends to provide additional clarity for when an individual whose case has been denied would be referred to ICE or issued an NTA and has identified based on current practice the three general categories of cases that are prioritized as subject to immigration enforcement. Pursuant to these guidelines, USCIS would issue an NTA or RTI for possible enforcement action against a DACA requestor under this proposed rule if the case involves a denial for fraud, a threat to national security, or public safety concerns.[307] This approach to enforcement is consistent with interim DHS guidelines to ''implement civil immigration enforcement based on sensible priorities,'' which include ''protecting national security, border security, and public safety.'' [308] The appropriate charges on the Form I–862, Notice to Appear, will be determined on a case-by-case basis, and DHS may charge an individual who falls under any of these immigration enforcement priorities with grounds for removal that are unrelated to the underlying fraud, criminality, national security, or public safety factors.

3. Termination of Deferred Action

The decision on whether to grant a request for DACA is determined on a case-by-case basis as an exercise of the agency's prosecutorial discretion. Accordingly, DHS maintains its position that USCIS also may terminate a grant of DACA at any time if it determines that the recipient did not meet the threshold criteria; there are criminal, national security, or public safety issues; or there are other adverse factors resulting in a determination that continuing to exercise prosecutorial discretion is no longer warranted. Despite its broad prosecutorial discretion to terminate DACA, USCIS generally has provided a NOIT with an opportunity for the DACA recipient to respond before USCIS makes its final decision on termination. However, subject to the Federal district court's 2018 nationwide preliminary injunction in *Inland Empire,*[309] USCIS does exercise its discretion to terminate DACA immediately upon issuance of a Termination Notice in cases involving certain criminal, national security, or public safety concerns. For example, USCIS may issue a Termination Notice where there is a criminal charge based on an EPS offense described in the USCIS 2011 NTA policy memorandum.[310] In addition and except

[294] Proposed 8 CFR 236.22(b)(7).

[295] Proposed 8 CFR 236.22(b)(7).

[296] Proposed 8 CFR 236.23(a)(2).

[297] *Id.; see also* ICE, ''Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Lawful Permanent Residents (DAPA),'' *https://www.ice.gov/daca.*

[298] Proposed 8 CFR 236.23(a)(2).

[299] Proposed 8 CFR 236.23(c).

[300] Proposed 8 CFR 236.23(a)(4).

[301] *See* Proposed 8 CFR 236.23(a)(3).

[302] *See* Proposed 8 CFR 236.21(b).

[303] *See* Proposed 8 CFR 236.22(d) and 236.23(c).

[304] *See* DACA FAQs.

[305] *See* Proposed 8 CFR 236.23(c)(2).

[306] *See* DACA FAQs.

[307] Proposed 8 CFR 236.23(c)(2).

[308] *See* Pekoske Memorandum. Previous guidelines pertaining to enforcement and removal policies similarly have identified ''national security, public security, and border security'' as the Department's top priorities. *See* Memorandum from Secretary Jeh Charles Johnson to Acting Director of ICE, et al., *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014).

[309] For a full description of the *Inland Empire* litigation, including the preliminary injunction, *see* discussion of litigation history at Section III.B of this preamble.

[310] Available at *https://www.uscis.gov/sites/default/files/document/memos/*

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with regard to class members in *Inland Empire,* DACA terminates automatically upon the issuance of an NTA in immigration court to a DACA recipient, although USCIS sends the individual a notice of action (NOA) informing the recipient that automatic termination has occurred as of the date of the NTA issuance. DACA also automatically terminates and an NOA is issued when the recipient departs the United States without having obtained an advance parole document from USCIS.[311]

Although the *Inland Empire* injunction currently prohibits USCIS from terminating a class member's DACA without issuance of a NOIT, a reasoned explanation, or an opportunity to respond prior to termination, or terminating DACA at all based on an NTA that charges the individual solely as being present without inspection and admission or being an overstay, it is significant that the court granted the parties' agreement to carve out from class membership individuals who: (1) Have a criminal conviction that is disqualifying for DACA; (2) have a charge for a crime that falls within the EPS grounds referenced in the USCIS 2011 NTA policy memorandum; [312] (3) have a pending charge for certain terrorism and security crimes described in 8 U.S.C. 1182(a)(3)(B)(iii) and (iv) or 8 U.S.C. 1227(a)(4)(A)(i); (4) departed the United States without advance parole; (5) were physically removed from the United States pursuant to an order of removal, voluntary departure order, or voluntary return agreement; or (6) maintain a nonimmigrant or immigrant status. In excluding these individuals from the *Inland Empire* class, the court effectively recognized USCIS' prosecutorial discretion to terminate DACA, with or without notice, including the automatic termination of DACA when an NTA is issued to a non-class member or when any DACA recipient departs the United States without advance parole.

Although DHS disagrees with the *Inland Empire* court's preliminary injunction and DHS's appeal of the order remains pending, DHS will continue to comply fully with the court's order, as it has for more than 3 years, unless and until that order is no longer in effect. Subject to such continued compliance if necessary when this rule becomes final, DHS currently proposes to codify USCIS' prosecutorial discretion to terminate a grant of DACA at any time, with or without the issuance of a NOIT.[313] This provision would allow for terminations under this paragraph in circumstances where the DACA recipient does not meet the threshold criteria proposed in this rule, the recipient committed disqualifying criminal offenses or presents national security or public safety concerns, or other adverse factors result in a determination that continuing to exercise prosecutorial discretion is no longer warranted. Although the provision permits the termination of DACA without a NOIT, USCIS intends to maintain its longstanding practice of generally providing a NOIT where appropriate.

Non-automatic terminations of a grant of DACA, regardless of whether a NOIT is issued, would be made on a case-by-case basis pursuant to an assessment of the totality of the circumstances, including any documentary evidence. The proposed rule also would codify two bases for automatic termination: (1) Filing of an NTA for removal proceedings with EOIR, unless the NTA is issued by USCIS solely as part of an asylum referral to EOIR; or (2) departure of the DACA recipient from the United States without an advance parole document.[314] Although the proposed grounds for automatic termination are consistent with longstanding policy, DHS is proposing to modify when termination will occur based upon an NTA by shifting from the current policy of termination at the time of issuance of an NTA to termination at the time the NTA is filed with EOIR, marking the commencement of proceedings before an immigration judge.[315] DHS proposes this change to avoid termination in instances where NTAs are issued but later canceled prior to filing with EOIR. In addition, DHS is proposing to create a new exception to termination based upon an NTA where USCIS files an NTA with EOIR solely as part of an asylum referral. This exception would preserve DACA for those whose asylum cases are referred to the immigration court by the USCIS Asylum Division. Without such an exception, a DACA recipient either must lose DACA with the filing of the NTA referring the case to the immigration court, or keep DACA but forgo the opportunity to continue seeking asylum as a principal applicant or as a dependent on a parent or spouse's claim in immigration court (as allowed by existing DHS and DOJ regulations).[316] DHS has determined that, in the balancing of the equities and for humanitarian reasons, DACA will not terminate automatically for reasons based solely on the filing of an NTA for purposes of referring an asylum case to EOIR. However, DHS continues to reserve its prosecutorial discretion to terminate the individual's DACA, as appropriate, for other reasons permitted by the rule.

Under proposed 8 CFR 236.23(d)(3), termination of a grant of DACA also would result in the automatic termination of any employment authorization granted under proposed 8 CFR 274a.12(c)(33) and any related employment authorization documentation as of the date DACA is terminated, as it would not be reasonable for employment authorization based on a grant of DACA to continue where the DACA has been affirmatively terminated by DHS. The individual retains the ability to seek employment authorization under any other ground applicable to the individual's particular circumstances in 8 CFR 274a.12.

DHS also is considering other alternatives for this termination of DACA section of the proposed rule, on which DHS welcomes comment. One alternative would be to modify the provision regarding automatic termination of DACA solely based on the filing of an NTA so that such termination would be applicable only to certain categories of DACA recipients, such as individuals who are subject to an investigation regarding, have been arrested for, or have a conviction for an EPS offense, and certain individuals who fall within the terrorism or national security related provisions of the INA grounds for inadmissibility or deportability. A second alternative would be to strike the provision regarding automatic termination of DACA solely based on the filing of an NTA or to modify it to make termination automatic at a later point in the process for some or all DACA recipients (*e.g.,* upon issuance of an administratively final order of removal).

A third alternative, which could be implemented separately or in conjunction with the first or second, would be to specify the instances in which USCIS generally will issue a NOIT, with opportunity for the DACA recipient to respond before USCIS makes its final decision on DACA

NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf. As discussed in the litigation history section of this rule and below, individuals with pending EPS charges are not class members covered by the *Inland Empire* preliminary injunction.

[311] Unlike cases where USCIS makes an affirmative decision to terminate DACA, these two instances of automatic DACA termination currently occur upon issuance of the NTA or departure without advance parole and do not require any USCIS decision to terminate.

[312] *See supra* note 128.

[313] Proposed 8 CFR 236.23(d).

[314] Proposed 8 CFR 236.23(d)(2).

[315] *See* 8 CFR 1003.14(a).

[316] *See* 8 CFR 208.14(c); 8 CFR 1208.14(c).

termination. Under this alternative, USCIS would continue to retain the discretionary authority to terminate DACA without a NOIT in cases involving criminal offenses or concerns regarding national security or public safety. Depending upon whether other alternative proposals described here are adopted, this alternative also could allow for automatic DACA termination where the recipient leaves the United States without advance parole or an NTA is filed in a case, generally or only in cases involving certain EPS, national security, or other public safety concerns.

Finally, DHS is considering an alternative related to automatic termination upon the DACA recipient's departure from the United States without an advance parole document. DHS is considering an alternative under which departure from the United States in certain exigent circumstances and without an advance parole document would not automatically result in termination, such as where the DACA recipient left the country temporarily in an emergency and did not have sufficient time to obtain an advance parole document.

In short, although termination on the provided grounds, including automatic termination, is a longstanding feature of DACA and serves important policy interests, DHS recognizes that there may be potentially beneficial alternatives in this area. DHS welcomes comment on each of the above alternatives, and other alternatives that would address the same issues.

4. Information Use

In order to mitigate a potential disincentive for noncitizens with no current lawful immigration status to file a request for DACA and make their presence known to the Government, DHS implemented an information use policy for DACA requests in 2012, which has not changed in any way since it was first announced in 2012 (including through previous attempts to rescind DACA) and remains in effect in its original form to this day. Under this longstanding policy, information provided by DACA requestors is collected and considered for the primary purpose of adjudicating their DACA requests and is safeguarded from use for certain immigration enforcement-related purposes. DHS policy as described in the DACA FAQs provides that information about the DACA requestor and their family members and guardians is protected from disclosure to ICE and CBP for the purpose of immigration enforcement proceedings unless the requestor meets the criteria set forth in the 2011 USCIS NTA policy memorandum, but it notes that the information may be shared with national security and law enforcement agencies, including ICE and CBP, for purposes other than removal, including for assistance in the consideration of DACA, to identify or prevent fraudulent claims, for national security purposes, or for the investigation or prosecution of a criminal offense.[317] Additionally, the policy assures that individuals whose cases are deferred pursuant to DACA will not be referred to ICE.[318] DHS policy regarding information provided in DACA requests has not changed since the initiation of DACA. However, DHS proposes in this rule under 8 CFR 236.23(e) to codify longstanding policy and practice, while clarifying that the policy is better understood as a restriction on the use of information provided in DACA requests than as a policy governing information sharing.

Since the inception of DHS and long before the DACA policy was initiated, the three immigration components of DHS (USCIS, ICE, and CBP) have had shared access to a variety of DHS electronic systems of records, as well as the paper Alien File or ''A-File,'' that contain information on noncitizens as they pass through the U.S. immigration process, so that each component can conduct its statutory functions properly within the overall DHS mission to administer and enforce U.S. immigration laws. For example, ICE and CBP officers with a ''need to know'' may query the systems on individual noncitizens they encounter to verify whether they are permitted to remain in or enter the United States and to ensure that the officers do not erroneously remove or take other enforcement action (*e.g.,* issuing an NTA for removal proceedings) against a person, such as a DACA recipient, who is so permitted.

Pursuant to the Privacy Act of 1974,[319] DHS regularly publishes System of Record Notices (SORNs) for immigration systems that provide the public with notice of each system's categories of individuals and categories of records, the purposes and legal authority for the collection of the information maintained in the system(s), and the potential use of the information described in ''routine uses'' for those systems that permit disclosure external to DHS. Information contained in DHS systems may be accessed by officers and employees of DHS ''who have a need for the record in the performance of their duties,'' either pursuant to the Privacy Act [320] or DHS privacy policy. The instructions for the Form I–821D, Consideration of Deferred Action for Childhood Arrivals, advise requestors that ''[t]he information you provide on this form may be shared with other Federal, state, local, and foreign government agencies and authorized organizations following approved routine uses described in the associated published [SORNs].'' In particular, the A-File/Central Index System SORN and the Benefits Information System SORN referenced therein describe what records are collected on and related to DACA requestors and recipients and how such records may be used by government officials in the immigration components of DHS as they perform their duties.[321] As such, ICE and CBP officers with a demonstrated ''need to know'' have always been able to access an individual's immigration-related information, including that contained in DACA requests, by querying DHS electronic systems on a case-by-case basis (for instance, by querying an individual's A-number or full name and date of birth).

Under the DACA information usage policy as set forth immediately below the description of ''Routine Uses'' in the instructions for Form I–821D, the ''[i]nformation provided in this request is protected from disclosure to ICE and [CBP] for the purpose of immigration enforcement proceedings unless the requestor meets the criteria for the issuance of [an NTA or RTI] under the criteria set forth in USCIS' 2011 [NTA] guidance (*www.uscis.gov/NTA*).'' In conjunction with the described routine uses, DHS upholds this policy by (1) prohibiting the affirmative provision of information provided by DACA requestors to ICE or CBP for the purpose of immigration enforcement, unless the listed exception applies; and (2) prohibiting ICE and CBP's use of information provided in a DACA

[317] *See* DACA FAQs; Instructions for Consideration of Deferred Action for Childhood Arrivals, USCIS Form I–821D at 13 (Apr. 24, 2019).

[318] *See* DACA FAQs.

[319] 5 U.S.C. 552a.

[320] *See* 5 U.S.C. 552a(b)(1).

[321] *See* DHS/USCIS/ICE/CBP–001—Alien File, Index, and National File Tracking System of Records, 82 FR 43556 (Sept. 18 2017); DHS/USCIS–007—Benefits Information System, 84 FR 54622 (Oct. 10, 2019); *see also* DHS/USCIS/PIA–003(a) Integrated Digitization Document Management Program (Sept. 24, 2013), *https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-iddmp-09242013.pdf;* DHS/USCIS/PIA–016(a)—Computer Linked Application Information Management System and Associated Systems (Mar. 25, 2016), *https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-claims3appendixupdated-september2019.pdf;* DHS/USCIS/PIA–056—USCIS Electronic Immigration System (May 17, 2016), *https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-elisappendixaupdate-may2018.pdf.*

request for the purpose of immigration enforcement, unless the listed exception applies. Additionally, DHS policy always has specified that if the information would be used for purposes other than removal, it could be shared with national security and law enforcement agencies, including ICE and CBP, and provided examples of such non-enforcement purposes, including for assistance in the consideration of a DACA request, to identify or prevent fraudulent claims, for national security purposes, or for the investigation or prosecution of a criminal offense. But this policy does not limit (and has never limited) ICE or CBP's access to information indicating that an individual has DACA where ICE or CBP needs such information in order to ensure that it does not take inappropriate enforcement action against the individual.

DHS proposes to codify this policy that has governed the use of information provided by DACA requestors since the beginning of DACA.[322]

E. Section 236.24—Severability

Deferred action is at its core an act of forbearance from removal granted by DHS to noncitizens who are a low priority for enforcement action. According to statute, regulation, and longstanding practice, the Secretary also may, as an act of discretion, authorize employment for such individuals, enabling them to support themselves and their families while in the United States. During the period of deferred action, such individuals have no legal immigration status but are considered ''lawfully present'' for the specific purposes of 8 CFR 1.3(a)(4)(vi) and do not accrue ''unlawful presence'' for purposes of the inadmissibility grounds at INA sec. 212(a)(9). For the reasons described above, DHS believes that its authority to implement each of these three aspects or consequences of deferred action in the proposed regulation is well-supported in law and practice and should be upheld in any legal challenge. DHS also believes that its exercise of its authority reflects sound policy.

However, in the event that any portion of the proposed rule is declared invalid, DHS intends that the various aspects of lawful presence for DACA recipients be severable. For example, if a court were to find unlawful (1) the provision of employment authorization for DACA recipients, (2) the pause on accrual of unlawful presence for DACA recipients, or (3) the provision of lawful presence for these noncitizens under 8 CFR 1.3(a)(4)(iv), or some combination thereof, DHS still would intend the remaining features of the policy to stand. Likewise, DHS proposes that employment authorization for DACA recipients would be severable from lawful presence as well as forbearance from removal. DHS is including a provision in the proposed regulatory text to that effect.

DHS believes that a forbearance-only enforcement discretion policy is also viable, although not preferred for the reasons expressed above. While lawful presence and employment authorization are important to the DACA policy's overall success for DHS, as well as to DACA recipients and their communities, DHS believes that any DACA rule should not be struck down in its entirety so long as the forbearance policy is found lawful.[323] As the Supreme Court noted in *Regents,* forbearance is the DACA policy's ''defining feature,'' offering DACA recipients an important measure of assurance, one that is important in itself. Neither employment authorization nor lawful presence is categorically required for the forbearance portion of the proposed rule to serve a meaningful purpose.[324] Even without the proposed rule or a DACA policy, individuals who meet the DACA guidelines are unlikely to be high enforcement priorities, although as discussed elsewhere DHS believes that there are significant benefits to both the Department and DACA recipients to codifying the policy choices behind that low-priority status and accompanying forbearance and providing a process for such individuals to affirmatively come forward to provide the Government with necessary information to complete background checks and otherwise conduct necessary vetting.

DHS believes that it is in the interests of both DACA recipients and the nation as a whole for the noncitizens granted deferred action under the proposed rule to be able to work lawfully and be treated as lawfully present (in the narrow sense explained here) during the period of deferred action. Employment authorization in particular allows DACA recipients to contribute more fully to their communities while supporting themselves and their families, many of whom are U.S. citizens. But a forbearance-only rule still would have significant advantages and be worthwhile in itself, in that it would allow DACA recipients to have a measure of assurance that they are indeed low priorities for enforcement and are unlikely to be removed while enforcement action is deferred. This alone could justify the continued implementation of the policy. Likewise, so long as the forbearance aspect of the policy is in effect, employment authorization without lawful presence, or lawful presence without employment authorization, would be justified on both legal and policy grounds and could be implemented effectively by the Department.[325]

F. Section 236.25—No Private Rights

Consistent with the rule's purpose as an exercise of the Secretary's enforcement discretion, DHS proposes to include a section specifically providing that this rule is not intended to and does not supplant or limit otherwise lawful activities of DHS or the Secretary, and is not intended to and does not create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal.[326] The proposed inclusion of a disclaimer is consistent with other DHS regulations governing immigration enforcement [327] and provides appropriate notice to the public of the intended effect of these regulations.

V. Statutory and Regulatory Requirements

A. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)

Executive Order (E.O.) 12866 and E.O. 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, to the extent permitted by law, to proceed only if the benefits justify the costs. They also direct agencies to select regulatory approaches that maximize net benefits while giving consideration, to the extent appropriate and consistent with law, to values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. In particular, E.O. 13563 emphasizes the importance of not only quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility, but also considering equity, fairness, distributive impacts, and

[322] *See* proposed 8 CFR 236.23(e).

[323] *See Alaska Airlines, Inc.* v. *Brock,* 480 U.S. 678, 683 (1987) (''Unless (1) it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part [of a statute] may be dropped if (2) what is left is fully operative as a law.''); *K-Mart Corp.* v. *Cartier,* 486 U.S. 281 (1988) (applying similar test to regulatory severability provision).

[324] 140 S. Ct. at 1911.

[325] *See* Section IV.A above for a discussion of fees.

[326] Proposed 8 CFR 236.25.

[327] *See* 8 CFR 287.12.

human dignity. The latter values are highly and particularly relevant here.

This proposed rule is designated a ''significant regulatory action'' that is economically significant since it is estimated the proposed rule would have an annual effect on the economy of $100 million or more, under section 3(f)(1) of E.O. 12866. Accordingly, OMB has reviewed this proposed regulation.* * *

1. Summary of Major Provisions of the Regulatory Action

This proposed rule would preserve and fortify DHS's DACA policy for the issuance of deferred action to certain young people who were brought to the United States many years earlier as children, who have no current lawful immigration status, and who are generally low enforcement priorities. The proposed rule would codify the following provisions of the DACA policy from the Napolitano Memorandum and longstanding USCIS practice:

- *Deferred Action.* The proposed rule would codify the definition of deferred action as a temporary forbearance from removal that does not confer any right or entitlement to remain in or re-enter the United States, and that does not prevent DHS from initiating any criminal or other enforcement action against the DACA requestor at any time.
- *Threshold Criteria.* The proposed rule would codify the following longstanding threshold criteria: That the requestor must have: (1) Come to the United States under the age of 16; (2) continuously resided in the United States from June 15, 2007, to the time of filing of the request; (3) been physically present in the United States on both June 15, 2012, and at the time of filing of the DACA request; (4) not been in a lawful immigration status on June 15, 2012, as well as at the time of request; (5) graduated or obtained a certificate of completion from high school, obtained a GED certificate, currently be enrolled in school, or be an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; (6) not been convicted of a felony, a misdemeanor described in § 236.22(b)(6) of the proposed rule, or three or more other misdemeanors not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct, or otherwise pose a threat to national security or public safety; and (7) been born on or after June 16, 1981, and be at least 15 years of age at the time of filing, unless the requestor is in removal proceedings, has a final order of removal, or a voluntary departure order. The proposed rule also would codify that deferred action under DACA may be granted only if USCIS determines in its discretion that the requestor meets the threshold criteria and merits a favorable exercise of discretion.
- *Procedures for Request, Terminations, and Restrictions on Information Use.* The proposed rule would codify the procedures for denial of a request for DACA or termination of a grant of DACA, the circumstances that would result in the issuance of an NTA or RTI, and the restrictions on use of information contained in a DACA request for the purpose of initiating immigration enforcement proceedings.

In addition to proposing the retention of longstanding DACA policy and procedure, the proposed rule includes the following changes:

- *Filing Requirements.* The proposed rule would modify the existing filing process and fees for DACA by making the request for employment authorization on Form I–765, Application for Employment Authorization, optional and charging a fee of $85 for Form I–821D, Consideration of Deferred Action for Childhood Arrivals. DHS would maintain the current total cost to DACA requestors who also file Form I–765 of $495 ($85 for Form I–821D plus $410 for Form I–765).
- *Employment Authorization.* The proposed rule would codify DACA-related employment authorization for deferred action recipients in a new paragraph designated at 8 CFR 274a.12(c)(33). The new paragraph would not constitute any substantive change in current policy: It would continue to specify that the noncitizen must have been granted deferred action and must establish economic need to be eligible for employment authorization.
- *Automatic Termination of Employment Authorization.* The proposed rule would automatically terminate employment authorization granted under 8 CFR 274.12(c)(33) upon termination of a grant of DACA.
- ''*Lawful Presence.*'' Additionally, the proposed rule reiterates USCIS' longstanding codification in 8 CFR 1.3(a)(4)(vi) of agency policy that a noncitizen who has been granted deferred action is considered ''lawfully present''—a term that does not confer authority to remain in the United States—for the discrete purpose of authorizing the receipt of certain benefits under that regulation. The proposed rule also would reiterate longstanding policy that a noncitizen who has been granted deferred action does not accrue ''unlawful presence'' for purposes of INA sec. 212(a)(9).

2. Summary of Costs and Benefits of the Proposed Rule

The proposed rule would result in new costs, benefits, and transfers. To provide a full understanding of the impacts of DACA, DHS considers the potential impacts of this proposed rule relative to two baselines. The No Action Baseline represents a state of the world under the DACA program; that is, the program initiated by the guidance in the Napolitano Memorandum in 2012 and prior to the July 16, 2021 district court decision. For reasons explained in Section V.A.4.a.(1) below, this baseline does not directly account for the July 16, 2021 district court decision. The second baseline is the Pre-Guidance Baseline, which represents a state of the world before the issuance of the Napolitano Memorandum (*i.e.,* a state of the world where the DACA program does not exist and has never existed). If the goal is to understand the consequences of the DACA program, the Pre-Guidance Baseline is the more useful point of reference.

Table 3 provides a detailed summary of the proposed provisions and their potential impacts relative to the No Action Baseline. Additionally, Table 4 provides a detailed summary of the proposed provisions and their potential impacts relative to the Pre-Guidance Baseline.

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Table 3. Summary of Major Changes to Provisions and Estimated Impacts of the Proposed Rule, FY 2021—FY 2031 (Relative to the No Action Baseline)

Proposed Provision	Description of Proposed Provision	Estimated Impact of Proposed Provision
Amending 8 CFR 106.2(a)(38). Fees.	The fee for Form I-821D, Consideration of Deferred Action for Childhood Arrivals, will change from $0 to $85.	**Quantitative:** Cost Savings Part of the DACA requestor population might choose only to request deferred action through Form I-821D, thus forgoing the cost of applying for an EAD through Form I-765: • Annual undiscounted cost savings for no longer filing the Form I-765 for employment authorization could range from $0 to $43.9 million, depending on how many individuals choose this option. • Total cost savings over a 11-year period could range from: ○ $0 to $483.6 million for undiscounted cost savings; ○ $0 to $422.2 million at a 3-percent discount rate; and ○ $0 to $359.0 million at a 7-percent discount rate. Transfer Payments Part of the DACA requestor population may choose only to request deferred action through Form I-821D. This would result in a transfer payment from USCIS to DACA requestors as requestors filing only the Form I-821D would now pay less in filing fees than the current filing
Amending 8 CFR 236.21(c)(2). Applicability.	DACA recipients who can demonstrate an economic need may apply to USCIS for employment authorization pursuant to 8 CFR 274a.13 and 274a.12(c)(33).	
Amending 8 CFR 236.23(a)(1). Procedures for request.	If a request for DACA does not include a request for employment authorization, employment authorization still may be requested subsequent to approval, but not for a period of time to exceed the grant of deferred action.	
Adding 8 CFR 236.24(b). Severability.	The provisions in § 236.21(c)(2) through (4) are intended to be severable from each other. The period of forbearance, employment authorization, and lawful presence are all severable under this provision.	

		fee cost for both Forms I-821D and I-765: • Annual undiscounted transfers could range from $0 to $34.9 million. • Total transfers over a 11-year period could range from: o $0 to $384.1 million undiscounted; o $0 to $335.4 million at a 3-percent discount rate; and o $0 to $285.2 million at a 7-percent discount rate. **Qualitative:** Benefits • Having the option to file Form I-765 could incentivize requests by reducing some of the financial barriers to entry for some requestors who do not need employment authorization but who will still file Form I-821D for deferred action. • The proposed rule allows the active DACA-approved population to continue enjoying the advantages of the policy and also have the option to request renewal of DACA in the future if needed. • For DACA recipients and their family members, the proposed rule would contribute to (1) a reduction of fear and anxiety, (2) an increased sense of acceptance and belonging to a community, (3) an increased sense of family security, and (4) an increased sense of hope for the future, including by virtue of mitigating the risk of litigation resulting in termination of the DACA program.

Source: USCIS analysis.

Note: The No Action Baseline refers to a state of the world under the current DACA program in effect under the guidance of the Napolitano Memorandum.

Table 4. Summary of Major Changes to Provisions and Estimated Impacts of the Proposed Rule, FY 2012–FY 2031 (Relative to the Pre-Guidance Baseline)

Proposed Provision	Description of Proposed Provision	Estimated Impact of Proposed Provision
Amending 8 CFR 106.2(a)(38). Fees.	The fee for Form I-821D, Consideration of Deferred Action for Childhood Arrivals, will be $85.	**Quantitative:** Benefits Income earnings of the employed DACA recipients due to obtaining an approved EAD: • Annual undiscounted benefits could be $22.8 billion dependent on the degree to which DACA recipients are substituted for other workers in the U.S. economy. • Total benefits over a 20-year period could be: o $455.5 billion for undiscounted benefits; o $424.8 billion at a 3-percent discount rate; and o $403.6 billion at a 7-percent discount rate. Costs Costs to requestors associated with a DACA request, including filing Form I-821D, Form I-765, and Form I-765WS: • Annual undiscounted costs could range from $385.6 million to $476.1 million. • Total costs over a 20-year period could range from: o $7.7 billion to $9.5 billion for undiscounted costs; o $7.3 billion to $9.1 billion at a 3-percent discount rate; and o $7.2 billion to $8.8 billion at a 7-percent discount rate. Transfer Payments Part of the DACA requestor population may choose only to request deferred action through Form I-821D. This would result in a transfer payment from USCIS
Amending 8 CFR 236.21(c). Applicability, regarding forbearance, employment authorization, and lawful presence.	DACA recipients receive a time-limited forbearance from removal. Those who can demonstrate an economic need may apply to USCIS for employment authorization pursuant to 8 CFR 274a.13 and 274a.12(c)(33) and are considered lawfully present and not unlawfully present for certain purposes.	
Amending 8 CFR 236.23(a)(1). Procedures for request.	If a request for DACA does not include a request for employment authorization, employment authorization still may be requested subsequent to approval, but not for a period of time to exceed the grant of deferred action.	

		to DACA requestors as requestors filing only the Form I-821D would now pay less in filing fees than the current filing fee cost for both Forms I-821D and I-765: • Annual undiscounted transfers over a 20-year period could range from $0 to $30.9 million. • Total transfers over a 20-year period could range from: ○ $0 to $619.8 million undiscounted; ○ $0 to $589.9 million at a 3-percent discount rate; and ○ $0 to $574.9 million at a 7-percent discount rate. Employment taxes from the employed DACA recipients and their employers to the Federal Government dependent on the degree to which DACA recipients are substituted for other workers in the U.S. economy: • Annual undiscounted transfers could be $3.8 billion. • Total transfers over a 20-year period could be: ○ $75.5 billion undiscounted; ○ $70.4 billion at a 3-percent discount rate; and ○ $66.9 billion at a 7-percent discount rate. **Qualitative:** Cost Savings DACA program simplifies many encounters between DHS and certain noncitizens, reducing the burden upon DHS of vetting, tracking, and potentially removing DACA recipients. Benefits • The proposed rule results in more streamlined enforcement encounters and decision making, as well as avoided

		costs associated with enforcement action against low-priority noncitizens. • The proposed rule allows the DACA-approved population to enjoy the advantages of the policy and also have the option to request renewal of DACA in the future if needed. • For DACA recipients and their family members, the proposed rule would contribute to (1) a reduction of fear and anxiety, (2) an increased sense of acceptance and belonging to a community, (3) an increased sense of family security, and (4) an increased sense of hope for the future.
Source: USCIS analysis. Note: The Pre-Guidance Baseline refers to a state of the world as it was before the guidance of the Napolitano Memorandum.		

In addition to the impacts summarized above, and as required by OMB Circular A–4, Table 5 and Table 6 present the prepared accounting statements showing the costs, benefits, and transfers associated with this proposed regulation relative to the No Action Baseline and the Pre-Guidance Baseline, respectively.[328] The primary estimate of annualized cost savings of the proposed rule relative to the No Action baseline is approximately $51.4 million, discounted at 3 percent, or $51.9 million, discounted at 7 percent. The primary estimate represents an average of the minimum estimate of cost savings, $0, and the high estimate, $102.7 million, discounted at 3 percent, or $103.7 million, discounted at 7 percent.

[328] *See* OMB Circular A–4, *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf.*

Table 5. OMB A-4 Accounting Statement – No Action Baseline ($ in millions, 2020; period of analysis: FY 2021–FY 2031)				
Category	**Primary Estimate**	**Minimum Estimate**	**Maximum Estimate**	**Source/ Citations**
Benefits				
Annualized monetized benefits (3%)	$0	$0	$0	RIA
Annualized monetized benefits (7%)	$0	$0	$0	RIA
Unquantified benefits	The proposed optional Form I-765 could increase DACA Form I-821D requests by reducing some financial barriers for those requestors who do not need employment authorization but who would file for deferred action. Additionally, the proposed rule allows the active DACA-approved population to continue enjoying the advantages of the policy and have the option to request renewal in the future. For DACA recipients and their family members, the proposed rule would contribute to (1) a reduction of fear and anxiety, (2) an increased sense of acceptance and belonging to a community, (3) an increased sense of family security, and (4) an increased sense of hope for the future, including by virtue of mitigating the risk of litigation resulting in termination of the DACA program.			RIA
Cost Savings				
Annualized monetized cost savings (3%)	$22.2	$0	$44.3	RIA
Annualized monetized cost savings (7%)	$22.4	$0	$44.7	RIA
Transfers				
From whom to whom?	Part of the DACA requestor population may choose only to request deferred action through Form I-821D. This would result in a transfer payment from USCIS to DACA requestors as requestors filing only the Form I-821D would now pay less in filing fees than the current filing fee cost for both Forms I-821D and I-765.			RIA

Annualized monetized transfers (3%)	$17.6	$0	$35.2	
Annualized monetized transfers (7%)	$17.8	$0	$35.5	
Unquantified transfers	None.			
Miscellaneous Categories	**Effects**			
Effects on State, local, and/or Tribal governments	No direct effects.			RIA
Effects on small businesses	The proposed rule does not directly regulate small entities and is not expected to have a direct effect on small entities. DHS certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities.			RFA
Effects on wages	None	None	None	RIA
Effects on growth	None	None	None	RIA
Source: USCIS analysis.				

Table 6. OMB A-4 Accounting Statement – Pre-Guidance Baseline ($ in millions, 2020; period of analysis: FY 2012–FY 2031)				
Category	**Primary Estimate**	**Minimum Estimate**	**Maximum Estimate**	**Source/ Citations**
Benefits				
Annualized monetized benefits (3%)	$2,188.3	N/A	N/A	RIA
Annualized monetized benefits (7%)	$2,072.3	N/A	N/A	RIA
Unquantified benefits	The proposed optional Form I-765 could increase DACA Form I-821D requests by reducing some of the financial barriers for those requestors who do not need employment authorization but who would file for deferred action. Additionally, the proposed rule allows the DACA-approved population to enjoy the advantages of the policy and have the option to request renewal in the future. For DACA recipients and their family members, the proposed rule would contribute to (1) a reduction of fear and anxiety, (2) an increased sense of acceptance and belonging to a community, (3) an increased sense of family security, and (4) an increased sense of hope for the future.			RIA
Costs				
Annualized monetized costs (3%)	$422.5	$378.1	$466.8	RIA
Annualized monetized costs (7%)	$410.4	$367.3	$453.5	RIA
Unquantified Cost Savings	DACA program simplifies many encounters between DHS and certain noncitizens, reducing the burden upon DHS of vetting, tracking, and potentially removing DACA recipients.			
Transfers				
From whom to whom?	Transfer payments in the form of employment taxes from the employed DACA recipients and their employers to the Federal Government dependent on the degree to which DACA recipients are substituted for other workers in the U.S. economy.			RIA

Annualized monetized transfers (3%)	$3,625.5	N/A	N/A	
Annualized monetized transfers (7%)	$3,433.2	N/A	N/A	
From whom to whom?	Part of the DACA requestor population may choose only to request deferred action through Form I-821D. This would result in a transfer payment from USCIS to DACA requestors as requestors filing only the Form I-821D would now pay less in filing fees than the current filing fee cost for both Forms I-821D and I-765.			RIA
Annualized monetized transfers (3%)	$15.2	$0	$30.4	
Annualized monetized transfers (7%)	$14.8	$0	$29.5	
Miscellaneous Categories	**Effects**			
Effects on State, local, and/or Tribal governments	Indirect effects, such as tax revenues and provision of certain government services, depending on (among other factors) policy choices made by the State, local, and/or Tribal governments.			RIA
Effects on small businesses	The proposed rule does not directly regulate small entities and is not expected to have a direct effect on small entities. DHS certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities.			RFA
Effects on wages	None	None	None	RIA
Effects on growth	None	None	None	RIA
Source: USCIS analysis.				

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3. Background and Purpose of the Rule

The INA [329] generally charges the Secretary with the administration and enforcement of the immigration and naturalization laws of the United States.[330] The INA further authorizes the Secretary to ''establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of'' the INA.[331] In the Homeland Security Act of 2002, Congress also provided that the Secretary ''shall be responsible for . . . [e]stablishing national immigration

[329] Public Law 82–414, 66 Stat. 163 (as amended).

[330] INA sec. 103(a)(1), 8 U.S.C. 1103(a)(1). The INA also vests certain authorities in the President, Attorney General, and Secretary of State, among others. *See id.*

[331] INA sec. 103(a)(3), 8 U.S.C. 1103(a)(3).

enforcement policies and priorities.'' [332] The Homeland Security Act also provides that the Secretary, in carrying out their authorities, must ''ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland.'' [333]

The Secretary proposes in this rule to establish specified guidelines for considering requests for deferred action submitted by certain individuals who came to the United States many years ago as children, consistent with the Napolitano Memorandum described above. As with the 2012 DACA policy, this proposed rule would serve the significant humanitarian and economic interests animating and engendered by the DACA policy, with respect to the population covered by that policy. In addition, the proposed rule would preserve not only DACA recipients' substantial reliance interests, but also those of their families, schools, employers, faith groups, and communities.[334] The proposed rule also would help appropriately focus the Department's limited immigration enforcement resources on threats to national security, public safety, and border security where they are most needed.

4. Cost-Benefit Analysis

DHS estimates the potential impacts of this proposed rule relative to two baselines. The first baseline is a No Action Baseline that represents a state of the world in which the DACA program would be expected to continue under the Napolitano Memorandum guidance. For reasons explained in Section V.A.4.a.(1), this baseline does not directly account for the July 16, 2021 district court decision. The second baseline is a Pre-Guidance Baseline, which represents a state of the world before the guidance in the Napolitano Memorandum, where the DACA program does not exist and has never existed. The Pre-Guidance Baseline is included in this analysis in accordance with OMB Circular A–4, which directs agencies to include a pre-statutory baseline in an analysis if substantial portions of a rule may simply restate statutory requirements that would be self-implementing, even in the absence of the regulatory action.[335] In this case, the DACA program was implemented through DHS and USCIS guidance. DHS has not performed a regulatory analysis on the regulatory costs and benefits of that guidance previously and, therefore, includes a Pre-Guidance Baseline in this analysis for purposes of clarity and completeness. In other words, notwithstanding that the program does in fact exist, we present the Pre-Guidance Baseline to provide a more informed picture on the overall impacts of the program since its inception, while at the same time recognizing that many of these impacts have been realized already. DHS notes that the Pre-Guidance Baseline analysis also can be used to better understand the state of the world under the July 16, 2021 district court decision, should the stay of that decision ultimately be lifted.

The rest of this cost-benefit analysis section is organized to present the impacts of this proposed rule relative to the No Action Baseline first and then relative to the Pre-Guidance Baseline second. In each baseline section of the analysis, we begin by laying out the assumptions and estimates used in calculating any costs, benefits, and transfers of this proposed rule.

a. No Action Baseline

(1) Population Estimates and Other Assumptions

The proposed rule would affect certain individuals who came to the United States many years ago as children, who have no current lawful immigration status, and who are generally low enforcement priorities. DHS currently allows eligible individuals to request an exercise of discretion, called ''deferred action,'' on a case-by-case basis according to certain criteria outlined in the Napolitano Memorandum. Individuals may request deferred action under this policy, known as DACA. The proposed rule would affect individuals seeking deferred action under the DACA policy.

DHS recognizes a growing literature on the impacts of DACA that identifies potentially DACA-eligible noncitizens based on age and length of time in the United States. This approach to estimating the population affected by this proposed rule estimates the total number of people who are potentially eligible for DACA and then predicts the proportion of those people who actually will request DACA in the future. Given that no widely available, national microdata survey exists that reports on the immigration status of the foreign-born population, the subpopulation potentially eligible for DACA must be estimated by other means. In general, analysts typically estimate the size of the DACA-eligible population using the so-called residual method, in which the total foreign-born population is estimated based on the U.S. Census Bureau's American Community Survey (ACS), Current Population Survey, American Time Use Survey, Survey of Income and Program Participation, or some other sample, and the lawfully present foreign-born population is estimated based on DHS administrative records or a mix of DHS administrative records and logical rules based on foreign-born demographic characteristics, with the difference between these estimates (*i.e.,* the residual) being the unauthorized population.[336] With this approach, the demographic characteristics of the underlying survey data may further be used to identify the portion of the unauthorized population that would be potentially eligible for DACA, although some factors, such as education, criminal history, and discretionary determinations may not be accounted for in such estimates.

The Migration Policy Institute (MPI) estimates an eligible DACA population of 1.7 million, including the currently active population.[337] Historical DHS administrative data between FY 2012 and FY 2021 show a total of around 1 million initial DACA program requests.[338] Thus, MPI's estimate implies a remaining DACA-eligible population of around 700,000 people.

DHS has two concerns with adopting this approach to estimate the number of future DACA applicants. First, as analysts who use the residual method observe, the approach is complex and highly sensitive to specific modeling assumptions. In a DHS Office of

[332] Public Law 107–296, sec. 402(5), 116 Stat. 2135, 2178 (codified at 6 U.S.C. 202(5)).

[333] 6 U.S.C. 111(b)(1)(F).

[334] *See DHS* v. *Regents of the Univ. of Cal.,* 140 S. Ct. 1891, 1914 (2020) (*Regents*) (''DACA recipients have 'enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance' on the DACA program. The consequences of the rescission, respondents emphasize, would 'radiate outward' to DACA recipients' families, including their 200,000 U.S. citizen children, to the schools where DACA recipients study and teach, and to the employers who have invested time and money in training them. In addition, excluding DACA recipients from the lawful labor force may, they tell us, result in the loss of $215 billion in economic activity and an associated $60 billion in federal tax revenue over the next ten years. Meanwhile, States and local governments could lose $1.25 billion in tax revenue each year.'' (internal citations omitted)).

[335] *See* OMB Circular A–4.

[336] *See, e.g.,* OIS Report (''DHS estimates that 11.4 million unauthorized immigrants were living in the United States on January 1, 2018, roughly unchanged from 11.4 million on January 1, 2015''); Capps (2020) (''As of 2018 . . . there were 11 million unauthorized immigrants in the country, down slightly from 12.3 million in 2007.'').

[337] Migration Policy Institute, *Back on the Table: U.S. Legalization and the Unauthorized Immigrant Groups that Could Factor in the Debate* (Feb. 2021), *https://www.migrationpolicy.org/research/us-legalization-unauthorized-immigrant-groups.*

[338] Source: DHS/USCIS/OPQ July 2021.

Immigration Statistics (OIS) report, ''Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2015–January 2018,'' OIS stated that ''estimates of the unauthorized population are subject to sampling error in the ACS and considerable non-sampling error because of uncertainty in some of the assumptions required for estimation [of the unauthorized population].'' [339] In the chapter on weighting and estimation in the latest ACS design and methodology report,[340] the U.S. Census Bureau details the many complex adjustments applied to produce estimates of the population by sex, age, race, Hispanic origin, and number of household units, clarifying that ''[t]he ACS estimates are based on a probability sample, and will vary from their true population values due to sampling and non-sampling error.'' [341] A rigorous analysis by sociologists and statisticians of the external validity of available methods used to impute unauthorized status in Census survey data concluded that

> it is not possible to spin straw into gold. All approaches that we tested produced biased estimates. Some methods failed in all circumstances, and others failed only when the join observation condition was not met, meaning that the imputation method was not informed by the association of unauthorized status with the dependent variable.[342]

In light of these modeling challenges, it is possible that a new estimate of the DACA-eligible population based on the residual method would systematically under- or overestimate the authorized immigrant population, which would in turn lead to systematic but unknown under- or overestimation of the residual subpopulation.[343]

A second concern about using the residual method to estimate the number of future DACA applicants is that, even if DHS accurately estimates the total DACA-eligible population, the Department does not have a ready methodology to predict how many potentially DACA-eligible individuals will actually request DACA in the future. Given the nature of the DACA program, its population, political factors, the challenging legal history, and characteristics of the active DACA and DACA-eligible populations, including varying personal circumstances and expectations, it is uncertain and would be complex to predict how many potentially eligible noncitizens may request DACA even if a census of the remaining DACA-eligible population existed.

Therefore, in the context of this proposed rule, DHS relies instead on the limited administrative data USCIS collects from individuals who have requested DACA over the past several years, as described later in this analysis. The Department nonetheless acknowledges potential limitations to the population estimate methodologies that USCIS uses in this analysis, and it emphasizes that USCIS remains open to modifying its approach or using alternative approaches at a later stage in the rulemaking. DHS particularly welcomes public comment and data from demographers, statisticians, researchers, and the public on available data sources and the validity, risks, and advantages to incorporating these methods in a final rule.

To provide a framework for our baseline population estimates, we start by first presenting historical USCIS data on the active DACA population and then presenting historical data on DACA program request receipts. These data provide a sense of historical participation in the program and insights into any trends. They also allow us to make certain assumptions in estimating a potential future active DACA population who would enjoy the benefits of this policy and contribute potential transfers to other populations as well as in estimating potential future DACA program request receipts (*i.e.,* the population who would incur the costs associated with applying to the program). We therefore proceed by presenting first the historical active DACA population and our estimates of a potential future active DACA population, and then the historical volume of DACA program request receipts and our estimates of this potential future population.

Before presenting the historical and projected populations associated with this proposed rule, we first identify certain historical time periods of interest to this analysis. Historically, the 2012 and then 2017 DACA-related memoranda have shaped the level of participation in the DACA program. The 2012 Napolitano Memorandum initiated the program, and the 2017 Duke Memorandum halted new requests.[344] As such, DHS identifies three periods of interest: A surge period, FY 2012–FY 2014, where initial requests were high compared to later years; a stable period, FY 2015–FY 2017, where initial requests were slowing, renewal requests were leveling off, and the overall active DACA-approved population was stabilizing; and a cool-off period, FY 2018–FY 2020, where initial requests dramatically decreased, the active DACA-approved population started to decline, and most requests were for renewals.[345]

Table 7 presents historical data on the volume of DACA recipients who were active as of September 30th of each year. For clarity, ''active'' is defined as those requestors who have an approved Form

[339] *See* OIS Report at 10.

[340] *See* U.S. Census Bureau, *American Community Survey Design and Methodology (January 2014), Chapter 11: Weighting and Estimation, https://www2.census.gov/programs-surveys/acs/methodology/design_and_methodology/acs_design_methodology_ch11_2014.pdf.*

[341] *Id.* at 16.

[342] *See* Jennifer Van Hook, et al., *Can We Spin Straw into Gold? An Evaluation of Immigrant Legal Status Imputation Approaches,* Demography 52(1): 329–54, at 330.

[343] In Pope (2016), *see* section 5, ''Empirical method.'' *See also* George J. Borjas and Hugh Cassidy, *The wage penalty to undocumented immigration,* Lab. Econ. 61, art. 101757 (2019), *https://scholar.harvard.edu/files/gborjas/files/labourecon2020.pdf* (hereinafter Borjas and Cassidy (2019)). In section 2, ''Imputing undocumented status in microdata files,'' the authors state that, ''[i]n the absence of administrative data on the characteristics of the undocumented population, it is not possible to quantify the direction and magnitude of any potential bias,'' and in footnote 2 they describe DHS's assumed correction for sample bias. *See also* Catalina Amuedo-Dorantes and Francisca Antman, *Schooling and Labor Market Effects of Temporary Authorization: Evidence from DACA,* J. of Population Econ. 30(1): 339–73, *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5497855/pdf/nihms866067.pdf.* In section III.B, ''Capturing Undocumented Immigrants and DACA Applicants,'' the authors describe a potential effect of a limitation in the data relied upon as follows: ''As such, some may be concerned that the control group may be made up of individuals who immigrated with the purpose of getting an educational degree in the United States, as is the case with F1 and J1 visa holders.''

[344] As discussed above, the Duke Memorandum rescinded the DACA policy, allowing for a brief wind-down period in which a limited number of renewal requests would be adjudicated, but all initial requests would be rejected. Duke Memorandum at 4–5. In the litigation that followed, the Duke Memorandum was enjoined in part, such that DHS was required to adjudicate renewal requests as well as ''initial'' requests from individuals who had been granted DACA previously but did not qualify for the renewal process. *See Regents* v. *DHS; Batalla Vidal* v. *Nielsen,* 279 F. Supp. 3d 401 (E.D.N.Y. 2018). The effect of the Duke Memorandum, along with these court orders and the Wolf Memorandum also discussed above, was that individuals who were granted DACA at some point before September 5, 2017, remained able to request DACA, while those who had never before received DACA were not able to do so until the Wolf Memorandum was vacated in December 2020. *See Batalla Vidal* v. *Wolf,* No. 16–cv–4756, 2020 WL 7121849 (E.D.N.Y. Dec. 4, 2020).

[345] DHS believes it is likely that the initial surge in DACA requests reflects a rush of interest in the new program, and that the slowdown in 2014–2017 simply reflects the fact that many of the eligible and interested noncitizens requested DACA shortly after it became available. It is also possible that there was a decline in interest due to the uncertainty caused by the *Texas I* litigation described above, which began in 2014. The limits on requests described above, *supra* note 344, along with changes in the national environment, likely account for much of the ''cooling off'' after 2017.

I–821D and I–765 in the relevant USCIS database. The approval can be either an initial or a renewed approval. Additionally, we do not need specificity or further breakdown of these data into initials and renewals to project this active DACA population and calculate associated monetized benefits and transfers based on the methodology employed in this RIA. Whether initial participants in the program or renewal participants, both categories of participants will have been issued an EAD that could be used to participate in the labor market.[346] Therefore, the annual cumulative totals of the active DACA population will suffice for estimating the quantified and monetized benefits and transfers of this proposed rule that stem from the potential labor market earnings of the DACA population with an EAD.

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Table 7. Historical Active DACA Program Population, FY 2012–FY 2020 (as of September 30th of each fiscal year)

FY	Total Active DACA Recipients
2012	2,019
2013	472,880
2014	608,037
2015	652,530
2016	679,830
2017	700,572
2018	704,095
2019	660,552
2020	647,278
Annual Growth Rate	
FY 2015–FY 2016	4.1837%
FY 2016–FY 2017	3.0511%
Average	**3.6174%**

Source: DHS/USCIS/OPQ ELIS, CLAIMS 3, and CIS2 (queried June 2021).

Notes: DHS considers FY 2015–FY 2017 to be a stable period in the DACA program history—after the surge in DACA initial requests prompted by the Napolitano Memorandum, FY 2012–FY 2014, and before the cool-off prompted by the Duke Memorandum, FY 2018–FY 2020. As noted below, the average annual growth rate of FY 2015–FY 2017 will be used to project the potential future active DACA population for FY 2021–FY 2031.

On July 16, 2021, the U.S. District Court for the Southern District of Texas issued a decision enjoining USCIS from approving new DACA requests.[347] At this time, it remains uncertain what impact this injunction will have on total projected initial requests for FY 2021. Projecting if and when USCIS might begin to approve initial requests again absent this rulemaking presents added difficulty. Consequently, the No Action baseline used for this RIA employs the assumption that the historical trends in the active DACA population outlined remain a reasonable and useful indication of the trend in the future over the period of analysis. Table 8 presents DHS's estimates for the active DACA population for FY 2021–FY 2031. Given the motivation and scope of this proposed rule, DHS assumes that upon the implementation of a final rule the DACA program will be characterized by relatively more stability, meaning the yearly active DACA population will not continue to decrease as it did in FY 2018–FY 2020. Therefore, in our projections of the active DACA population, DHS used the average annual growth rate of the stable period, FY 2015–FY 2017, which was 3.6174%, and multiplied it by the current year cumulative totals to obtain the next year's estimated active DACA population. In other words, the values in Table 8 grow at an annual rate of

[346] Please see the *Labor Market Impacts* section of this RIA for discussion and analysis of labor force participation as well as discussion of the possibility that some DACA recipients might choose not to work despite having employment authorization, or that some DACA recipients might opt out of requesting an EAD given the choice as this rulemaking is proposing.

[347] As of July 20, 2021, USCIS ELIS and CLAIMS 3 data show 89,605 initial requests have been accepted at a lockbox in FY 2021.

3.6174%. These estimates will be used later when calculating the monetized benefits and transfers of this proposed rule.

DHS notes that although this methodology for projecting a future active DACA population has important advantages (including transparency, reproducibility, and a clear nexus to historical program data), it also has some potential limitations. For instance, the methodology assumes that the active DACA population again will grow at the same rate that it did in FY 2015–FY 2017, just a few years after the Napolitano Memorandum was first issued. The methodology does not account, for instance, for the fact that when the Duke Memorandum was issued, the growth rate had been declining, or for the fact that potential DACA requestors will stop ''aging in'' to the policy in June 2022, when the youngest possible requestor reaches 15 years of age. DHS does not believe there necessarily will be a precipitous decline in the growth rate of DACA requestors after new requestors stop ''aging in'' in 2022. A substantial portion of initial DACA requests have come from individuals who applied long after they were eligible. And some individuals may become newly eligible after June 2022, upon satisfying the educational or military service requirement for the first time. DHS has included data in the rulemaking docket regarding DACA requestors' age at time of filing. DHS welcomes comments regarding whether and how DHS might incorporate these data into the population estimate methodology for the final rule.

Similarly, the active DACA population projections do not directly capture the possibility that there will be a surge of request receipts following publication of a final rule (or in the wake of the vacatur of the Wolf Memorandum, which already has occurred), followed by a slower growth rate in later years. However, USCIS notes that projecting a surge in application receipts does not necessarily imply a surge in the active DACA population. The levels of approvals, renewals, and noncitizens remaining in or exiting the program can vary. For example, there could be delays in processing requests caused by the surge of new applications (assuming that USCIS maintains current staff levels) or by other events, noncitizens could exit the program at higher rates than before, and approval rates could change relative to historical trends. As mentioned previously, a continuation of the injunction of approvals of new DACA requests would curtail initial requests. As noted above, DHS welcomes comments on its methodology for projecting the active DACA population, as well as all other aspects of this RIA.

Table 8. Projected Active DACA Program Population (FY 2021–FY 2031)

FY	Active DACA Recipients
2020	647,278
2021	670,693
2022	694,954
2023	720,093
2024	746,142
2025	773,133
2026	801,100
2027	830,079
2028	860,106
2029	891,219
2030	923,458
2031	956,863

Source: USCIS analysis.

Notes: FY 2020 is included as a reference. Active DACA recipients equals previous year total plus the average annual growth rate (3.6174%) of the stable historical period FY 2015–FY 2017. The active DACA population is used to calculate the monetized benefits and transfers of this proposed rule.

Next, we present the population that will be used when calculating the monetized costs of this proposed rule. Table 9 presents historical data on the numbers of DACA program receipts. This population incurred the cost of requesting DACA. The population is made up of initial and renewal requestors, both of whom face similar costs, such as application fees,[348] time burdens, and opportunity costs. For clarity, this table represents intake and processing data and does not say anything about how many requests were approved. DHS does not need that level

[348] The proposed fee does not differentiate between initial and renewal receipt costs. The estimated full cost reflects a weighted average of April 2020 to March 2021 initial and renewal workload receipt data.

of detail to estimate the monetized costs of this proposed rule. We only need total receipts to estimate the monetized costs of this proposed rule.

Table 9. Historical DACA Program Receipts

FY	Initials	Renewals	Total
2012	157,826		157,826
2013	443,967		443,967
2014	141,538	122,249	263,787
2015	92,470	391,878	484,348
2016	74,498	198,520	273,018
2017	45,637	470,668	516,305
2018	2,062	287,709	289,771
2019	1,574	406,588	408,162
2020	4,301	339,632	343,933

Source: DHS/USCIS/OPQ ELIS and CLAIMS 3 Consolidated (queried Dec. 2020).

Note: The paragraphs surrounding this table explain how this historical information is used to project the future population over FY 2021–FY 2031.

To project total DACA program receipts, DHS makes use of the historical information from Table 9 as follows. In doing so, the intention is to capture a possible surge effect in initial requests, a stabilization effect through the renewals, and then a steady decline in initial requests as the newly DACA-eligible population might dwindle over time because individuals stop ''aging in'' after June 2022. We first calculate the percentage of initials in the previously defined surge years FY 2012–FY 2014 out of the total over period FY 2012–FY 2017, to account for a similar possibility in our projections, which we call a surge rate.[349] This rate is 77.76%. Second, DHS calculates the average initial requests over the stable period of FY 2015–FY 2017, which is 70,868. Third, we calculate the average annual rate of growth in initial requests over FY 2015–FY 2017, which is −29.08%. Fourth, DHS calculates the average number of renewal requests over FY 2015–FY 2020, which is 349,166. We chose FY 2015–FY 2020 for this calculation due to the relatively stable nature of historical renewal requests. The intention is to capture a possible surge effect in initial requests, a stabilization effect through the renewals, and then a steady decline in initial requests as the DACA-eligible population might dwindle over time.

Table 10 presents the projected volume of DACA program request receipts. DHS estimates a surge component in initials over FY 2021–FY 2022. As stated, these projections make no adjustment for the uncertain impacts of the July 16, 2021 injunction on initial requests. To do so, we first calculate the total number of historic initials over the stable period FY 2015–FY 2017, which is 212,605. We then multiply this number by the surge rate of 77.76% to estimate a potential surge in our projections of 165,321 initial requests in the first two projected years, FY 2021–FY 2022. DHS then divides this number in two to estimate a surge in initial requests for FY 2021 and FY 2022, which is 82,660. Adding to this number the average number of historic initial requests of 70,868 yields a total (surge) number of 153,529 initial requests for FY 2021 and FY 2022. Starting with FY 2024, DHS applies the historic FY 2015–FY 2017 growth rate of −29.08% to initial requests for the rest of the projected years.[350]

The renewals in FY 2023–FY 2024 capture this surge as the historical average number of renewals of 349,166 plus 153,529. Recall, DACA approved participants can renew their deferred action every 2 years. Adding total initials and renewals for every fiscal year then yields a total number of requests that will be used in estimating the monetized costs of this proposed rule.

As with DHS's projection methodology for the active DACA population, DHS acknowledges potential limitations associated with the methodology used to project requests. For instance, although the methodology is transparent, reproducible, and has a clear nexus to historical program data, the methodology assumes that the ''surge rate'' for DACA requests following publication of this proposed rule would mirror the surge rate that followed issuance of the Napolitano Memorandum. There are reasons to support such an assumption, including a potential backlog of demand following the Duke Memorandum and subsequent guidance and ongoing litigation. But there are also reasons to question it, such as the potential that demand was exhausted in the years prior to the Duke Memorandum's issuance such that any ''surge'' in applications would consist primarily of applications from individuals who turned 15 after the issuance of the Duke Memorandum.

[349] Calculation: FY 2012–FY 2014 initials total = 743,331; FY 2012–FY 2017 initials total = 955,936; initials surge rate = (743,331/955,936) * 100 = 77.76%.

[350] For example: FY 2024 = FY 2023 * (1 − 29.08%), which yields 70,868 * (1 − 0.2908) = 50,254.

Table 10. Projected DACA Program Receipts (FY 2021–FY 2031)

FY	Initials	Renewals	Total
2021	153,529	349,166	**502,694**
2022	153,529	349,166	**502,694**
2023	70,868	502,695	**573,563**
2024	50,254	502,695	**552,949**
2025	35,636	420,034	**455,670**
2026	25,270	420,034	**445,304**
2027	17,920	420,034	**437,954**
2028	12,707	420,034	**432,741**
2029	9,011	420,034	**429,045**
2030	6,390	420,034	**426,424**
2031	4,531	420,034	**424,565**

Source: USCIS analysis.

Notes: For FY 2023, 70,868 represents initials averaged over FY 2015–FY 2017. For the rest of the projection period this population declines at the average annual rate of 29.08%. For FY 2021–FY 2022, 349,166 represents renewals averaged over FY 2015–FY 2020. For FY 2025–FY 2031, 420,034 represents historical average initials (349,166) plus historical average renewals (70,868). The surges in initials in FY 2021–FY 2022 and renewals in FY 2023–FY 2024 are explained in the surrounding text. Total receipts are used in calculating the monetized cost (to the requestors) of this proposed rule.

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As of July 2021, DHS administrative data for quarters 2 and 3 of FY 2021 show that there were 89,701 initial DACA requests and 302,985 renewal DACA requests pending.[351] These data include requests filed during periods in which DHS did not accept most initial DACA requests due to ongoing litigation and subsequent policy changes.[352] In this RIA's projections, it is assumed that initial DACA requests would be accepted without interruptions from any legal rulings on the program in FY 2021 and all other subsequent projected fiscal years. In the absence of these restrictions on initial requests, DHS's projection for FY 2021 tracks with the observed trend in the most recent FY 2021 administrative data.

In sum, while population estimates in this NPRM are consistent with the overall MPI population estimate, this RIA relies on historical application data to estimate future DACA applications rather than estimating the overall DACA-eligible population and then further estimating the share of the population likely to apply for DACA in the future. While both approaches face methodological challenges, the Department has no reason to believe the residual-based methodology would yield a more accurate estimate. At the same time, the current approach based on historical application data offers an especially transparent and easily reproducible estimation methodology. The Department invites public comment on the ability to improve accuracy and validity of unbiased estimates of the active population projections using other methodologies in the final rule.

(2) Forms and Fees

Individuals seeking deferred action under the DACA program must file Form I–821D in order to be considered for approval. Currently, all individuals filing Form I–821D to request deferred action under DACA, whether for the initial consideration for or a renewal of DACA, also must file Form I–765 and Form I–765WS (Form I–765 Worksheet) and submit biometrics. Submission of Forms I–821D, I–765, and I–765WS and biometrics together is considered to comprise a complete DACA request. Additionally, certain DACA requestors choose to have a representative, such as a lawyer, prepare and file their DACA request.[353] If that is the case, a Form G–28 must accompany a complete DACA request.[354]

Currently, the fees associated with a DACA request are as follows: For Form I–821D, $0; for Form I–765, $410; for Form I–765WS, $0; for Form G–28, $0; and for biometrics collection, $85. This yields a total current fee of $495, with or without the submission of a Form G–28. DHS believes this is a reasonable proxy for the Government's costs of processing and vetting these forms

[351] Source: DHS/USCIS/OPQ July 2021.

[352] *See* Section III.B above for litigation history, including *Regents,* 140 S. Ct. 1891 (2020), and *Texas II,* No. 1:18–cv–00068, 2021 WL 3025857 (S.D. Tex. July 16, 2021).

[353] An internal OPQ data request reveals that 44 percent of requestors chose to have a preparer. We use this percentage breakdown in subsequent cost calculations.

[354] Individuals retained to help a requestor prepare and file their DACA request must submit a Form G–28, Notice of Entry of Appearance as Attorney or Accredited Representative, to provide information about their eligibility to act on behalf of the requestor (*see* 8 CFR 292.4(a)).

when filed together.[355] However, DHS expects there would be little savings in the Government's costs of processing and vetting for applicants who choose not to apply for an EAD. Therefore, fees for these applicants are not anticipated to cover the Government's costs for these applicants since they would be paying only $85.

(3) Wage Assumptions

The estimated wage rate of DACA requestors and the total compensation rate of those hired to prepare and file DACA requests are used as proxies for the opportunity cost of time in the calculation of costs. The estimated wage rate of the requestors also is used to estimate the benefits of income that accrue to those requestors who participate in the labor market through the grant of employment authorization. In the following paragraphs, DHS explains how it estimates the preparers' and requestors' compensation rates. All compensation estimates are in 2020 dollars.

A DACA request can be prepared on behalf of the applicant. In this proposed rule, we assume that a preparer has similar knowledge and skills necessary for filing a DACA request as an average lawyer would for the same task. Based on Bureau of Labor Statistics (BLS) data, DHS estimates an average loaded wage, or compensation, for a preparer of $103.81.[356]

To estimate the DACA requestor population's hourly opportunity cost of time, DHS uses data from the U.S. Census Bureau and USCIS. We assume, for the purposes of this analysis, that the profile of the DACA-approved requestors matches that of the population at large; that is, the average DACA-approved requestor values education and employment in a similar way as the average person in the population at large and in that age group. This allows DHS to use other government agencies' official data, such as the Census Bureau's, to estimate DACA-approved requestor compensation rates and other economic characteristics given the absence of DHS-specific DACA-approved population economic data, but DHS welcomes comments about other methods for estimating compensation rates and economic characteristics.

USCIS data on the active DACA population[357] lend themselves to delineation by age group: 15 to 25, 26 to 35, and 36 to 39.[358] In an effort to provide a more focused estimate of wages, DHS takes this information into account. We estimate these age groups to represent 43 percent, 51 percent, and 6 percent, respectively, out of this total population. Next, DHS seeks to estimate an average compensation rate that accounts for income variations across these age groups. We first obtain annual average Consumer Price Index information for years 2012 through 2020.[359] We set 2020 as the base year and then calculate historical average annual incomes (in 2020 dollars) based on U.S. Census Bureau historical income data.[360] To do this, DHS converts the annual mean incomes in the Census data (2019 dollars) into 2020 dollars and then averages the period 2012–2019 to obtain average full-time salary information for the population at large for these age groups as $18,389, $45,529, and $60,767, respectively.[361] DHS recognizes that not all DACA recipients work full time or have jobs that offer additional benefits beyond the offered wage. The employment and school attendance status of DACA recipients is varied and includes being in school only, working full or part time, or being unemployed. Moreover, some DACA recipients have additional compensation benefits such as health insurance whereas others do not. Additionally, DACA recipients could hold entry-level jobs as well as more senior positions in companies. Some are employed in industries that generally pay higher wages and some are employed in industries where wages are relatively lower. To account for this wide range of possibilities, DHS takes a weighted average of the salaries presented above using the distribution of the age groups as weights, divided by 26 pay periods and 80 hours per pay period (the typical biweekly pay schedule), loading the wage to account for benefits, to arrive at an average hourly DACA requestor compensation of $24.20.[362]

(4) Time Burdens

Calculating any potential costs associated with this proposed rule involves accounting for the time that it takes to fill out the required forms, submit biometrics collection, and travel to and from the biometrics collection site. The Paperwork Reduction Act (PRA) section of the instructions for Form I–821D estimates a response time of 3 hours for reviewing instructions and completing and submitting the form: For Form I–765, 4.75 hours; for Form I–765WS, 0.5 hours; and for Form G–28, 0.83 hours.

In addition to the biometrics services fee, the requestor will incur the costs to comply with the biometrics submission requirement as well as the opportunity cost of time for traveling to an USCIS Application Support Center (ASC), the mileage cost of traveling to an ASC, and the opportunity cost of time for submitting his or her biometrics. While travel times and distances vary, DHS estimates that a requestor's average roundtrip distance to an ASC is 50 miles and takes 2.5 hours on average to complete the trip.[363] Furthermore, DHS estimates that a requestor waits an average of 70 minutes or 1.17 (rounded, 70 divide by 60 minutes) hours for service and to have his or her biometrics collected at an ASC according to the PRA section of the instructions for Form I–765, adding up to a total biometrics-related time burden of 3.67 hours. In addition to the opportunity cost of time for providing biometrics and traveling to an ASC, requestors will incur travel costs related to biometrics collection. The per-requestor cost of travel related to biometrics collection is about $28.00

[355] USCIS Office of the Chief Financial Officer (OCFO) analysis.

[356] DHS assumes the preparers with similar knowledge and skills necessary for filing DACA requests have average wage rates equal to the average lawyer wage of $71.59 per hour. Source: BLS, Occupational Employment and Wage Statistics, Occupational Employment and Wages, May 2020, 23–1011 Lawyers, *https://www.bls.gov/oes/2020/may/oes231011.htm#nat.*

The benefits-to-wage multiplier is calculated as follows: (total employee compensation per hour)/(wages and salaries per hour) = $38.60/$26.53 = 1.4549 = 1.45 (rounded). *See* BLS, Economic News Release (Mar. 2021), *Employer Cost for Employee Compensation—December 2020,* Table 1. Employer Costs for Employee Compensation by ownership, *https://www.bls.gov/news.release/archives/ecec_03182021.htm.* Total compensation rate calculation: (wage rate) * (benefits multiplier) = $71.59 * 1.45 = $103.81.

[357] Source: Count of Active DACA Recipients by Month of Current DACA Expiration as of Dec. 31, 2020. DHS/USCIS/OPQ ELIS and CLAIMS 3 Consolidated (queried Jan. 2021).

[358] We assume this distribution remains constant throughout the periods of analysis for both baselines as new DACA recipients enter and previous DACA recipients exit the program. The current (age) requirements of the DACA program does not prohibit us from making this assumption.

[359] Source: BLS, *Historical Consumer Price Index for All Urban Consumers (CPI–U): U.S. city average, all items, index averages, https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202103.pdf.*

[360] Source: U.S. Census Bureau, *Historical Income Tables: People,* Table P–10. Age—People (Both Sexes Combined) by Median and Mean, *https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-people.html.*

[361] The Census data delineate age groups as 15 to 24, 25 to 34, and 35 to 44. DHS assumes the age groups identified in the USCIS data follow the same pattern on average as the age groups in the Census data (*e.g.,* the Census income information by age group also represents the income information in the age groups identified in the USCIS data).

[362] Calculation: $24.20 = (($18,389 * 43%) + ($45,529 * 51%) + ($60,767 * 6%))/26)/80 * 1.45.

[363] *See* Final Rule, *Employment Authorization for Certain H–4 Dependent Spouses,* 80 FR 10284 (Feb. 25, 2015), and Final Rule, *Provisional and Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives,* 78 FR 536, 572 (Jan. 3, 2013).

per trip, based on the 50-mile roundtrip distance to an ASC and the General Services Administration's (GSA) travel rate of $0.56 per mile.[364] DHS assumes that each requestor travels independently to an ASC to submit his or her biometrics.

(5) Costs of the Proposed Regulatory Action

The provisions of this proposed rule would not impose any new costs on the potential DACA requestor population if requesting both deferred action through Form I–821D and applying for an EAD using Form I–765 and Form I–765WS (though this rule would change the composition of these fees). The proposed rule would not implement any new forms to file, nor would it change the estimated time burden for completing and filing any of the required forms to request deferred action, and thus the total DACA request cost would not change from the current amount if requestors continued to file all Forms I–821D, I–765, and I–765WS. With this proposed rule, DHS seeks to (1) make it optional to file Form I–765 to apply for employment authorization; (2) eliminate the $85 biometrics fee when filing Form I–765; and (3) implement a new $85 fee to file Form I–821D. Requestors still would be required to submit biometrics information, but that process would be included as part of the requirements for filing Form I–821D. Requestors who both request DACA and apply for employment authorization would incur the same total costs as they currently incur.

Nevertheless, the provisions of the proposed rule would make requesting an EAD optional when filing for DACA. DHS recognizes the possibility that some requestors might forgo applying for employment authorization using Form I–765 and opt only to request deferred action by filing Form I–821D. For example, this category could include DACA requestors who are currently enrolled in school, who perhaps have scholarships or other types of aid, and who may not need additional financial support (*e.g.,* young DACA requestors, including high school students, who are supported by their parents or guardians). Therefore, such individuals may choose not to participate in the labor market. DHS acknowledges that such requestors might choose to save the $410 fee to file Form I–765. As a result, requestors who forgo seeking employment authorization would incur fewer costs when requesting DACA. These requestors would be required to submit Form I–821D and pay the proposed $85 form fee only. Therefore, DHS conducts a sensitivity analysis to account for the possibility that some DACA requestors likely would not seek employment authorization.

In order to identify the proportion of the DACA requestor population who might forgo applying for employment authorization, DHS uses data from BLS on labor force participation rates.[365] BLS data show historical and projected labor force participation rates (as a percent of total working-age population) by age group. Assuming the DACA requestors' population profiles (such as education and employment status) match those of the U.S. population at large, DHS combines the BLS data on labor force participation by age group with previously presented USCIS data on the distribution of ages for the approved DACA requestor population (*see Wage Assumptions* section) to calculate an age-group-adjusted weighted average. Based on this methodology, DHS estimates that the rate of the potential DACA requestor population who may opt in and apply for employment authorization is 70 percent and the rate of those who may opt out and not apply for employment authorization is 30 percent.[366] Under this sensitivity analysis using a 70/30 percent population split, the entire population would file Form I–821D to request deferred action and would pay an $85 fee, while only 70 percent of the population of those who file Form I–821D to request deferred action would file Form I–765 and Form I–765WS to request an EAD. DHS recognizes that the 70-percent estimate does not directly account for the potential additional benefits of an EAD, which may result in a greater percentage of DACA requestors also requesting an EAD. DHS describes these potential additional benefits in the analysis below, at Section V.A.4.b.(6), regarding the benefits of the proposed rule relative to the Pre-Guidance Baseline.

If 100 percent of the estimated population applies for an EAD, the costs of the proposed rule relative to the No Action Baseline are zero since currently all DACA requestors filing Form I–821D must file Forms I–765 and I–765WS and request employment authorization. Using the estimated requestors' wage rate ($24.20 per hour), the preparers' total compensation rate ($103.81 per hour), and the percentage of requestors who use a preparer (44%), we find that applicants would face the same total numbers of fees, the same forms time burdens, and the same biometric travel costs. The quantified and monetized costs of the proposed rule relative to the No Action Baseline would be zero.

By contrast, if 70 percent of DACA requestors apply for an EAD based on the provision of this proposed rule that makes such application optional, there would be cost savings. In particular, there would be cost savings to DACA requestors in terms of opportunity costs of time in no longer having to fill out forms to apply for an EAD. For example, some requestors, including renewal requestors, do not need an EAD. Such requestors would have the option to save the costs associated with submitting Form I–765 and Form I–765WS to apply for employment authorization relative to the No Action Baseline where they are required to submit these forms as part of the application. They now have the option not to do so.

The potential cost savings are calculated as the difference between the total costs associated with 100 percent of the population applying for an EAD and the total costs associated with 70 percent of the population applying for an EAD, less the $410 fee for Form I–765 multiplied by 30% of the DACA requestor population estimates. In Table 11, DHS then subtracts the $410 fee from the cost savings estimate, because in this analysis we account for the distributional effect of a lower fee as a transfer rather than a cost saving. (We acknowledge that in this scenario the requestor and USCIS avoid the costs of filing and processing the Form I–765, respectively. For this proposed rule, this fee will not be considered a cost saving as there are no estimated government resources saved. The time it takes to

[364] See the U.S. General Services Administration website for privately owned vehicle mileage reimbursement rates, *https://www.gsa.gov/travel/plan-book/transportation-airfare-rates-pov-rates/privately-owned-vehicle-povmileage-reimbursement-rates.*

[365] Source: BLS, Employment Projections (Sept. 2020), *Civilian labor force participation rate by age, sex, race, and ethnicity,* Table 3.3. Civilian labor force participation rates by age, sex, race, and ethnicity, 1999, 2009, 2019, and projected 2029, *https://www.bls.gov/emp/tables/civilian-labor-force-participation-rate.htm.*

[366] BLS labor force calculated averages by age group, United States: 16-to-24-year-old average is 53.6 percent (average of FY 2019 [55.9%] and FY 2029 [51.3%]); 25-to-34-year-old average is 82.4 percent (average of FY 2019 [82.9%] and FY 2029 [81.9%]); and 34-to-44-year-old average is 82.15 percent (average of FY 2019 [82.1%] and FY 2029 [82.2%]). USCIS age group distribution of the active DACA-approved population: 16 to 24 years old is 43 percent; 25 to 34 years old is 51 percent; and 35 to 44 years old is 6 percent. Calculations: Age group adjusted weighted average is (53.6% * 43%) + (82.4% * 51%) + (82.15% * 6%) = 70.001% = 70% (rounded) of the DACA applicant population who potentially will opt in to apply for employment authorization. Thus, it follows, (1–70.001%) = 29.999% = 30% (rounded) of the DACA requesting population who potentially will opt out of applying for employment authorization.

adjudicate Form I–765 with Form I–821D is negligible compared to adjudicating only Form I–821D.[367])

Table 11 presents the estimates used in calculating any potential cost savings.

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Table 11. Total Cost Savings, FY 2021–FY 2031, Relative to the No Action Baseline (2020 dollars) (if 100% EAD requests, cost savings = 0)

	Costs			
FY	**If 100% Apply for an EAD (A)**	**If 70% Apply for an EAD (B)**	**Less $410 I-765 Fee (C)**	**Cost Savings D = A - B - C**
2021	$572,247,113	$463,521,979	$61,831,418	$46,893,716
2022	$572,247,113	$463,521,979	$61,831,418	$46,893,716
2023	$652,920,958	$528,868,050	$70,548,243	$53,504,665
2024	$629,454,553	$509,860,187	$68,012,693	$51,581,673
2025	$518,716,551	$420,162,054	$56,047,430	$42,507,068
2026	$506,916,464	$410,603,945	$54,772,428	$41,540,090
2027	$498,548,793	$403,826,106	$53,868,299	$40,854,388
2028	$492,615,116	$399,019,808	$53,227,164	$40,368,143
2029	$488,407,430	$395,611,570	$52,772,523	$40,023,338
2030	$485,423,679	$393,194,722	$52,450,128	$39,778,829
2031	$483,307,844	$391,480,888	$52,221,511	$39,605,444
Undiscounted Total	$5,900,805,614	$4,779,671,287	$637,583,255	**$483,551,071**

Source: USCIS analysis.

Note: Assuming 30% of the I-821D population estimates in Table 10, FY 2021: 502,694 * 0.30 = 150,808.336 * $410 I-765 fee = $61,831,418 (rounded).

(6) Benefits of the Proposed Regulatory Action

There are quantified and monetized benefits as well as unquantified and qualitative benefits associated with the DACA program under the Napolitano Memorandum and this proposed rule. The quantified and monetized benefits stem from the income earned by DACA recipients who have been granted an EAD and participate in the labor market. DHS calculates the quantified and monetized benefits associated with this proposed rule by taking the sum of the approved initial and renewal populations (*i.e.,* those who have been granted an EAD) and multiplying it by an estimated yearly compensation total of $50,341, which is the previously estimated compensation rate of $24.20, multiplied by 80 hours in a pay period, times 26 pay periods per year. As previously discussed, DHS assumes only 70 percent of DACA recipients will choose to work, so the total population projections presented previously will be adjusted to reflect this (population * 70 percent). Given the previously delineated provisions of this proposed rule and the stated assumptions, there are no new quantified and monetized benefits relative to the No Action Baseline. In the No Action Baseline, 70 percent of DACA recipients will work, which is the same percentage of people who would work under this proposed rule.

The unquantified and qualitative benefits stem from the forbearance component of an approved DACA request, and they are discussed in significantly greater detail in the analysis below, at Section V.A.4.b.(6), regarding the benefits of the proposed rule relative to the Pre-Guidance Baseline. These benefits are generally the same under this proposed rule and under the No Action Baseline.

(7) Transfers of the Proposed Regulatory Changes

The provisions of this proposed rule could produce transfers relative to the No Action Baseline. The proposed rule would change the fee for Form I–821D from $0 to $85 and the fee for biometrics from $85 to $0. These changes move in opposite directions, cancelling each other out. However, the full cost of adjudication to USCIS for Form I–821D, including biometrics adjudication costs, is estimated at $332.[368] Table 12 presents the pre- and post-rulemaking fees to applicants with and without filing Form I–765, along with the estimated pre- and post-rulemaking costs to the Government for processing and vetting each application.

[367] USCIS OCFO analysis.

[368] USCIS OCFO analysis.

Table 12. Pre- and Post-Rulemaking Per-Applicant Fees to Applicants and Processing Costs to DHS				
Pre-Rulemaking				
	Form I-821D	Form I-765	Biometrics	**Total**
Fees to Applicants	$0	$410	$85	$495
Processing and Vetting Costs to DHS	$280	$0	$52	$332
Post-Rulemaking with EAD				
	Form I-821D	Form I-765	Biometrics	**Total**
Fees to Applicants	$85	$410	$0	$495
Processing and Vetting Costs to DHS	$280	$0	$52	$332
Post-Rulemaking without EAD				
	Form I-821D	Form I-765	Biometrics	**Total**
Fees to Applicants	$85	N/A	$0	$85
Processing and Vetting Costs to DHS	$280	N/A	$52	$332
Source: USCIS OCFO analysis.				
Note: Form I-765 incurs negligible processing and vetting costs because Form I-821D already captures the information requested on Form I-765.				

For the 30% of the projected population who are assumed to file Form I–821D without filing and paying the fee for Form I–765, DHS subtracts the new fee of $85 from the full cost of $332 for an estimated $247 transfer payment from USCIS to each DACA requestor who chooses to request only deferred action by filing Form I–821D without Form I–765. This would result in a transfer payment from USCIS to DACA requestors as requestors filing only the Form I–821D would now pay less in filing fees than the current filing fee cost for both Forms I–821D and I–765. Table 13 presents the estimates of these potential transfers.

Table 13. Total Transfers, FY 2021–FY 2031, If 30% of DACA Requestors Forgo EAD Applications (from USCIS to certain DACA requestors) (2020 dollars)

FY	Transfers
2021	$37,249,659
2022	$37,249,659
2023	$42,501,015
2024	$40,973,501
2025	$33,765,159
2026	$32,997,048
2027	$32,452,366
2028	$32,066,121
2029	$31,792,227
2030	$31,598,004
2031	$31,460,276
Undiscounted Total	**$384,105,034**

Source: USCIS analysis.

b. Pre-Guidance Baseline

As noted above, the period of analysis for this baseline also includes the time period FY 2012–FY 2020, which includes the time period during which DHS has operated under the Napolitano Memorandum, to provide a more informed picture of the total impact of the DACA program. We proceed by taking into account the DACA population from this time period (given by the historical data of Table 7 and Table 9), but applying all the assumptions (for example, on wages and age distributions) as presented before. In essence, in this baseline, we assume the DACA program never existed but instead of starting the analysis in FY 2021 we start the analysis from FY 2012 spanning to FY 2031, analyzing the potential effects of the proposed rule's provisions starting in FY 2012. As a result, the Pre-Guidance baseline condition is similar to the state of the world under the July 16, 2021 district court decision, should the stay of that decision ultimately be lifted.

(1) Population Estimates and Other Assumptions

For the Pre-Guidance Baseline, the total population estimates include all the projected populations described earlier in this analysis for FY 2021–FY 2031, in Table 8 and Table 10, while also adding the historical population numbers presented in Table 7 and Table 9 for FY 2012–FY 2020. To conserve space and time, we will not repeat those numbers here.

(2) Forms and Fees

All the forms and fees remain the same in the Pre-Guidance Baseline, except that Form I–821D has a fee of $85 and there is no fee charged for biometrics collection.

(3) Wage Assumptions

For the Pre-Guidance Baseline, the wage assumptions remain as presented previously with an overall average compensation for the DACA requestors of $24.20 and a total compensation rate for preparers of $103.81.

(4) Time Burdens

For the Pre-Guidance Baseline, all the time burdens remain as presented previously.

(5) Costs of the Proposed Regulatory Changes

The Pre-Guidance Baseline represents a world without DACA; that is, all baseline impacts are $0. DHS calculates the proposed rule's impacts relative to this baseline of $0 costs, benefits, and transfers. As presented previously, we maintain the assumption that only 70 percent of requestors will apply for an EAD given that this proposed rule allows this option. This will serve as a lower bound estimate of costs. Given the population estimates, form fees, time burdens, wage assumptions, biometrics fee, travel costs, and biometrics time burden information, DHS presents next the application costs for time period FY 2012–FY 2031. The cost per requestor in a scenario where all DACA requestors (100%) apply for an EAD is $1,138.36. The cost per requestor in a scenario where only 70 percent of DACA requestors apply for an EAD is $922.07. Multiplying these per-requestor costs with the population estimates yields total costs. The following tables present our quantified and monetized cost estimates.

Table 14. Total Costs Relative to the Pre-Guidance Baseline, FY 2012–FY 2031 (2020 dollars)

FY	Costs if 100% Apply for an EAD	Costs if 70% Apply for an EAD
2012	$179,662,760	$145,527,406
2013	$505,394,146	$409,370,864
2014	$300,284,493	$243,231,393
2015	$551,362,250	$446,605,173
2016	$310,792,692	$251,743,067
2017	$587,740,811	$476,071,924
2018	$329,863,632	$267,190,590
2019	$464,635,177	$376,355,969
2020	$391,519,471	$317,132,015
2021	$572,247,113	$463,521,979
2022	$572,247,113	$463,521,979
2023	$652,920,958	$528,868,050
2024	$629,454,553	$509,860,187
2025	$518,716,551	$420,162,054
2026	$506,916,464	$410,603,945
2027	$498,548,793	$403,826,106
2028	$492,615,116	$399,019,808
2029	$488,407,430	$395,611,570
2030	$485,423,679	$393,194,722
2031	$483,307,844	$391,480,888
Undiscounted Total	**$9,522,061,046**	**$7,712,899,688**

Source: USCIS analysis.

The DACA program also creates cost savings for DHS that are not simple to quantify and monetize. For instance, the DACA program simplifies many encounters between DHS and certain noncitizens, reducing the burden upon DHS of vetting, tracking, and potentially removing DACA recipients. Cost savings vary considerably depending on the circumstances of the encounter; the type of enforcement officer involved; relevant national security, border security, and public safety considerations; and any intervening developments in the noncitizen's situation and equities. In addition, some cost savings that historically have been considered as part of deferred action decision making are inherently difficult to quantify, such as costs associated with taking enforcement action without first considering ''the likelihood of ultimately removing the alien, the presence of sympathetic factors that could adversely affect future cases or generate bad publicity . . . , and whether the alien had violated a provision that had been given high enforcement priority.'' [369]

(6) Benefits of the Proposed Regulatory Changes

There are quantified and monetized benefits and unquantified and qualitative benefits associated with this proposed rule. The quantified and monetized benefits stem from the income earned by DACA recipients who have received an EAD and choose to participate in the labor market. By participating in the labor market, DACA recipients are increasing the production of the economy and earning wages, which in turn leads to additional consumption. DHS acknowledges the possibility that certain DACA recipients might have participated in the informal labor market and earned wages prior to being granted lawful presence and work authorization under the DACA program. For this segment of the DACA-recipient population, DHS could be overestimating the quantified benefits in the form of earned income directly attributable to receiving work authorization. Adjusting the quantified benefits to show only income attributable to work authorization under DACA would entail estimating the difference between the compensation these individuals might expect to earn in the informal labor market and the compensation estimates presented in

[369] *See AADC,* 525 U.S. at 484 n.8 (citing 16 C. Gordon, S. Mailman, and S. Yale-Loehr, *Immigration Law and Procedure* § 242.1 (1998)).

this analysis, multiplied by the estimate of this population.[370]

For example, Borjas and Cassidy (2019) examine the wage differential between informal and formal work for immigrant populations. They apply their analysis of a wage differential, or ''wage penalty,'' to an estimated proxy of the DACA-eligible population, suggesting that the wage earned as a documented noncitizen would be, on average, 4.5% to 6.8% higher than the wage of an individual working as an undocumented noncitizen. This phenomenon also is discussed in a recently published piece on the economic benefits of unauthorized immigrants gaining permanent legal status, which points out that there exist per-hour income differentials when comparing unauthorized immigrant workers to native-born and legal immigrant workers.[371] In contrast, in a survey of 1,157 DACA recipients fielded by Wong (2020), respondents age 25 and older (n = 882) reported wage increases of 129% ($27.17/$11.89 = 2.285) since receiving DACA.[372] If done properly, such an adjustment would yield a more accurate estimate of the quantified benefits attributable to the receipt of work authorization under DACA.[373] DHS welcomes public comment regarding wage differentials and wage penalties of unauthorized and authorized workers, including differences in wages among those immigrant workers participating in formal or informal employment.

Other empirical and conceptual issues are also challenging here. In addition to the difficulty of identifying the correct adjustment to the quantified benefits due to wages presented in this analysis, the Department recognizes that the lack of work authorization under DACA could push immigrants to seek informal work with greater hazards and vulnerabilities to exploitation. Seeking and engaging in that informal work would involve welfare losses (hedonic as well as economic).

In addition, DHS is considering whether to make an additional modification to the estimated benefits in order to help ensure DHS is not overestimating the quantified benefits directly attributable to receiving DACA. For those who entered the labor market after receiving work authorization and began to receive paid compensation from an employer, counting the entire amount received by the employer as a benefit likely results in an overestimate. Even without working for wages, the time spent by an individual has value. For example, if someone performs childcare, housework, or other activities without paid compensation, that time still has value. Consequently, a more accurate estimate of the net benefits of receiving work authorization under the proposed rule would take into account the value of time of the individual before receiving work authorization. For example, the individual and the economy would gain the benefit of the DACA recipients entering the workforce and receiving paid compensation but would lose the value of their time spent performing non-paid activities. Due to the wide variety of non-paid activities an individual could pursue without DACA work authorization, it is difficult to estimate the value of that time. DHS is requesting public comment on how to best value the non-paid time of those who were not part of the authorized workforce without DACA. One possible method is to use 50% of wages as a proxy of the value for this non-paid time. DHS requests public comment on ways to best estimate the value of this non-paid time.

DHS welcomes public comment and/or data on all these issues, including, for example, data regarding wages earned by the DACA-eligible or DACA-approved populations both with and without work authorization, which DHS may be able to use in order to adjust the benefit estimates presented in Table 14 in a final rule.

For benefit calculations, DHS makes use of the previously estimated average annual compensation of DACA EAD recipients of $50,341 multiplied by 70 percent of each the population data in Table 7 and the population estimates in Table 8. Recall, DHS estimated that 70 percent of DACA recipients will choose to participate in the labor market, potentially earning income. This earned income is presented here as the quantified and monetized benefit of this proposed rule because of recipients having an EAD and working. The benefit (from income earnings) per applicant is $35,238.77 ($50,341 * 70%), assuming that these jobs were added to the economy and that DACA workers were not substituted for other workers. Multiplying this per-applicant benefit by the population projections presented earlier in Table 7 and Table 8 and subtracting the portion of income that is a transfer from the DACA population to the Federal Government yields the results in Table 15.[374]

[370] *See* Borjas and Cassidy (2019).

[371] *See* White House Council of Economic Advisors, *The Economic Benefits of Extending Permanent Legal Status to Unauthorized Immigrants* (Sept. 17, 2021), *https://www.whitehouse.gov/cea/blog/2021/09/17/the-economic-benefits-of-extending-permanent-legal-status-to-unauthorized-immigrants.*

[372] *See* Wong (2020). DHS notes that the intervening years of experience could explain some of this growth rate.

[373] Borjas and Cassidy (2019) and Wong (2020) suggest that the additional earnings from wages presented in this proposed rule, for this segment of the DACA population, would have to be adjusted by this formula: NPRM estimated DACA wage—(NPRM DACA estimated wage/(1 + wage differential %)). This adjustment multiplied by this population yields a more accurate estimate of the quantified and monetized benefits of this proposed rule.

[374] The portion of total potential income earned that is a payroll tax transfer from the DACA working population to the Federal Government is 7.65%. Multiplying the benefits numbers in Table 15 by [1/(1 − 0.0765)] yields the pre-tax overall total potential income earned. Section V.A.4.b.(7) discusses more details on the calculations and transfer estimates.

Table 15. Total Benefits Relative to the Pre-Guidance Baseline, FY 2012–FY 2031 (2020 dollars)

FY	Benefits
2012	$65,704,318
2013	$15,388,934,012
2014	$19,787,348,312
2015	$21,235,284,027
2016	$22,123,707,937
2017	$22,798,714,851
2018	$22,913,363,841
2019	$21,496,343,976
2020	$21,064,368,190
2021	$21,826,347,756
2022	$22,615,891,066
2023	$23,433,995,208
2024	$24,281,693,337
2025	$25,160,055,982
2026	$26,070,192,397
2027	$27,013,251,962
2028	$27,990,425,634
2029	$29,002,947,452
2030	$30,052,096,096
2031	$31,139,145,259
Undiscounted Total	**$455,459,811,615**

Source: USCIS analysis.

DHS notes that to whatever extent a DACA recipient's wages otherwise would be earned by another worker, the benefits in Table 15 could be overstated (*see* Section V.A.4.d for additional analysis).

The unquantified and qualitative benefits stem in part from the forbearance component of an approved DACA request. The DACA requestors who receive deferred action under this proposed rule would enjoy additional benefits relative to the Pre-Guidance Baseline. We will describe these next along with any other qualitative impacts this proposed rule creates relative to the Pre-Guidance Baseline.

Some of the benefits associated with the DACA program accrue to DHS (as discussed above), whereas others accrue to the noncitizens who are granted deferred action and employment authorization, and still others accrue to family members, employers, universities, and others. Quantification and monetization of many of these benefits is unusually challenging. E.O. 13563 states that

> each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.[375]

It is essential to emphasize that the goals of this regulation include protection of equity, human dignity, and fairness, and that DHS is keenly alert to distributive impacts. DHS also recognizes that while some of those qualitative benefits are difficult or impossible to measure, it is essential that they be considered. Under the proposed regulation, deferred action may be available to people who came to the United States many years ago as children—often as young children. As discussed above, in DHS's view, scarce resources are not best expended with respect to people who meet the relevant criteria. In addition, DHS believes forbearance of removal for such individuals furthers values of equity, human dignity, and fairness.

It is not simple to quantify and monetize the benefits of forbearance for those who obtain deferred action and their family members. These challenging-to-quantify benefits include (1) a reduction of fear and anxiety for DACA recipients and their families,[376] (2) an increased sense of acceptance and

[375] 76 FR 3821 (Jan. 21, 2011).

[376] Osea Giuntella, et al., *Immigration policy and immigrants' sleep. Evidence from DACA,* 182 J. of Econ. Behav. & Org. 1 (Feb. 2021).

belonging to a community, (3) an increased sense of family security, and (4) an increased sense of hope for the future. Some of these benefits are connected with equity and fairness, mentioned in E.O. 13563; others are plausibly connected with human dignity, also mentioned in that E.O. Again, these benefits are difficult to quantify.[377] It might be tempting to try to compare the benefits of the reduced risk of deportation to other benefits from risk reduction, such as the reduction of mortality and morbidity risks. But any such comparison would be highly speculative, and DHS does not believe that it can monetize the total value of these specific benefits to DACA recipients. A possible (and very conservative) lower bound estimate could be the cost of requesting DACA; that is, it would be reasonable to assume that the DACA-approved population values these benefits at least as much as the cost of requesting DACA. DHS does not speculate on an upper bound but concludes that it could well be a substantially large sum, much larger than the lower bound; the benefits of items (1), (2), (3), and (4) above are likely to be high. DHS invites comments on the challenges of quantification here and on how they might be met.

DHS notes as well that DACA recipients could qualify for discretionary advance parole, which would allow them to travel outside of the United States during the duration of their deferred action and be allowed to return to the United States.[378] In addition to the benefits of travel itself, DHS recognizes that some DACA recipients who were not previously lawfully admitted or paroled into the United States and are otherwise eligible to adjust status to that of a lawful permanent resident (such as through employment or family relationships) may satisfy the ''inspected and admitted or paroled'' requirement of the adjustment of status statute at 8 U.S.C. 1255(a) upon their return to the United States through advance parole. However, DHS may grant advance parole to any individual who meets the statutory criteria with or without lawful status or deferred action, and a grant of advance parole alone does not create a pathway to lawful status or citizenship. Regardless, DHS is also unable to quantify the value of advance parole to the DACA population. DHS welcomes public comments on these specific benefits and, in particular, on whether and how quantitative estimates might be operationalized.

Employment authorization and receipt of an EAD grants additional benefits to the DACA-approved population and their families. An EAD can serve as official personal identification, in addition to serving as proof that an individual is authorized to work in the United States for a specific time period. In certain States, depending on policy choices made by the State, an EAD also could be used to obtain a driver's license or other government-issued identification. Similar to the benefits that are derived from being granted deferred action, DHS is unable to estimate the total value of benefits from having official personal identification or a driver's license for individuals in the DACA population. DHS invites public comments on whether and how quantitative estimates might be used for benefits derived from being granted employment authorization and receiving an EAD, such as serving as official personal identification, or as a conduit to receiving additional tangential benefits like a driver's license.

The fee structure in the proposed rule may result in some additional qualitative benefits relative to the No Action Baseline, and may result in increased benefits relative to the Pre-Guidance Baseline, as compared to the existing fee structure. Providing the option to forgo requesting employment authorization when requesting deferred action using Form I–821D, and thus pay only the accompanying $85 fee, could incentivize noncitizens to request DACA by reducing some of the financial barriers to entry for individuals who potentially qualify for deferred action, but do not need (or yet need) employment authorization, and desire the benefits associated with deferred action. Such individuals otherwise may be discouraged from requesting DACA due to the current $495 cost to file. For example, it is possible that some persons who are in school, receive scholarships, or have other types of school or non-school aid, and who value the benefits from deferred action, might find the lower cost of the program ($85 without employment authorization) more attractive than the current cost to request DACA ($495) and be encouraged to do so. Additionally, the proposed rule allows the current DACA-approved population to continue enjoying the advantages of the policy and have the option to request renewal of DACA in the future without also requesting a renewal of employment authorization.

Finally, as discussed above, the proposed rule reiterates USCIS' longstanding codification in 8 CFR 1.3(a)(4)(vi) of agency policy that a noncitizen who has been granted deferred action is considered ''lawfully present''—a specialized term of art that does not confer lawful status or the right to remain in the United States—for the discrete purpose of authorizing the receipt of certain Social Security benefits consistent with 8 U.S.C. 1611(b)(2). The proposed rule also reiterates longstanding policy that a noncitizen who has been granted deferred action does not accrue ''unlawful presence'' for purposes of INA sec. 212(a)(9) (imposing certain admissibility limitations for noncitizens who departed the United States after having accrued certain periods of unlawful presence). These benefits as well are difficult to quantify in part due to the time-limited nature of the benefit, the age of the relevant population, and the various ways in which accrual of unlawful presence might ultimately affect an individual based on their immigration history. DHS welcomes comments on ways to evaluate these benefits.

(7) Transfers of the Proposed Regulatory Changes

Relative to the Pre-Guidance Baseline, the proposed rule would result in tax transfers to different levels of government, assuming that DACA recipients who have employment perform work that is new to the economy rather than substituting their labor for the labor of workers already employed in the economy. It is difficult to quantify tax transfers because individual tax situations vary widely (as do taxation rules imposed by different levels of government), but DHS estimates the potential increase in transfer payments to Federal employment tax programs, namely Medicare and Social Security, which have a combined payroll tax rate of 7.65 percent (6.2 percent and 1.45 percent, respectively).[379] With both the employee and employer paying their respective portion of Medicare and Social Security taxes, the total estimated increase in tax transfer payments from employees and employers to Medicare and Social Security is 15.3 percent. This analysis relies on this total tax rate to calculate these transfers relative to the Pre-Guidance Baseline. DHS takes this rate and multiplies it by the total (pre-

[377] On some of the conceptual and empirical issues, *see* Matthew Adler, *Fear Assessment: Cost-Benefit Analysis and the Pricing of Fear and Anxiety,* 79 Chicago-Kent L. Rev. 977 (2004).

[378] *See* 8 U.S.C. 1182(d)(5), 8 CFR 212.5, authorizing parole on a case-by-case basis for urgent humanitarian reasons or significant public benefit.

[379] Internal Revenue Service, ''Topic No. 751 Social Security and Medicare Withholding Rates,'' *https://www.irs.gov/taxtopics/tc751* (last updated Mar. 10, 2021).

tax income earnings) benefits,[380] which yields our transfer estimates for this section. Table 16 presents these estimates.

Table 16. Total Employment Federal Tax Transfers, FY 2012–FY 2031 (from DACA employees and employers to the Federal Government) (2020 dollars)

FY	Transfers
2012	$10,885,501
2013	$2,549,547,270
2014	$3,278,250,451
2015	$3,518,135,849
2016	$3,665,324,650
2017	$3,777,155,790
2018	$3,796,150,155
2019	$3,561,386,712
2020	$3,489,819,527
2021	$3,616,059,780
2022	$3,746,866,630
2023	$3,882,405,270
2024	$4,022,846,866
2025	$4,168,368,777
2026	$4,319,154,777
2027	$4,475,395,290
2028	$4,637,287,625
2029	$4,805,036,232
2030	$4,978,852,954
2031	$5,159,059,778
Undiscounted Total	**$75,457,989,883**

Source: USCIS analysis.

Part of the DACA requestor population may choose only to request deferred action through Form I–821D. If this were to happen, this would result in a transfer from USCIS to those DACA requestors as requestors filing only the Form I–821D (proposed fee: $85) would now pay less in filing fees than the current filing fee cost for both Forms I–821D and I–765. As previously discussed, the cost to USCIS of adjudicating Form I–821D is $332. The difference of $247 multiplied by 30% of the DACA requestor population yields the potential transfers if 30% of DACA requestors apply for deferred action only. Table 17 presents the estimates of these potential transfers.

[380] The benefit (from pre-tax income earnings) per applicant is $35,238.77 ($50,341 * 70%). Multiplying this benefit per applicant by the population projections presented earlier in Table 7 and Table 8 yields total pre-tax earnings. Multiplying the 15.3% payroll tax rate to this pre-tax total yields the Table 16 estimates.

Table 17. Total Transfers, FY 2012–FY 2031, If 30% of DACA Requestors Forgo EAD Applications (from USCIS to certain DACA requestors) (2020 dollars)

FY	Transfers
2012	$11,694,907
2013	$32,897,955
2014	$19,546,617
2015	$35,890,187
2016	$20,230,634
2017	$38,258,201
2018	$21,472,031
2019	$30,244,804
2020	$25,485,435
2021	$37,249,659
2022	$37,249,659
2023	$42,501,015
2024	$40,973,501
2025	$33,765,159
2026	$32,997,048
2027	$32,452,366
2028	$32,066,121
2029	$31,792,227
2030	$31,598,004
2031	$31,460,276
Undiscounted Total	**$619,825,804**

Source: USCIS analysis.

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c. Costs to the Federal Government

The INA provides for the collection of fees at a level that will ensure recovery of the full costs of providing immigration adjudication and naturalization services by DHS, including administrative costs and services provided without charge to certain applicants and petitioners.[381] Generally, DHS establishes USCIS fees according to the estimated cost of adjudication based on its relative adjudication burden and use of USCIS resources. Fees are established at an amount that is necessary to recover these assigned costs, such as clerical, officer, and managerial salaries and benefits, plus an amount to recover unassigned overhead (*e.g.,* facility rent, information technology equipment and systems) and immigration benefits provided without a fee charge. DHS established the current fee for Form I–765, Application for Employment Authorization, in its FY 2016/FY 2017 USCIS Fee Rule at a level below the estimated full cost of adjudication but raised other fees to provide for full cost recovery to USCIS overall. DHS proposes no change to the $410 fee for Form I–765 in this NPRM and will review the fee in the context of an overall adjustment to the USCIS fee schedule. However, in instances where DHS determines it to be in the public interest, DHS establishes fees that are below the estimated full cost and charges other benefit requestors more to provide for the recovery of USCIS' costs. As previously discussed, DHS has determined that it is in the public interest to hold the fee for Form I–821D, Consideration of Deferred Action for Childhood Arrivals, below the estimated full cost of adjudication. Consequently, if the primary fee proposal is finalized, the rule may result in the transfer of a portion of these estimated full costs of adjudication to the fee-paying population. Moreover, another form affected by this proposed rule that currently does not charge a filing fee is Form I–765WS, I–765 Worksheet, which DACA requestors must file with Form I–765. DHS notes the time necessary for USCIS to review the information submitted with each of these forms includes the time to adjudicate the underlying benefit request. DHS notes that the proposed rule may increase USCIS' costs associated with adjudicating immigration benefit

[381] *See* INA sec. 286(m), 8 U.S.C. 1356(m).

requests. Future adjustments to the fee schedule may be necessary to recover these additional operating costs and will be determined at USCIS' next comprehensive biennial fee review. DHS invites public comments on the potential impacts of these additional operating costs.

d. Labor Market Impacts

The projected active DACA population of the proposed rule in the *No Action Baseline* section of the analysis suggests that about 16,391 new participants [382] could enter the U.S. labor force in the first year of implementation of the proposed rule as compared to the number of DACA recipients in the labor market in FY 2020 (based on the 70% labor force participation rate presented earlier). This number increases annually at a growth rate of 3.6174%, reaching up to 23,384 new participants in the last year of analysis, FY 2031. As of 2020, there were an estimated 160,742,000 people in the U.S. civilian labor force.[383] The aforementioned estimate of 16,391 new participants in the U.S. labor force in FY 2021 would represent approximately 0.0102% of the 2020 overall U.S. civilian labor force.[384] Of course, as noted above, these figures likely represent an overestimate, insofar as some individuals otherwise would be engaged in informal employment.

The top four States where current DACA recipients reside represent about 55 percent of the total DACA-approved population: California (29%), Texas (16%), Illinois (5%), and New York (4%).[385] These States may have a slightly larger share of potentially additional DACA workers compared with the rest of the United States. Assuming the estimate for first year impacts could be distributed following the same patterns, DHS estimates the following potential impacts. California could receive approximately 4,753 (*i.e.,* 29% * 16,391) additional workers in the first year of implementation; Texas 2,623 additional workers; Illinois 820 additional workers; and New York 656 additional workers. To provide additional context, in April of 2021, California had a population of 18,895,158 in the civilian labor force in February 2021, Texas had 14,034,972, Illinois had 6,146,496, and New York had 9,502,491.[386] As an example, the additional 4,753 workers who could be added to the Californian labor force in the first year after promulgation of this proposed rule would represent about 0.0252% of the overall California labor force.[387] The potential impacts to the other States would be lower (*e.g.,* for Texas, the impact would be about 0.0187%).

As noted above, the analysis of the proposed rule relative to the Pre-Guidance Baseline entails consideration of effects going back to FY 2012, when the program was introduced and the surge of new requestors occurred. Because the Napolitano Memorandum was released in June of 2012, the FY 2012 September 30th count of 2,019 active DACA participants does not cover a full fiscal year; therefore, we add FY 2012 and FY 2013 together, adjusting by the 70% labor market participation rate, for a count of new active DACA entrants in the U.S. labor market equal to 332,429. Applying this number to the U.S. labor market statistics, as in the No Action Baseline labor market analysis above, we estimate that this number of new entrants would represent about 0.2139% of the 2013 overall US. civilian labor force of 155,389,000.[388] As discussed in the preceding paragraph, for California, the new active DACA entrant population in FY 2012 and FY 2013 would represent about 0.5102% of California's April 2021 labor force, 0.3790% of Texas's, 0.2704% of Illinois's, and 0.1399% of New York's. Again, these figures likely represent an overestimate, insofar as some individuals otherwise would be engaged in informal employment.

As noted above, the relative proportion of DACA recipients in any given labor market would depend on the number of active DACA recipients who choose to work and the size of the labor market at that time. In future years within the period of analysis, the number of DACA recipients in the labor force would be expected to increase because, as indicated in Table 8, the RIA projects an increase in the active DACA population in future years. Even in FY 2031, however—when the projected active DACA population would be at its peak of 956,863—the number estimated to participate in the labor force would be 669,804, or 0.4167 percent of the 2020 U.S. civilian labor force.[389]

Although the estimated annual increases in the active DACA population in this proposed rule are small relative to the total U.S. and individual State labor forces, DHS recognizes that, in general, any increase in worker supply may affect wages and, in turn, the welfare of other workers and employers. However, the effects are not obvious as changes in wages depend on many factors and various market forces, such as the type of occupation and industry, geographic market locations, and overall economic conditions. For example, there are industries where labor demand might outpace labor supply, such as in healthcare, food services, and software development sectors. BLS projects that home health and personal care aides occupations will grow by about 34 percent over the next 10 years, cooks in restaurants by about 23 percent, and software development occupations by about 22 percent.[390] In industries or sectors such as these, holding everything else constant, increases in the labor supply might not be enough to satisfy labor demand. As a result, wages might rise to attract qualified workers, thereby improving welfare for all workers in these sectors. The opposite could happen for industries or sectors where labor supply outpaces labor demand. DHS cannot predict the degree to which DACA recipients are substituted for other workers in the U.S. economy since this depends on factors such as industry characteristics as described above as well as on the hiring practices and preferences of employers, which depend on many factors, such as worker skill levels, experience levels, education levels, training needs, and labor market regulations, among others.[391]

Isolating immigration's effect on labor markets has been an ongoing task in the research. A 2017 National Academies of Sciences, Engineering, and Medicine

[382] Calculation: (FY 2021 projected active DACA population − FY 2020 projected active DACA population) * 0.70 = (670,693 − 647,278) = 23,415 * 0.70 = 16,391.

[383] Source: BLS, *Labor Force Statistics from the Current Population Survey,* Household Data Annual Averages: Table 3. Employment status of the civilian noninstitutional population by age, sex, and race, *https://www.bls.gov/cps/cpsaat03.htm.*

[384] Calculation: (16,391/160,742,000) * 100 = 0.0102%.

[385] Source: Count of Active DACA Recipients by Month of Current DACA Expiration as of Dec. 31, 2020. DHS/USCIS/OPQ ELIS and CLAIMS 3 Consolidated (queried Jan. 2021).

[386] Source: BLS, News Release, *State Employment and Unemployment—May 2021,* Labor Force Data Seasonally Adjusted: Table 1. Civilian labor force and unemployment by state and selected area, seasonally adjusted, *https://www.bls.gov/news.release/pdf/laus.pdf.*

[387] Calculation: (4,753/18,895,158) × 100 = 0.0252%.

[388] Source: BLS, *Labor Force Statistics from the Current Population Survey,* Household Data Annual Averages: Table 1. Employment status of the civilian noninstitutional population, 1950 to date, *https://www.bls.gov/cps/cpsaat01.pdf.*

Calculation: (332,429/155,389,000) * 100 = 0.2139%.

[389] Calculation: (669,804/160,742,000) * 100 = 0.4167%.

[390] Source: BLS, Employment Projections (Sept. 2020), *Occupations with the most job growth,* Table 1.4. Occupations with the most job growth, 2019 and projected 2029, *https://www.bls.gov/emp/tables/occupations-most-job-growth.htm.*

[391] DHS also discusses the possibility of informal employment elsewhere in this analysis.

(NAS) publication synthesizes the current peer-reviewed literature on the effects of immigration and empirical findings from various publications.[392] Notably, the 2017 NAS Report addresses a different subject than this proposed rule, which relates to a policy of enforcement discretion with respect to those who arrived in the United States as children and have lived here continuously for well over a decade. Nonetheless, the analysis presented in that report may be instructive.

The 2017 NAS Report cautions that

> economic theory alone is not capable of producing definitive answers about the net impacts of immigration on labor markets over specific periods or episodes. Empirical investigation is needed. But wage and employment impacts created by flows of foreign-born workers into labor markets are difficult to measure. The effects of immigration have to be isolated from many other influences that shape local and national economies and the relative wages of different groups of workers.[393]

Whether immigrants are low-skilled or high-skilled workers can matter with respect to effects on wages and the labor market generally.[394] According to the 2017 NAS Report, some studies have found high-skilled immigrant workers positively impact wages and employment of both college-educated and non-college-educated native workers, consistent with the hypothesis that high-skilled immigrants often complement native-born high-skilled workers, and some studies looking at ''narrowly defined fields'' involving high-skilled workers have found adverse wage or productivity effects on native-born workers.[395] In addition,

> some studies have found sizable negative short-run wage impacts for high school dropouts, the native-born workers who in many cases are the group most likely to be in direct competition for jobs with immigrants. Even for this group, however, there are studies finding small to zero effects, likely indicating that outcomes are highly dependent on prevailing conditions in the specific labor market into which immigrants flow or the methods and assumptions researchers use to examine the impact of immigration. The literature continues to find less favorable effects for certain disadvantaged workers and for prior immigrants than for natives overall.[396]

With respect to wages, in particular, the 2017 NAS Report described recent research showing that,

> when measured over a period of more than 10 years, the impact of immigration on the wages of natives overall is very small. However, estimates for subgroups [of noncitizens] span a comparatively wider range, indicating a revised and somewhat more detailed understanding of the wage impact of immigration since the 1990s. To the extent that negative wage effects are found, prior immigrants—who are often the closest substitutes for new immigrants—are most likely to experience them, followed by native-born high school dropouts, who share job qualifications similar to the large share of low-skilled workers among immigrants to the United States.[397]

With respect to employment, the report described research finding

> little evidence that immigration significantly affects the overall employment levels of native-born workers. However, recent research finds that immigration reduces the number of hours worked by native teens (but not their employment rate). Moreover, as with wage impacts, there is some evidence that recent immigrants reduce the employment rate of prior immigrants—again suggesting a higher degree of substitutability between new and prior immigrants than between new immigrants and natives.[398]

Further, the characteristics of local economies matter with respect to wage and employment effects. For instance, the impacts to local labor markets can vary based on whether such market economies are experiencing growth, stagnation, or decline. On average, immigrants tend to locate in areas with relatively high labor demand or low unemployment levels where worker competition for available jobs is low.[399]

Overall, as noted, the 2017 NAS Report observed that when measured over a period of 10 years, the impact of immigration on the wage of the native-born population overall was ''very small.'' [400] Although the current and eligible DACA population is a subset of the overall immigrant population, it still shares similar characteristics with the overall immigrant population, including varying education and skill levels. Therefore, one could expect the DACA population to have similar economic impacts as the overall immigrant population, relative to the Pre-Guidance Baseline.

The 2017 NAS Report also discusses the economic impacts of immigration and considers effects beyond labor market impacts. Similar to the native-born population, immigrants also pay taxes; stimulate the economy by consuming goods, services, and entertainment; engage in the real estate market; and take part in domestic tourism. Such activities contribute to further growth of the economy and create additional jobs and opportunities for both native-born and noncitizen populations.[401]

DHS welcomes public comments and information that can further inform any labor market or wage impact analysis.

e. Fiscal Effects on State and Local Governments

In this section, in consideration of the *Texas II* court's discussion of fiscal effects (as described in the next section of this RIA), DHS briefly addresses the proposed rule's potential fiscal effects on State and local governments. It would be extremely challenging to measure the overall fiscal effects of this proposed rule in particular, especially due to those governments' budgetary control. The 2017 NAS Report discussed above canvassed studies of the fiscal impacts of immigration as a whole, and it described such analysis as extremely challenging and dependent on a range of assumptions. Although the 2017 NAS Report addresses a different subject than this proposed rule (which relates to a policy of enforcement discretion with respect to those who arrived in the United States as children and have lived here continuously for well over a decade), DHS discusses the 2017 NAS Report to offer general context for this topic. DHS then offers a discussion of the potential effects of this proposed rule in particular.

With respect to its topic of study, the NAS wrote that

> estimating the fiscal impacts of immigration is a complex calculation that depends to a significant degree on what the questions of interest are, how they are framed, and what assumptions are built into the accounting exercise. The first-order net fiscal impact of immigration is the difference between the various tax contributions immigrants make to public finances and the government expenditures on public benefits and services they receive. The foreign-born are a diverse population, and the way in which they affect government finances is sensitive to their demographic and skill characteristics, their role in labor and other markets, and the rules regulating accessibility and use of government-financed programs.[402]

In addition, second-order effects also clearly occur; analysis of such effects also presents methodological and empirical challenges.[403]

For example, as with the native-born population, the age structure of immigrants plays a major role in assessing any fiscal impacts. Children and young adults contribute less to

[392] NAS, *The Economic and Fiscal Consequences of Immigration* (2017), *https://www.nap.edu/catalog/23550/the-economic-and-fiscal-consequences-of-immigration* (hereinafter 2017 NAS Report).

[393] *Id.* at p. 4.

[394] *Id.* at p. 4.

[395] *Id.* at 6.

[396] *Id.* at 267.

[397] *Id.* at 5.

[398] *Id.* at 5–6.

[399] *Id.* at 5.

[400] *Id.* at 5.

[401] *Id.* at 6–7.

[402] *Id.* at 28.

[403] *Id.* at 342.

society in terms of taxes and draw more in benefits by using public education, for example. On average, as people age and start participating in the labor market they become net contributors to public finances, paying more in taxes than they draw from public benefit programs. Moreover, people in post-retirement again could become net users of public benefit programs. Compared to the native-born population, immigrants also can differ in their characteristics in terms of skills, education levels, income levels, number of dependents in the family, the places they choose to live, etc., and any combination of these factors could have varying fiscal impacts.

Local and State economic conditions and laws that govern public finances and availability of public benefits also vary and can influence the fiscal impacts of immigration. The 2017 NAS Report explained that fiscal impacts of immigration

> vary strongly by level of governments. States and localities bear the burden of funding educational benefits enjoyed by immigrant and native children. The federal government transfers relatively little to individuals at young and working ages but collects much tax revenue from working-age immigrant and native-born workers. Inequality between levels of government in the fiscal gains or losses associated with immigration appears to have widened since 1994.[404]

The extent of such gaps among Federal, State, and local impacts necessarily varies by jurisdiction and due to a range of surrounding circumstances.[405]

Based on the information presented in the 2017 NAS Report, DHS approaches the question of State and local fiscal impacts as follows. First, it is clear that the fiscal impacts of the proposed rule to State and local governments would vary based on a range of factors, such as the characteristics of the DACA-recipient population within a particular jurisdiction at a particular time (or over a particular period of time), including recipients' age, educational attainment, income, and level of work-related skill as well as the number of dependents in their families. In addition, fiscal effects would vary significantly depending on local economic conditions and the local rules governing eligibility for public benefits.[406] For example, some States may allow DACA recipients to apply for subsidized driver's licenses or allow DACA recipients to qualify for instate tuition at public universities, which may not be available to similarly situated individuals without deferred action. These costs to the State will be highly location specific and are, therefore, difficult to quantify.

Second, as compared to the Pre-Guidance Baseline, multiple aspects of this proposed rule suggest that the burden on State and local fiscal resources imposed by the proposed rule is unlikely to be significant, and it may well have a positive net effect. Recall that under the Pre-Guidance Baseline, most noncitizens who otherwise would be DACA recipients likely would remain in the country, but without the additional measure of security, employment authorization, and lawful presence that this proposed rule would provide. Under the Pre-Guidance Baseline, these noncitizens would continue to use and rely, as necessary, on those safety net and other public resources for which they are eligible. As noted above, DACA recipients may be eligible for more benefits under current State and local law than they otherwise would be eligible for without DACA, but they still do not fall under the ''qualified alien'' category, and are, therefore, generally ineligible for public benefits at the Federal, State, and local levels.[407] Under the proposed rule, these noncitizens can work and build human capital and, depending on the choices made by a State, may be able to secure driver's licenses and other identification, obtain professional licenses, or otherwise realize benefits from the policy. In short, the proposed rule likely would result in increases in tax revenues, as well as decreases in reliance on safety net programs, although effects on specific programs may vary based on a range of factors.

Third, DHS notes the relatively small size of the DACA population in any particular region relative to any given jurisdiction's overall population. The overall long-term fiscal health of State and local jurisdictions where DACA recipients choose to work and live will depend on many other factors not within DHS's control. In the long term, DHS expects State and local governments to continue to choose how to finance public goods, set tax structures and rates, allocate public resources, and set eligibilities for various public benefit programs, and to adjust these approaches based on the evolving conditions of their respective populations.

In short, DHS acknowledges that though the proposed rule likely would result in some indirect fiscal effects on State and local governments (both positive and negative), such effects would be extremely challenging to quantify fully and would vary based on a range of factors, including policy choices made by such governments. DHS welcomes comment on such fiscal effects and how, if at all, DHS should weigh those fiscal effects in the context of the full range of policy considerations relevant to this rulemaking.

DHS invites public comments on State and local fiscal effects that could be incorporated in the analysis.

f. Reliance Interests and Other Regulatory Effects

In the *Texas II* district court's decision, the court identified a range of considerations potentially relevant to ''arbitrary and capricious'' review of any actions that DHS might take on remand,[408] although the court noted that many of these considerations were matters raised by parties and amici in the course of *Texas I* and *Texas II,* and the court did not appear to suggest that DHS was required to analyze each of these considerations. The court further cautioned that it did not mean to suggest ''this is an exhaustive list, and no doubt many more issues may arise throughout the notice and comment period. Further, the Court takes no position on how DHS (or Congress, should it decide to take up the issue) should resolve these considerations, as long as that resolution complies with the law.'' DHS has assessed the considerations presented by the district court, and it presents its preliminary views in this section.[409]

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[404] *Id.* at 407.

[405] *See, e.g., id.* at 518, 545 (tables displaying State and local revenues per independent person unit and State and local expenditures per independent person unit, by immigrant generation by State, but without adjusting for eligibility rules specific to noncitizens).

[406] DHS notes that DACA recipients are not considered ''qualified aliens.'' *See* 8 U.S.C. 1641(b). As noted elsewhere in this preamble, PRWORA also limits the provision of ''state and local public benefits'' to noncitizens who are ''qualified aliens,'' with limited exceptions, but provides that States may affirmatively enact legislation making noncitizens ''who [are] not lawfully present in the United States'' eligible for such benefits. *See* 8 U.S.C. 1621(d).

[407] *See* 8 U.S.C. 1641(b), 1611 (general ineligibility for Federal public benefits), and 1621 (general ineligibility for State public benefits).

[408] In the same section of the court's opinion, the court also suggested that DHS consider a forbearance-only alternative to DACA. The court wrote that ''the underlying DACA record points out in multiple places that while forbearance fell within the realm of prosecutorial discretion, the award of status and benefits did not. Despite this distinction, neither the DACA Memorandum nor the underlying record reflects that any consideration was given to adopting a policy of forbearance without the award of benefits.'' DHS has addressed this issue in the *Regulatory Alternatives* section below.

[409] DHS has opted to address these considerations out of deference to the district court's memorandum and order, and in an abundance of caution. This decision should not be viewed as a concession that DHS must or should consider the various considerations raised by the district court, with respect to this proposed rule or any other proposed rule.

First, the court raised potential reliance interests of States and their residents, writing that

> for decades the states and their residents have relied upon DHS (and its predecessors) to protect their employees by enforcing the law as Congress had written it. Once again, neither the DACA Memorandum nor its underlying record gives any consideration to these reliance interests. Thus, if one applies the Supreme Court's rescission analysis from *Regents* to DACA's creation, it faces similar deficiencies and would likely be found to be arbitrary and capricious.

In developing this proposed rule, DHS has considered a wide range of potential reliance interests. As noted throughout this preamble, reliance interests can take multiple forms, and may be entitled to greater or lesser weight depending on the nature of the Department action or statement on which they are based. Such interests can include not only the reliance interests of DACA recipients, but also those indirectly affected by DHS's actions, including DACA recipients' family members, employers, schools, and neighbors, as well as the various States and their other residents. Some States have relied on the existence of DACA in setting policies regarding eligibility for driver's licenses, instate tuition, State-funded health care benefits, and professional licenses.[410] Other States may have relied on certain aspects of DACA—such as employment authorization or lawful presence—in making other policy choices.[411]

In addition, prior to 2012, some States may have relied on the pre-DACA status quo in various ways, although the relevance of such reliance interests may be attenuated by the fact that DACA has been in existence since 2012, and by the fact that the executive branch has long exercised, even prior to 2012, various forms of enforcement discretion with features similar to DACA (*see* Section III.A for examples). DHS is aware of such interests and has taken them into account; it does not believe they are sufficient to outweigh the many considerations, outlined above, that support the proposed rule. DHS seeks comments on potential reliance interests of all kinds, including any reliance interests established prior to the issuance of the Napolitano Memorandum, and how DHS should accommodate such asserted reliance interests in a final rule.

Second, the court wrote that ''the parties and amici curiae have raised various other issues that might be considered in a reformulation of DACA,'' as follows (in the court's terms):

1. The benefits bestowed by the DACA recipients on this country and the communities where they reside;
2. the effects of DACA or similar programs on legal and illegal immigration;
3. the effects of DACA on the unemployed or underemployed legal residents of the States;
4. whether DACA amounts to an abandonment of the executive branch's duty to enforce the law as written (as the plaintiff States have long claimed);
5. whether any purported new formulation violates the equal protection guarantees of the Constitution (as Justice Sotomayor was concerned that DACA's rescission would); and
6. the costs DACA imposes on the States and their respective communities.

The court also identified ''more attenuated considerations,'' as follows:

7. The secondary costs imposed on States and local communities by any alleged increase in the number of undocumented immigrants due to DACA; and
8. what effect illegal immigration may have on the lucrative human smuggling and human trafficking activities of the drug cartels that operate on our Southern border.

Throughout the preamble generally and in this RIA specifically, DHS has addressed several of these issues relative to both baselines, and we seek comment on all of them. DHS addresses each question briefly below, with the expectation of additional engagement by the public during the comment period for this proposed rule.

With respect to item (1), the benefits bestowed by DACA recipients on this country and the communities where they reside are numerous. DHS directs the reader to Section II.A, as well as the discussions of benefits and transfers in this RIA. DACA recipients have made substantial contributions, including as members of families and communities, and have offered substantial productivity and tax revenue through their work in a wide range of occupations.

With respect to item (2), as noted above, DHS does not perceive DACA as having a substantial effect on volumes of lawful and unlawful immigration into the United States.[412] DHS is not aware of any evidence, and does not believe that, DACA acts as a significant material ''pull factor'' (in light of the wide range of factors that contribute to both lawful and unlawful immigration into the United States).[413] DHS policy and messaging have been and continue to be clear that DACA is not available to individuals who have not continuously resided in the United States since at least June 15, 2007, and that border security remains a high priority for the Department.[414] DHS does not propose to open up the DACA policy to new groups of noncitizens and does not believe that codifying the DACA policy would undermine DHS's enforcement messaging.[415] For the same reasons, DHS does not believe it necessary to address items (7) and (8) above, although DHS welcomes comments to inform DHS's analysis further.

With respect to item (3), DHS details its consideration of potential harm to unemployed and underemployed individuals in the *Labor Market Impacts* section. That section discusses findings from the 2017 NAS Report, which

[410] *See, e.g.,* National Conference of State Legislators, ''Deferred Action for Childhood Arrivals | Federal Policy and Examples of State Actions,'' *https://www.ncsl.org/research/immigration/deferred-action.aspx* (last updated Apr. 16, 2020) (describing State actions, in the years following the Napolitano Memorandum, with respect to unauthorized noncitizens generally, DACA recipients in particular, and other classes of noncitizens).

[411] *See, e.g.,* National Conference of State Legislators, ''States Offering Driver's Licenses to Immigrants,'' *https://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx* (last updated Aug. 9, 2021) (describing multiple State decisions to offer driver's licenses to noncitizens with lawful presence).

[412] As discussed elsewhere in this rule, DHS believes that the proposed rule will not necessarily affect the number of noncitizens it removes each year, but rather helps ensure that finite removal resources are focused on the highest priority cases.

[413] *See, e.g.,* Catalina Amuedo-Dorantes and Thitima Puttitanun, *DACA and the Surge in Unaccompanied Minors at the US-Mexico Border,* 54(4) Int'l Migration 102, 112 (2016) (''DACA does not appear to have a significant impact on the observed increase in unaccompanied alien children in 2012 and 2013.'').

[414] For example, DHS continues to invest in new CBP personnel, including hiring more than 100 additional Border Patrol Processing Coordinators in FY 2021, with plans to hire hundreds more. CBP also is investing in technology that enhances its border security mission. Over the last few years, CBP has increased its use of relocatable Autonomous Surveillance Towers (ASTs) along the border, which enable enhanced visual detection, identification, and classification of subjects or vehicles at a great distance via autonomous detection capabilities. ASTs can be moved to areas of interest or high traffic, as circumstances on the ground dictate. To increase situational awareness, CBP also recently integrated the Team Awareness Kit, which provides near real-time situational awareness for USBP agents and the locations of suspected illegal border activities. Advanced technology returns agents to the field and increases the probability of successful interdiction and enforcement.

[415] *See* DACA FAQs; Pekoske Memorandum; *see also* Acting ICE Director Tae D. Johnson, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021). As noted above, on September 15, 2021, the U.S. Court of Appeals for the Fifth Circuit partially stayed a preliminary injunction issued by the U.S. District Court for the Southern District of Texas with respect to the two 2021 policies. *See State of Texas* v. *United States,* No. 21–40618 (5th Cir. Sept. 15, 2021).

summarizes the work of numerous social scientists who have studied the costs and benefits of immigration for decades.

This RIA does not contain a section that discusses the costs of a regulatory alternative in which DACA EADs are terminated or phased out relative to a No Action baseline, although it does contain estimates of costs, benefits, and transfers relative to the Pre-Guidance Baseline, which may be instructive for understanding some of these effects. In such a scenario, as discussed in USCIS' Asylum Application, Interview, and Employment Authorization for Applicants Final Rule (85 FR 38532, June 26, 2020), the lost compensation from DACA recipients could serve as a proxy for the cost of lost productivity to U.S. employers that are unable to find replacement workers in the U.S. labor force. There also could be additional employer costs related to searching for new job applicants.

With respect to item (4), DHS continues to enforce the law as written. As noted in Sections II.A, III.A, and III.C, the use of prioritization and discretion is a necessary element of fulfilling the DHS mission, and the use of deferred action for this purpose is consistent with the longstanding practice of DHS and the former INS.

With respect to item (5), DHS does not believe that the DACA policy or this proposed rule would violate the equal protection component of the Fifth Amendment's Due Process Clause. DHS nonetheless invites comment on whether equal protection principles bear on or would preclude DACA.[416]

With respect to item (6), DHS addresses the issue in Section V.A.4.e above. In short, although such an analysis is challenging for a variety of reasons, multiple aspects of this proposed rule suggest that the proposed rule is unlikely to impose a significant burden on State and local fiscal resources, and it may well have a positive effect.

With respect to items (7) and (8), which relate to the costs of unlawful immigration and human smuggling, DHS disagrees with the premise, as noted in DHS's discussion of item (2) above. As with each of these items, however, DHS welcomes the submission of evidence pertinent to the empirical question, as well as information and views as to how to evaluate and use such evidence.

Finally, the court also stated that ''if DHS elects to justify DACA by asserting that it will conserve resources, it should support this conclusion with evidence and data. No such evidence is to be found in the administrative record or the DACA Memorandum. DHS should consider the costs imposed on or saved by all governmental units.'' DHS agrees on the importance of evidence and data and has addressed the resource implications of DACA throughout the proposed rule, including at Sections III.C and V.A.4.b.(5).

[416] Although the Equal Protection Clause of the Fourteenth Amendment does not apply to the Federal Government, the Supreme Court in *Bolling* v. *Sharpe,* 347 U.S. 497, 500 (1954), held that while '''equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' . . . discrimination may be so unjustifiable as to be violative of due process.''

g. Discounted Direct Costs, Cost Savings, Transfers, and Benefits of the Proposed Regulatory Changes

To compare costs over time, DHS applied a 3-percent and a 7-percent discount rate to the total estimated costs, cost savings, transfers, and benefits associated with the proposed rule. Table 18 presents a summary of the proposed rule's quantified cost savings relative to the No Action Baseline at 3-percent and 7-percent discount rates.

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Table 18. Total Estimated Potential Cost Savings of the Proposed Rule Discounted at 3 Percent and 7 Percent (relative to the No Action Baseline) (FY 2021–FY 2031)

Form	Source of Cost Savings	Total Estimated Annual Cost Savings (Undiscounted)	Total Estimated Cost Savings Over 11-Year Period (Undiscounted)
Form I-821D	• $85 fee to file form; • Biometrics collection (additional time burden)	Could range between $0 and $43,959,188	Could range between $0 and $483,551,071
Form I-765	• $410 fee to file form; • Optional form; • No biometrics collection (less total time burden)		
Form I-765WS	No changes		
Total Undiscounted Cost Savings		**Could range between $0 and $43,959,188**	**Could range between $0 and $483,551,071**
Total Cost Savings at 3-Percent Discount Rate		**Could range between $0 and $44,306,430**	**Could range between $0 and $422,249,263**
Total Cost Savings at 7-Percent Discount Rate		**Could range between $0 and $44,747,009**	**Could range between $0 and $359,031,274**

Source: USCIS analysis.

Notes: The larger numbers represent the higher bound cost savings estimates presented earlier based on the 70/30 percent population split assumption. The $0 represents when the entire DACA population requests deferred action and EAD.

Table 19 presents a summary of the proposed rule's potential transfers relative to the No Action Baseline at 3-percent and 7-percent discount rates.

Table 19. Proposed Rule Potential Transfers from USCIS to Certain DACA Requestors Discounted at 3 Percent and 7 Percent (relative to the No Action Baseline) (FY 2021–FY 2031)

Form	Source of Transfers	Total Estimated Annual Transfer (Undiscounted)	Total Estimated Transfers Over 11-Year Period
Form I-821D	• $85 fee to file form; • Biometrics collection (additional time burden)	Could range between $0 and $34,918,639	Could range between $0 and $384,105,034
Form I-765	Optional form (optional EAD)		
Total Undiscounted Transfers		**Could range between $0 and $34,918,639**	**Could range between $0 and $384,105,034**
Total Transfers at 3-Percent Discount Rate		**Could range between $0 and $35,194,468**	**Could range between $0 and $335,410,419**
Total Transfers at 7-Percent Discount Rate		**Could range between $0 and $35,544,439**	**Could range between $0 and $285,193,701**

Source: USCIS analysis.

Table 20 presents a summary of the potential costs relative to the Pre-Guidance Baseline in undiscounted dollars and discounted at 3 percent and 7 percent.

Table 20. Total Estimated Potential Costs of the Proposed Rule Discounted at 3 Percent and 7 Percent (relative to the Pre-Guidance Baseline) (FY 2012–FY 2031)

Form	Source of Costs	Total Estimated Annual Costs (Undiscounted)	Total Estimated Costs Over 20-Year Period
Form I-821D	• $85 fee to file form; • Biometrics collection (additional time burden)	Could range between $385,644,984 and $476,103,052	Could range between $7,712,899,688 and $9,522,061,046
Form I-765	Optional form (optional EAD)		
Total Undiscounted Costs		**Could range between $385,644,984 and $476,103,052**	**Could range between $7,712,899,688 and $9,522,061,046**
Total Costs at 3-Percent Discount Rate		**Could range between $378,119,675 and $466,812,583**	**Could range between $7,339,957,122 and $9,061,639,930**
Total Costs at 7-Percent Discount Rate		**Could range between $367,333,528 and 453,496,405**	**Could range between $7,154,431,373 and $8,832,596,693**

Source: USCIS analysis.

Note: The Pre-Guidance Baseline applies reverse-discounts to the costs associated with 100 percent of the FY 2012–FY 2021 population applying for EAD. The lower numbers represent the lower bound cost estimates for FY 2022–FY 2031, presented earlier based on the 70/30 percent population split assumption. The larger numbers represent the costs if the entire projected DACA population requests deferred action/EAD.

Table 21 presents a summary of the potential benefits relative to the Pre-Guidance Baseline in undiscounted dollars and discounted at 3 percent and 7 percent.

Table 21. Total Estimated Potential Benefits of the Proposed Rule Discounted at 3 Percent and 7 Percent (relative to the Pre-Guidance Baseline) (FY 2012–FY 2031)

Form	Source of Benefits	Total Estimated Annual Benefits (Undiscounted)	Total Estimated Benefits Over 20-Year Period
Form I-821D	• $85 fee to file form; • Biometrics collection (additional time burden)	Could be $22,772,990,581	Could be $455,459,811,615
Form I-765	Optional form (optional EAD)		
Total Undiscounted Benefits		**Could be $22,772,990,581**	**Could be $455,459,811,615**
Total Benefits at 3-Percent Discount Rate		**Could be $21,883,257,823**	**Could be $424,791,897,651**
Total Benefits at 7-Percent Discount Rate		**Could be $20,722,598,193**	**Could be $403,607,063,268**

Source: USCIS analysis.

Table 22 presents a summary of the potential tax transfers relative to the Pre-Guidance Baseline in undiscounted dollars and discounted at 3 percent and 7 percent.

Table 22. Proposed Rule Employment Federal Tax Transfers from DACA Employees and Employers to the Federal Government Discounted at 3 Percent and 7 Percent (relative to the Pre-Guidance Baseline) (FY 2012–FY 2031)

Form	Source of Tax Transfers	Total Estimated Annual Tax Transfer (Undiscounted)	Total Estimated Tax Transfers Over 20-Year Period
Form I-821D	• $85 fee to file form; • Biometrics collection (additional time burden)	Could be $3,772,899,494	Could be $75,457,989,883
Form I-765	Optional form (optional EAD)		
Total Undiscounted Tax Transfers		**Could be $3,772,899,494**	**Could be $75,457,989,883**
Total Tax Transfers at 3-Percent Discount Rate		**Could be $3,625,492,432**	**Could be $70,377,081,077**
Total Tax Transfers at 7-Percent Discount Rate		**Could be $3,433,199,809**	**Could be $66,867,275,980**
Source: USCIS analysis.			

Table 23 presents a summary of the potential transfers relative to the Pre-Guidance Baseline in undiscounted dollars and discounted at 3 percent and 7 percent.

Table 23. Proposed Rule Potential Transfers from USCIS to Certain DACA Requestors Discounted at 3 Percent and 7 Percent (relative to the Pre-Guidance Baseline) (FY 2012–FY 2031)

Form	Source of Transfers	Total Estimated Annual Transfer (Undiscounted)	Total Estimated Transfers Over 20-Year Period
Form I-821D	• $85 fee to file form; • Biometrics collection (additional time burden)	Could range between $0 and $30,991,290	Could range between $0 and $619,825,804
Form I-765	Optional form (optional EAD)		
Total Undiscounted Transfers		**Could range between $0 and $30,991,290**	**Could range between $0 and $619,825,804**
Total Transfers at 3-Percent Discount Rate		**Could range between $0 and $30,386,540**	**Could range between $0 and $589,855,308**
Total Transfers at 7-Percent Discount Rate		**Could range between $0 and $29,519,741**	**Could range between $0 and $574,946,046**
Source: USCIS analysis.			

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h. Regulatory Alternatives

Consistent with the Supreme Court's general analysis in *Regents,* and the more recent analysis of the district court in *Texas II,* DHS is keenly alert to the importance of exploring all relevant alternatives. This focus is also consistent with E.O. 12866 and E.O. 13563. As stated in E.O. 12866,

[i]n deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

Consistent with these requirements, DHS has considered a range of regulatory alternatives to the proposed rule, including alternatives related to a policy of forbearance without employment authorization or the benefits associated with so-called lawful presence. As discussed in detail in Sections III.A through III.C above, the authority to forbear is an undisputed feature of DHS's enforcement discretion, whereas the district court in *Texas II* held that DHS lacked authority to provide employment authorization and benefits such as Social Security benefits to DACA recipients.[417]

The analysis of this forbearance-only alternative is in a sense relatively straightforward. Like the proposed rule, as compared to the Pre-Guidance Baseline, such an approach would confer a range of benefits to DHS, while also conferring benefits to DACA recipients and their families, in the form of increased security, reduced fear and anxiety, and associated values (which we have not been able to quantify). Unlike the proposed rule, however, such an approach would not confer upon DACA recipients, their families, and their communities the benefits of their work authorization and employment, or impose the corresponding costs (both quantified here, to the extent feasible). To that

[417] As the court stated in *Texas II* in objecting to work authorization and lawful presence, ''the individualized notion of deferred action'' is an approach ''that courts have found permissible in other contexts.''

extent, a forbearance-only alternative would have substantially lower net benefits, consistent with the numbers discussed above.

For instance, as discussed in Section III.D. above, a policy of forbearance without work authorization also would disrupt the reliance interests of hundreds of thousands of people, as well as the families, employers, and communities that rely on them. It would result in substantial economic losses. It would produce a great deal of human suffering, including harms to dignitary interests, associated with lost income and ability to self-support. It potentially would result in hundreds of thousands of prime-working-age people remaining in the United States while lacking authorization to work to support either themselves or their families. Importantly, it also would deprive American employers and the American public at large of the ability to benefit from valuable work of hundreds of thousands of skilled and educated individuals and disappoint their own, independent reliance interests as well. For the Federal Government, as well as for State and local governments, it likely would have adverse fiscal implications, due to reduced tax revenues. In addition, unlike the proposed rule, such an approach would produce reduced transfers to Medicare and Social Security funds, as well as any other transfers associated with the DACA policy under the No Action Baseline.

A possible alternative to the policy in the proposed rule would include (1) forbearance and (2) work authorization, but exclude (3) ''lawful presence'' and the resulting elimination of one ground of ineligibility for the associated benefits. DHS has considered this alternative and seeks comment on the issues of law and policy associated with it, including data as to the potential effects of such an approach. As noted above, ''lawful presence'' is a term of art; it could not and does not mean ''lawful status.'' But DHS believes that this alternative approach also may be inferior to the proposal, for at least two reasons. First, that approach would single out DACA recipients—alone among other recipients of deferred action, as well as others whose continued presence DHS has chosen to tolerate for a period of time—for differential treatment. Second, DHS is aware that some States have keyed benefits eligibility to lawful presence and may experience unintended indirect impacts if DHS, a decade after issuance of the Napolitano Memorandum, revises that aspect of the policy.[418] For these reasons, DHS does not at this time believe that it would be preferable to limit the proposal to forbearance and work authorization, but it welcomes comments on that alternative, and on all reasonable alternatives.

Finally, consistent with the *Texas II* district court's equitable decision to stay its vacatur and injunction as it relates to existing DACA recipients, DHS considered the alternative of applying this proposed rule only to existing DACA recipients. Existing DACA recipients have clearer reliance interests in the continuation of DACA than do prospective applicants who have yet to apply. On the other hand, the benefits of the program are equally applicable to those who have yet to apply, and some who might have benefited under the Napolitano Memorandum but have yet to ''age in'' to eligibility to request DACA. Although DHS believes that restricting eligibility to existing DACA recipients would not be desirable or maximize net benefits, DHS welcomes comment on the matter.

DHS invites the public to provide input regarding the current regulatory alternatives presented, suggest any other possible regulatory alternatives, or both.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA),[419] as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[420] requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.[421]

The proposed rule does not directly regulate small entities and is not expected to have a direct effect on small entities. It does not mandate any actions or requirements for small entities in the process of a DACA requestor seeking DACA or employment authorization. Rather, this proposed rule regulates individuals, and individuals are not defined as ''small entities'' by the RFA.[422] Based on the evidence presented in this analysis and throughout this preamble, DHS certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. DHS nonetheless welcomes comments regarding potential economic impacts on small entities, which DHS may consider as appropriate in a final rule. For example, DHS seeks data and information on the number of DACA recipients who have started small businesses or work at small businesses.

C. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and Tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector.[423] The inflation-adjusted value of $100 million in 1995 is approximately $169.8 million in 2020 based on the CPI–U.[424] The term ''Federal mandate'' means a Federal intergovernmental mandate or a Federal private sector mandate.[425] The term ''Federal intergovernmental mandate'' means, in relevant part, a provision that would impose an enforceable duty upon State, local, or Tribal governments (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program).[426] The term ''Federal private sector mandate'' means, in relevant part, a provision that would impose an enforceable duty upon the

[418] *See supra* note 411.

[419] 5 U.S.C. ch. 6.

[420] Public Law 104–121, tit. II, 110 Stat. 847 (5 U.S.C. 601 note).

[421] A small business is defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act (15 U.S.C. 632).

[422] 5 U.S.C. 601(6).

[423] *See* 2 U.S.C. 1532(a).

[424] *See* BLS, *Historical Consumer Price Index for All Urban Consumers (CPI–U): U.S. City Average, All Items, https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202103.pdf.*

Steps in calculation of inflation: (1) Calculate the average monthly CPI–U for the reference year (1995) and the most recent current year available (2020); (2) Subtract reference year CPI–U from current year CPI–U; (3) Divide the difference of the reference year CPI–U and current year CPI–U by the reference year CPI–U; (4) Multiply by 100.

Calculation of inflation: [(Average monthly CPI–U for 2020—Average monthly CPI–U for 1995)/(Average monthly CPI–U for 1995)] * 100 = [(258.811 − 152.383)/152.383] * 100 = (106.428/152.383) * 100 = 0.6984 * 100 = 69.84 percent = 69.8 percent (rounded).

Calculation of inflation-adjusted value: $100 million in 1995 dollars * 1.698 = $169.8 million in 2020 dollars.

[425] *See* 2 U.S.C. 1502(1), 658(6).

[426] 2 U.S.C. 658(5).

private sector except (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program).[427]

This proposed rule does not contain such a mandate, because it does not impose any enforceable duty upon any other level of government or private sector entity. Any downstream effects on such entities would arise solely due to their voluntary choices and would not be a consequence of an enforceable duty. Similarly, any costs or transfer effects on State and local governments would not result from a Federal mandate as that term is defined under UMRA.[428] The requirements of title II of UMRA, therefore, do not apply, and DHS has not prepared a statement under UMRA. DHS has, however, analyzed many of the potential effects of this action in the RIA above. DHS welcomes comments on this analysis.

D. Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule, if finalized, would be a major rule as defined by section 804 of SBREFA.[429] This proposed rule likely would result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based companies to compete with foreign-based companies in domestic and export markets. Accordingly, absent exceptional circumstances, this rule, if enacted as a final rule, would be effective at least 60 days after the date on which Congress receives a report submitted by DHS as required by 5 U.S.C. 801(a)(1).

E. Executive Order 13132: Federalism

This proposed rule would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. DHS does not expect that this rule would impose substantial direct compliance costs on State and local governments or preempt State law. Therefore, in accordance with section 6 of E.O. 13132, this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988: Civil Justice Reform

This proposed rule was drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform. This final rule was written to provide a clear legal standard for affected conduct and was reviewed carefully to eliminate drafting errors and ambiguities, so as to minimize litigation and undue burden on the Federal court system. DHS has determined that this final rule meets the applicable standards provided in section 3 of E.O. 12988.

G. Paperwork Reduction Act—Collection of Information

Under the PRA,[430] all Departments are required to submit to OMB, for review and approval, any reporting or recordkeeping requirements inherent in a rule. DHS and USCIS are revising two information collections in association with this rulemaking action:

USCIS Form I–821D

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0124 and the agency name. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses).

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Consideration of Deferred Action for Childhood Arrivals.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–821D; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. The information collected on this form is used by USCIS to determine eligibility of certain noncitizens who entered the United States as minors and meet the guidelines to be considered for DACA.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the I–821D initial requests information collection is 112,254 annually, and the estimated hour burden per response is 3 hours; the estimated total number of respondents for the I–821D renewal requests information collection is 276,459, and the estimated hour burden per response is 3 hours; the estimated total number of respondents for the biometrics collection is 388,713 annually, and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,620,933 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $42,758,430.

USCIS Form I–765

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0040 and the agency name. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the

[427] 2 U.S.C. 658(7).

[428] *See* 2 U.S.C. 1502(1), 658(6).

[429] *See* 5 U.S.C. 804(2).

[430] Public Law 104–13, 109 Stat. 163.

agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses).

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Employment Authorization.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–765 and I–765WS; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. USCIS uses Form I–765 to collect information needed to determine if a noncitizen is eligible for an initial EAD, a new replacement EAD, or a subsequent EAD upon the expiration of a previous EAD under the same eligibility category. Noncitizens in many immigration statuses are required to possess an EAD as evidence of employment authorization.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the I–765 information collection is 2,062,880 annually, and the estimated hour burden per response is 4.5 hours; the estimated total number of respondents for the Form I–765 (e-file) information collection is 106,506 annually, and the estimated hour burden per response is 4 hours; the estimated total number of respondents for the I–765WS information collection is 185,386 annually, and the estimated hour burden per response is 0.5 hours; the estimated total number of respondents for the biometrics collection is 302,535 annually, and the estimated hour burden per response is 1.17 hours; the estimated total number of respondents for the passport photos collection is 2,169,386 annually, and the estimated hour burden per response is 0.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 11,240,336 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $379,642,550.

H. Family Assessment

DHS has reviewed this proposed rule in line with the requirements of section 654 of the Treasury and General Government Appropriations Act, 1999,[431] enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999.[432] DHS has systematically reviewed the criteria specified in section 654(c)(1) of that act, by evaluating whether this proposed regulatory action: (1) Impacts the stability or safety of the family, particularly in terms of marital commitment; (2) impacts the authority of parents in the education, nurture, and supervision of their children; (3) helps the family perform its functions; (4) affects disposable income or poverty of families and children; (5) only financially impacts families, if at all, to the extent such impacts are justified; (6) may be carried out by State or local government or by the family; or (7) establishes a policy concerning the relationship between the behavior and personal responsibility of youth and the norms of society. If the agency determines the proposed regulation may negatively affect family well-being, then the agency must provide an adequate rationale for its implementation.

DHS has determined that the implementation of this proposed rule would not negatively affect family well-being, but rather would strengthen it. This regulation would create a positive effect on the family by allowing families to remain together in the United States and enabling access to greater financial stability. More than 250,000 children have been born in the United States with at least one parent who is a DACA recipient.[433] DACA would provide recipients with U.S. citizen children a greater sense of security, which is important for families' overall well-being and success. It would also make recipients eligible for employment authorization, which would motivate DACA recipients to continue their education, graduate from high school, pursue post-secondary and advanced degrees, and seek additional vocational training, which ultimately would provide greater opportunities, financial stability, and disposable income for themselves and their families.[434]

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

This proposed rule has been reviewed in accordance with the requirements of E.O. 13175, Consultation and Coordination with Indian Tribal Governments. E.O. 13175 requires Federal agencies to consult and coordinate with Tribes on a Government-to-Government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. DHS has assessed the impact of this rule on Indian Tribes and determined that this proposed rule does not have Tribal implications that require Tribal consultation under E.O. 13175.

J. National Environmental Policy Act

DHS Directive 023–01 Rev. 01 (Directive) and Instruction Manual 023–01–001–01 Rev. 01 (Instruction Manual) establish the policies and procedures DHS and its components use to comply with the National Environmental Policy Act (NEPA) and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500 through 1508.

The CEQ regulations allow Federal agencies to establish, with CEQ review and concurrence, categories of actions (''categorical exclusions'') that experience has shown do not have a significant effect on the human environment and, therefore, do not require an Environmental Assessment or Environmental Impact Statement.[435] The Instruction Manual establishes categorical exclusions that DHS has found to have no such effect.[436] Under DHS implementing procedures for NEPA, for a proposed action to be categorically excluded, it must satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no

[431] *See* 5 U.S.C. 601 note.

[432] Public Law 105–277, 112 Stat. 2681 (1998).

[433] Svajlenka and Wolgin (2020).

[434] Gonzales (2019); Wong (2020).

[435] 40 CFR 1507.3(e)(2)(ii) and 1501.4.

[436] *See* Instruction Manual, Appendix A, Table 1.

extraordinary circumstances exist that create the potential for a significant environmental effect.[437]

This proposed rule codifies the enforcement discretion policy stated in the Napolitano Memorandum into DHS regulations. It defines the criteria under which DHS will consider requests for DACA, the procedures by which one may request DACA, and what an affirmative grant of DACA will confer upon the requestor.

To whatever extent this rule might have effects on the human environment, if any, DHS believes that analysis of such effects would require predicting a myriad of independent decisions by a range of actors (including current and prospective DACA recipients, employers, law enforcement officers, and courts) at indeterminate times in the future. Such predictions are unduly speculative and not amenable to NEPA analysis.

Nevertheless, if NEPA did apply to this action, the proposed action would clearly fit within categorical exclusion number A3(c), which includes rules that ''implement, without substantive change, procedures, manuals, and other guidance documents'' as set forth in the Instruction Manual,[438] as the proposed rule codifies the existing DACA policy and is not expected to alter the population who qualify for DACA.

This proposed rule is not part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, if NEPA were determined to apply, this rule would be categorically excluded from further NEPA review.

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

This proposed rule would not cause a taking of private property or otherwise have taking implications under E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights. Therefore, a takings implication assessment is not required.

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

E.O. 13045 requires agencies to consider the impacts of environmental health risk or safety risk that may disproportionately affect children. DHS has reviewed this rule and determined that this rule is not a covered regulatory action under E.O. 13045. Although the rule is economically significant, it would not create an environmental risk to health or risk to safety that may disproportionately affect children. Therefore, DHS has not prepared a statement under this E.O.

VI. List of Subjects and Regulatory Amendments

List of Subjects

8 CFR 106

Fees, Immigration.

8 CFR Part 236

Administrative practice and procedure, Aliens, Immigration.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Penalties, Reporting and recordkeeping requirements, Students.

Accordingly, DHS proposes to amend parts 106, 236, and 274a of chapter I of title 8 of the Code of Federal Regulations as follows:

PART 106—USCIS FEE SCHEDULE

■ 1. The authority citation for 8 CFR part 106 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1254a, 1254b, 1304, 1356; Pub. L. 107–609; Pub. L. 115–218.

■ 2. Amend § 106.2 by revising paragraph (a)(38) to read as follows:

§ 106.2 Fees.

(a) * * *

(38) *Application for Deferred Action for Childhood Arrivals, Form I–821D:* $85.

* * * * *

PART 236—APPREHENSION AND DETENTION OF INADMISSIBLE AND DEPORTABLE ALIENS; REMOVAL OF ALIENS ORDERED REMOVED

■ 3. The authority citation for part 236 is revised to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 6 U.S.C. 112(a)(2), 112(a)(3), 112(b)(1), 112(e), 202, 251, 279, 291; 8 U.S.C. 1103, 1182, 1224, 1225, 1226, 1227, 1231, 1232, 1324a, 1357, 1362, 1611; 18 U.S.C. 4002, 4013(c)(4); 8 CFR part 2.

■ 4. Add subpart C, consisting of §§ 236.21 through 236.25, to read as follows:

Subpart C—Deferred Action for Childhood Arrivals

Sec.

§ 236.21 Applicability.

(a) This subpart applies to requests for deferred action under the enforcement discretion policy set forth in this subpart, which will be described as Deferred Action for Childhood Arrivals (DACA). This section does not apply to or govern any other request for or grant of deferred action or any other DHS deferred action policy.

(b) Except as specifically provided in this subpart, the provisions of 8 CFR part 103 do not apply to requests filed under this subpart.

(c)(1) Deferred action is an exercise of the Secretary's broad authority to establish national immigration enforcement policies and priorities under 6 U.S.C. 202(5) and section 103 of the Act. It is a form of enforcement discretion not to pursue the removal of certain aliens for a limited period in the interest of ordering enforcement priorities in light of limitations on available resources, taking into account humanitarian considerations and administrative convenience. It furthers the administrability of the complex immigration system by permitting the Secretary to focus enforcement on higher priority targets. This temporary forbearance from removal does not confer any right or entitlement to remain in or re-enter the United States. A grant of deferred action under this section does not preclude DHS from commencing removal proceedings at any time or prohibit DHS or any other Federal agency from initiating any criminal or other enforcement action at any time.

(2) During this period of forbearance, on the basis of this subpart only, DACA recipients who can demonstrate an economic need may apply to USCIS for employment authorization pursuant to 8 CFR 274a.13 and 274a.12(c)(33).

(3) During this period of forbearance, on the basis of this subpart only, a DACA recipient is considered ''lawfully present'' under the provisions of 8 CFR 1.3(a)(4)(vi).

(4) During this period of forbearance, on the basis of this subpart only, a DACA recipient is not considered ''unlawfully present'' for the purpose of inadmissibility under section 212(a)(9) of the Act.

§ 236.22 Discretionary determination.

(a) *Deferred Action for Childhood Arrivals; in general.* (1) USCIS may consider requests for Deferred Action for Childhood Arrivals submitted by

[437] *See id.* at Section V.B(2)(a) through (c).

[438] *See id.* at Appendix A, Table 1.

aliens described in paragraph (b) of this section.

(2) A pending request for deferred action under this section does not authorize or confer any interim immigration benefits such as employment authorization or advance parole.

(3) Subject to paragraph (c) of this section, the requestor bears the burden of demonstrating by a preponderance of the evidence that he or she meets the threshold criteria described in paragraph (b) of this section.

(b) *Threshold criteria.* Subject to paragraph (c) of this section, a request for deferred action under this section may be granted only if USCIS determines in its sole discretion that the alien meets each of the following threshold criteria and merits a favorable exercise of discretion:

(1) *Came to the United States under the age of 16.* The requestor must demonstrate that he or she first resided in the United States before his or her sixteenth birthday.

(2) *Continuous residence in the United States from June 15, 2007, to the time of filing of the request.* The requestor also must demonstrate that he or she has been residing in the United States continuously from June 15, 2007, to the time of filing of the request. As used in this section, ''residence'' means the principal, actual dwelling place in fact, without regard to intent, and specifically the country of the actual dwelling place. In particular, brief, casual, and innocent absences from the United States will not break the continuity of one's residence. However, unauthorized travel outside of the United States on or after August 15, 2012, will interrupt continuous residence, regardless of whether it was otherwise brief, casual, and innocent. An absence will be considered brief, casual, and innocent if it occurred before August 15, 2012, and—

(i) The absence was short and reasonably calculated to accomplish the purpose for the absence;

(ii) The absence was not because of a post-June 15, 2007 order of exclusion, deportation, or removal;

(iii) The absence was not because of a post-June 15, 2007 order of voluntary departure, or an administrative grant of voluntary departure before the requestor was placed in exclusion, deportation, or removal proceedings; and

(iv) The purpose of the trip, and the requestor's actions while outside the United States, were not contrary to law.

(3) *Physical presence in the United States.* The requestor must demonstrate that he or she was physically present in the United States both on June 15, 2012, and at the time of filing of the request for Deferred Action for Childhood Arrivals under this section.

(4) *Lack of lawful immigration status.* Both on June 15, 2012, and at the time of filing of the request for Deferred Action for Childhood Arrivals under this section, the requestor must not have been in a lawful immigration status. If the requestor was in lawful immigration status at any time before June 15, 2012, or at any time after June 15, 2012, and before the submission date of the request, he or she must submit evidence that that lawful status had expired or otherwise terminated prior to those dates.

(5) *Education or veteran status.* The requestor must currently be enrolled in school, have graduated or obtained a certificate of completion from high school, have obtained a General Educational Development certificate, or be an honorably discharged veteran of the United States Coast Guard or Armed Forces of the United States.

(6) *Criminal history and public safety.* The requestor must not have been convicted (as defined in section 101(a)(48) of the Act and as demonstrated by any of the documents or records listed in § 1003.41 of this chapter) of a felony, a misdemeanor described in this paragraph (b)(6), or three or more other misdemeanors not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct, or otherwise pose a threat to national security or public safety. For purposes of paragraph (b)(6) of this section only, a single misdemeanor is disqualifying if it is a misdemeanor as defined by Federal law (specifically, one for which the maximum term of imprisonment authorized is 1 year or less but greater than 5 days) and that meets the following criteria:

(i) Regardless of the sentence imposed, is an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or

(ii) If not an offense listed above, is one for which the individual was sentenced to time in custody of more than 90 days. The sentence must involve time to be served in custody and, therefore, does not include a suspended sentence.

(7) *Age at time of request.* The requestor must have been born on or after June 16, 1981. Additionally, the requestor must be at least 15 years of age at the time of filing his or her request, unless, at the time of his or her request, he or she is in removal proceedings, has a final order of removal, or has a voluntary departure order.

(c) *Final discretionary determination.* Deferred action requests submitted under this section are determined on a case-by-case basis. Even if the threshold criteria in paragraph (b) are all found to have been met, USCIS retains the discretion to assess the individual's circumstances and to determine that any factor specific to that individual makes deferred action inappropriate.

§ 236.23 Procedures for request, terminations, and restrictions on information use.

(a) *General.* (1) A request for Deferred Action for Childhood Arrivals must be filed in the manner and on the form designated by USCIS, with the required fee, including any biometrics required by 8 CFR 103.16. A request for Deferred Action for Childhood Arrivals may also contain a request for employment authorization filed pursuant to 8 CFR 274a.12(c)(33) and 274a.13. If a request for Deferred Action for Childhood Arrivals does not include a request for employment authorization, employment authorization may still be requested subsequent to approval for deferred action, but not for a period of time to exceed the grant of deferred action.

(2) All requests for Deferred Action for Childhood Arrivals, including any requests made by aliens in removal proceedings before EOIR, must be filed with USCIS. USCIS has exclusive jurisdiction to consider requests for Deferred Action for Childhood Arrivals. EOIR shall have no jurisdiction to consider requests for Deferred Action for Childhood Arrivals or to review USCIS approvals or denials of such requests. A voluntary departure order or a final order of exclusion, deportation, or removal is not a bar to requesting Deferred Action for Childhood Arrivals. An alien who is in removal proceedings may request Deferred Action for Childhood Arrivals regardless of whether those proceedings have been administratively closed. An alien who is in immigration detention may request Deferred Action for Childhood Arrivals but may not be approved for Deferred Action for Childhood Arrivals unless the alien is released from detention by ICE prior to USCIS' decision on the Deferred Action for Childhood Arrivals request.

(3) USCIS may request additional evidence from the requestor, including, but not limited to, by notice, interview, or other appearance of the requestor. USCIS may deny a request for Deferred Action for Childhood Arrivals without prior issuance of a request for evidence or notice of intent to deny.

(4) A grant of Deferred Action for Childhood Arrivals will be provided for an initial or renewal period of 2 years, subject to DHS's discretion.

(b) *Consideration of a request for Deferred Action for Childhood Arrivals.* In considering requests for Deferred Action for Childhood Arrivals, USCIS may consult, as it deems appropriate in its discretion and without notice to the requestor, with any other component or office of DHS, including ICE and CBP, any other Federal agency, or any State or local law enforcement agency, in accordance with paragraph (e) of this section.

(c) *Notice of decision.* (1) USCIS will notify the requestor and, if applicable, the requestor's attorney of record or accredited representative of the decision in writing. Denial of a request for Deferred Action for Childhood Arrivals does not bar a requestor from applying for any benefit or form of relief under the immigration laws or requesting any other form of prosecutorial discretion, including another request for Deferred Action for Childhood Arrivals.

(2) If USCIS denies a request for Deferred Action for Childhood Arrivals under this section, USCIS will not issue a Notice to Appear or refer a requestor's case to U.S. Immigration and Customs Enforcement for possible enforcement action based on such denial unless the case involves denial for fraud, a threat to national security, or public safety concerns.

(3) There is no administrative appeal from a denial of a request for Deferred Action for Childhood Arrivals. The alien may not file, pursuant to 8 CFR 103.5 or otherwise, a motion to reopen or reconsider a denial of a request for Deferred Action for Childhood Arrivals.

(d) *Termination.* (1) *Discretionary termination.* USCIS may terminate a grant of Deferred Action for Childhood Arrivals at any time in its discretion with or without issuance of a notice of intent to terminate.

(2) *Automatic termination.* Deferred Action for Childhood Arrivals is terminated automatically without notice upon:

(i) Filing of a Notice to Appear for removal proceedings with EOIR, unless the Notice to Appear is issued by USCIS solely as part of an asylum case referral to EOIR; or

(ii) Departure of the noncitizen from the United States without advance parole.

(3) *Automatic termination of employment authorization.* Upon termination of a grant of Deferred Action for Childhood Arrivals, any grant of employment authorization pursuant to § 274a.12(c)(33) of this chapter will automatically terminate in accordance with § 274a.14(a)(1)(iv) of this chapter, and notice of intent to revoke employment authorization is not required pursuant to § 274a.14(a)(2) of this chapter.

(e) *Restrictions on information use.* (1) Information contained in a request for Deferred Action for Childhood Arrivals related to the requestor will not be used by DHS for the purpose of initiating immigration enforcement proceedings against such requestor, unless DHS is initiating immigration enforcement proceedings against the requestor due to a criminal offense, fraud, a threat to national security, or public safety concerns.

(2) Information contained in a request for Deferred Action for Childhood Arrivals related to the requestor's family members or guardians will not be used for immigration enforcement purposes against such family members or guardians.

§ 236.24 Severability.

(a) Any provision of this subpart held to be invalid or unenforceable as applied to any person or circumstance shall be construed so as to continue to give the maximum effect to the provision permitted by law, including as applied to persons not similarly situated or to dissimilar circumstances, unless such holding is that the provision of this subpart is invalid and unenforceable in all circumstances, in which event the provision shall be severable from the remainder of this subpart and shall not affect the remainder thereof.

(b) The provisions in § 236.21(c)(2) through (4) are intended to be severable from one another, from any grant of forbearance from removal resulting from this subpart, and from any provision referenced in those paragraphs, including such referenced provision's application to persons with deferred action generally.

§ 236.25 No private rights.

This subpart is an exercise of the Secretary's enforcement discretion. This subpart—

(a) Is not intended to and does not supplant or limit otherwise lawful activities of the Department or the Secretary; and

(b) Is not intended to and does not create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal.

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

■ 5. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1105a, 1324a; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 114–74, 129 Stat. 599.

■ 6. Amend § 274a.12 by revising paragraph (c)(14) and adding paragraph (c)(33) to read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(c) * * *

(14) Except as provided for in paragraph (c)(33) of this section, an alien who has been granted deferred action, an act of administrative convenience to the government that gives some cases lower priority, if the alien establishes an economic necessity for employment.

* * * * *

(33) An alien who has been granted deferred action pursuant to 8 CFR 236.21 through 236.23, Deferred Action for Childhood Arrivals, if the alien establishes an economic necessity for employment.

* * * * *

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

[FR Doc. 2021–20898 Filed 9–27–21; 8:45 am]

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Part III

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 216

Swim With and Approach Regulation for Hawaiian Spinner Dolphins Under the Marine Mammal Protection Act; Establishment of Time-Area Closures for Hawaiian Spinner Dolphins Under the Marine Mammal Protection Act; Final Rule and Proposed Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 210901–0173]

RIN 0648–AU02

Swim With and Approach Regulation for Hawaiian Spinner Dolphins Under the Marine Mammal Protection Act

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

ACTION: Final rule.

SUMMARY: We, NMFS, establish a regulation under the Marine Mammal Protection Act (MMPA) to prohibit swimming with and approaching a Hawaiian spinner dolphin within 50 yards (45.7 meters (m)) (for persons, vessels, and objects), including approach by interception. These regulatory measures are intended to prevent take of Hawaiian spinner dolphins from occurring in marine areas where viewing pressures are most prevalent; the swim-with and approach prohibitions apply in waters within 2 nautical miles (nmi; 3.7 kilometers (km)) of the Hawaiian Islands and in designated waters bounded by the islands of Lāna'i, Maui, and Kaho'olawe. Although unauthorized take of marine mammals, including harassment of spinner dolphins, already is and continues to be prohibited under the MMPA throughout their range, the purpose of this regulation is to identify and prohibit specific human activities that result in take (including harassment) of Hawaiian spinner dolphins, and thus reduce disturbance and disruption of important Hawaiian spinner dolphin behaviors in areas where human-dolphin interactions are most likely to occur. This regulation is expected to reduce take of Hawaiian spinner dolphins and the impact of human viewing and interaction on these animals in the main Hawaiian Islands (MHI).

DATES: This final rule is effective October 28, 2021.

ADDRESSES: Copies of this rule and the Final Environmental Impact Statement (FEIS) and Record of Decision can be obtained from the website. *https://www.fisheries.noaa.gov/action/enhancing-protections-hawaiian-spinner-dolphins.* Written requests for copies of these documents should be addressed to Kevin Brindock, Deputy Assistant Regional Administrator, Protected Resources Division, National Marine Fisheries Service, Pacific Islands Regional Office, 1845 Wasp Blvd., Bldg. 176, Honolulu, HI 96818, Attn: Hawaiian Spinner Dolphin Final Rule.

FOR FURTHER INFORMATION CONTACT: Kevin Brindock, NMFS, Pacific Islands Region, Deputy Assistant Regional Administrator, Protected Resources Division, 808–725–5146; or Trevor Spradlin, NMFS, Office of Protected Resources, Deputy Chief, Marine Mammal and Sea Turtle Conservation Division, Office of Protected Resources, 301–427–8402.

SUPPLEMENTARY INFORMATION: We developed this final rule after considering comments submitted in response to an Advance Notice of Proposed Rulemaking (ANPR), as well as information from the public scoping period and public comment period for the Draft Environmental Impact Statement (DEIS) and the proposed rule, from community meetings and hearings on the proposed rule, and from relevant scientific literature and a dedicated scientific research project.

Background

Viewing wild marine mammals in Hawai'i has been a popular recreational activity for both tourists and residents over the past several decades. Historically, most marine mammal viewing focused on humpback whales (*Megaptera novaeangliae*) during the winter months when the whales migrate from their feeding grounds off the coast of Alaska to Hawai'i's warm and protected waters to breed and calve. However, increased marine mammal viewing has focused on small cetaceans, with a particular emphasis on Hawaiian spinner dolphins (*Stenella longirostris longirostris*), which can be predictably found close to shore in shallow waters throughout the MHI.

The number of commercial operators engaged in wild dolphin viewing has grown dramatically in Hawai'i in recent years (O'Connor 2009, Impact Assessment 2018), putting new pressures on easily accessible groups of resting Hawaiian spinner dolphins. Wiener (2016) found that on the Wai'anae coast of O'ahu and the Kona coast of Hawai'i Island, 752,762 people are estimated to have participated in boat-based commercial dolphin tours annually in 2013, which is 632,762 more than a preliminary estimate conducted statewide in 2008 (O'Conner *et al.* 2009). Supporting this finding, Impact Assessment (2018) documented the number of spiritual retreats (*i.e.,* organized retreats centered on dolphin encounters, dolphin-assisted therapy, and dolphin-associated spiritual practices) on Hawai'i Island as increasing from 5 in 2007 to 47 in 2017. Similarly, commercial boat tours that facilitate close in-water dolphin interactions increased on Hawai'i Island from 6 to 47 over the same period. In addition, a number of residents and visitors venture on their own, independent of commercial operators, to view and interact with spinner dolphins.

The expectation for close interactions with wild dolphins has been encouraged by some operators and various news and social media outlets, which routinely contradict established wildlife viewing guidelines by promoting close vessel or in-water encounters with the dolphins. As noted by Wiener, Needham, and Wilkenson (2009) when interviewing dolphin swim-with tourists, participants verbalized extreme disappointment if they did not participate in up-close activities during wild dolphin encounter trips, even when operators said that it would not be in the best interest of the animals.

We have received many complaints that spinner dolphins are being routinely disturbed by people attempting to closely approach and interact with the dolphins by boat or other watercraft (*e.g.,* kayaks), or in the water (*e.g.,* snorkel or ''swim-with-wild-dolphins'' activities). For example, Tyne (2015), who studied spinner dolphins along the Kona coast of Hawai'i Island, noted that the spinner dolphin population there is chronically exposed to human tourism activities more than 82 percent of the time during daylight hours, with a median interval between exposure events of 10 minutes. Heenehan *et al.* (2014) observed up to 13 tour boats jockeying for position on a single dolphin group, with up to 60 snorkelers in the water. In addition, officials from the Hawai'i Department of Land and Natural Resources (DLNR) and the U.S. Marine Mammal Commission (MMC), as well as various members of the public, including representatives of the Native Hawaiian community, scientific researchers, wildlife conservation organizations, public display organizations, and some commercial tour operators have expressed their concerns over human-dolphin interactions.

In 2010, we recognized 5 island-associated stocks and one pelagic stock of Hawaiian spinner dolphins in our annual Stock Assessment Report (SAR), identifying genetic distinctions and site fidelity differences as reasons to separately manage stocks found in waters surrounding the Hawaiian

Islands (Andrews 2009, Andrews *et al.* 2010, Hill *et al.* 2009, Carretta *et al.* 2011). Three of the five island-associated stocks (the Kaua'i/Ni'ihau stock, O'ahu/four Islands stock, and Hawai'i Island stock) are found near the MHI and are considered resident stocks. These three stocks reside in waters surrounding their namesake islands out to approximately 10 nmi (18.5 km) (Hill *et al.* 2010), and population estimates for each stock are relatively small. The most recent SAR indicates that the Hawai'i Island stock, which is thought to be the largest stock, has an estimated 665 individuals (Coefficient of Variation (CV)=0.09) (Tyne *et al.* 2014, Carretta *et al.* 2019). The Kaua'i/Ni'ihau and O'ahu/4 Islands stocks are estimated to be around 601 (CV=0.20) and 355 (CV=0.09) individuals, respectively (Carretta *et al.* 2019).

Island-associated spinner dolphins, such as those found in the MHI, have complex social structures and behavioral patterns linked to specific habitats that support their high energetic demands. The rigid, cyclical, and patterned behavior of a Hawaiian spinner dolphin's day is well documented from decades of scientific research on spinner dolphins off the Kona coast on Hawai'i Island (Norris and Dohl 1980, Norris *et al.* 1994). The daily pattern of Hawaiian spinner dolphins has been characterized as ''working the night shift,'' because the energetically demanding task of foraging is accomplished nightly when spinner dolphins move offshore in large groups to feed. Spinner dolphins feed on fish, shrimp, and squid found in the mesopelagic boundary community, part of the pelagic zone that extends from a depth of 200 to 1,000 m (~660 to 3,300 feet) below the ocean surface. Spinner dolphins maximize their foraging time by actively moving with, or tracking, the horizontal migration of the mesopelagic boundary community throughout the night, as it moves inshore until midnight and then offshore around sunrise (Benoit-Bird and Au 2003). Spinner dolphins are acoustically very active during foraging activities (Norris *et al.* 1994), working cooperatively in large groups using coordinated movements to maximize foraging potential (Benoit-Bird 2004).

During the day, spinner dolphins return in smaller groups to areas closer to shore to socialize, nurture their young, and rest in preparation for nightly foraging (Norris *et al.* 1994, Tyne *et al.,* 2017). These smaller groups visit specific habitats that are located along the coastlines of the MHI. These preferred daytime habitats of spinner dolphins are areas that provide space with optimal environmental conditions for resting, socializing, and nurturing young, and are referred to hereafter as ''essential daytime habitats.'' Spinner dolphins' essential daytime habitats are located close to offshore feeding areas, which minimizes the energetic cost of nightly travel to and from these areas (Norris *et al.* 1994, Thorne *et al.* 2012). Additionally, essential daytime habitats have large patches of sand bottom habitat, which increases the dolphins' ability to visually (instead of acoustically) detect predators while resting, and thus minimizes the energetic costs of vigilance (Norris *et al.* 1994). Throughout the day, spinner dolphins take advantage of the physical characteristics of essential daytime habitats to engage in specific patterned resting behaviors to recuperate between foraging bouts. The physical characteristics of these essential daytime habitats, combined with specific patterned resting behaviors, play an important role in supporting the dolphins' activity and energetic budgets.

Commercial operators and individuals interested in viewing or interacting with Hawaiian spinner target essential daytime habitats (Sepez 2006). In addition, organized retreats centered on dolphin encounters, dolphin-assisted therapy, and dolphin-associated spiritual practices have flourished in certain areas, further increasing the intensity of dolphin-directed activities in nearshore areas and especially within essential daytime habitats (Sepez 2006, Impact Assessment 2018).

The effects of dolphin-directed activities on spinner dolphins, especially activities that involve close approaches by humans, have been well documented. Peer-reviewed scientific literature documents disturbance of individual spinner dolphins as well as changes to spinner dolphin group behavioral patterns and effects of swimmers on dolphins' daily resting behavioral patterns (Norris *et al.* 1994; Lammers 2004; Danil *et al.* 2005; Courbis 2007; Courbis and Timmel 2009; Timmel *et al.* 2008; Forest 2001; Heenehan *et al.* 2017; Ostman-Lind *et al.* 2004; Ostman-Lind 2009; Thorne *et al.* 2012; and Wiener 2016).

There are several studies that have investigated the importance of adequate rest, and the negative impacts that can occur if animals do not obtain adequate rest (*e.g.,* Cirelli & Tononi 2008; Siegel 2008). Studies involving Hawaiian spinner dolphins reported behaviors that suggest a heightened state of alertness in response to swimmers and vessels. Responses include aerial displays, tail-slapping, or other visible behavior changes when closely approached by vessels and swimmers (Forest 2001, Courbis and Timmel 2008); avoidance behaviors, including increased swimming speed, directional changes, moving around and away from swimmers and vessels, or leaving the area in response to human pursuit (Ostman-Lind *et al.* 2004, Courbis 2004, Courbis and Timmel 2008); and aggressive behaviors directed at people, including charging or threat displays (Norris *et al.* 1985, Norris *et al.* 1994). In some resting areas with consistent levels of exposure to human activity, Hawaiian spinner dolphin resting activity is characterized by such vigilance that it does not represent a natural resting state (Danil *et al.* 2005; Tyne 2018). Vigilance, or enhanced brain function, is essential for active behaviors such as foraging, socializing, and avoiding predators. However, remaining in a state of constant vigilance without recovering with adequate rest can hinder the abilities of spinner dolphins to effectively forage and avoid predators (Dukas & Clark 1995; Benoit-Bird & Au 2003; Tyne *et al.* 2018). Thus, an inability to achieve a natural resting state could potentially cause negative population-wide impacts to spinner dolphins over time.

Additionally, when marine mammals respond to disturbance events, they can incur a cost in the form of the energy expended to respond (Williams *et al.* 2006), as well as the lost opportunity to engage in natural fitness-enhancing behavior (Lusseau 2003). For example, spinner dolphins disturbed during rest engage in avoidance or distress behaviors (Timmel *et al.* 2008; Danil *et al.* 2005; Forest 2001; Courbis 2008), which require energy. This disturbance detracts from the dolphins' abilities to recuperate from energetically demanding behaviors like foraging, transiting to and from offshore foraging grounds, and nurturing their young. In this example, the lack of consistent, undisturbed resting periods can reduce the amount of energy available to forage and care for young.

The predictable temporal and spatial patterns of MHI resident spinner dolphins' nearshore distribution and daytime behaviors result in concentrated daily viewing and interaction pressure on individual dolphins and groups over extended periods of time. As stated above, several researchers have observed disruption of Hawaiian spinner dolphin behavioral patterns in response to human activity that suggest the potential for biologically significant impacts. In other small cetacean populations, chronic disturbance to natural behavioral patterns has been linked to biologically

significant impacts, such as habitat abandonment, reduced female reproductive success, impeded activity and energy budgeting, and increased vigilance (Bejder 2005; Bejder *et al.* 2006a, 2006b; Lusseau and Bejder 2007; Williams *et al.* 2006; Lusseau 2003; Johnston 2014). Researchers investigating impacts of human disturbance to spinner dolphin populations outside of Hawai'i observed a decrease in residency times in a Tahitian resting bay (Gannier & Petiau 2006) and abandonment of a resting bay in Samadai Reef, Egypt (Nature Conservation Sector 2006; Notarbartolo-di-Sciara *et al.* 2009) in response to high levels of human activity.

Similarly, over time, chronic disturbance to the MHI's resident spinner dolphins could ultimately lead to habitat displacement and/or long term impacts to their individual fitness. These types of impacts may be amplified for Hawaiian spinner dolphins because they are theorized to be more vulnerable to disturbance than other marine mammal populations. Bejder (2005) suggests resident, closed, or isolated populations (*i.e.,* local populations with barriers to gene flow, similar to Hawaiian spinner dolphins) are more at risk from negative stressors, such as disturbance from human activity, because the impacts to multiple individuals' health and fitness are quickly reflected in the overall fitness of the population.

Spinner dolphins also exhibit spatially and temporally constrained behavioral patterns in their daily cycle that likely make it more difficult to compensate for high levels of disturbance. Spinner dolphins are reported to have high fidelity to specific daytime resting and evening foraging areas and reside in these areas during certain times of the day (Norris & Dohl 1980; Norris *et al.* 1994; Benoit-Bird & Au 2009; Thorne *et al.* 2012; Tyne *et al.* 2015). This spatially and temporally constrained behavioral strategy allows spinners dolphins to both forage efficiently and limit their risk of predation while resting (Johnston 2014). Disruption to essential behaviors (*e.g.,* resting) by human activity drive individuals to respond by either moving away from the disturbance to continue the behavior somewhere else, or remaining in the area as an attempt to continue the behavior, despite the disturbance. The ability of a population to adapt and persist through a disturbance is a measure of its resilience (Hollins 1973), and populations that are more constrained, like the island-associated stocks of Hawaiian spinner dolphins, are less resilient to disturbance than populations that exhibit more flexible behavioral strategies (Lusseau *et al.* 2009). Accordingly, the rigid daily cycle of small resident spinner dolphin populations of the MHI likely makes them more vulnerable to negative impacts from human disturbance (Tyne *et al.* 2017).

Disturbances to dolphins' daily behavioral patterns may result in ''take,'' as defined and prohibited under the MMPA and its implementing regulations, and the chronic nature of these problems in Hawai'i and observed changes to spinner dolphin behavioral patterns over time are a cause for concern. Prohibiting approach within 50 yards (45.7 m) of Hawaiian spinner dolphins and eliminating swim-with activities is expected to minimize disturbance that would result in take.

This regulation adopts a 50 yard (45.7 m) approach buffer around spinner dolphins, which is consistent with well-established national and regional guidelines, including the recommended viewing distance for the Dolphin SMART program, our regional Responsible Marine Wildlife Viewing Guidelines (publicly available at *https://www.fisheries.noaa.gov/pacific-islands/marine-life-viewing-guidelines/viewing-marine-wildlife-hawaii*), and our national viewing guidelines for dolphins and porpoises (publicly available at *https://www.fisheries.noaa.gov/topic/marine-life-viewing-guidelines#guidelines-&-distances*).

The 50 yard (45.7 m) approach regulation, which includes a prohibition on swimming with dolphins, is intended to reduce the degree of behavioral disruption from close approaches by vessels and swimmers, while placing the least restrictive burden on the viewing public. As indicated in the proposed rule (81 FR 57854, August 24, 2016) and the FEIS, research indicates that spinner dolphins exhibit changes and disruptions to natural behaviors from close approach by swimmers (Danil *et al.* 2005, Courbis and Timmel 2008) and that swimmer presence within 150 m (approximately 164 yards) reduces the likelihood of spinner dolphins being in a resting state (Symons 2013, Johnston *et al.* 2014). Approach by vessels and watercraft have also been shown to disrupt and alter spinner dolphin behavior (Ross 2001, Forest 2001, Timmel *et al.* 2008). In the MHI, several studies note that close approach by vessels disrupt dolphin behaviors at various distances ranging from 10 m to 300 m (Forest 2001, Timmel *et al.* 2008). At Midway Atoll in the Northwestern Hawaiian Islands, Ross (2001) found that spinner dolphins were affected by vessel presence at distances as great as 500 m and that the effects increased as the distance decreased. Although Johnson *et al.'s* (2013) work in the MHI found the likelihood that dolphins were resting was higher when vessels were present between 50 and 150 m, they noted that these results may be influenced by the fact that vessels were present in proximity to the dolphins most of the time.

It is possible that implementing an approach restriction at a greater distance (*e.g.,* 100 or 150 yards (91.4 or 137.1 m)) could provide better protection from disturbance. However, we also recognized that not all approaches within 100 or 150 yards (91.4 or 137.1 m) result in take of spinner dolphins, and that swimmers may have difficulty judging and achieving greater distances around these animals because spinner dolphins are fast moving and relatively small (81 FR 57862, August 24, 2016). We have therefore determined that a 50 yard (45.7 m) approach distance is appropriate, as this will provide increased protection and safety for these spinner dolphins, has been a recommended viewing distance in long-lasting regional and national guidelines, and will not unreasonably restrict the public from observing these animals. We caution that disruptive human behaviors can still result in take at distances greater than 50 yards (45.7 m), and that compliance with the 50 yard (45.7 m) requirement does not necessarily absolve those behaviors from enforcement action

Marine wildlife viewing can be a powerful tool to promote species awareness and conservation. Dolphin and whale watching experiences provide an avenue for the public to learn about conservation issues and increase empathy towards these animals (Wilson & Tisdell 2002; Wiener 2016). Implementing a 50 yard approach rule will still allow the wildlife viewing public to experience spinner dolphins in a way that will minimize disturbance to the animals' natural behaviors. These safe encounters, particularly if coupled with educational interpretation and/or trained tour guides, will likely benefit spinner dolphin conservation and bring an awareness to conservation issues for other protected marine species.

Changes From Proposed Rule

In a proposed rule published on August 24, 2016 (81 FR 57854), we proposed a regulation under the MMPA to prohibit (with exceptions) swimming with and approaching a Hawaiian spinner dolphin within 50 yards (45.7 m) (for persons, vessels, and objects),

including approach by interception, within 2 nmi of the MHI and designated waters in between the islands of Lāna'i, Maui, and Kaho'olawe. This proposed rule was published along with a DEIS describing alternative actions and announcements for six public hearings occurring in September 2016.

There are a number of changes that were made to this proposed rule following the public input process and the review of new data. These changes are outlined in the following paragraphs.

In the proposed rule, we refer to the ''designated waters in between the islands of Lāna'i, Maui, and Kaho'olawe.'' In the final rule we changed the text to read, ''designated waters bounded by the islands of Lāna'i, Maui, and Kaho'olawe.'' This change does not alter the boundaries of the area described in the proposed rule.

In the proposed rule, we specified that the rule was applicable in all waters within 2 nmi of the MHI and in all waters located between the islands of Lāna'i, Maui, and Kaho'olawe.

In the final rule, we specify that the rule was applicable in all waters within 2 nautical miles (nmi) of the main Hawaiian Islands, and in all waters bounded by the islands of Lāna'i, Maui, and Kaho'olawe.

In the proposed rule, we listed six exceptions to this rule:

(1) Any person who inadvertently comes within 50 yards (45.7 m) of a Hawaiian spinner dolphin or is approached by a spinner dolphin, provided the person makes no effort to engage or pursue the animal and takes immediate steps to move away from the animal;

(2) Any vessel that is underway and is approached by a Hawaiian spinner dolphin, provided the vessel continues normal navigation and makes no effort to engage or pursue the animal. For purposes of this exception, a vessel is defined as a watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water (1 U.S.C. 3); a vessel is underway if it is not at anchor, made fast to the shore, or aground;

(3) Any vessel transiting to or from a port, harbor, or in a restricted channel when a 50 yard distance will not allow the vessel to maintain safe navigation;

(4) Vessel operations necessary to avoid an imminent and serious threat to a person or vessel;

(5) Activities authorized through a permit or authorization issued by the National Marine Fisheries Service to take Hawaiian spinner dolphins; and

(6) Federal, state, or local government vessels, aircraft, personnel, and assets when necessary in the course of performing official duties.

Upon review of the comments received during the public comment period, we decided to add two exceptions for: (1) Vessels that are anchored or aground and approached by spinner dolphins, provided they do not make any effort to engage or pursue the animal(s), and (2) commercial fishing vessels that incidentally take spinner dolphins during the course of commercial fishing operations, provided such vessels operate in compliance with a valid marine mammal authorization in accordance with MMPA Section 118(c). This change is fully described below in the response to Comment 6.

In response to a public comment, we also amended exception (2) to read ''Any vessel that is underway and is approached by a Hawaiian spinner dolphin, provided the vessel continues normal navigation and makes no effort to engage or pursue the animal.'' This amendment to the exception, adds ''Hawaiian'' to spinner dolphins to specify the island-associated stocks of spinner dolphins that are found near the MHI and are considered resident stocks.

Current MMPA Prohibitions and NMFS Guidelines and Regulations

Under section 102 of the MMPA, 16 U.S.C. 1361 *et seq.,* it is unlawful for any person, vessel, or other conveyance to ''take'' any marine mammal in waters under the jurisdiction of the United States (16 U.S.C. 1372). The prohibition against take includes acts that ''harass'' marine mammals (16 U.S.C. 1362(13)). Harassment means any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal in the wild (Level A Harassment), or has the potential to disturb a marine mammal in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B Harassment) (16 U.S.C. 1362 (18); see also 50 CFR 216.3).

In addition, NMFS' regulations implementing the MMPA further define the term ''take'' to include ''the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal; and feeding or attempting to feed a marine mammal in the wild'' (50 CFR 216.3).

Section 112 of the MMPA authorizes NOAA to implement regulations that are ''necessary and appropriate to carry out the purpose'' of the MMPA (16 U.S.C. 1382). NMFS has developed regulations under the MMPA to protect marine mammals from take. An example of this type of regulation is a 100 yard (91.4 m) approach limit for humpback whales within 200 nmi of the islands of Hawai'i (81 FR 62010; September 8, 2021). This regulation also prohibits approach by interception and prohibits approach by aircraft within 1,000 feet (304.8 m). In addition to regulations, NMFS has developed national and regional guidelines for conducting responsible marine wildlife viewing to help the public avoid causing any take (harassment or disturbance) of protected wildlife species. The NMFS Pacific Islands Regional Office's viewing guidelines for Hawai'i recommend that people view wild dolphins from a safe distance of at least 50 yards (45.7 m) and advise against trying to chase, closely approach, surround, swim with, or touch the animals. To support the guidelines in Hawai'i, NMFS has partnered with the State of Hawai'i and the Hawaiian Islands Humpback Whale National Marine Sanctuary over the past several years to promote safe and responsible wildlife viewing practices through the development of outreach materials, training workshops, signage, and public service announcements. See the proposed rule for more examples and discussion of additional regulations and guidelines.

Need for Additional Action

Despite the prohibitions, guidelines, outreach, and stewardship efforts currently in place, close interactions between humans and spinner dolphins continue to occur in Hawai'i's waters (see Background and the proposed rule for more discussion). Based on extensive review and analysis through internal scoping, external scoping via an ANPR (70 FR 73426, December 12, 2005), public scoping for the DEIS, the best available scientific information, and public comments on the proposed rule, we have determined that the existing prohibitions, regulations, and guidelines need to be strengthened to protect Hawaiian spinner dolphins from various forms of take from human activities that cause harassment or disturbance. Despite the existing regulations and guidelines, chronic disturbance to spinner dolphins continues to occur and additional action is required to protect spinner dolphins from take. We therefore deem it necessary and appropriate to adopt additional regulations to protect Hawaiian spinner dolphins from activities that result in take, including harassment or other forms of disturbance as currently defined by 0statute and regulation.

Development of the Regulation

In 2005, NMFS convened a Spinner Dolphin Working Group with representatives from the MMC, state and Federal agencies, and scientific researchers who work on spinner dolphin conservation concerns. The group evaluated the best available information at the time to understand the scope of the tourist and recreational activities targeting spinner dolphins. In December 2005, we published an ANPR in the **Federal Register** (70 FR 73426, December 12, 2005) to solicit input from the public on potential ways to enhance protections for spinner dolphins and mitigate activities of concern (*e.g.,* close approach and swim-with activities). This was followed by a Notice of Intent (NOI) to Prepare an EIS under the National Environmental Policy Act (NEPA) (71 FR 57923; October 2, 2006), in which we identified a preliminary list of potential regulations for future consideration and comment, which included partial time-area closures in certain spinner dolphin essential daytime habitats, a minimum distance limit for approaching dolphins in the wild, restrictions on certain human behaviors in NMFS-identified spinner dolphin resting areas, and complete closure of all known spinner dolphin resting areas in the MHI.

During the ANPR and the NOI comment periods, five public scoping meetings were held on the islands of Kaua'i, O'ahu, Maui, and Hawai'i, and oral statements were taken at each meeting. NMFS received a combined total of 4,641 public comments in response to the ANPR and the NOI (this includes all emails, letters, and public testimonies). Comments were submitted by concerned citizens, tour operators, scientific researchers, conservation and education groups, and Federal, state, and other government entities.

Comments received throughout both public comment periods varied widely and recommended numerous actions to consider, ranging from no regulations to permanent closure of areas used by the dolphins for rest and shelter. Additionally, public comments raised concerns about various topics that should be addressed in the EIS or proposed action. These concerns are grouped by topic in the final scoping report, and include the following: Hawaiian spinner dolphin biology and behavior; cultural issues; cumulative effects; data/data gaps; direct and indirect effects; education/outreach; enforcement; guidelines/solutions for other species or from other countries; human-dolphin interaction; medical benefits from swimming with dolphins; the MMPA; monitoring; the NEPA; public and stakeholder involvement; regulatory regime; social and economic issues; spiritual and religious issues; take and harassment; traditional Hawaiian knowledge; and welfare of the dolphins. Although comments varied greatly, a consistent theme was the need for effective and enforceable regulations.

As a result of stakeholder concerns expressed through these public comments, and to prepare the proposed rule and associated DEIS, we made multiple site visits to areas where concerns have been raised regarding Hawaiian spinner dolphin disturbance in the MHI. During these visits, we met with concerned members of the public to gather information relevant to this analysis. Additionally, we coordinated with state and Federal agencies, and used the public comments generated from the ANPR and NOI to develop a range of actions and mitigation measures that are reflected in numerous alternatives considered in the DEIS.

Presentations made at the public scoping meetings, the April 2007 EIS public scoping summary report, a list of the attendees, the ANPR, public comments, and background materials are provided at *https://www.fisheries.noaa.gov/action/enhancing-protections-hawaiian-spinner-dolphins.*

During the initial scoping period for the DEIS, we received comments that recommended gathering additional information on Hawaiian spinner dolphins, including monitoring local populations to determine impacts to numbers and overall health of the MHI resident spinner dolphins. In response to this recommendation and to inform this rulemaking effort, NMFS internal grant funding was awarded to the ''Spinner Dolphin Acoustics, Population Parameters, and Human Impact Research'' (SAPPHIRE) project, conducted jointly by Duke University and Murdoch University between September 2010 and December 2012. The SAPPHIRE project's objective was to provide baseline data on the local abundance, distribution, and behavior of spinner dolphins at four bays on Hawai'i Island to assess spinner dolphin daytime habitat use and resting behavior, residency and fidelity patterns in nearshore habitats spinner dolphin exposure to human activities, and spinner dolphin demographic response to human activities.

Results from this study provided robust population estimates for the Hawai'i Island stock (see Background), as well as additional information about spinner dolphin habitat use and the pressure that this resident stock faces from dolphin-directed human activities. Many of the results from the SAPPHIRE project have been published in scientific literature and scientific reports and were used to inform this rulemaking process (Thorne *et al.* 2012, Johnston *et al.* 2013, Heenehan *et al.* 2014, Heenehan *et al.* 2016, Heenehan *et al.* 2017, Tyne *et al.* 2014, Tyne 2015, Tyne *et al.* 2015, Tyne *et al.* 2016, Tyne *et al.* 2017, Tyne *et al.* 2018). Many of these studies are described in detail in the proposed rule and the Background section above.

We relied on the public comments on the ANPR and the NOI, and on the best available scientific information to develop a range of regulatory and non-regulatory alternatives in the DEIS, including the No Action alternative of not adopting regulations. We analyzed the environmental effects of these alternatives and considered options for mitigating effects. After a preliminary analysis of alternatives, we developed and analyzed the effects of the swim-with and 50 yard (45.7 m) approach regulation, which also includes no interception (*i.e.,* ''leapfrogging'' or placing a person or vessel in the path of dolphins for the purpose of interception).

Proposed Rulemaking

On August 24, 2016, we proposed a regulation under the MMPA to prohibit swimming with and approaching a Hawaiian spinner dolphin within 50 yards (45.7 m) (for persons, vessels, and objects), including approach by interception. The proposed regulatory measures were intended to prevent take of Hawaiian spinner dolphins, including harassment and disturbance, from occurring in marine areas where viewing pressures are most prevalent. Prohibitions would apply in waters within 2 nm (3.7 km) of the MHI and in the waters bounded by the islands of Lāna'i, Maui, and Kaho'olawe. The proposed rule also included exemptions for certain activities. We published the proposed rule in the **Federal Register** and requested public comment on the proposed regulation, the draft EIS, and supporting documents. The public comment period ended on October 23, 2016; however, in response to multiple requests from the public, the comment period was later extended until December 1, 2016 (81 FR 80629, November 16, 2016). We held six public hearings occurring in September 2016 across the State of Hawai'i. During the public hearings, 145 people provided recorded, oral testimony on the proposed rule.

Comments and Responses to Comments on the Proposed Rule

Throughout the public comment period, NMFS received 22,031 written submissions via letter, email, and the Federal eRulemaking Portal, in addition to the 145 oral testimonies received during the public hearings described above. Of these comments, 2,294 were unique, with anywhere from two to 17,000 near-duplicates of each. Additionally, NMFS received a letter supporting swim-with and approach regulations submitted by Kama'āina United to Protect the 'Āina (KUPA)—Friends of Ho'okena Beach Park (Kauhakō Bay), which contained over 285 names and signatures. Comments were submitted by individuals; research, conservation, and education groups; trade and industry associations; tour and retreat operators and participants; and Federal, state, and local government entities. We posted all written comments received during the comment period on the Federal eRulemaking Portal (*https://www.regulations.gov/document?D=NOAA-2005-0226-0002*). We have considered all public comments and provide responses to all significant issues raised by commenters that are associated with the proposed rulemaking. Comments and issues have been aggregated into the comment summaries below in an order that similar assertions, suggested alternatives or actions, data, and clarifications are addressed together. We have not responded to comments or concerns outside the scope of this rulemaking, which is to prevent take of Hawaiian spinner dolphins caused by viewing and interaction pressures. Many of the written and oral comments from individual members of the public were short or general statements that (1) expressed support for the proposed regulation and/or spinner dolphin conservation in general, (2) expressed disagreement with the proposed regulation, or (3) expressed disagreement with all regulations prohibiting human interaction with dolphins in general. We did not respond to comments expressing general support or opposition. In addition, we did not respond to anecdotes that many people shared regarding their personal experiences swimming with the dolphins, nor to anecdotes that were shared about witnessing human users harassing spinner dolphins in coastal bays, unless they were accompanied by specific information or comment on the proposed rule. The following comment summaries and agency responses are organized by the issue categories we identified in the proposed rule for public comment, with three issue categories added at the end because they did not fit squarely in one of the categories in the proposed rule.

Effects of the Increasing Number of Human Interactions With Hawaiian Spinner Dolphins

Comment 1: Many commenters raised questions about the scientific information used to support the spinner dolphin protections in this rule. Scientific information on the impacts of close approach was called biased, inconclusive, incomplete, or wrong. Some commenters noted their personal observations were not consistent with the published studies, asserting that they have not seen spinner dolphins changing their behavior in response to vessels and swimmers, nor have they seen spinner dolphin populations decreasing. Additionally, some commenters suggested that scientific studies are not complete since most peer reviewed studies include shore-based or vessel-based observations as opposed to underwater observations.

Response: We relied on the best available science to develop a regulation to improve protections for spinner dolphins in Hawai'i. The majority of information used to develop the proposed rule, DEIS, and FEIS came from peer reviewed scientific publications. To a lesser extent, we used unpublished data, personal accounts, and other anecdotal information. We gave greater weight to empirical studies published in scientific journals than to personal observation and interpretation because such scientific studies use established scientific methods, test hypotheses, employ statistical analyses, and have been peer reviewed. These steps in the scientific process reduce the potential for bias in results. Reviewing best-available information from multiple independent scientists limits concerns about potential bias related to any one researcher, and provides a complete, robust set of information from which a decision can be made. Reported behavioral changes observed in scientific studies may not be obvious to an observer who is not systematically observing the behavioral patterns that support spinner dolphins throughout the day.

Many independent scientists studying Hawaiian spinner dolphins have reported changes in spinner dolphin behavior or reduced time spent engaging in resting behavior when in the presence of human activity (Norris *et al.* 1994; Lammers 2004; Danil *et al.* 2005; Courbis 2007; Courbis and Timmel 2009; Timmel *et al.* 2008; Forest 2001; Heenehan *et al.* 2017; Ostman-Lind *et al.* 2004; Ostman-Lind 2009; Thorne *et al.* 2012; and Wiener 2016). These studies show a clear trend that certain types of human activity, especially dolphin-directed activity, can disturb spinner dolphins by disrupting behavioral patterns, to a degree that is considered Level B harassment under the MMPA.

Additionally, we relied on studies that investigated the biological and population-wide impacts of human disturbance to other dolphin and marine mammal populations around the world. As indicated in the sections above, high levels of exposure to human activities have had deleterious impacts on other analogous dolphins and marine mammal species, including habitat abandonment, reduced female reproductive success, impeded activity and energy budgeting, and increased vigilance (Bejder 2005; Bejder *et al.* 2006a, 2006b; Lusseau and Bejder 2007; Williams *et al.* 2006; Lusseau 2003; Johnston 2014). Several spinner dolphin researchers have also argued that spinner dolphins are at a higher risk of experiencing negative biological impacts because they are much more vulnerable to human disturbance than other marine mammal populations, as previously stated (Danil *et al.* 2005; Bejder 2005; Tyne *et al.* 2017; Tyne *et al.* 2018).

A few commenters referenced a study by Tyne (2015) in Hawai'i Island resting bays that claimed he did not observe a significant effect from human activity on the probability of spinner dolphins resting, socializing, or traveling, and that spinner dolphins have become habituated and/or tolerant to human activity. Tyne concluded, however, that the absence of a measurable impact was likely because the high levels of exposure to human activity (82.7 percent within 100 m) and the brief time periods between exposures (median duration of 10 minutes) within these bays did not allow an adequate level of control data (*i.e.,* data collected when no human activity was present). The author claims that this level of exposure to human activity is higher than any other studied dolphin population in the world, and several other studies on Hawaiian spinner dolphins have observed a disruption in resting behavioral patterns from human activities (Forest 2001; Danil *et al.* 2005; Courbis 2007; Courbis 2008; Timmel *et al.* 2008). In a subsequent publication, Tyne and his co-authors suggested that spinner dolphins did not have enough time in between exposures to human activity to regress into pre-disturbed resting behavior, and the observed

resting behavior was one of a more vigilant nature and may not represent a natural resting state (Tyne *et al.* 2018). The authors concluded that vigilance decrement (*i.e.,* physical and cognitive fatigue from inadequate rest from a vigilant state) experienced by spinner dolphins may impair cognitive and decision-making abilities. Resting and abating vigilance decrement is particularly crucial for spinner dolphin survival because spinner dolphins require complex cooperative strategies and coordination between individuals to forage and avoid predation. Although spinner dolphins may appear to ''tolerate'' close human activity, the authors argue that spinner dolphins may decide that it is less costly to remain in areas where they are frequently disturbed and may experience constant vigilance, as opposed to an alternate undisturbed site that would make them more vulnerable to predation. Even though spinner dolphins may appear to be habituated or tolerant to human activity, their continued residence in these areas is likely due to the lack of suitable, undisturbed habitats, and, therefore, the dolphins are subject to endure high levels of disturbance (Tyne *et al.* 2018).

Several spinner dolphin studies utilize multiple data collection techniques to observe dolphin behavior in the presence of human users and vessels, including shore-based observations, vessel-based observations, and in-water passive acoustic monitoring. Additionally, Wiener (2016) conducted in-water surveys of human and dolphin behaviors using Go-Pro cameras at 14 known spinner dolphin resting sites and found that humans exhibited aggressive behaviors (defined as active pursuit of interaction by chasing, diving, or deliberate approach) while interacting with dolphins 27 percent of their in-water time. Combined, the above studies provide multiple lines of evidence regarding certain vessel and swimmer activities that can potentially disturb and disrupt behavioral patterns of spinner dolphins, which is considered take by Level B harassment under the MMPA. Additionally, while underwater observations can yield insights into dolphin mating behaviors, they are not required to record evidence of disturbance, as disturbance can be seen in acoustic activity of dolphins, as well as behaviors visible from shore and from vessels. An overview of the scientific literature used in our decision making is available in the FEIS, section 1.4 ''Scientific evidence of impacts of small cetaceans caused by human interactions.''

We do not base this rule on population decline. The MMPA prohibits harassment of any marine mammal and additional measures are necessary to minimize harassment and prevent take from occurring. It is not possible to gain a thorough understanding of spinner dolphin abundance from observations in one or two bays. Factors such as habitat displacement, the movement of prey species in offshore waters, or season can account for increases or decreases in the number of spinner dolphins observed using a particular bay. Analysis of long-term trends has not been conducted with the available data because the methods used for spinner dolphin abundance surveys throughout the last several decades were not consistent, and are, therefore, difficult to compare. Although the most recent survey suggested a potential decline in the Hawai'i Island stock from earlier studies, the research conducted in the 1980s did not include year-round surveys and used different methods and a different survey area than more recent 2010–2011 surveys (Norris *et al.* 1994; Tyne *et al.* 2014; SAR 2019). However, more recent survey studies, such as surveys conducted in the SAPPHIRE project, provide baseline data that can be compared to future survey studies to analyze a long-term population abundance trend. That said, other investigations have examined the relationship between cumulative vessel exposure and female dolphin reproductive success. For example, Bejder (2005 and 2006a) observed bottlenose dolphins and cautioned that dolphin tourism has potential for long-term consequences on female dolphin productivity, and that impacts may be amplified for small, closed, or isolated, resident cetacean populations. While Bejder does not focus his studies on spinner dolphins, it is important to note here that Hawaiian spinner dolphins fit the description of small, closed, or isolated, resident cetacean populations.

It is important to note that evidence of a decline in population abundance or adverse physiological or reproductive impacts are not a requirement when classifying which human actions are considered harassment under the MMPA. The statute characterizes Level B harassment as certain human acts (*i.e.,* pursuit, torment, or annoyance) that have the potential to disturb a marine mammal by disrupting behavioral patterns. Studies that provide clear evidence of this phenomenon with Hawaiian spinner dolphins have been thoroughly referenced in the Background section. The threshold for Level B harassment does not require evidence of adverse biological or population-wide impacts. However, we do assert that human activities that cause disruption of behavioral patterns could be adversely impacting Hawaiian spinner dolphins, similar to what is referenced in the aforementioned studies on other analogous small cetacean populations. Therefore, we have decided to implement additional protections for Hawaiian spinner dolphins to minimize take that we know is currently occurring, even though we recognize that there is not clear evidence of population decline or adverse biological impacts. This precautionary approach is the best way to protect and conserve Hawaiian spinner dolphin populations and is necessary in order for NMFS to comply with our statutory requirement under the MMPA.

Proposed Prohibited and Exempted Activities

Comment 2: One commenter stated he is against commercial swim-with-dolphin programs and proposed a 5-year moratorium on all commercial aspects of swimming with dolphins. Several commenters suggested that commercial swim-with-dolphin operators need to be regulated/restricted but are not in favor of limiting non-motorized vessels or individuals' rights to swim with the dolphins. Commenters suggested that approach distance regulations should only be applied to commercial tour operators, rather than individual swimmers. One commenter noted that large boatloads of people cause most of the trouble for spinner dolphins. Additionally, one commenter suggested that the 50 yard (45.7 m) approach distance only apply within designated essential daytime habitats.

Response: First, we note that all of our alternatives, except the no action alternative, would prohibit swimming with dolphins. One reason for this is that, while commercial operations may occur at a larger scale and may appear to be more egregious, scientific studies have shown that any vessel or person approaching near dolphins has the potential to disturb and change their behavior (Forest 2001, Courbis and Timmel 2008, Ostman-Lind *et al.* 2004, Courbis 2004). This can result in take which is prohibited under the MMPA. The regulation is written to apply to any person or vessel that approaches a Hawaiian spinner dolphin within 50 yards (45.7 m).

As noted in the proposed rule, DEIS, and FEIS, Hawaiian spinner dolphin take (including harassment and

disturbance) is not a problem that is specific to one ocean user group or one area of the Hawaiian Islands. Taking Hawaiian spinner dolphins occurs as a result of close approach by a variety of ocean users, including commercial tour operators, non-commercial motorized and non-motorized vessels, and swimmers in many areas of Hawai'i's nearshore waters (see section 3.1.8 of the FEIS describing the Affected Environment and targeted areas across the MHI). There are multiple studies that have attempted to analyze how the presence of swimmers, independent of vessels, can disturb the natural behavior of spinner dolphins, including changes in resting patterns, avoidance behavior, changes in direction, aerial behavior patterns (Danil *et al.* 2005; Courbis 2004; Courbis 2007; Timmel *et al.* 2008; Johnston *et al.* 2013). While tour operations may be the primary cause of disturbance in some areas (*e.g.,* Makako Bay), in other areas, shore-based swimmers or recreational users are the primary concern (*e.g.,* Kauhakō Bay). Therefore, we apply these prohibitions designed to limit take to all user groups.

Although specific essential daytime habitats are often targeted for close approach activities, spinner dolphins may travel among these areas and be found in many nearshore locations throughout the day. We are concerned that applying approach limits only within certain heavily-used areas will displace human interactions with dolphins to other areas. In addition, in some areas, dolphins do not predominantly use discrete bays for their resting habitat as they do in other locations. For example, the 10-fathom isobath off O'ahu's west coast was nicknamed the ''spinner expressway'' because dolphins are often found moving back and forth between sites throughout the day. Only protecting discrete areas would leave the dolphins vulnerable to take in areas outside of designated essential daytime habitats.

Comment 3: Some commenters claimed harassment of spinner dolphins is not a problem because swimmers and tour operators police themselves.

Response: Several studies suggest that Hawaiian spinner dolphins are regularly being disturbed by human activities, especially in known resting areas (Norris *et al.* 1994; Lammers 2004; Danil *et al.* 2005; Courbis 2007; Courbis and Timmel 2009; Timmel *et al.* 2008; Forest 2001; Heenehan *et al.* 2017; Ostman-Lind *et al.* 2004; Ostman-Lind 2009; Thorne *et al.* 2012; and Wiener 2016). Further, the swim-with-dolphin tour industry has grown tremendously over the last decade (Wiener, 2016), thus exacerbating such disturbance. Individual and tour self-policing may help limit harassment, but it has not been sufficient to avoid negative effects to the dolphins and, given the potential for long-term impacts, such as habitat displacement, adverse impacts to reproductive fitness, and population declines, there is a need for enhancing protections beyond self-policing.

Comment 4: One commenter argued that the Federal government does not have authority to regulate coastal waters. The commenter argues that this is a local issue, and should be governed by local government authorities.

Response: NMFS disagrees. These regulations apply in specified areas of U.S. navigable waters surrounding the State of Hawaii. Under sections 102(a) and 103 of the MMPA, NMFS may enforce regulations prohibiting take of marine mammals by any person, vessel, or conveyance in waters, lands, ports, harbors and other places under the jurisdiction of the United States. Additionally, as described in a November 16, 2016 letter NMFS received from the State of Hawai'i DLNR following publication of the 2016 proposed rule, the State supports implementation of regulations to prohibit swimming with or approaching a Hawaiian spinner dolphin within 50 yards.

Comment 5: Some commenters expressed concern that exceptions #1 and #2 in the proposed rule (which provide exceptions for people who inadvertently come within 50 yards (45.7 m) of a dolphin or are approached by a dolphin, and for vessels that are underway and approached by a dolphin, provided the person or vessel makes no effort to engage the dolphin and continues normal navigation) will ''hollow-out'' the rule and specifically make enforcement difficult as it will allow those approaching dolphins within 50 yards (45.7 m) to claim that the animal approached them. Additionally, commenters asked how NMFS will distinguish between an interaction that was inadvertent and one that was purposeful. One commenter suggested that subsection (d) of the proposed rule ''affirmative defense'' be eliminated in its entirety because it places too much burden on a vessel operator and makes the exceptions difficult to successfully invoke.

Response: In developing this rule, NMFS understood that spinner dolphins, as fast-moving marine mammals, may approach swimmers and boaters who, through no fault of their own, are placed in apparent violation of the 50-yard approach regulation. NMFS intends this rule to deter humans from approaching and disturbing spinner dolphins; it is not intended to punish individuals who come into inadvertent contact with spinners and then take all necessary and appropriate action to withdraw. While we appreciate that some individuals might abuse this defense, we believe that the NOAA enforcement proceeding is the appropriate forum for resolving these questions on a case by case basis.

Comment 6: We received comments requesting specific exemptions from this proposed rule for fishing vessels. In particular, Hawai'i Fishermen's Alliance for Conservation and Tradition (HFACT) requested that NMFS consider the following exception, ''Any fishing vessel that is anchored or adrift and is approached by a spinner dolphin, provided the vessel makes no effort to engage or pursue the animal.'' In addition, the Hawai'i Longline Association (HLA) noted that the longline fisheries do not threaten spinner dolphins with ''chronic disturbance'' and that, to the extent that the fisheries could interact with spinner dolphins, these interactions are already regulated under the MMPA. To minimize confusion for these commercial fishing vessel operators, HLA requested an exemption for ''vessels that are duly licensed to fish in the Hawai'i-based commercial longline fisheries.''

Response: In response to this comment, the final rule clarifies that this prohibition does not apply to a commercial fishing vessel that incidentally takes a spinner dolphin during the course of commercial fishing operations, provided such vessel operates in compliance with a valid marine mammal authorization in accordance with MMPA Section 118(c). See exception (8) in the final regulations. Regarding HFACT's requested exception, a vessel that is adrift is, in accordance with COLREGS Rule 3, a vessel underway powered by the prevailing current, a scenario which is included in exception (2). However, HFACT has identified that a vessel at anchor may not be able to avoid coming within 50 yards (45.7 m) of spinner dolphins if approached by these animals, and we agree that this scenario should be included in the exceptions to prohibitions. As a result, we have added an exception to the final rule, which exempts any vessel that is anchored or aground and is approached by a Hawaiian spinner dolphin, provided the vessel makes no effort to engage or pursue the animal (50 CFR 216.20 (c)(5)). We believe that the addition of this exception will not affect the overall purpose of this rule and will provide allowances for vessels that are not

engaged in dolphin-directed activities, but find themselves within 50 yards (45.7 m) of approaching animals. Additional information is included in the *Changes from Proposed Rule* section later in this rule.

Comment 7: Several commenters suggested that, as part of this regulation, NMFS should require all vessels to participate in the Dolphin SMART program and should include Dolphin SMART guidelines in the regulation. One particular commenter stated that they operate a tour company that follows Dolphin SMART guidelines and has successfully maintained a stable business.

Response: This regulation adopts a 50 yard (45.7 m) approach buffer around spinner dolphins, which is the same approach distance recommended by the Dolphin SMART program, our regional Responsible Marine Wildlife Viewing Guidelines (publicly available at *https://www.fisheries.noaa.gov/pacific-islands/marine-life-viewing-guidelines/viewing-marine-wildlife-hawaii*), and our national guidelines for dolphins and porpoises (publicly available at *https://www.fisheries.noaa.gov/topic/marine-life-viewing-guidelines#guidelines-&-distances*). While we appreciate the commenters' support of the Dolphin SMART program, this program is a voluntary recognition and education program designed specifically for tour operators and is not appropriate for all vessels, including fishing vessels and personal recreational vessels. For instance, guidelines such as those requiring vessels to engage in responsible advertising and to provide outreach materials on responsible viewing to customers may not be applicable to private vessels. Therefore, we support maintaining the Dolphin SMART program as part of a separate spinner dolphin conservation effort, rather than making all of the guidelines part of this regulation.

Whether 50 Yards Is the Most Appropriate Distance for Swim-With and Approach Restrictions To Reduce Take of Spinner Dolphins

Comment 8: Several commenters expressed concern that the proposed rule will be difficult to enforce and will be easily arguable since the burden will be on enforcement officials to show that a human user was within 50 yards (45.7 m) and that a violation occurred. Commenters also noted that it can be difficult to judge distance, making it difficult for people in the water and for enforcement officials to determine if people in the water are within 50 yards (45.7 m).

Response: Because the rule has an objective approach distance, we believe that this rule can be effectively enforced. This approach prohibition clarifies protections in the MMPA by establishing a clear, objective distance requirement, thus facilitating enforcement activities while preventing take of spinner dolphins. NMFS has implemented 50 yards (45.7 m) as the recommended viewing distance for dolphins and small whales at both the regional and national level for decades, so this standard will not be a novel standard for members of the public. Enforcement officials are experienced at judging the distances and have experience through enforcement of other approach regulations, such as the 100 yard (91.4 m) approach rule for humpback whales in Hawai'i (81 FR 62010, September 8, 2016). In addition to visual observations, enforcement officials will use other evidence, such as photographic evidence, video evidence, and/or eye-witness accounts, when determining if a violation of the rule occurred.

Whether 100 Yards (91.4 m) or Another Distance is the Most Appropriate Distance for Swim-With and Approach Restrictions To Reduce Take of Spinner Dolphins

Comment 9: We received comments in favor of decreasing or increasing the proposed approach distance to lessen the impact on the viewing industry and to increase protections for Hawaiian spinner dolphins, respectively. Specifically, three commenters suggested that a 50 yard (45.7 m) approach distance is too strict, and would not allow for any dolphin viewing activities to take place at that distance. One commenter suggested a 25 yard (22.9 m) approach distance be used instead, and others suggested 20 yards (18.3 m) or even 10 yards (9.1 m). Over 17,900 commenters suggested that a 100 yard (91.4 m) approach distance is more appropriate than 50 yards (45.7 m). These commenters, many submitting comments through a form letter, argued that a 100 yard (91.4 m) approach distance would be easier to comply with because it is consistent with the humpback whale approach rule in Hawaiian waters (81 FR 62018, September 8, 2016). Commenters argued that this consistency would lead to greater compliance and easier enforcement. Additionally, commenters argued that a 100 yard (91.4 m) buffer zone would provide spinner dolphins in Hawai'i increased protection from exposure to human disturbance. Over 2,600 commenters suggested that 150 yards (137.1 m) is a more appropriate buffer distance because it conforms to scientific evidence that dolphins can detect a disturbance within 150 yards (137.1 m). Several commenters suggested different approach distances based on the type of human user or the location. Finally, one commenter claimed that dolphin tour boats on the Wai'anae coast of O'ahu are chumming the waters to attract dolphins, honu (green sea turtles), and fishes, which also attracts sharks. Therefore, they felt that 50 yards (45.7 m) is not enough and that a radius of 1 mile is required so as to protect humans from what they perceived as an increased frequency in shark attacks.

Response: As stated in the rationale of the proposed rule and in the DEIS, we selected the 50 yard (45.7 m) approach regulation because this distance is the least restrictive measure that still reduces the threat of take from occurring (including harassment and disturbance) to Hawaiian spinner dolphins from close approaches by vessels and swimmers. NMFS believes the 50 yard (45.7 m) distance will still allow for meaningful dolphin watching opportunities. The 50 yard (45.7 m) viewing distance has been recommended in NOAA's Watchable Wildlife Viewing guidelines for many years and is also used by the Dolphin SMART program. We disagree that this distance is overly restrictive, as many tour operators in Hawai'i and elsewhere around the country have been certified in the Dolphin SMART program and have been able to run successful dolphin watching operations while complying with the 50 yard (45.7 m) approach distance.

We evaluated the effects of a 50 yard and 100 yard (91.4 m) approach distance and discussed scientific literature regarding other distances. As indicated in the proposed rule, the FEIS, and the background section of this rule, scientific literature indicates that changes in spinner dolphin behavior are detectable when vessels or swimmers are found at distances ranging out as far as 500 m (Ross 2001, Forest 2001, Danil *et al.* 2005, Courbis and Timmel 2008, Timmel *et al.* 2008, Symons 2013, Johnston *et al.* 2014) and that effects generally increased as distance from the dolphins decreased (Ross 2001). We also recognized that there are scientific studies indicating that swimmer presence within 150 m (164 yards) reduces the likelihood of spinner dolphins being in a resting state, although vessel presence within this distance did not appear to cause disturbance. This research illustrates the complexity of the issue and why selecting one distance that will provide

protection from disturbance can be difficult. However, as described in the proposed rule, we also recognized that not all approaches within 100 or 150 yards (91.4 or 137.1 m) are likely to result in take of spinner dolphins, and that swimmers may have difficulty judging and achieving greater distances around these animals because they are fast moving and relatively small. In comparison to viewing distances for large whales, the 100 yard distance (or greater) would likely decrease viewers' ability to actually see spinner dolphins without using visual aids, such as binoculars. Although consistency with the humpback approach regulation (which prohibits approaching within 100 yards (91.4 m) of humpback whales) may be easier to remember, and thus simplify compliance, our selection of 50 yards (45.7 m) was guided by the most appropriate distance to prevent take of spinner dolphins from occurring, while placing the least restrictive burden on the viewing public. We have therefore determined that a 50 yard (45.7 m) approach distance is appropriate, as this distance will allow people to observe spinner dolphins, while providing increased protection and safety for these animals.

Finally, NMFS regulations do prohibit the feeding of wild dolphins (50 CFR 216.3), so any chumming activity is properly reported to NMFS Office of Law Enforcement. These regulations prohibit feeding and, while not specifically designed to prevent shark attacks on humans, should serve as a deterrent for any person considering chumming to attract dolphins.

Research Recommendations and Priorities for Better Understanding How Human Disturbance Affects Hawaiian Spinner Dolphins

Comment 10: Several commenters suggested that we should take different actions instead of an approach rule, such as working directly with experts in dolphin communication, instituting a 2-year moratorium on intentional dolphin interactions at essential daytime resting habitat, or monitoring the change in spinner dolphin behavior/population health.

Response: We agree that additional research is necessary to better understand spinner dolphin ecology. However, we believe that research is a necessary complement to, and not a substitute for, regulatory measures to reduce the impact of take on spinner dolphins. While we appreciate that there may be other actions that could be taken to address take of spinner dolphins in their resting habitat, we note that voluntary measures have been tried in the past and, while helpful, they have not been sufficient. We intend to implement this rule at this time and monitor its impact.

Comment 11: Several commenters suggested that monitoring the effectiveness of the regulation would be an important step to assess compliance with the rule. One commenter suggested that we conduct a review of the rule's effectiveness after 2 years, requesting feedback from local stakeholders. Other commenters requested that we utilize ''citizen scientists'' as part of spinner dolphin monitoring.

Response: We agree that monitoring the effectiveness of the final rule would be an important step to assess compliance with the rule. Citizen science, in the form of volunteer data collectors, may be one aspect of a multi-pronged approach to gathering the data necessary to determine such an impact. This multi-pronged approach could include data collection by volunteer observers, spinner dolphin researchers (through passive acoustic monitoring equipment), and NOAA OLE and the State of Hawai'i's Department of Conservation and Resource Enforcement (DOCARE) officials.

Comment 12: One commenter states that we did not consider a study that shows there are no harmful effects when dolphins remain vigilant for extended periods of time. The research article cited is Branstetter *et al.* (2012), and entitled, ''Dolphins Can Maintain Vigilant Behavior through Echolocation for 15 Days without Interruption or Cognitive Impairment.''

Response: The research to which the commenter refers was conducted on captive bottlenose dolphins and looked at the impacts to their cognitive abilities, in the form of their ability to detect objects via echolocation, after 5 days and 15 days of constant engagement by researchers. The researchers found that there was no detectable loss of the dolphins' cognitive ability after maintaining a vigilant state for these extended time periods. Their results seemed to demonstrate that bottlenose dolphins can continuously monitor their environment and maintain long-term vigilant behavior through echolocation. The comment suggests that this research provides evidence that Hawaiian spinner dolphins do not suffer harm from disturbance by human interactions due to their ability to sleep with one half of their brain while the other half remains vigilant. However, there are several points that would argue against this assertion. First, captive bottlenose dolphins have already been habituated to human disturbance by their very state of captivity, and may have even been subjected to other research projects over the course of their captive lives. Captive dolphins also do not need to forage for food, detect predators, or socialize with others in the pods in order to survive. Captive bottlenose dolphins cannot, therefore, be readily compared to wild dolphins. Second, bottlenose dolphins are a much more robust animal than are spinner dolphins, and they have a much more fluid life history strategy. They are adaptable to being held in captivity, whereas spinner dolphins have never been successfully held in captivity. Bottlenose dolphins are larger than spinner dolphins, both in size and weight, and forage opportunistically throughout the day on a large variety of prey species. Spinner dolphins forage only on the mesopelagic species that are hunted at night and are therefore only able to rest and nurture their young during the day, making them more susceptible to the impacts of human disturbance on their essential daytime behaviors. Finally, this study looked only at cognitive impacts to the dolphins, and did not consider physical impacts to their well-being and fitness from maintaining a constant state of vigilance.

Comment 13: Many commenters suggested that NMFS should focus rulemaking efforts on other factors that they perceive as having a greater impact on the health of Hawaiian spinner dolphins than close approach from humans. These commenters identified overfishing of prey species, pollution (*e.g.,* storm water runoff, trash, and trace chemicals from sunken, decommissioned military ships), captive dolphin swim-with programs and hotel exhibits (an activity that they suggested NMFS should ban), and acoustic impacts from military operations (*e.g.,* Exercise Rim of the Pacific (RIMPAC) and military use of sonar equipment). Further, one commenter suggested that new regulations should not be implemented until NMFS understands how each of the above-mentioned factors impacts spinner population health.

Response: Commenters are correct in noting that many factors can negatively affect the health of Hawaiian spinner dolphins. There are a variety of external factors or actions that have affected, may be affecting, or may have future effects on Hawaiian spinner dolphins. Many of these external factors are beyond the scope of this rulemaking, which is addressing close approach by humans as a specific threat to Hawaiian spinner dolphin health. Additional information about the effects of these external factors on Hawaiian spinner

dolphin health is included in section 4.5.1.1 of the FEIS (''Cumulative Effects of External Factors'') and some are discussed below.

Regarding commenter concerns about overfishing of spinner dolphin prey species, we work closely with the Western Pacific Regional Fishery Management Council to reduce impacts of Federal fisheries to marine mammals through regulations and management actions, and work with the state and other fishery councils where our concerns overlap with nearshore fisheries.

Regarding exposure to marine debris or trace chemicals from decommissioned ships, a variety of existing Federal laws and regulations regulate or prohibit the discharge of oil, garbage, waste, plastics, and hazardous substances into ocean waters, including the Clean Water Act as amended by the Oil Pollution Act of 1990; MARPOL 1973/1978; and the Marine Protection, Research, and Sanctuaries Act. These laws have strict civil and criminal penalties for violations.

Regarding concerns about human interaction with dolphins in captivity, this rule only applies to wild Hawaiian spinner dolphins, not dolphins in captivity. NMFS issues permits under the MMPA for the taking or the importation of marine mammals for the purposes of public display (16 U.S.C. 1374 Sec. 104(c)), the transfer of ''releasable'' rehabilitated marine mammals, and maintains the National Inventory of Marine Mammals, which tracks acquisitions, dispositions, and transfers/transports of marine mammals.

Regarding the use of sonar in the marine environment and its impact on spinner dolphins, section 101(a)(5) of the MMPA allows for incidental take for certain limited activities. Such authorizations for incidental take are subject to a public process that provides for notice and comment for each proposed activity, and accordingly, are beyond the scope of this rulemaking.

Regardless of the other factors potentially affecting Hawaiian spinner dolphins, peer-reviewed scientific studies cited in the proposed rule and again in this final rule have shown that close approach by humans may result in negative impacts on Hawaiian spinner dolphin health, and multiple studies have shown an increase in the intensity of human interactions with dolphins in recent years. While we recognize that close approach by humans is not the only threat to dolphin health, this rule seeks to mitigate this real and increasing threat by reducing the impact of human viewing and interaction on resident stocks.

Comment 14: One commenter stated that the information published in the DEIS does not comply with the Office of Management and Budget (OMB) requirements under the Information Quality Act (a.k.a. Data Quality Act) by not adequately presenting a balance of best and worst case scenarios, a lack of bias and exhibited transparency, and by not adequately fulfilling the public notice requirements. Additionally, the commenter provided additional scientific articles that they believe need to be included in the rule's environmental impact analysis.

Response: Under NOAA's Information Quality Guidelines, which fulfill OMB requirements under the Information Quality Act (IQA), the proposed rule does not qualify as Influential Scientific Information (scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions) or Highly Influential Scientific Assessment (influential scientific information that the agency or the Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget determines to be a scientific assessment that: (i) Could have a potential impact of more than $500 million in any year, or (ii) is novel, controversial, or precedent-setting or has significant interagency interest).

With regard to the science supporting the rule, we relied on published reports and studies, most of which have been peer reviewed prior to publication under independent processes, dependent upon the terms of the publication. We have reviewed the articles referenced by the commenter for their applicability to this final rule and address them here.

The article cited as Christiansen and Lusseau (2015) describes studies that were conducted to determine if disturbance corresponded to changes in female reproductive success. The researchers developed a mechanistic model for minke whales (*Balaenoptera acutorostrata*) to measure the effects of behavioral disturbances caused by whale watching activities on fetal growth. The model illustrates the pathway through which behaviorally mediated effects of anthropogenic disturbance might influence female reproductive success. The results indicated that, although the behavioral disruptions caused by whale watching interactions were substantial, the cumulative exposure of individuals to whale watching boats was low, resulting in an effect on fetal growth no different from natural variability. For the minke whales studied in this research, the whale watching took place at their feeding grounds, and even the highest exposure to whale watching vessels amounted to a total of only 427.5 minutes during the feeding season. The authors concluded that female minke whales would have to spend a large proportion of their day with whale watching boats during each day of the feeding season for them to start having a biologically important effect on fetal growth. The results of this research are not directly applicable to the issue being addressed by this final rule because Hawaiian spinner dolphins are exposed to much higher levels of disturbance in their essential daytime habitats. In fact, the authors of the study conclude that if these minke whales were exposed to boats throughout the day (*i.e.,* similar to levels experienced by spinner dolphins in Hawai'i), they would experience a net energy loss sufficient enough to have significant effects on fetal growth. The cumulative exposure of spinner dolphins to human disturbance is occurring on a daily or near-daily basis throughout the year, and also occurs during times and at places that they would normally be resting and nurturing their young, not during feeding times. These essential daytime behaviors are needed to replenish and restore their energy and provide the nourishment needed for calves to reach maturity.

The research cited as Hartel and Torres (2015) studied exclusion zones designed to protect bottlenose dolphin habitats. The research found that, over time, the bottlenose dolphins did not use the designated exclusion zones, and that they were therefore ineffective in providing habitat protection. While this research may seem to be applicable, we note that there are significant differences in the behaviors and life history strategies of bottlenose and spinner dolphins. Spinner dolphins have a very rigid, predictable behavior pattern of hunting at night and resting and nurturing their young during the day. They generally return from their offshore feeding grounds to the same protected bays and shallow, sandy bottomed habitats and are found there with regularity. This is one of the main reasons why the swim-with-dolphin industry has been so successful in Hawai'i, as the tour vessels are consistently able to locate the dolphins at the same sites on a daily basis. Researchers believe Hawaiian spinner dolphins choose these areas because of their proximity to their offshore feeding grounds and the protection they afford from predators, providing a safe place to rest and nurture their young. In contrast,

bottlenose dolphins are much more fluid in their behaviors, feeding and resting throughout the day and foraging over much wider areas. They do not exhibit the same site fidelity to a particular area that spinner dolphins do.

The research cited as New *et al.* (2013) explored the response by bottlenose dolphins to a scenario in which vessel traffic increased from 70 to 470 vessels a year in response to the construction of a proposed offshore renewables' facility. Despite the more than six-fold increase in vessel traffic, the dolphins' behavioral time budget, spatial distribution, motivations, and social structure remained unchanged. They found that the dolphins are able to compensate for their immediate behavioral response to disturbances by commercial vessels. The research showed that if the increased commercial vessel traffic is the only escalation in anthropogenic activity, then the dolphins' response to disturbance is not biologically significant because the dolphins' health is unaffected, leaving the vital rates and population dynamics unchanged. The authors note that behavioral change should not automatically be correlated with biological significance when assessing the conservation and management needs of species of interest. Again, this study centered on the responses of bottlenose dolphins to increased vessel traffic. For the same reasons stated above, the differences between bottlenose and spinner dolphins needs to be taken into consideration when looking at the results of this study. Unlike bottlenose dolphins, spinner dolphins have very rigid and stable behavioral patterns of daily rest and socialization and nighttime foraging, and are therefore much more susceptible to disturbance at their essential daytime behaviors.

Comment 15: Two commenters expressed the need for NMFS to address climate change in the environmental analysis.

Response: We provided a complete analysis of climate change impacts associated with this rulemaking in section 4.5.5 of the FEIS (''Impacts of Climate Change''). In this section, we detailed the cumulative effects that climate change may have on Hawaiian spinner dolphin health, including impacts on abundance and distribution of prey species, impacts of sea level rise, and impacts associated with rising ocean temperatures (see section 4.5.5.1 of the FEIS). Additionally, we considered and evaluated impacts that the proposed alternatives could have on climate change (see section 4.5.5.2 of the FEIS).

Comment 16: We received comments that questioned the credibility of some of the research used to support the proposed rule and the analyses of alternatives in the DEIS. Specifically, commenters noted that the SAPPHIRE Project received partial funding from Dolphin Quest, which profits from swim-with captive dolphin programs. Commenters suggested that this presents a conflict of interest, as findings that support prohibitions for approaching wild dolphins could increase support for Dolphin Quest's business.

Response: To clarify, the research effort to which the commenters refer (which resulted in several publications, see Background above) received a portion (less than 25 percent) of their funding from Dolphin Quest. Our decisions associated with this rulemaking do not rest solely on the studies from the SAPPHIRE project. Rather we relied on the many scientific publications, including multiple studies in Hawai'i, that indicate that intense human pressure can have negative effects on local wild spinner dolphin populations. A comprehensive list of journal articles and information sources are referenced in the Final EIS.

Researchers in many fields rely on funding from various sources to conduct their work, including government grants, NGOs, and private sources, and on that basis alone we do not assume that the acceptance of funds from specific entities would compromise the research being conducted. The academic papers in question were peer-reviewed, which is a process by which research is checked by a group of experts in the same field to ensure that the scholarly work meets necessary standards before it is published in an academic journal. Tyne's papers were peer reviewed and published in the academic journals Royal Society Open Science, Biological Conservation, and the Journal of Applied Ecology. The abundance information was reviewed closely by PIFSC researchers and currently provides the most rigorous estimate for our local spinner dolphin populations. Tyne *et al.*'s work indicating the significance of resting habitat in supporting spinner dolphin resting behavior confirmed ideas presented by earlier works by Ken Norris in the 1990s. Additionally, Tyne *et al.*'s work questioning the quality of rest that this population receives echoes concerns expressed by other researchers, including Courbis and Timmel (2009), Heenehan *et al.* (2015 and 2016), Forrest (2001), and Danil *et al.* (2005). As a result, we determined that these studies by Tyne *et al.* are credible and unbiased, and included them in our analysis of the best available science.

Information on Responsible Viewing of Marine Mammals

Comment 17: Several commenters expressed concern that limiting interaction with spinner dolphins may displace the impacts of human interaction onto other wild marine mammals, or onto captive bottlenose dolphins. Additionally, commenters specifically suggested that to avoid this displaced impact, NMFS should expand the scope of this rule to protect all marine mammals in Hawai'i, including dolphins in captivity.

Response: All marine mammals are protected from take by the MMPA, defined as ''to harass, hunt, capture, or kill or attempt to harass, hunt, capture, or kill any marine mammal'' (16 U.S.C. 1362). While this regulation implements necessary and appropriate measures to reduce take in the form of harassment of spinner dolphins, other wild marine mammals are still protected from take (including harassment) under the MMPA. Spinner dolphins are unique in that they spend time resting in areas close to shore, and therefore are easily accessible to human users of the nearshore environment. Their predictable daytime behavior has made it possible for the swim-with-wild-dolphin industry to develop. It is difficult to determine to what degree operators may switch to ''swim-with'' activities with other marine mammals.

With regard to other marine mammals in Hawaiian waters, we note that we have approach distance regulations for some other species of marine mammals, such as humpback whales in Hawai'i (50 CFR 216.19). However, each rule is based on the ecology of the specific animal, as well as the best available scientific information on the nature of the threats.

This rule implements additional protections to prevent harassment of spinner dolphins in the wild. Extending these protections to captive dolphins is beyond the scope of this rulemaking. Please see the response to comment 13 for additional information on dolphins in captivity.

Additional Information on Spinner Dolphin Behaviors

Comment 18: Many commenters suggest that Hawaiian spinner dolphins choose to interact with human users and vessels. Additionally, commenters suggest that if dolphins did not want to interact with human users and vessels, the dolphins have the ability to swim away. As a result, some commenters assert that people can't swim with

dolphins; rather, it is the dolphins who swim with people, because the dolphins could swim away at any time.

Response: We recognize that dolphins can appear curious and may approach humans in the water. Indeed, there was an exception in the proposed rule, which remains in the final rule, that allows humans to be within 50 yards (45.7 m) of a dolphin if the dolphin approaches them, provided that they do not purposefully place themselves in the path of oncoming dolphins, that they make no effort to engage or pursue the animal, and that they take immediate steps to move away from the animal. Requiring the swimmer to withdraw reduces the likelihood that exposure to human activities will result in harassment. There is ample evidence that humans often approach dolphins in their daytime resting areas, and this may have negative biological impacts on spinner dolphins. As discussed in the Background, Hawaiian spinner dolphins experience high frequency and intensity of disturbance at essential daytime habitats. Some dolphins may stay in these habitats even when people are present, swimming in relatively close proximity to people, because these areas provide habitat essential for resting, recovering from nighttime feeding, and protection from predators. Leaving these sites carries increased risk of predation and may move dolphins further away from offshore feeding areas.

While dolphins can indeed swim away from and faster than humans, having to do so interrupts their rest, keeps them in a state of vigilance, and forces the dolphins to expend energy to increase their swimming speed and/or change direction. This increase in their energetic expenditures for purposes of avoidance could lead to decreased energy needed for other important behaviors, such as foraging and nurturing their young. Over the long term, this could affect the fitness of individual dolphins, and their ability to forage as a group. Further, their ability to swim away is limited by the fact that avoiding humans or leaving their preferred resting habitat altogether can lead to a greater risk of predation, and may involve greater energetic demands because they may need to travel farther distances to reach their feeding grounds. Finally, peer reviewed studies on Hawai'i Island suggest that dolphins are unlikely to rest outside of their daytime essential habitat in resting bays (Tyne *et al.* 2015; Lammers 2004; Norris *et al.* 1994).

Comment 19: Many commenters argued that NMFS fails to understand the consciousness of dolphins and that NMFS perceives a problem with humans swimming with dolphins where none exists. Additionally, one commenter suggested that humans swimming with dolphins is important to both species, while another commenter argued that those who attend spiritual retreats to swim with dolphins attest that the experience is life-changing.

Response: As mentioned in the Background section, we believe that safe, responsible viewing of spinner dolphins can provide benefits to species awareness and conservation. However, there is a substantial and growing body of scientific evidence documenting the negative effects of dolphin-directed activities on spinner dolphins, especially activities that involve close approaches by humans, regardless of the intent of the humans. There is no scientific evidence to suggest that Hawaiian spinner dolphins receive a long-term health benefit from prolonged, close interactions with humans. Peer-reviewed scientific literature documents dolphin-directed human activity as causing disturbance to individual spinner dolphins, as well as changes to spinner dolphin group behavioral patterns. Individual dolphin responses to these activities vary and, in some cases, may not be apparent to an observer (*e.g.,* elevated heart rates or increased vigilance). However, discernible responses include aerial displays, tail-slapping, or other visible behavior changes when closely approached by vessels and swimmers (Forest 2001, Courbis and Timmel 2008); avoidance behaviors, including increased swimming speed, directional changes, moving around and away from swimmers and vessels, or leaving the area in response to human pursuit (Ostman-Lind *et al.* 2004, Courbis 2004, Courbis and Timmel 2008); and aggressive behaviors directed at people, including charging or threat displays (Norris *et al.* 1985, Norris *et al.* 1994). Effects have also been documented in the form of changes to spinner dolphins' behavior patterns in essential daytime habitats, including the amount of time spent within resting habitat, distribution within the habitat, and changes to patterns associated with aerial behaviors (Courbis 2004, 2007; Timmel *et al.* 2008; Östman-Lind 2007; Danil *et al.* 2005; Forest 2001).

Swimming with Hawaiian spinner dolphins has become a popular activity in Hawai'i, because Hawaiian spinner dolphins are charismatic animals, are easily accessible to humans while in their resting habitat. However, as stated in our response to Comment 13, spinner dolphins that interact with swimmers incur an energetic cost, and the time for restorative or fitness-enhancing behaviors, particularly rest, is lost due to these disruptions. Additionally, several spinner dolphin studies provide evidence of chronic disturbance to natural behavioral patterns that could potentially cause biologically significant impacts, see Background for discussion on chronic disturbance. People are often unaware that changes in dolphin behavior take away from daytime fitness-promoting behaviors with other dolphins.

The purpose of this regulation is to prevent encounters that result in disturbance to and harassment of Hawaiian spinner dolphins. This rule implements regulations for the conservation purposes of MMPA, including necessary and appropriate regulations that protect spinner dolphins from harassment. As described in the preamble, human encounters with Hawaiian spinner dolphins may have long-term adverse effects that may not be immediately apparent to the observer. We considered other distances for swim-with and approach regulations, including 100 and 150 yards (91.4 or 137.1 m), as well as no swim-with and approach measures. We do not believe that the status quo provides adequate safeguards for these marine mammals. One of the considerations in choosing a 50 yard (45.7 m) approach rule, as opposed to 100 or 150 yards (91.4 or 137.1 m), was that it was the minimum appropriate distance to prevent disturbance to them, while still allowing people to view the dolphins. At this time, we believe that a 50 yard (45.7 m) approach buffer provides the least restrictive means for accomplishing the important conservation purposes of the approach regulation, while still accounting for the interests of the observing public.

Other Human Activities Affected by the Proposed Rule That Were Not Discussed

Comment 20: Many commenters expressed concern that this rule would have a large impact on the local economy. Some commenters representing the tour industry specifically indicated that they anticipate this rule to have a large impact on their businesses. Additionally, 17 commenters argued that the data used in our economic impact analysis, presented as part of the DEIS, was insufficient, out-of-date, and needed to include additional data in order to analyze the potential economic impact of this rule's implementation. One commenter specifically suggested a need for more data on the tour industry on West O'ahu.

Response: In response to concerns raised that the economic data used for

the analysis in the DEIS is outdated, we have updated the economic analysis and conducted a Regulatory Impact Review/Regulatory Impact Assessment in accordance with Executive Order 12866 and the Regulatory Flexibility Act, and incorporate this assessment and the Final Regulatory Flexibility Analysis into the final EIS as Chapter 5 for the final rule. While we have supplemented the 2008 economic analysis and 2016 RIR/IFRA, the new economic information does not materially alter earlier findings in the proposed rule about the need for regulation and the impact of the regulation on small entities. There has been an approximately 6-fold increase in the number of tours and spiritual retreats offering swim-with-wild-dolphin experiences, as well as a corresponding increase in the gross revenues generated by these businesses, in the 10-year span between the original economic data report and the updated report. This increased economic activity also represents an increase in human pressures on spinner dolphins. The expected economic impact of the final rule on dolphin-directed business activity is similar to that of the proposed rule. It is possible that some tour operators will experience some loss of revenues due to differences in the amounts charged for a swim-with-dolphin experience versus a general marine tour/wildlife viewing experience. Indeed a commenter stated that they had experienced declines in their dolphin tour business after shifting to a 50 yard (45.7 m) viewing distance. However, tour operators in Hawai'i that voluntarily follow Dolphin SMART safe viewing guidelines that use a 50 yard (45.7 m) viewing distance from spinner dolphins have stayed in business and remained competitive for nearly a decade, and the final rule will implement even handed requirements for all operators, mitigating lower revenues resulting from competition with swim-with-dolphin operators.

Restrictions resulting from the COVID pandemic have significantly impacted the tourism industry in Hawaii, and COVID restrictions and the overall decline in tourism have significantly curtailed wild dolphin tours. Nevertheless, tourism has rebounded over the last year, with 791,053 visitors in June 2021 (*https://www.hawaiitourismauthority.org/media/7582/june-2021-visitor-statistics-press-release.pdf*). As conditions continue to improve, NMFS anticipates that dolphin-directed activities will resume at or near pre-pandemic levels.

Comment 21: One commenter indicated that they receive ''life force'' from dolphins and whales, and that this regulation would violate the commenter's constitutional rights.

Response: As discussed in the response to Comment 19, the purpose of this regulation is to prevent encounters that result in disturbance to and harassment of Hawaiian spinner dolphins. This rule implements regulations for the conservation purposes of MMPA, including necessary and appropriate regulations that protect spinner dolphins from harassment. As described in the preamble, human encounters with Hawaiian spinner dolphins may have long-term adverse effects that may not be immediately apparent to the observer. We considered other distances for swim-with and approach regulations, including 100 and 150 yards (91.4 or 137.1 m), as well as no swim-with and approach measures. We do not believe that the status quo provides adequate safeguards for these marine mammals. One of the considerations in choosing a 50 yard (45.7 m) approach rule, as opposed to 100 or 150 yards (91.4 or 137.1 m), was that it was the minimum appropriate distance to prevent disturbance to them, while still allowing people to view the dolphins. At this time, we believe that a 50 yard (45.7 m) approach buffer provides the least restrictive means for accomplishing the important conservation purposes of the approach regulation, while still accounting for the interests of the observing public.

Comment 22: One commenter noted that spotted dolphins (*Stenella attenuata*) often interact with fishing vessels for long periods of time and have intensive feeding requirements similar to those of spinner dolphins, but the need for spotted dolphins to have uninterrupted sleep is not a concern to NMFS. Additionally, this commenter notes that bottlenose dolphins have long been harassed by fishermen off the Kona coast for stealing live bait from marlin and tuna fishermen and market fish from bottom fishermen, yet NMFS has not established protections for bottlenose dolphins.

Response: As described in several comment responses above, as well as the **SUPPLEMENTARY INFORMATION** section of the Final Rule, wild marine mammal harassment is prohibited by the MMPA. This includes Level A harassment (any act of pursuit, torment, or annoyance which has the *potential to injure* a marine mammal) and Level B harassment (any act that has the *potential to disturb* a marine mammal in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering). As a result, harassment of any wild dolphin species, including spotted dolphins and bottlenose dolphins, is illegal under the MMPA. While NMFS is concerned about spotted and bottlenose dolphins, this rule focused on spinner dolphins because their unique habitat preferences and resting behaviors make them particularly vulnerable to disturbance. More detail about spinner dolphin vulnerability to disturbance is available in the response to Comment 24, as well as in section 3.1.4 of the FEIS ''Ecology and Behavior.''

The Temporal and Geographic Scope (i.e., Two nmi From Shore) of the Approach Regulation

Comment 23: Multiple commenters suggested that we should implement a rule that extends 10 nmi from shore to encompass the entire range of the MHI-associated resident stocks. Some commenters suggested that people may seek encounters with the dolphins outside of two nmi, leaving the dolphins unprotected outside of this boundary.

Response: Extending the effective area of the regulation out to 10 nmi from shore was considered in the DEIS and FEIS (see section 2.1.3 in the DEIS and FEIS). As stated in the rationale for the rule and in the EIS, these regulatory measures are intended to prevent take of Hawaiian spinner dolphins from occurring in marine areas where viewing pressures are most prevalent. We have no information to suggest that these stocks of Hawaiian spinner dolphins face any kind of regular exposure to wildlife viewing activities that cause take outside of two nmi from shore. Unlike nearshore areas where spinner dolphins predictably use essential daytime habitats, the locations where spinner dolphins might be found beyond two nmi is not predictable and we do not anticipate that encounters with dolphins outside of two nmi will become common after the rule is finalized. MMPA take prohibitions will continue to apply in the U.S. exclusive economic zone (EEZ) and high seas where these regulations do not apply. To encompass the range of dolphin-directed activities that are likely to result in take, we focused on where people are most likely to encounter Hawaiian spinner dolphin groups, *i.e.,* where dolphins are known to occur during the day when they are engaged in nearshore resting and socializing activities. We reviewed information from scientific literature about Hawaiian spinner dolphin daytime habitat preferences and information from over 400 sightings of spinner dolphins collected around the MHI since 1992

from various members of the Pacific Islands Photo Identification Network (PIPIN) to determine that the 2 nmi boundary sufficiently covered the dolphins' daytime habitat use. Because almost all viewing and interaction pressures occur during the day within two nmi from shore and in the designated waters bounded by Lāna'i, Maui, and Kaho'olawe, expanding the scope to include the resident stock's entire range would provide negligible additional protection from take by approach within 50 yards (45.7 m).

Comment 24: The State of Hawai'i DLNR commented that it supports the proposed rule, but believes it should be expanded to apply to the entire U.S. EEZ within 200 nmi from shore, to simplify compliance for users and streamline enforcement efforts.

Response: As described above in our response to Comment 23, we considered the geographic scope of the rulemaking in our EIS, including applying it to the entire EEZ, and determined that a 2nm boundary provided the protections from daytime disturbance needed for spinner dolphins. These proposed regulatory measures are intended to prevent take of Hawaiian spinner dolphins from occurring in areas where viewing pressures are most prevalent. We therefore felt it was unnecessary to extend the reach of the regulation to areas where take is less likely to occur. Further, keeping the boundary to two nmi allows enforcement efforts to be concentrated within the two nmi boundary rather than spread across a much larger area, thereby increasing the effectiveness of these efforts.

Comment 25: A commenter suggested that the regulation should be applicable to all dolphin species and all U.S. citizens or nationals anywhere in the world (and also advocated for a 100 yard approach rule).

Response: The purpose of this rule is to address the increase in human pressures on spinner dolphins in coastal waters around the state of Hawaii. A no-approach regulation with national application is beyond the scope of this rule. Additionally, swim-with tours have not been identified as a major threat for other dolphin species in the areas surrounding MHI at this time. While this rule does not apply to other dolphin species, other species may benefit as public ocean users become aware of the potential impacts of close approach and would keep their distance from all wildlife.

As described in the responses to Comment 23 and Comment 24, we do not find, at this time, that the enhanced protections in this rule are necessary seaward of two nmi off the Hawaiian islands, or in other regions of the United States. The MMPA's general moratorium on the taking of marine mammals, which applies in waters under U.S. jurisdiction as well as to persons and vessels subject to U.S. jurisdiction on the high-seas, continues to protect dolphins that may be found outside the boundaries of this rule. With regard to the specific comment that the regulation should include a 100 yard approach rule, see our response to Comment 9.

Comment 26: Many commenters suggested that the geographic action area for the proposed rule should be limited to one or two islands, rather than all waters within two nmi of each of the MHI and in the designated waters bounded by the islands of Lāna'i, Maui, and Kaho'olawe. Specifically, commenters noted that the problem of spinner dolphin harassment from close approach by humans is greater on Hawai'i Island and O'ahu than it is on islands like Maui and Kaua'i. As such, the geographic action area for the proposed rule establishing protections for spinner dolphins should be limited to areas with the largest number of tour operators and human users. Additionally, several commenters argued that, because many of the supporting studies cited by NMFS in the proposed rule and DEIS conducted their research along the Kona coast of Hawai'i Island, the geographic action area of the proposed rule should only include waters surrounding Hawai'i Island. These commenters argue that the DEIS gives too much weight to these studies, which cover a small geographic area (relative to the state as a whole), and therefore the rule does not adequately account for the behavioral or social differences between island-specific populations of spinner dolphins. One commenter suggested that the geographic action area of the proposed rule be limited to the range of one or more of the three island-associated stocks of spinner dolphins in the MHI. The commenter did not suggest a specific stock for protection.

Response: The commenters are correct that the islands of O'ahu and Hawai'i have a greater number of dolphin-directed tour companies, spiritual retreats, and individuals swimming to the dolphins from shore due to factors such as easily accessible essential daytime habitats. However, Hawaiian spinner dolphins utilize sandy, protected bays and nearshore areas for resting and socializing across the state. While the largest number of human users are concentrated on one or two islands, close approach by humans occurs statewide (Sepez, 2006; see section 1.6 of the FEIS, ''Description and Scope of the Proposed Action'') and affects all of the island-associated spinner stocks. Limiting this rule to only one or two islands or to the geographic extent of an island-associated stock could result in displacement of dolphin-directed human activity to other areas of the state where Hawaiian spinner dolphins are present, thus undermining the protections established in this regulation.

Regarding the concern by some commenters that spinner dolphin data informing this rule was only collected on Hawai'i Island, this rule was developed through a literature review of available data for Hawaiian spinner dolphins throughout the state. Many recent research efforts focused on bays on Hawai'i Island, as these bays are often used as daytime resting habitat for spinner dolphins and are a place where researchers can reliably study spinner dolphin behavior. These locations include Hōnaunau Bay, Kealakekua Bay, Makako Bay, and Kauhakō Bay, which were the sites for more recent studies on the impacts of human interaction on dolphin population health, such as the SAPPHIRE studies. While these studies focused on a limited geography, the findings regarding spinner dolphin behavior changes in the presence of human users are representative of wider scenarios where humans are in prolonged contact with resting Hawaiian spinner dolphins. Additionally, while the SAPPHIRE studies researched Hawaiian spinner dolphins on Hawai'i Island, research has been conducted on O'ahu, Maui, Lāna'i, Kaho'olawe, Moloka'i, and Kaua'i, resulting in peer-reviewed journal articles that were consulted when developing this rule and FEIS (*e.g.,* Norris and Dohl 1980; Benoit-Bird and Au 2003; Danil *et al.* 2005; Hill *et al.* 2005; Lammers *et al.* 2000, 2001, 2003, 2004, 2006; Mobley *et al.* 2000, and Wiener 2016). In short, we consulted studies conducted across the state, and, because close approach of Hawaiian spinner dolphins by humans is occurring statewide, we determined that the geographic extent of the rule should be statewide as well.

Comment 27: Multiple commenters submitted ideas for alternative management considerations with different combinations of geographic ranges, approach distances, and enforcement times. For example, one commenter, citing O'ahu-based studies done by Lammers and Danil, suggested a 100 yard approach regulation on O'ahu from 11AM to 6PM. The commenter stated that 100 yards (91.4 m) is easier to judge and more

enforceable than 50 yards (45.7 m), and suggested that the regulation be O'ahu-specific given habitat and behavioral differences between O'ahu spinner dolphins and Hawai'i Island spinner dolphins, specifically that they often rest during the midday and early afternoon periods.

Response: We addressed aspects of this alternative suggestion in multiple comment responses. As stated in the response to Comment 9, we determined that a 100 yard (91.4 m) approach distance would decrease a dolphin viewer's ability to see the animals without visual aids, and is inconsistent with our current wildlife viewing guidelines. We determined that an approach distance of 50 yards (45.7 m) would provide increased protection for the animals by reducing harassment, while still allowing people to observe spinner dolphins. Regarding an O'ahu-specific regulation, we would like to direct the commenter to our response to Comment 26, in which we address comments to limit the regulation to certain areas. Limiting the swim-with and approach regulation to O'ahu only would not provide protections to spinner dolphins in other areas of the MHI where disturbance at daytime essential habitats is also occurring, undermining the protections established in this regulation.

Whether Time-Area Closures are Necessary To Address the Intensity of Hawaiian Spinner Dolphin-Directed Activities in Some Areas

Comment 28: We received comments that were opposed to the implementation of time-area closures. These commenters felt that closures were either unnecessary to achieve the desired protections because the proposed approach regulation would provide adequate protection, or overly restrictive to the public because they could restrict shore access rights or use of waters in Hawai'i. The State of Hawai'i DLNR provided comments to the proposed rule stating that they did not support time-area closures because they felt that an approach rule best addresses the threat posed by dolphin-directed activities across the extent of their range.

Response: Although time-area closures provide members of the public with precise boundaries around which they may readily tailor their conduct, we recognize that such closures can also carry undesired costs, such as imposing a burden on the public when spinner dolphins are not present. Accordingly, and as we explained in the proposed rule, we are not including time-area closures in this final rule. However, based on consideration of public comments and revised input from the State of Hawaii, NMFS has reconsidered its prior position and is publishing a separate proposed rule to implement time-area closures.

Comment 29: Researchers suggested looking at the time-area closures in Samadai Reef, Egypt as an example of what has been proven to be effective in protecting other dolphin species.

Response: When determining whether to propose implementing time-area closures, we considered the Samadai Reef example, in which spinner dolphins that had abandoned the site returned to it after management measures were put in place to prevent human entry into the core resting area (see DEIS section 1.5.2). As noted in the response to comment 28, NMFS has reconsidered its prior position on time-area closures and is publishing a separate proposed rule to implement time-area closures.

Comment 30: Several commenters said an approach rule is too difficult to enforce and time-area closures is a more appropriate alternative. The National Park Service also commented that, while they support the proposed rule, the data from Östman-Lind (2009) and other studies (Johnston *et al.* 2013) suggest that a larger buffer distance or a selection of mandatory time-area closures (with the exceptions mentioned in the DEIS) would be more beneficial to the Hawaiian spinner dolphin population, and would likely improve enforcement of the proposed rule

Response: Given our experience with enforcing the 100 yard (91.4 m) humpback whale approach rule in Hawai'i, we believe that this spinner dolphin approach rule can be successfully enforced. We also recognize that time-area closures provide members of the public with precise boundaries around which they may tailor their conduct and makes enforcement of such closures straightforward. We considered this comment and others that are supportive of time-area closures. In addition to the swim-with and approach regulation established in this final rule, we are proposing time-area closures in a separate rulemaking. With regard to larger ''buffer'' distances, see our response to Comment 9.

The Bays and Times of Day Identified for Time-Area Closures

Comment 31: One commenter suggested that the proposed boundaries of the time-area closures be changed to cover half of the bays so that one half of each bay could be reserved for humans to interact with the dolphins, while the other half could be reserved as essential resting habitat. The commenter argues that this would allow the dolphins to choose either to swim with humans or to rest.

Response: We have considered these comments and are publishing a separate proposed rule to implement time-area closures.

Comment 32: Many commenters supported time-area closures, but suggested alternative closures times such as from 9:30 a.m. to 4 p.m., from 10 a.m. to 2 p.m., or from 11 a.m. and 6 p.m. to reduce the impacts to other ocean users. Some commenters claim that if time-area closures are chosen, the time should be expanded to when the dolphins leave, as the dolphins often stay in the bays past 3 p.m.

Response: We have considered these comments and are publishing a separate proposed rule to implement time-area closures.

Comment 33: Several members of the Ho'okena community advocated closing Kauhakō Bay to swimming with dolphins with the aim of restoring their akule fishery. Anecdotal observations by community members indicate they have seen no akule in Kauhakō Bay since 1997 which coincides with the time when swimming with dolphins became popular in their bay. In addition, a petition with over 285 names and signatures was submitted by members of the Ho'okena community, KUPA, and Friends of Ho'okena Beach Park voicing their support for stronger rules to prohibit people from approaching resting Hawaiian spinner dolphins.

Response: We recognize that Kauhakō Bay faces intense pressure from people approaching spinner dolphins and we are working with members of the Ho'okena community to increase outreach and education to the public. Although restoration of the akule fishery is outside the scope of this rule, we plan to continue working with the community and DOCARE to address the community's concerns regarding the disturbance of dolphins at this location. The swim-with and approach regulation will reduce the intensity of dolphin-directed activities within essential daytime habitats to some degree. We are proposing time-area closures as part of a separate rulemaking, and such regulation, combined with the swim-with and approach regulation, can be expected to reduce the intensity of dolphin-directed activities within the essential daytime habitat at this location. We will continue to work with the community to address their concerns as needed.

Comment 34: Several commenters noted that La Perouse Bay banned the

use of kayaks in the bay in 2006. These commenters observed that the dolphins, which used to frequent the area, no longer use that essential daytime habitat to the same extent following the ban on kayaks. The commenters suggest that the number of dolphins using La Perouse Bay has decreased because kayakers are no longer using the bay, leading the commenters to suggest that the dolphins enjoy the presence of kayaks.

Response: In 2004, the State of Hawai'i declared the 'Āhihi-Kīna'u Natural Area Reserve and neighboring La Perouse Bay off limits to commercial kayaking and other commercial operations. We understand that the State has not banned non-commercial operations, such as using a personally-owned kayak, within the bay.

Although NMFS is unable to determine whether the number of dolphins using La Perouse Bay has decreased since 2006, as the commenters suggest, we do not agree that we can attribute changes in abundance of dolphins in certain bays to any one factor, such as the number of kayaks. Dolphins choose their resting habitat for a number of factors, which is described further in the response to Comment 1. Any number of these factors can cause a change in habitat preference. Additionally, NMFS has no reason to believe dolphins are ''attracted to'' kayaks, as the commenter suggests, on the contrary kayaks may contribute to harassment of dolphins.

Suggestions on Other Areas That Should Be Considered for Time-Area Closures

Comment 35: NMFS received comments suggesting that if closures are implemented, time-area closures should also be considered in Hulopo'e and Mānele bays on Lāna'i, Honolua Bay on Maui, and Mākua Bay on O'ahu because these areas are also targeted by tour operators and swimmers and, specific to Mākua Bay, because they claim that it is a spinner dolphin nursery.

Response: In a separate rulemaking we are proposing time-area closures based on Alternatives provided in the DEIS, FEIS, and the 2016 proposed rule. The sites we are proposing for time-area closures are descried in the DEIS as areas reported as having a high level of chronic human disturbance at daytime essential resting habitat. Should we consider implementing additional time-area closures other than the 5 selected sites described in the DEIS, we will look closely at the areas identified by the commenter, likely using a step-down process similar to that used in the DEIS Appendix A.

Alternate Management Strategies

Comment 36: Several commenters asked why we couldn't make the Coral Reef Alliance (CORAL) West Hawai'i Voluntary Standards (WHVS) into enforceable regulations. The WHVS were created by the CORAL, with stakeholder input and consensus by a wide variety of Hawai'i Island businesses and community members, to apply to all wildlife viewing and interactions in West Hawai'i. This includes viewing and interaction guidelines for marine mammals, including Hawaiian spinner dolphins (WHVS 2009). Measures under section 4.6 of the document include educational information about prohibitions already outlined in the MMPA, detailed boating etiquette and safety measures around marine mammals and swimmers, and human activities to avoid when viewing and interacting with marine mammals. In addition, section 4.7 focuses on voluntary standards specific to spinner dolphins.

Response: In the FEIS, we considered promulgating regulations based on the WHVS as an alternative to enhance protections for Hawaiian spinner dolphins, but eliminated that alternative from further consideration because these standards did not meet the primary criteria necessary to effectively address our purpose and need, which is to reduce the threat of take to Hawaiian spinner dolphins, including harassment and disturbance caused by dolphin-directed activities that are concentrated in coastal waters, and to address chronic interaction and viewing impacts on resident stocks of Hawaiian spinner dolphins (see section 1.1 of the FEIS). As outlined in section 2.9.5 of the FEIS, the WHVS standards are mainly adapted for marine recreational providers (tour operators). Therefore, some measures, such as restricting the number of boats surrounding a pod of dolphins to no more than three at a time, do not convert well to all user groups and may not be easily understood by other resource users. Further, the complexity of certain standards (*e.g.,* no boat staying longer than 30 minutes with a pod, but boats being allowed to return to a pod for an additional 30 minute time period after a minimum of 1 hour away from the pod, as long as doing so does not exceed the three boat maximum) makes them difficult to follow and enforce. We also note that, because the measures addressed in the WHVS were narrowly focused on commercial activities and areas on the west coast of Hawai'i Island, not all measures would easily transfer to other areas. Finally, the WHVS do not apply to individuals who choose to swim, kayak, or otherwise approach the dolphins on their own apart from a commercial tour operation, leaving the dolphins vulnerable to disturbance by a large sector of the population in Hawai'i. The combination of these factors led to the decision to eliminate this alternative from further analysis.

Comment 37: A number of commenters suggested that it is essential to have a strong educational component in order for new regulations to be effective. Additionally, many commenters suggested that regulations would not be necessary if swimmers and vessels were educated about the impacts of close approach of spinner dolphins by humans, advocating for self-regulation rather than this proposed rule.

Response: We agree that conducting outreach and education with the public and tour industry is essential to promote compliance with any new regulation and reduce the impacts on spinner dolphins caused by disturbance by humans. A robust education and outreach effort with partners, including state and Federal government partners, non-profit organizations, and researchers, will support the implementation of this regulation. Based on the lack of consistent compliance with voluntary measures to protect Hawaiian spinner dolphins to date (*e.g.,* wildlife viewing guidelines, NMFS guidelines, and the CORAL West Hawai'i Voluntary Standards) as well as the number of people wanting to be in proximity to the dolphins, we anticipate that relying solely upon education and self-regulation would have limited success in reducing the overall intensity of dolphin-directed activities in most areas.

Comment 38: Multiple commenters suggested that, in lieu of the proposed rule, NMFS or the State of Hawai'i should institute a permit program. In these comments, this permit program could take numerous forms. For example, thirteen commenters suggested using a permit system to limit the total number of human users in order to limit the impact of close approach by humans on dolphins. One commenter suggested establishing a permit system for operators that would require the operators to participate in a training program on proper dolphin viewing practices before they are allowed to operate swim-with dolphin tours. Another suggestion was to establish a permit system that educates swim-with dolphin tour participants on proper dolphin viewing practices before they can participate in a guided tour. Commenters also suggested other

permitting strategies, such as limiting human activity to non-motorized vessels only, limiting the number of tour operators allowed to conduct swim-with dolphin tours, and limiting the number of people allowed per vessel. Finally, some of these commenters suggested that funding generated through the permit system could be used to support research/education efforts.

Response: We considered the alternative of licensing and permitting of commercial tour operators and eliminated it from further analysis because it would require a large infrastructure to administer, monitor, and enforce. A licensing and permitting system could also introduce equity issues between those receiving a permit and those not receiving a permit. We also noted that such a system would not resolve the threats from stakeholders other than tour operators (such as personal vessels and swimmers from the shore). A uniform system that applies more or less equally to everyone and reduces the cumulative effect of the disturbances occurring on the spinner dolphins is preferable to a permit system.

Comment 39: Several commenters suggested alternative solutions, such as enforcing a limit on the number of vessels and swimmers allowed in a bay at one time, with one additional commenter suggesting that a limit be enforced on the number of people allowed per tour boat.

Response: Although particularly high numbers of swimmers and vessels can be problematic, limiting the number of human users allowed in a dolphin resting bay at any given time can still result in take if the human users closely approach the dolphins. Therefore, we concluded that such limitations would not adequately meet the conservation purpose of this rule, which is to prevent take.

Comment 40: Several commenters suggested that the proposed rule was not developed with community input or recommendations, and that NMFS should engage community members and tour operators to hear local concerns and to develop a new regulation. Several commenters suggested that this could take the form of a committee of local community members that would advise NMFS on formulating a new regulation.

Response: We recognize the importance of community and stakeholder input when creating a regulation, and we took steps to solicit and incorporate community input and recommendations into the rulemaking process. The process for enhancing protections for Hawaiian spinner dolphins from human disturbance began in 2005, when we published an ANPR (70 FR 73426, December 12, 2005), which was followed by a Notice of Intent to prepare an EIS for this proposed rule (71 FR 57923, October 2, 2006). In this notice, we identified five preliminary alternatives for public consideration and comment, and invited information from the public on the scope of the issues that should be addressed in a Draft EIS, the issues of concern regarding practical considerations involved in applying the proposed regulation, and identifying environmental and socioeconomic concerns to be addressed in the analysis. In 2006, we also held five public scoping meetings on the islands of Kaua'i, O'ahu, Maui, and Hawai'i, and collected 4,641 public comments in response to the ANPR and the NOI. Comments submitted during this process included many that focused on cultural issues (*e.g.,* accommodating local culture and livelihoods, as well as the visitor industry) and traditional Hawaiian knowledge (*e.g.,* recommending that researchers listen to Native Hawaiians' knowledge instead of relying on outside research). In addition to these public scoping meetings, we attended a forum organized by State Senator Colleen Hanabusa's office specifically for the kūpuna (elders) of the Wai'anae community to voice their opinions. Full details regarding how we collected, analyzed, and responded to comments on the ANPR and the notice are available in section 1.5.3 of the FEIS.

In addition to the scoping process to develop the proposed rule, we held six public hearings on the proposed rule in September 2016, in which 145 attendees provided their oral testimony on the proposed rule. These attendees included community members, native Hawaiian community leaders, tour operators, researchers, and government officials. In addition to the 145 testimonies, we received over 22,000 additional comments during the public comment period. Following the public hearing some modifications were made to the rule. See section titled *Changes from Proposed Rule* in the final rule background, which highlights the differences between the proposed rule and the final rule.

Comment 41: One commenter specifically mentioned the Wai'anae Baseline Environmental Study and the West O'ahu Ocean Protocols as existing examples of community efforts to address the issue of spinner dolphin harassment, and stated that these two documents are not referred to in the DEIS.

Response: The West O'ahu Ocean Operation Protocols and the subsequent Wai'anae Baseline Environmental Study were developed with a goal of reducing conflict among multiple ocean users, not reducing spinner dolphin disturbance as a result of close human approach. These two products stemmed from Act 6, passed by the Hawai'i State Legislature in 2006, which directed DLNR to establish waters in West O'ahu as an Ocean Recreation Management Area in order to ''limit the locations, times, and types of permitted ocean recreation activities'' (DOBOR 2009). This state legislation was passed to minimize conflict among multiple ocean users, such as between tourism industry vessels and fishing vessels.

Although we did reference the Wai'anae Baseline Environmental Study in the DEIS and FEIS when discussing conflicts between akule fishing and the tourism industry when those uses overlap (DEIS section 3.4.4.1), our focus in this rule was to establish protections for spinner dolphins from close approach under the MMPA, not to manage interactions between two different industries.

Comment 42: Commenters suggested our consideration of a designated swim-with area in the bays where it would be permissible to swim with the dolphins. One commenter suggested, rather than implementing a swim-with and approach regulation, that we consider closing two bays to dolphin swimming for 10 years, then studying this to compare the difference between dolphin health in the closed bays versus the open bays. Several commenters suggested roping off half of two bays to study whether the dolphins would choose to interact with people or not, believing that the dolphins are not harmed by interacting with people, but rather seek them out and enjoy it.

Response: As noted in the final rule and FEIS, the MMPA provides limited exceptions to the prohibitions on take (*e.g.,* scientific research permits) and requires that people and organizations conduct wildlife viewing in a manner that does not cause take. Because close interactions with marine mammals are likely to result in take, including harassment and disturbance, we cannot support, condone, approve, or authorize attempting to swim with, pet, touch, or elicit a reaction from dolphins. We recognize there are numerous ways to test hypotheses and efficacy of different management strategies. However, we have chosen the approach rule as the best way to immediately relieve the pressure on the dolphins. We are also proposing time-area closures in a separate rulemaking to provide

protections for spinner dolphins in essential daytime habitats.

Hawaiian Cultural Concerns

Comment 43: One commenter expressed concern that Native Hawaiians practicing a traditional burial of a marine mammal could be fined under this regulation.

Response: This regulation has no effect on traditional burials of marine mammals. The NOAA Marine Mammal Health and Stranding Response Program oversees and coordinates all responses to stranded marine mammals in the United States, including traditional burial of a marine mammal and other cultural practices. In Hawai'i, NMFS engages Hawaiian cultural practitioners in marine mammal stranding responses whenever possible and in compliance with the MMPA. These cultural practitioners can help us be culturally respectful of the individual animal and the community where the stranding occurs. In order to be in compliance with the MMPA, all responders must be authorized as a regional stranding network participant (in accordance with section 112(c) and section 403, or section 109(h) of the MMPA), which gives authority to state and local government employees to humanely take marine mammals in the course of their official duties.

Comment 44: Some commenters expressed concern that the cultural impact analysis in the DEIS completed for this proposed rule is inadequate. One commenter stated that input from Ho'okena residents was heard and considered by NMFS, but because the proposed rule is statewide, the cultural impact analysis needs to be expanded to include other areas in the list of proposed restricted areas. Some of these commenters recommended that, in lieu of this proposed regulation, NMFS work with local residents and elders to craft a new alternative.

Response: We conducted a comprehensive scoping process through which we received feedback from concerned citizens, including members of the native Hawaiian community, tour operators, researchers, members of the public involved in dolphin-directed activities, and other stakeholders from around the state, not just on Hawai'i Island. Further detail about the public input we solicited on this regulation is available in the response to Comment 40.

In addition to this public input process, we initiated a separate scoping process to determine if historic properties could be affected by any of the alternatives under consideration, as required by the National Historic Preservation Act (NHPA). With assistance from Hawai'i's State Historic Preservation Division, we identified and contacted Native Hawaiian organizations, communities, and individuals, and then held four scoping meetings in 2012 with those who expressed interest in participating. Following these meetings, we contracted a consultant to conduct interviews with three lineal descendants from each of the five bays identified as potential time-area closure locations (Kealakekua Bay, Kauhakō Bay (Ho'okena), Hōnaunau Bay, Makako Bay, and La Perouse Bay), to help us identify historic properties or practices that could be affected by the time-area closures that were under consideration to protect Hawaiian spinner dolphins. We incorporated the findings from the initial scoping process in 2006, as well as the 2012 NHPA scoping process into the development of the various alternatives in the DEIS, and we have not received any information through the public comment period to suggest that this rule would hinder cultural practices identified through the interviews with lineal descendants (*e.g.,* fishing, canoe activities, ancestral caretaking and worship, and care of burial sites; see section 3.4.5 in the FEIS for descriptions of activities in various bays around the state). We have determined that this final rule to implement swim-with and approach regulations for Hawaiian spinner dolphins has no potential to cause effects to historic properties under section 106 of the NHPA.

Enforcement

Comment 45: We received comments requesting that this rule be enforced upon all water users, including swimmers and all private and commercial vessels. Conversely, we received comments requesting that the regulation be tailored so that there would be ''no burden'' for non-dolphin tour operators and responsible dolphin-viewing vessels, since those vessels are not harassing the dolphins.

Response: We agree that this rule should be enforced for all water users, both private and commercial (including non-dolphin tour operators). As described in Comment 1 and 2, multiple scientific studies provide evidence regarding the various and differing vessel and swimmer impacts on the behavior of spinner dolphins and how those impacts can create long term health impacts. Because spinner dolphins can be affected by numerous activities on the water, this rule applies to all water users, unless a narrow exception applies. We believe that the 50 yard (45.7 m) limit provides an appropriate opportunity for responsible wildlife viewing, without unnecessarily burdening the public. Exceptions are provided in the final rule (50 CFR 216.20 (c)).

Comment 46: Several commenters expressed concern that this rule will not be enforced, noting that DLNR has limited resources devoted to enforcement. Several commenters suggested actions for NMFS to provide resources for enforcement, including providing funding to DOCARE, staffing observers in bays with lots of human activity, collecting funding from tour vessels for enforcement in the form of a licensing fee, and using fines levied on violators of this proposed rule to support enforcement.

Response: Enforcement of the MMPA is accomplished via all available means, including through land and sea patrols conducted by the NMFS OLE, the United States Coast Guard, and DOCARE, all of whom work with us on outreach and enforcement. NMFS OLE conducts periodic patrols, which include areas with high amounts of human activity, and accepts evidence of harassment submitted by citizens observing violations. Historically, NMFS has also provided funds to DOCARE through a Joint Enforcement Agreement to conduct enforcement activities. NMFS OLE, with support from DOCARE, is actively pursuing violations of the MMPA and will continue to do so. Regarding the suggestion to use fines levied on violators of the proposed rule to support enforcement, MMPA civil fines are currently directed into a national Asset Forfeiture Fund, which is then used to help fund enforcement activities subject to NOAA policy. Finally, with regard to the comment recommending collection of funding from tour vessel operators in the form of a licensing fee, we refer the commenter to our response to Comment 38 regarding permitting fees.

Comment 47: Several commenters suggested that NMFS should focus on enforcing the MMPA, rather than creating a new regulation, since Hawaiian spinner dolphins are already protected from take by the MMPA. One commenter, noted that spinner dolphins are not threatened or endangered under the ESA, and this regulation will set a precedent for establishing protections for non-ESA listed species.

Response: The MMPA protects all marine mammals, whether or not listed under the ESA, in U.S. waters and on the high seas from take, which includes Level B harassment. This regulation further enhances protections for spinner dolphins under the MMPA (see the

responses to Comment 8 and Comment 14). The commenter is correct that the spinner dolphin is not currently listed as threatened or endangered under the ESA; however, the MMPA protects all marine mammals, regardless of whether they are ESA listed, and this action is taken under authority of the MMPA to strengthen protections for spinner dolphins from increased human pressures that have resulted in observed disruption of behavioral patterns.

Final Rulemaking

The swim-with and approach prohibitions described in this rule are designed to protect spinner dolphins from take, including harassment and disturbance, caused by dolphin-directed activities, such as close viewing and interaction. Although we stress that unauthorized take of spinner dolphins or any marine mammals already is and continues to be prohibited by the MMPA in any location, we believe that specific regulations aimed at identified human activities that result in take of Hawaiian spinner dolphins are warranted because of the chronic disturbance that is currently taking place in nearshore waters. This regulation is limited to nearshore areas, within 2 nmi (3.7 km) from shore of the MHI and including designated waters bounded by Lāna'i, Maui, and Kaho'olawe (see Figures 2 and 3 in section 216.20(e) and *Geographic Action Area* section below), where threats from dolphin-directed activities are concentrated and where spinner dolphins engage in essential daytime behaviors, including resting, socializing, nurturing, and traveling. These measures are intended to prevent take during important resting periods and allow Hawaiian spinner dolphins to engage in normal fitness-enhancing behaviors, thereby preventing long-term negative impacts to individuals and to the population. We are finalizing this regulation pursuant to our rulemaking authority under MMPA sections 112 (a) (16 U.S.C. 1382(a)) and 102 (16 U.S.C. 1372).

Scope and Applicability

Application to All Hawaiian Spinner Dolphins

The rule's swim-with and approach prohibitions apply to all Hawaiian spinner dolphins found in the action area (see *Geographic Action Area* section below).

Geographic Action Area

The action area for the swim-with and approach prohibitions in this rule is limited to waters within 2 nmi (3.7 km) of each of the MHI and in designated waters bounded by the islands of Lāna'i, Maui, and Kaho'olawe (see Figures 2 and 3 in section 216.20(e)). The latter designated waters include all water areas enclosed by three line segments that connect points at the 2-nm boundary bounded by the islands as follows: The rhumb line between (A1) 20°32′51″ N/156°43′50″ W (Kaho'olawe) and (A2) 20°42′4″ N/156°55′34″ W (Lāna'i); the rhumb line between (B1) 20°51′1″ N/156°54′0″ W (Lāna'i) and (B2) 20°59′48″ N/156°42′28″ W (Maui); and the rhumb line between (C1) 20°33′55″ N/156°26′43″ W (Maui) and (C2) 20°32′15″ N/156°29′51″ W (Kaho'olawe). Throughout this rule, all coordinates are referenced to the World Geodetic System of 1984 (WGS84).

This is inclusive of the majority of the nearshore habitats where MHI resident stocks of spinner dolphins engage in essential daytime behaviors and where dolphin-directed human activities that may result in take are known to occur (see Rationale section below).

Applications to All Forms of Swimming and Approach

The regulation applies to all forms of swim-with and approach activities in water and air. Forms of approaching spinner dolphins include, but are not limited to, operating a manned or unmanned motorized, non-motorized, self-propelled, human-powered, or submersible vessel; operating an unmanned aircraft system (UAS) or drone; and swimming at the water surface or underwater (*i.e.,* SCUBA, snorkeling, or free diving).

Requirements of the Rule

Swim-With and Approach Regulation

The rule prohibits people from approaching or remaining within 50 yards (45.7 m) of a spinner dolphin; swimming or attempting to swim within 50 yards (45.7 m) of a spinner dolphin; causing a vessel, person, or object to approach or remain within 50 yards (45.7 m) of a spinner dolphin; and intercepting, or placing a vessel, person, or other object in the path of a spinner dolphin so that the dolphin approaches within 50 yards (45.7 m) of the vessel, person, or object.

Exceptions

Specific categories are exempt from the swim-with and approach regulation, and are outlined below:

(1) Any person who inadvertently comes within 50 yards (45.7 m) of a Hawaiian spinner dolphin or is approached by a spinner dolphin, provided the person makes no effort to engage or pursue the animal and takes immediate steps to move away from the animal;

(2) Any vessel that is underway and is approached by a Hawaiian spinner dolphin, provided the vessel continues normal navigation and makes no effort to engage or pursue the animal. For purposes of this exception, a vessel is underway if it is not at anchor, made fast to the shore, or aground;

(3) Any vessel transiting to or from a port, harbor, or in a restricted channel when a 50 yard (45.7 m) distance will not allow the vessel to maintain safe navigation;

(4) Vessel operations necessary to avoid an imminent and serious threat to a person or vessel;

(5) Any vessel that is anchored or aground and is approached by a Hawaiian spinner dolphin, provided the vessel makes no effort to engage or pursue the animal;

(6) Activities authorized through a permit or authorization issued by the National Marine Fisheries Service to take Hawaiian spinner dolphins; and

(7) Federal, state, or local government vessels, aircraft, personnel, and assets when necessary in the course of performing official duties.

(8) Commercial fishing vessels that incidentally take spinner dolphins during the course of commercial fishing operations, provided such vessels operate in compliance with a valid marine mammal authorization in accordance with MMPA Section 118(c).

The exception for vessels transiting to or from ports, harbors, or restricted channels is necessary to allow continuation of safe navigation when approaching spinner dolphins closer than 50 yards (45.7 m) is unavoidable. For these cases, the vessel should continue normal navigation to reduce the likelihood that close interactions result in disturbances for an appreciable period of time. The exception for vessel operations necessary to avoid an imminent and serious threat to a person or vessel is needed for the safety of human life and property, and to allow for compliance with applicable navigation rules. The exception for anchored and aground vessels was added in response to public comments received on the proposed rule and is intended to recognize that anchored vessels may not be able to avoid coming within 50 yards (45.7 m) of Hawaiian spinner dolphins if approached by the animals. The exception for vessels, aircraft (manned or unmanned) or persons engaged in an activity authorized through a permit or other authorization issued by NMFS to take spinner dolphins is necessary to ensure

the continued availability of scientific research and biological data necessary to inform management and conservation decisions related to the dolphins. We anticipate that compliance with relevant permit terms and conditions will help minimize the potential impacts to dolphins. The exception for government vessels, aircraft, personnel, and assets operating in the course of official duties is intended to avoid disruption of essential government missions, including enforcement and national security activities. The exception for commercial fishing vessels is limited to incidental take by those vessels in compliance with the associated valid marine mammal authorization in accordance with MMPA Section 118(c).

Rationale

Hawaiian spinner dolphins resident to the MHI are made up of small, genetically isolated stocks that exhibit a specialized behavioral ecology that makes them easy to access in coastal environments during their daytime resting hours. This leaves these resident stocks vulnerable to human-caused disturbance and its effects, such as habitat abandonment or declines in reproductive success (Norris *et al.* 1994, Andrews *et al.* 2010, Tyne *et al.* 2014). In the MHI, dolphin-directed activities have increased in recent years, and the public's expectation of close interactions has placed increased pressure on resident stocks of Hawaiian spinner dolphins and the habitats that support these stocks (see Background above). Despite outreach, guidelines, and current prohibitions, observations indicate that MHI resident Hawaiian spinner dolphins' natural behaviors are disrupted by activities that include approach by both swimmers and vessels (Ostman-Lind *et al.* 2004, Danil *et al.* 2005, Courbis 2004, Courbis and Timmel 2008), and overarching spinner dolphin group behavioral patterns may be changing in essential daytime habitats as a result of these pressures (Norris *et al.* 1994, Forest 2001, Courbis 2004, Courbis and Timmel 2008).

The public, through public comment submissions, brought several recent studies to our attention that they believed should be incorporated into environmental review process. Upon review of these studies (Branstetter *et al.,* 2012; Christiansen and Lusseau, 2015; Hartel and Torres, 2015; and New *et al.,* 2013), we determined that these were not applicable to the issue being addressed by this regulation. A detailed review of these studies, including why we determined they were not applicable to this regulation, is available in the responses to Comments 12 and 14.

This regulation is designed to address dolphin-directed activities that result in various forms of take of Hawaiian spinner dolphins. As described in the proposed rule, we selected 2 nmi (3.7 km) from shore around the MHI, as well as designated waters bounded by the islands of Lāna'i, Maui, and Kaho'olawe, for the boundaries for the swim-with and approach regulation. We are maintaining this as the boundary for the final regulation because this range encompasses the areas where current and best available information indicates that most dolphin-directed activities are likely to be concentrated. For further detail regarding this decision, please see the responses to Comments 23–26.

Regarding the approach distance, this final regulation maintains the 50 yard (45.7 m) approach distance proposed in the DEIS, proposed rulemaking, and analyzed in the FEIS. We received public comments in support of both increasing the distance and decreasing the distance. However, we selected 50 yards (45.7 m) as the approach distance for this regulation because it would reduce the threat of take occurring to spinner dolphins resulting from close approach by swimmers and vessels, while placing the least restrictive burden on the viewing public. Additionally, we already recommend this distance (50 yards (45.7 m)) in our wildlife viewing guidelines and request that people do not swim-with wild dolphins to reduce the risk of behavioral disruption from close encounters. These guidelines are recognized by tour operators and are used by some (*e.g.,* Dolphin SMART operators) to help ensure that spinner dolphins are viewed responsibly. This decision is more fully described in the responses to Comments 8 and 9.

For further information regarding the effects of close approach on spinner dolphins, please see the proposed rule.

References Cited

A complete list of all references cited in this rulemaking can be found on our website at: *https://www.fisheries.noaa.gov/action/enhancing-protections-hawaiian-spinner-dolphins,* or at *www.regulations.gov,* and is available upon request from the NMFS office in Honolulu, Hawai'i (see **ADDRESSES**).

Classification

National Environmental Policy Act (NEPA) and Regulatory Impact Review (RIR)

NMFS has prepared an FEIS and an RIR pursuant to NEPA (42 U.S.C. 4321 *et seq.*) and Executive Order (E.O.) 12866, to support this regulation. The FEIS/RIR contains a full analysis of a No Action Alternative, five action alternatives, and the Preferred Alternative. NMFS prepared a Record of Decision (ROD) detailing the agency's decision concerning this regulation. The FEIS/RIR, ROD, and supporting documents are available for review and comment and can be found on the NMFS Pacific Islands Region website at *https://www.fisheries.noaa.gov/action/enhancing-protections-hawaiian-spinner-dolphins.*

Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) was prepared for this action and is included below. The FRFA incorporates the initial regulatory flexibility analysis (IRFA) prepared for the proposed rule stage, an analysis of updated information collected after the comment period for the proposed rule closed (Impact Assessment 2018), and includes a summary of the significant issues raised by the public and the Small Business Administration (SBA) in response to the IRFA, along with NMFS' responses to those comments.

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, whenever an agency publishes a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a Regulatory Flexibility Analysis describing the effects of the rule on small entities, *i.e.,* small businesses, small organizations, and small government jurisdictions.

Pursuant to the RFA, NMFS prepared the following Final Regulatory Flexibility Analysis (FRFA). A description of the action, why it is being considered, and the legal basis for this action are contained in the preamble to this final rule. This final rule does not duplicate, overlap, or conflict with other Federal rules. The analysis contains a description of and, where feasible, an estimate of the number of, small entities to which the rule will apply. The Small Business Administration (SBA) establishes criteria for defining a ''small entity'' for purposes of the RFA. There are no record-keeping or reporting requirements associated with this action.

The Chief Counsel for Advocacy of the Small Business Administration did not file any comments on the proposed rule. NMFS did not receive comments on the IRFA, although some comments on the economic aspects of the proposed rule, including those that affect small entities, could be relevant. Please see

Comments 20, 38, 39, and 40 and NMFS's responses to those comments.

There are several types of industries directly affected by this rulemaking: Swim-with-wild-dolphins tour operators; dolphin watch tour operators; non-motorized vessel ocean wildlife viewing tour operators; and generalized commercial boat tour operators. This analysis uses size standards prescribed by the SBA. Specifically, for scenic and sightseeing water transportation operators (North American Industry Classification System Code 487210), the SBA size standard for a small business is average annual receipts of $8.0 million or less. Much of the background information for potentially affected entities is based on a 2018 report (2018 report) that summarized information collected in 2017 with regard to participants within these industries that potentially interact with Hawaiian spinner dolphins to varying degrees in the MHI (Impact Assessment 2018). The 2018 report is similar to the socioeconomic report finalized in 2007 (which contained information collected in 2006 and provided much of the information for the IRFA in support of the proposed rule), but with updated information. The 2018 report provides information that suggests that most, if not all, businesses operating in the swim-with-wild-dolphins tour and the dolphin watch tour industries operating in 2017 could be considered small entities, and most of the generalized commercial boat tour operators were assumed to be small entities (Impact Assessment 2018).

Swim-with-wild-dolphins tour operators are those that bring clientele into close proximity with spinner dolphins. This includes health and/or spiritual retreat operations as well as dolphin-oriented swim tours. Health and spiritually-linked businesses provide opportunities for persons wishing to interact with spinner dolphins for perceived physical, mental, and/or spiritual well-being enhancement. The number of businesses in this category increased between 2007 and 2017, especially on the Island of Hawai'i. Spiritually-linked tour operations may charter vessels through other established dolphin-swim companies to transport customers as part of an overall per-person package consisting of lodging, swimming with dolphins, and other activities. According to the 2018 report, an estimated six to eight locally owned spiritual retreat businesses and at least 33 non-local (*i.e.,* mainland United States, Europe, Japan, South Africa, and Australia) spiritual retreat businesses operating on Hawai'i Island reportedly provided direct Hawaiian spinner dolphin interaction in 2017. No numbers were provided for spiritual retreat businesses operating on O'ahu, Maui, and Kaua'i.

Dolphin-oriented swim tours operate by transporting passengers by boat or having them swim from shore to areas in which dolphins are known to be present during daytime hours. Customers may also be provided with facemasks, fins, flotation devices, and snorkels to enhance viewing. The 2018 report suggests that at least 41 swim-with-dolphins tour companies operated on Hawai'i and seven operated on O'ahu. The report also indicated that commercial boat tours on Maui did not appear to advertise underwater encounters with spinner dolphins, nor did those on Kauai, although unplanned encounters may occur. All are believed to be small entities.

Dolphin-watch tour operators involve taking clients out specifically to view wild dolphins. These companies tend to operate smaller boats than the more generalized commercial boat tours described below, and are more likely to view dolphins at a closer range. Revenue information for this specific business category is not available. The 2018 report did not provide estimated number of businesses that primarily focused on dolphin viewing, but NMFS had previously estimated the number of dolphin watch tour businesses to be as follows: Hawai'i (3), Maui (21), O'ahu (3), and Kaua'i (11) in 2015 (NOAA Fisheries, PIRO).

More generalized commercial boat tours offer a range of ocean activities, which may include sightseeing, snorkeling, diving, viewing various forms of sea life from a vantage point in and/or above the water, or just generally spending time on the ocean. The majority of the general tour boats derive revenue from whale watching and sightseeing operations, while a number of the dive/snorkel vessels offer snorkeling or diving trips. The 2018 report provided economic or operational information from 28 generalized commercial boat tour businesses (Hawai'i Island: 5, O'ahu: 2, Maui: 16, and Kaua'i: 15), although there are likely more businesses that fall in this category. NMFS believes that most, but not all, would be considered small entities.

Non-motorized vessel ocean wildlife viewing tour operators, specifically kayak tour businesses around the MHI, provide a general wildlife viewing experience, with a very few, if any, operators advertising direct or intentional interactions with dolphins. The 2018 report indicated that these operations were designed to provide clients with a variety of recreational and sightseeing experiences that typically did not include dolphin interactions. The 2018 report did not provide estimated number of businesses in this category, but NMFS had previously estimated that in 2015, the numbers of companies that either operate kayak tours or rent out kayaks to be as follows: Hawai'i (6), Maui (9), O'ahu (6), and Kaua'i (13) (NOAA Fisheries, PIRO). Based on the information from the 2018 report and/or obtained by NMFS in 2015, the estimated numbers of small entities directly affected by the final rulemaking, by industry, on the MHI are as follows: At least 60 or 70 swim-with-wild-dolphins tour operators (including health and/or spiritual retreats enabling opportunities to swim with wild dolphins), and at least 38 generalized commercial boat tour operators (one or more of which are likely to be considered large entities).

Because information on these entities were collected in 2017, their numbers might differ currently and in the near term, as these are businesses whose customer base are often comprised of tourists and visitors to the State of Hawaii or interisland travelers. Beginning in March 2020, the Hawaii tourism industry has been undergoing a significant drop in travel and tourism-related business activities due to the COVID pandemic. In April 2020, 4,564 visitors arrived in Hawaii, a 99.5% decrease from the number of visitors that arrived in April 2019 (*https://www.hawaiitourismauthority.org/media/4635/april-2020-visitor-statistics-press-release-final.pdf*). While tourism has increased in the state over the last year with 791,053 visitor arriving in Hawaii in June 2021, this number represents a 16.5 percent decline compared to June 2019 (*https://www.hawaiitourismauthority.org/media/7582/june-2021-visitor-statistics-press-release.pdf*). As a result, the tourism industry has faced immediate financial challenges and businesses that rely on tourists, such as boat-based wildlife viewing tours, snorkel tours, and spiritual retreats have been financially impacted from the COVID pandemic. Although it is not known when tourism will return to pre-COVID levels, we anticipate that that dolphin directed activities would resume to pre-pandemic levels in the future.

This final rule would restrict all activities associated with close approach to Hawaiian spinner dolphins, including swimming with dolphins and close approach by vessel. These approach prohibitions would be applicable within 2 nmi (3.7 km) of each

of the MHI and in designated waters bounded by the islands of Lāna'i, Maui, and Kaho'olawe. This rule implements the least restrictive measure that still achieves reduction in harassment of dolphins.

The ban on swimming and approaching within 50 yards (45.7 m) of Hawaiian spinner dolphins, has the potential to eliminate all activities, including commercial activities that may result in take of spinner dolphins (*e.g.,* swim-with-wild-dolphins) at a close distance. Therefore, implementing this final action would require operators that currently offer the opportunity to swim with spinner dolphins to cease this specific activity, although they may choose to continue to provide other services among their menu of options. For example, a spiritual retreat that offers a menu of other activities along with swim-with-wild-dolphins activities may continue to offer the other activities. In addition, swim-with-wild-dolphins tour operators may choose to transition to operate as a dolphin-watching or generalized tour vessel operation. For these businesses, eliminating opportunities to swim with wild spinner dolphins within 50 yards (45.7 m) is likely to result in a reduction in revenue in the short term and potentially in the long term. The decrease in revenue could come from the reduction in the number of customers, specifically those who seek the experience of swimming with spinner dolphins, and/or reduced trip or package prices with a reduced menu of options available for each trip. The loss in overall revenue to individual businesses and the industry as a whole that rely on close approach with spinner dolphins by any means for revenue is uncertain. The same is true with regard to the number of businesses that would be still be able to remain in operation after the implementation of the final rule. The 2018 report indicated that many of the business owners or operators facilitating underwater dolphin encounters expected that they would see lower profits, devaluation of business assets, employee layoffs, or they might decide move the business to a different location outside of Hawaii, or some operators expected they would go out of business. One operator reported laying off all his employees after voluntarily complying with the proposed rule. NMFS, however, has no corroborating information for this report. Some others stated that they would try to create a different kind of retreat.

Commercial wildlife boat tour operators, including generalized commercial boat tour operators, dolphin watch tour operators, and non-motorized vessel tour operators, would no longer be able to take customers to view Hawaiian spinner dolphins from closer than 50 yards (45.7 m). Restricting operators from approaching within 50 yards (45.7 m) of spinner dolphins may reduce demand for vessel-based tours among customers who specifically hope to view dolphins from a vessel at a closer range, although there will be no options other than not taking a tour at all, as no boats in Hawai'i would be able to offer tours closer than 50 yards (45.7 m). Some tour operators may be able to offer alternative recreational opportunities or amenities as part of a tour to help offset any loss in demand for tours. For generalized tour boat operators with a clientele base that does not have a specific goal of viewing spinner dolphins, the direct economic impact of the final action is likely to be minimal.

Participants of dolphin directed activities may also support other industries indirectly, including lodging, food industry, and car rentals. Many dolphin-swim participants may travel to Hawaii and participate in a wide variety of other ocean based activities, including vessel based wildlife viewing. Weiner (2016) found that 78 percent of participants of swim-with dolphin tours would still participate in a dolphin tour, even if they could not go in the water with dolphins. The industries that provide goods and services to visitors could potentially see some loss in revenue if new regulations were implemented that prohibited swimming with dolphins. However, many of these businesses serve a much larger number of local, U.S., and international visitors to the state seeking a wide range of experiences, of which direct encounters with dolphins are a small component.

NMFS concludes that there would be disproportionate impacts to the swim-with-wild-dolphin tour operators from implementation of this final action relative to all other general wildlife viewing tour operators. Similarly, because of the focus of activities, it is also likely that the dolphin watch tour industry will face greater impacts than the generalized wildlife tour companies. As a result, dolphin-watch tour entities may face disproportionate impacts relative to the generalized commercial boat tour companies, which are likely to incur few direct economic impacts from the final action. We note that dolphin watch tour entities are all believed to be small entities, and most of the generalized commercial boat tour companies are as well, although a few might be considered large entities with revenues exceeding $8.0 million.

NMFS considered other alternatives in addition to the swim-with and 50 yard (45.7 m) approach regulations (Alternative 3(A)). These include Alternative 1: No action; Alternative 2: Swim-with regulations; Alternative 3(B): Swim-with and 100 yard (91.4 m) approach regulations; Alternative 4: Mandatory time-area closures, swim-with, and 50 yard (45.7 m) approach regulations; and Alternative 5: Voluntary time-area closures and swim-with and 50 yard (45.7 m) approach regulations. As is the case for this final action, Alternatives 2, 3(B), 4, and 5 would all be applicable within 2 nmi of each MHI and in designated waters bounded by the islands of Lāna'i, Maui, and Kaho'olawe. Among the non-selected action alternatives, all would likely result in a higher direct economic impact to individual small entities and the dolphin-viewing industry as a whole, relative to the final action, except for Alternative 2. NMFS has determined that the final action meets the goals and objective of reducing human-caused disturbances that Hawaiian spinner dolphins are facing in their natural habitat, and will help protect against declines in the fitness of the population over time.

No additional reporting, record keeping, and other compliance requirements are anticipated for small businesses. NMFS has identified no Federal rules that may duplicate, overlap, or conflict with the action alternatives.

Executive Order 12866, Regulatory Planning and Review

This rule was determined to be not significant for purposes of E.O. 12866.

Paperwork Reduction Act

The purpose of the Paperwork Reduction Act is to minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, and other persons resulting from the collection of information by or for the Federal government. The rule includes no new collection of information, so further analysis is not required.

National Historic Preservation Act (NHPA)

The goal of the NHPA (16 U.S.C. 470 *et seq.)* is to have Federal agencies act as responsible stewards of our nation's resources when their actions affect historic properties. Section 106 of the NHPA requires Federal agencies to take into account the effects of undertakings they carry out, assist, fund, or permit on historic properties. Federal agencies meet this requirement by completing the

section 106 process set forth in the implementing regulation, ''Protection of Historic Properties,'' 36 CFR part 800. The goal of the section 106 process is to identify and consider historic properties (or sites eligible for listing) that might be affected by an undertaking, and to attempt to resolve any adverse effects through consultation. Under the NHPA, an ''effect'' means an alteration to the characteristics of a historic property qualifying it for inclusion or eligibility for the National Register.

NMFS conducted a scoping process to determine if historic properties may be affected by the proposed regulation. Native Hawaiian organizations, communities, and individuals were contacted upon recommendation from Hawai'i's State Historic Preservation Division and four community scoping meetings were held in 2012 with those who expressed interest in the proposed undertaking. NMFS has not received any information to suggest that this undertaking would adversely affect historic properties or hinder cultural practices within historic properties such as those identified through the interviews with lineal descendants (*e.g.,* fishing, canoe activities, ancestral caretaking and worship, and care of burial sites).

We have determined a swim-with and approach regulation for Hawaiian spinner dolphins does not have the potential to cause effects on or alterations to the characteristics of historic properties. In consideration of the foregoing the NMFS has determined that the undertaking is a no potential to effect determination (36 CFR 800.3) under Section 106 of the NHPA.

Coastal Zone Management Act

Section 307(c)(1) of the Federal Coastal Zone Management Act of 1972 requires that all Federal activities that affect any land or water use or natural resource of the coastal zone be consistent with approved state coastal zone management programs to the maximum extent practicable. We determined that this regulation is consistent to the maximum extent practicable with the enforceable policies of the approved Coastal Zone Management Program of Hawai'i. This determination and the DEIS were submitted for review by the Hawai'i Coastal Zone Management (CZM) Program. The Hawai'i CZM Program concurred with our determination in a letter dated September 27, 2016.

List of Subjects in 50 CFR Part 216

Administrative practice and procedure, Marine mammals.

Dated: September 20, 2021.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 216 is amended as follows:

PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 1. The authority citation for 50 CFR part 216 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

■ 2. Add § 216.20 to subpart B to read as follows:

§ 216.20 Special restrictions for Hawaiian spinner dolphins.

(a) *Applicability.* The following special restrictions designed to protect Hawaiian Spinner Dolphins apply:

(1) In all waters within 2 nautical miles (nmi) of the main Hawaiian Islands, and

(2) In all waters bounded by the islands of Lāna'i, Maui, and Kaho'olawe enclosed by 3 line segments that connect points on the 2-nmi boundary between the islands as follows: The straight line between 20°32′51″ N/156°43′50″ W (Kaho'olawe) and 20°42′4″ N/156°55′34″ W (Lāna'i), the straight line between 20°51′1″ N/156°54′0″ W (Lāna'i) and 20°59′48″ N/156°42′28″ W (Maui), and the straight line between 20°33′55″ N/156°26′43″ W (Maui) and 20°32′15″ N/156°29′51″ W (Kaho'olawe) (all coordinates referenced to The World Geodetic System of 1984 (WGS 84)).

TABLE 1 TO PARAGRAPH (a)(2)—COORDINATES FOR THE EXTENT OF THE DESIGNATED WATERS BOUNDED BY LĀNA'I, MAUI, AND KAHO'OLAWE *

[All coordinates referenced to The World Geodetic System of 1984 (WGS 84).]

Line segment between islands	Figure 3 label	Latitude	Longitude
Kaho'olawe and Lāna'i	A1	20°32′51″ N	156°43′50″ W
	A2	20°42′4″ N	156°55′34″ W
Lāna'i and Maui	B1	20°51′1″ N	156°54′0″ W
	B2	20°59′48″ N	156°42′28″ W
Maui and Kaho'olawe	C1	20°33′55″ N	156°26′43″ W
	C2	20°32′15″ N	156°29′51″ W

* (see Figure 3 of this section).

(b) *Prohibitions.* Except as noted in paragraph (c) of this section, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or to cause to be committed any of the following:

(1) Approach or remain within 50 yards (45.7 m) of a Hawaiian spinner dolphin by any means;

(2) Swim within 50 yards (45.7 m) of a Hawaiian spinner dolphin;

(3) Cause a vessel, person, or other object to approach or remain within 50 yards (45.7 m) of a Hawaiian spinner dolphin; or

(4) Intercept or place a vessel, person, or other object in the path of a Hawaiian spinner dolphin so that the dolphin approaches within 50 yards (45.7 m) of the vessel, person, or object.

(c) *Exceptions.* The prohibitions of paragraph (b) of this section do not apply to:

(1) Any person who inadvertently comes within 50 yards (45.7 m) of a Hawaiian spinner dolphin or is approached by a spinner dolphin, provided the person makes no effort to engage or pursue the animal and takes immediate steps to move away from the animal;

(2) Any vessel that is underway and is approached by a Hawaiian spinner dolphin, provided the vessel continues normal navigation and makes no effort to engage or pursue the animal. For purposes of this exception, a vessel is defined as a watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water (1 U.S.C. 3); a vessel is underway if it is not made fast to the shore, at anchor, or aground;

(3) Any vessel transiting to or from a port, harbor, or in a restricted channel when a 50-yard (45.7 m) distance will not allow the vessel to maintain safe navigation;

(4) Vessel operations necessary to avoid an imminent and serious threat to a person or vessel;

(5) Any vessel that is anchored or aground and is approached by a Hawaiian spinner dolphin, provided the vessel makes no effort to engage or pursue the animal;

(6) Activities authorized through a permit or authorization issued by the National Marine Fisheries Service to take Hawaiian spinner dolphins;

(7) Federal, State, or local government vessels, aircraft, personnel, and assets when necessary in the course of performing official duties;

(8) Commercial fishing vessels that incidentally take spinner dolphins during the course of commercial fishing operations, provided such vessels operate in compliance with a valid marine mammal authorization in accordance with MMPA section 118(c).

(d) *Affirmative defense.* In connection with any action alleging a violation of this section, any person claiming the benefit of any exemption, exception, or permit listed in paragraph (c) of this section has the burden of proving that the exemption or exception is applicable, or that the permit was granted and was valid and in force at the time of the alleged violation.

(e) *Maps of areas for Hawaiian spinner dolphin special restrictions.* The following are overview maps and a table with corresponding coordinate data for the areas for Hawaiian spinner dolphin special restriction.

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Figure 1 to § 216.20. Overview of Area of Spinner Dolphin Protections

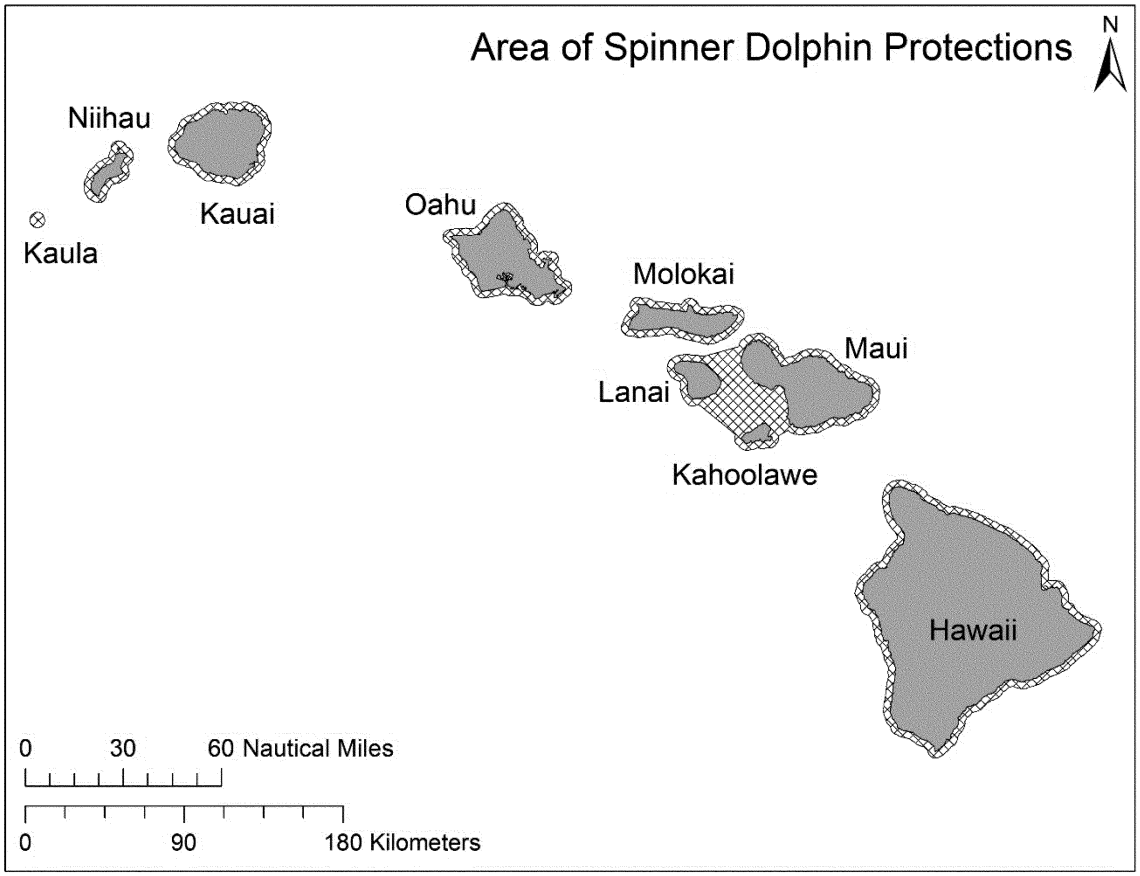
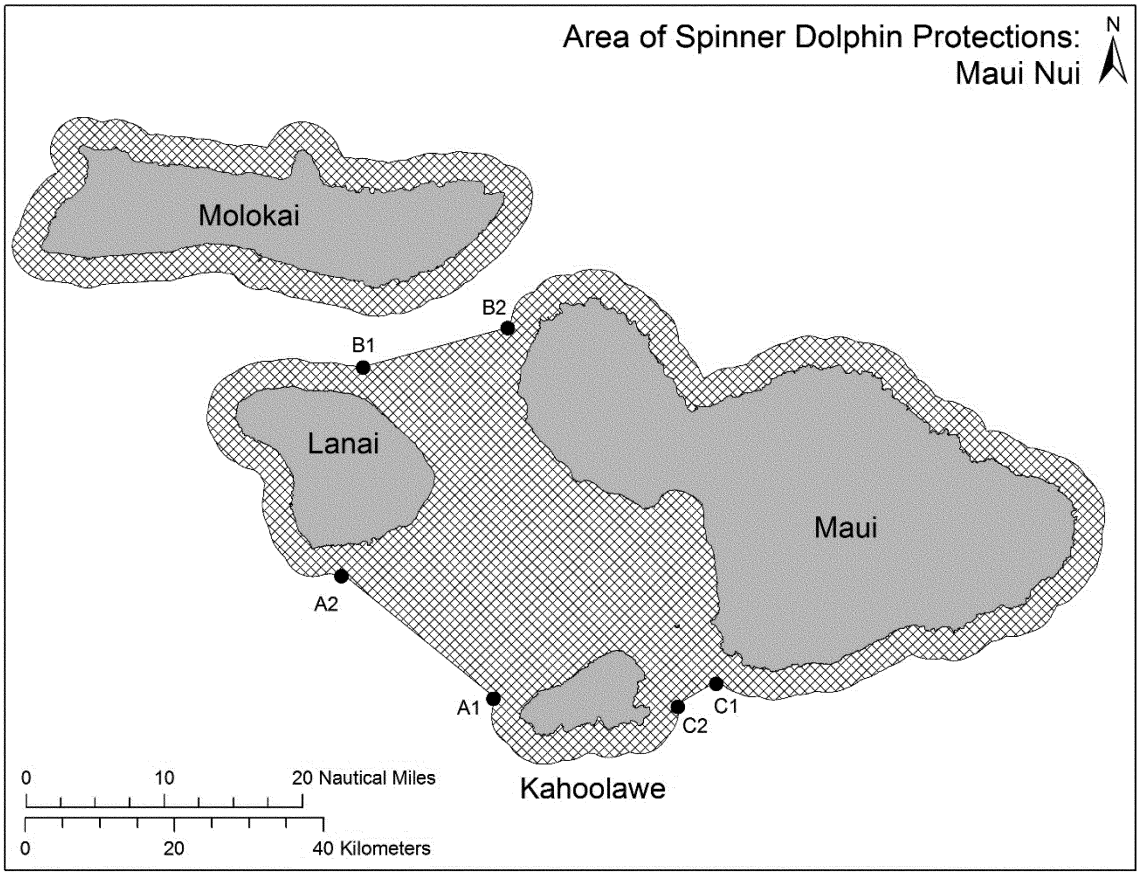


Figure 2 to § 216.20. Overview of Designated Waters bounded by Lāna'i, Maui, and Kaho'olawe for Spinner Dolphin Protections. See Table 1 for coordinates.



[FR Doc. 2021–20616 Filed 9–27–21; 8:45 am]
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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 210901–0174]

RIN 0648–BK04

Establishment of Time-Area Closures for Hawaiian Spinner Dolphins Under the Marine Mammal Protection Act

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

ACTION: Proposed rule; request for comment.

SUMMARY: We, NMFS, propose a regulation under the Marine Mammal Protection Act (MMPA) to establish mandatory time-area closures of Hawaiian spinner dolphins' essential daytime habitats at five selected sites in the Main Hawaiian Islands (MHI). These regulatory measures are intended to reduce take of Hawaiian spinner dolphins from occurring in inshore marine areas at essential daytime habitats, and where high levels of disturbance from human activities are most prevalent. During designated times, unless subject to an exception as described in this rule, these regulatory measures would prohibit any person or vessel, on or below the surface, to enter, cause to enter, solicit to enter, or remain within any of the five time-area closures, for the purpose of preventing take of Hawaiian spinner dolphins in areas identified as important essential daytime habitats for spinner dolphins that have high levels of human disturbance. The proposed mandatory time-area closures would occur from 6 a.m. to 3 p.m. daily in areas of Kealakekua Bay, Hōnaunau Bay, Kauhakō Bay (Hoʻokena), and Makako Bay on Hawai'i Island, and La Perouse Bay on Maui.

DATES: Comments on this proposal must be received by December 27, 2021.

ADDRESSES: You may submit comments, identified by the docket number NOAA–NMFS–2021–0091, by either of the following methods:

Electronic Submission: Submit all electronic comments via the Federal eRulemaking Portal. Go to *www.regulations.gov* and enter NOAA–NMFS–2021–0091 in the search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments. Copies of this rule and the Final Environmental Impact Statement (FEIS) and Record of Decision (ROD) can be obtained from the website *https://www.fisheries.noaa.gov/action/enhancing-protections-hawaiian-spinner-dolphins.* Written requests for copies of these documents should be addressed to

Mail: Kevin Brindock, Deputy Assistant Regional Administrator, Protected Resources Division, National Marine Fisheries Service, Pacific Islands Regional Office, 1845 Wasp Blvd., Bldg. 176, Honolulu, HI 96818.

Instructions: You must submit comments by one of the above methods to ensure that we receive, document, and consider them. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Kevin Brindock, NMFS, Pacific Islands Region, Deputy Assistant Regional Administrator, Protected Resources Division, 808–725–5146; or Trevor Spradlin, NMFS, Office of Protected Resources, Deputy Chief, Marine Mammal and Sea Turtle Conservation Division, Office of Protected Resources, 301–427–8402.

SUPPLEMENTARY INFORMATION:

Background

In recent years, viewing of wild marine mammals in Hawai'i has increased, with a particular emphasis on Hawaiian spinner dolphins (*Stenella longirostris longirostris*), which can be predictably found close to shore in shallow waters throughout the MHI. The number of commercial operators engaged in wild dolphin viewing has grown dramatically in Hawai'i (O'Connor 2009, Impact Assessment 2018), putting new pressures on easily accessible groups of resting Hawaiian spinner dolphins. In 2016, when NMFS proposed a swim-with and approach regulation for Hawaiian spinner dolphins (81 FR 57854), 8,934,277 visitors came to Hawaii representing a substantial (18.2 percent) increase from the number of visitors Hawaii received a decade earlier when 7,561,311 visitors arrived in 2006 (*https://www.hawaiitourismauthority.org/media/1146/2006-annual-visitor-research-report.pdf, https://www.hawaiitourismauthority.org/media/3711/2016-annual-visitor-research-report-revised-5-24-18.pdf*). Since 2016, the number of visitors has increased at an even higher rate with 10,386,673 visitors arriving in 2019, representing a 16.3 percent increase over a 3 year period (*https://www.hawaiitourismauthority.org/media/5062/2019-annual-report-final-for-posting.pdf*). The COVID pandemic and associated travel restrictions significantly reduced tourism in 2020, with a 75.2 percent decrease in the number of visitors in December 2020 compared to December 2019. However, tourism has already rebounded in 2021 to date, with the number of visitors in June 2021 approaching pre-pandemic levels, showing only an approximate 16.5 percent decrease compared to June 2019 (*https://www.hawaiitourismauthority.org/media/7582/june-2021-visitor-statistics-press-release.pdf*).

Along the Wai'anae coast of O'ahu and the Kona coast of Hawai'i Island, 752,762 people are estimated to have participated in boat-based commercial dolphin tours annually in 2013, which is 632,762 more than a preliminary estimate conducted statewide in 2008 (Wiener 2016, O'Conner *et al.* 2009). The number of spiritual retreats (*i.e.,* organized retreats centered on dolphin encounters, dolphin-assisted therapy, and dolphin-associated spiritual practices) on Hawai'i Island has increased from 5 in 2007 to 47 in 2017 (Impact Assessment 2018). Similarly, commercial boat tours that facilitate close, in-water dolphin interactions increased on Hawai'i Island from six to 47 over the same period. In addition, a number of residents and visitors venture on their own, independent of commercial operators, to view and interact with spinner dolphins.

Essential daytime habitats refer to preferred daytime habitats of spinner dolphins that provide space with optimal environmental conditions for resting, socializing, and nurturing young. Officials from the Hawai'i Department of Land and Natural Resources (DLNR) and the U.S. Marine Mammal Commission (MMC), as well as various members of the public (including representatives of the native Hawaiian community, scientific researchers, wildlife conservation organizations, public display organizations, and some commercial tour operators), have expressed

concerns over human-dolphin interactions.

In April 2000, the MMC released a literature review of scientific publications that evaluated the impacts of swimming with wild dolphins worldwide (Samuels *et al.* 2000). The authors of this review noted the prevalence of disturbances by tourist activities in areas critical to the animals' well-being, and recommended that precautions be taken to protect the dolphins (Samuels *et al.* 2000). The concerns about disturbance to spinner dolphins by boaters and swimmers prompted NMFS to raise the topic of enhancing protections for these animals in an ANPR (70 FR 73426, December 12, 2005). Public comments received in 2005 reiterated and reinforced the concerns expressed by the MMC. In the years since the 2000 Samuels *et al.* review, additional scientific evidence has documented disturbances or disruptions to spinner dolphins by boaters or swimmers (Forest 2001; Courbis 2004, 2007; Danil *et al.* 2005; Timmel 2005; Courbis and Timmel 2009; Ostman-Lind 2009; Symons 2013; Heenehan *et al.* 2014; Tyne *et al.* 2015). This problem is pronounced in spinner dolphin essential daytime habitats that are targeted for dolphin-directed activities, and animals that use these areas are exposed to intense activity on a daily basis. For example, a recent study found that human activities took place within 100 meters (m) of spinner dolphins over 82 percent of the time that the animals were using four spinner dolphin resting bays on Hawai'i Island: Kealakekua Bay, Makako Bay, Hōnaunau Bay, and Kauhakō Bay (Tyne *et al.* 2018).

Certain biological and life history characteristics make Hawaiian spinner dolphins uniquely vulnerable to disturbance from human activity. In 2010, we recognized five island-associated stocks and one pelagic stock of Hawaiian spinner dolphins in our annual Stock Assessment Report, identifying genetic distinctions and site fidelity differences as reasons to separately manage stocks found in waters surrounding the Hawaiian Islands (Andrews 2009; Andrews *et al.* 2010; Carretta *et al.* 2011; Hill *et al.* 2010). Three of the 5 island-associated stocks (the Kaua'i/Ni'ihau stock, O'ahu/4-Islands stock, and Hawai'i Island stock) are found near the MHI and are considered resident stocks. These 3 stocks reside in waters surrounding their namesake islands out to approximately 10 nautical miles (nmi) (18.5 kilometers (km)) (Hill *et al.* 2010), and population estimates for each stock are relatively small. The Hawai'i Island stock, which is thought to be the largest stock, has an estimated 617 individuals (Coefficient of Variation (CV)=0.09), the Kaua'i/Ni'ihau estimated to be around 601 (CV=0.20), and O'ahu/4-Islands stocks is estimated to be 355 (CV=0.09) individuals, (Tyne *et al.* 2014, Carretta *et al.* 2019).

These smaller, island-associated spinner dolphin populations may be at a higher risk compared to a larger population that may interbreed widely throughout the region. Dolphin populations that are resident, closed, or isolated (local populations with barriers to gene flow) can become more susceptible to threats than larger, genetically-diverse populations because the impacts to multiple individuals' health and fitness have quicker and more disproportionate effects population-wide (Bejder 2005). Thus, the small island-associated spinner dolphin populations of the MHI may be more vulnerable to negative impacts from threats, including human disturbance.

MHI spinner dolphins have complex social structures and behavioral patterns linked to specific habitats that support their high energetic demands. The rigid, cyclical, and patterned behavior of a Hawaiian spinner dolphin's day is well documented from decades of scientific research on spinner dolphins off the Kona coast on Hawai'i Island (Norris and Dohl 1980, Norris *et al.* 1994). The daily pattern of Hawaiian spinner dolphins involves accomplishing the energetically demanding task of foraging at night when spinner dolphins move offshore in large groups to feed on fish, shrimp, and squid found in the mesopelagic boundary community, part of the pelagic zone that extends from a depth of 200 to 1,000 m (~660 to 3,300 feet) below the ocean surface. During the day, spinner dolphins return in smaller groups to areas closer to shore to socialize, nurture their young, and rest in preparation for nightly foraging (Norris *et al.* 1994, Tyne *et al.,* 2017). These smaller groups visit specific habitats that are located along the coastlines of the MHI. These essential daytime habitats of spinner dolphins are areas that provide space with optimal environmental conditions for resting, socializing, and nurturing young. Spinner dolphins' essential daytime habitats are located close to offshore feeding areas, which minimize the energetic cost of nightly travel to and from these areas and have environmental characteristics that support the dolphins' ability to detect predators (Norris and Dohl 1980, Norris *et al.* 1994, Thorne *et al.* 2012).

Throughout the day, spinner dolphins take advantage of the physical characteristics of essential daytime habitats to engage in specific patterned resting behaviors to recuperate between foraging bouts. The physical characteristics of these essential daytime habitats, combined with specific patterned resting behaviors, play an important role in supporting the dolphins' activity and energetic budgets. Additionally, the physical characteristics of essential daytime habitats increase the dolphins' ability to visually (instead of acoustically) detect predators while resting, and thus minimize the energetic costs of vigilance (Norris *et al.* 1994). Tyne *et al.* (2017) observed socializing behavior in the early mornings and late afternoons in essential resting habitats and found that spinner dolphins were never observed foraging during the daytime, when resting was the predominant activity. As a result, the authors propose that the constrained nature of spinner dolphin behaviors suggests that they are less resilient to human disturbance than other cetaceans.

Thorne *et al.* (2012) used dolphin surveys and predictive habitat modeling to test a suite of these environmental factors that may make spinner dolphins favor these areas. The study found that proximity to deep-water foraging areas, depth, the proportion of bays with shallow depths, and low rugosity (indicating low substrate roughness, *i.e.,* sand) were important predictors of spinner dolphin habitat. The strongest predictors of spinner dolphin resting habitat were distance to the 100 m depth contour (foraging habitat) and depth of the resting areas, with spinner dolphin resting habitat generally occurring in the shallow depths (<50 m) within a bay that was close to the 100 m depth contour and thus, their offshore foraging grounds (Thorne *et al.* 2012). In tests of these characteristics across the MHI, the bays that were predicted by the model to be optimal resting habitats were consistent with spinner dolphin resting habitats that are recognized as preferred from various observations.

Tyne *et al.* (2015) further examined key ecological characteristics and spinner dolphin behavior to see which characteristics support resting behavior. The most important factor contributing to the likelihood of rest was the dolphins' presence within a bay, meaning that they were most likely to rest when they were inside a bay (Tyne *et al.* 2015). Another important factor was the presence of sand substrate. In general, spinner dolphins spent disproportionately more time over sandy substrates in and out of bays;

however, outside of bays, spinner dolphins were observed mostly travelling over sandy substrates. This supports the finding that the bays themselves are the most important factor for resting behaviors, because even sandy substrate outside of the bays did not significantly predict resting behavior. This work highlights the role that essential daytime habitat areas play in supporting important fitness enhancing behaviors, specifically rest.

Essential daytime habitats have been targeted by commercial operators and individuals interested in viewing or interacting with Hawaiian spinner dolphins because encounters with dolphins in these areas are virtually guaranteed. Tyne *et al.* (2018) found that dolphins using essential daytime habitats off the west coast of Hawai'i are experiencing human activities within 100 m over 82 percent of the time. The rate of exposure to human activities off the west coast of Hawai'i Island is 25 percent higher than reported for other dolphins studied for behavioral response to human activities in other areas of the world (Tyne 2015). At some locations, up to 13 tour boats have been observed jockeying for position on a single dolphin group, with up to 60 snorkelers in the water (Heenehan *et al.* 2014). Apart from commercial tour operations, people also swim, kayak, or paddle into essential daytime habitats to seek interactions with the dolphins (Sepez 2006). In addition, spiritual retreats have flourished in certain areas, further increasing the intensity of dolphin-directed activities in nearshore areas and, especially, within essential daytime habitats (Sepez 2006, Impact Assessment 2018). The rate of exposure at Hawaiian spinner dolphin daytime essential habitats may place resident stocks at risk and long-term disturbance could result in habitat displacement or reduced fitness, as seen in other dolphin populations (Bejder *et al.* 2006a, 2006b; Lusseau and Bejder 2007).

Several studies have investigated how high levels of human activity have impacted the quality of essential daytime habitats for spinner dolphins. Heenehan *et al.* (2017) assessed the acoustic response of Hawaiian spinner dolphins to human activities, such as presence of vessels and swimmers/snorkelers in four Hawai'i Island bays (Makako Bay, Kealakekua Bay, Hōnaunau Bay, and Kauhakō Bay). By using passive acoustic monitoring equipment, Heenehan *et al.* found that human activity drastically altered the quiet daytime soundscape of these four bays. Johnston *et al.* (2013) evaluated the likelihood of spinner dolphins resting, given various human activities occurring at different distances. Researchers found that the presence of swimmers within 150 m significantly decreased the likelihood of resting. Interestingly, the likelihood of dolphins resting was higher when vessels were present between 50 and 150 m, creating the appearance of a positive relationship between resting behavior and vessel presence at this distance. These results may demonstrate a difference in dolphins' perceived risk between swimmers and vessels, or a lack of perceived risk associated with vessels. However, this positive relationship between resting behavior and vessels may also be influenced by the high frequency of observations with vessels present between 50–300 m and few observations with no vessels present (Johnston *et al.* 2013), and therefore provide limited opportunities during the day for resting when vessel are not in close proximity.

The best available scientific evidence documents the effects of dolphin-directed activities on spinner dolphin health and behavior, especially activities that occur within these essential daytime habitats. Peer-reviewed scientific literature documents disturbance of individual spinner dolphins, as well as changes to spinner dolphin group behavioral patterns and effects of swimmers on dolphins' daily resting behavioral patterns. Individual dolphin responses to these activities vary, and in some cases, may not be apparent to an observer (*e.g.,* elevated heart rates or increased watchfulness). However, discernable responses may include aerial displays when closely approached by vessels and swimmers (Forest 2001, Courbis and Timmel 2008); avoidance behaviors, including moving around and away from swimmers and vessels, or leaving the area in response to human pursuit (Ostman-Lind *et al.* 2004, Courbis 2004, Courbis and Timmel 2008); and aggressive behaviors directed at people, including charging or threat displays (Norris *et al.* 1985, Norris *et al.* 1994).

Effects have been documented in the form of changes over time to spinner dolphins' behavioral patterns in essential daytime habitats. Courbis and Timmel (2008) reported differences in peak aerial activity throughout the day in comparison with earlier studies (Forrest 2001), and noted that dolphins may have reduced aerial behavior to avoid human notice and approaches. Timmel *et al.* (2008) noted the dolphins' direction of travel altered more frequently as the number of swimmers and/or vessels near to them increased. Symons (2013) found that spinner dolphins are less likely to rest when swimmers are present within 150 m. Numerous studies report changes in dolphin residence time within essential daytime habitats compared to earlier studies (Courbis 2004, Courbis and Timmel 2008, Ostman-Lind 2007, Forest 2001). In addition, human activities within essential daytime habitats may be affecting where spinner dolphins engage in their daytime behaviors within these areas. Courbis and Timmel (2008) reported changes in the location of resting spots within Kealakekua Bay from previous studies by Doty (1968) and Norris and Dohl (1980), and warned that changes in locations within the bay could be a precursor to abandonment of the bay with future increases in traffic.

When marine mammals respond to disturbance events, they incur a cost in the form of the energy expended to respond, as well as the lost opportunity to engage in natural fitness-enhancing behavior. For example, spinner dolphins disturbed during rest may engage in avoidance or distress behaviors, which require energy, and disturbance detracts from the dolphins' abilities to recuperate from energetically demanding behaviors, such as foraging, transiting to and from offshore foraging grounds, and nurturing their young. In this example, the lack of consistent, undisturbed resting periods can reduce the amount of energy available to forage and care for young.

The predictable patterns of MHI resident spinner dolphins' nearshore distribution, particularly in essential daytime habitats, result in concentrated daily viewing and disturbance pressure on individual dolphins and groups over extended periods of time. In other small cetacean populations, chronic disturbance to natural behavioral patterns has been linked to biologically significant impacts, such as habitat abandonment and reduced female reproductive success (Bejder 2005; Bejder *et al.* 2006a, 2006b; Lusseau and Bejder 2007). Over time, chronic disturbance to the MHI's resident spinner dolphins could ultimately lead to habitat displacement and/or long term impacts to their individual fitness. These types of impacts may be amplified in local populations with barriers to gene flow, such as isolated island-associated spinner dolphin stocks, because the impacts to multiple individuals' health and fitness are quickly reflected in the overall fitness of the population (Bejder 2005). Accordingly, the small resident spinner dolphin populations of the MHI may be more vulnerable to negative impacts from human disturbance. Chronic wildlife disturbance within important habitats may ultimately leading to

population level impacts (Frid and Dill 2002, Bejder 2006).

These time-area closures are necessary and appropriate under the MMPA to reduce take of individual animals in their daytime resting areas. Disturbances to dolphins' daily behavioral patterns in essential daytime habitats may result in ''take,'' as defined and prohibited under the MMPA and its implementing regulations. The chronic nature of these problems in Hawai'i and observed changes to spinner dolphin behavioral patterns over time are a cause for concern and require management action to prevent take and provide sufficient protection for Hawaiian spinner dolphins at essential daytime habitats.

Current MMPA Prohibitions and NMFS Guidelines and Regulations

Under section 102 of the MMPA, 16 U.S.C. 1361 *et seq.,* it is unlawful for any person, vessel, or other conveyance to ''take'' any marine mammal in waters under the jurisdiction of the United States (16 U.S.C. 1372). The prohibition against take includes acts that ''harass'' marine mammals (16 U.S.C. 1362(13)). Harassment means any act of pursuit, torment, or annoyance which has the *potential to injure* a marine mammal in the wild (Level A Harassment), or has the *potential to disturb* a marine mammal in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B Harassment) (16 U.S.C. 1362(18)). In addition, NMFS' regulations implementing the MMPA define the term ''take'' to include ''the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal; and feeding or attempting to feed a marine mammal in the wild'' (50 CFR 216.3).

Section 112 of the MMPA authorizes NOAA to implement regulations that are ''necessary and appropriate to carry out the purpose'' of the MMPA (16 U.S.C. 1382). NMFS has developed regulations under the MMPA to protect marine mammals from take throughout the country. In Hawai'i, we are implementing a regulation under the MMPA, along with a EIS, to prohibit (with exceptions) swimming with and approaching a Hawaiian spinner dolphin within 50 yards (for persons, vessels, and objects), including approach by interception, within 2 nmi of the MHI and designated waters in between the islands of Lāna'i, Maui, and Kaho'olawe. NMFS is publishing the final rule implementing the swim-with and approach regulation concurrent with this proposed rule.

In addition to regulations, NMFS has developed national and regional guidelines for conducting responsible marine wildlife viewing to help the public avoid causing any take (harassment or disturbance) of protected wildlife species. On a national level, NMFS guidelines note that the Marine Mammal Protection Act and the Endangered Species Act do not provide for permits or other authorizations to view or interact with wild marine mammals and sea turtles, except for specific listed purposes such as scientific research. NMFS maintains as policy that interacting with wild marine life outside of permitted research should not be attempted and viewing marine mammals and sea turtles must be conducted in a manner that does not harass the animals. NMFS does not support, condone, approve, or authorize activities that involve closely approaching, interacting, or attempting to interact with whales, dolphins, porpoises, seals, sea lions, and sea turtles in the wild. This includes attempting to swim with, pet, touch, or elicit a reaction from the animals (*https://www.fisheries.noaa.gov/topic/marine-life-viewing-guidelines*). In addition to national guidelines, each of the five NMFS Regions has developed recommended viewing guidelines relevant to protected species in the respective regions to assist the general public with information on how to responsibly view and act around these animals in the wild. The guidelines are aimed at assisting the public in meeting their obligations under the MMPA. Although some guidelines address activities that are prohibited under law, others address activities that are not expressly prohibited.

The NMFS Pacific Islands Regional Office's viewing guidelines for Hawai'i recommend that people view wild dolphins from a safe distance of at least 50 yards (45.7 m) and advise against trying to chase, closely approach, surround, swim with, or touch the animals (*https://www.fisheries.noaa.gov/pacific-islands/marine-life-viewing-guidelines/viewing-marine-wildlife-hawaii*). To support the guidelines in Hawai'i, NMFS has partnered with the State of Hawai'i and the Hawaiian Islands Humpback Whale National Marine Sanctuary over the past several years to promote safe and responsible wildlife viewing practices through the development of outreach materials, training workshops, signage, and public service announcements.

The swim-with and 50-yard approach prohibition regulation is expected to reduce the frequency of human and spinner dolphin encounters in waters within 2nm of the Hawaiian Islands, and in designated waters bounded by the islands of Lāna'i, Maui, and Kaho'olawe. However, specific essential daytime habitats have been a focused target for dolphin directed activities where animals that use these areas are exposed to intense levels of disturbance. Tyne *et al.* 2018, found that Hawaiian spinner dolphins at key essential daytime habitats were exposed to human activity within 100 m for greater than 82 percent of the time. The sites proposed for time-area closures are important areas for the biological needs of Hawaiian spinner dolphins, but animals at these sites are also routinely exposed to chronic levels of disturbance (Heenehan *et al.* 2017 and Tyne *et al.* 2018). Such sites can be effectively protected through time-area closures, as demonstrated by the successful implementation of similar measures in the Red Sea where dolphins were exposed to high levels of disturbance at targeted sites (Heenehan *et al.* 2017). Recent studies (see Heenan *et al.* 2017, Tyne *et al.* 2017, Stack *et al.* 2020) have concluded that time-area closures at essential daytime habitats that are experiencing high levels of disturbance can provide effective protection for Hawaiian spinner dolphins.

The number of dolphin directed activities in Hawaii has increased from 2007 to 2017 (Impact Assessment 2018). The spinner dolphin essential daytime habitats are heavily-targeted for dolphin-directed activities, and dolphins that use these areas are being exposed to intense activity on a daily basis. The additional time-area closures regulation is needed to address this large increase in the number of commercial swim-with tour companies, and the associated increase in take of dolphins that utilize these areas during the day (O'Connor 2009, Impact Assessment 2018; FEIS 2021). Although tourism in Hawaii was heavily impacted from the COVID pandemic in 2020, which reduced dolphin directed activities, the number of visitors arriving in Hawaii has significantly increased in 2021. The number of visitors arriving in December 2020 was 75.2 percent less than the number of visitors in December 2019; however, tourism has increased throughout 2021 with the number of visitors in June 2021 only about 16.5 percent below the number in June 2019 (*https://www.hawaiitourismauthority.org/media/7582/june-2021-visitor-statistics-press-release.pdf*). We expect tourism to continue to increase to reach pre-COVID

levels. The proposed time-area closures are needed to prevent take by prohibiting entry into specific areas of daytime essential spinner dolphin habitat. The sites for the proposed time-area closures were carefully delineated to the smallest area compatible with still meeting the purpose of this action to reduce take of Hawaiian spinner dolphins.

Need for Additional Action

Despite the prohibitions, guidelines, outreach, and stewardship efforts currently in place, the best scientific information available indicates that Hawaiian spinner dolphins require additional protections within their essential daytime habitats, the expansion of commercial swim-with tours has put additional pressures on Hawaiian spinner dolphins (see Background). Consequently, we expect the swim-with and approach regulation alone will not provide sufficient protection to Hawaiian spinner dolphins by reducing close encounters between spinner dolphins and humans that result in take, particularly at the five selected sites that are significant for Hawaiian spinner dolphins and face especially high levels of disturbance (Tyne *et al.* 2018). We expect the swim-with and approach regulation will reduce the intensity of activities within essential daytime habitats to some degree, but effective protection for spinner dolphins residing in these habitats will be provided by implementing time-area closures in the five areas identified in Alternative 4 of the FEIS in addition to the swim-with and approach regulation.

Numerous research studies suggest that restricting human activity in essential daytime habitats for spinner dolphins will minimize disturbance and harm to the dolphins (see Background). Several studies involved in the ''Spinner Dolphin Acoustics, Population Parameters, and Human Impact Research'' (SAPPHIRE) project, recommended that management strategies should focus on reducing human activity that can disturb dolphins in essential daytime habitats, particularly through the use of time-area closures (Thorne *et al.* 2012, Johnston *et al.* 2013, Heenehan *et al.* 2014, Heenehan *et al.* 2016, Heenehan *et al.* 2017, Tyne *et al.* 2014, Tyne 2015, Tyne *et al.* 2015, Tyne *et al.* 2016, Tyne *et al.* 2017, Tyne *et al.* 2018). In addition, we solicited comments regarding the implementation of time-area closures in bays designated as spinner dolphin essential daytime habitats on Hawai'i Island and Maui in the proposed rule published on August 24, 2016 (81 FR 57854). We received comments from individuals, scientific researchers, community groups, Native Hawaiians, and tour operators. Although some commenters opposed implementation of time-area closures, most comments that referenced time-area closures were in favor of implementing a version of these restrictions, and supported the establishment of time-area closures at the five bays proposed in this rulemaking. As discussed earlier, after reviewing the public comments from the 2016 proposed rule and analyzing the scientific literature supporting the inclusion of time-area closures to protect spinner dolphins, and in considering the large increase in commercial swim-with dolphin tours and associated high levels of take from these activities occurring in dolphin daytime essential resting sites since 2016, we believe that mandatory time-area closures should be implemented in Hawaiian spinner dolphins' essential daytime habitats at the five selected sites described in this proposed rule to provide sufficient protective measures for spinner dolphins. The sites proposed for time-area closures include four sites located on Hawai'i Island, Kealakekua Bay, Hōnaunau Bay, Kauhakō Bay, and Makako Bay, and one site located on Maui, La Perouse Bay.

Development of the Proposed Regulation

In 2005, NMFS convened a Spinner Dolphin Working Group with representatives from the MMC, state and Federal agencies, and scientific researchers who work on spinner dolphin conservation concerns. The group evaluated the best available information at the time to understand the scope of the tourist and recreational activities targeting spinner dolphins. As noted above in the Background section, in December 2005, we published an ANPR in the **Federal Register** (70 FR 73426, December 12, 2005) to solicit input from the public on potential ways to better enhance protections for spinner dolphins and mitigate activities of concern (*e.g.,* close approach and swim-with activities). This was followed by a Notice of Intent (NOI) to Prepare an EIS under the National Environmental Policy Act (NEPA) (71 FR 57923; October 2, 2006), in which we identified a preliminary list of potential regulations for future consideration and comment, which included partial time-area closures in certain spinner dolphin essential daytime habitats, a minimum distance limit for approaching dolphins in the wild, restrictions on certain human behaviors in NMFS-identified spinner dolphin resting areas, and complete closure of all known spinner dolphin resting areas in the MHI.

During the ANPR and the NOI comment periods, five public scoping meetings were held on the islands of Kaua'i, O'ahu, Maui, and Hawai'i, and oral statements were taken at each meeting. NMFS received a total of 4,641 public comments in response to the ANPR and the NOI (this includes all emails, letters, and public testimonies). Comments were submitted by concerned citizens, tour operators, scientific researchers, conservation and education groups, and Federal, state, and other government entities.

Comments received through both of the public comment periods for the ANPR and NOI varied widely and recommended numerous actions to consider, ranging from no regulations to permanent closure of areas used by the dolphins for rest and shelter. Additionally, public comments raised concerns about various topics that should be addressed in the EIS or proposed action. These concerns are grouped by topic in the final scoping report, and include the following: Hawaiian spinner dolphin biology and behavior; cultural issues; cumulative effects; data/data gaps; direct and indirect effects; education/outreach; enforcement; the Endangered Species Act (ESA); guidelines/solutions for other species or from other countries; human-dolphin interaction; medical benefits from swimming with dolphins; the MMPA; monitoring; NEPA; public and stakeholder involvement; regulatory regime; social and economic issues; spiritual and religious issues; take and harassment; traditional Hawaiian knowledge; and welfare of the dolphins. Although comments varied greatly, a consistent theme that stood out under several topics was the need for effective and enforceable regulations.

As a result of stakeholder concerns expressed through these public comments, and to prepare a proposed rule to add protections for spinner dolphins and an associated DEIS, we made multiple site visits to areas where concerns have been raised regarding Hawaiian spinner dolphin disturbance in the MHI. During these visits, we met with concerned members of the public to gather information relevant to this analysis. Additionally, we coordinated with state and Federal agencies, and we used the public comments generated from the ANPR and NOI to develop a range of actions and mitigation measures that are reflected in numerous alternatives considered in the EIS.

Presentations made at the public scoping meetings, the April 2007 EIS public scoping summary report, a list of

the attendees, the ANPR, public comments, and background materials are provided at *https://www.fisheries.noaa.gov/resource/document/hawaiian-spinner-dolphin-draft-environmental-impact-statement-and-regulatory.* During the initial scoping period for the DEIS, we received comments that recommended gathering additional information on Hawaiian spinner dolphins, including monitoring local populations to determine impacts to numbers and overall health of the MHI resident spinner dolphins. In response to this recommendation and to inform this rulemaking effort, NMFS internal grant funding was awarded to the SAPPHIRE project, conducted jointly by Duke University and Murdoch University. The SAPPHIRE project's objective was to provide baseline data on the local abundance, distribution, and behavior of spinner dolphins by integrating a suite of visual and acoustic sampling techniques, boat-based and land-based surveys, and acoustic recording devices to assess the following: Spinner dolphin daytime habitat use and resting behavior in study areas and surrounding waters; residency and fidelity patterns of spinner dolphins during the day in nearshore habitats in both the study areas and surrounding waters; spinner dolphin exposure to human activities within the studied resting bays and surrounding waters; and spinner dolphin demographic response to human activities within resting bays and surrounding waters.

Research targeting four bays (Kealakekua Bay, Hōnaunau Bay, Kauhakō Bay, and Makako Bay) and nearshore waters of Hawai'i Island began in August 2010 and was completed in May 2013. Results from this study provided robust population estimates for the Hawai'i Island stock (see Background), as well as additional information about spinner dolphin habitat use and the pressure from dolphin-directed human activities. Many of these studies have been published in scientific literature and reports and were used to inform this rulemaking process (Thorne *et al.* 2012, Johnston *et al.* 2013, Heenehan *et al.* 2014, Heenehan *et al.* 2016, Heenehan *et al.* 2017, Tyne *et al.* 2014, Tyne 2015, Tyne *et al.* 2015, Tyne *et al.* 2016, Tyne *et al.* 2017, Tyne *et al.* 2018). Many of these studies are described in detail in the Background section above.

We relied on the public comments on the ANPR and the NOI, and the best available scientific information to develop a range of regulatory and non-regulatory alternatives in the DEIS. We analyzed the environmental effects of these alternatives and considered options for mitigating effects. On August 24, 2016, we published the DEIS and proposed a rule to implement a prohibition on approaching spinner dolphins within 50 yard and swimming with dolphins, and solicited comments on both the proposed regulation and the consideration of establishing time-area closures (81 FR 57854*).* During the public comment period for the 2016 proposed rule, we received 22,031 written submissions via letter, email, and the Federal eRulemaking Portal. In addition, we hosted 6 public hearings on the islands of Hawai'i, O'ahu, Maui, and Kaua'i, and received 145 oral testimonies. Of these written comments, 2,294 were unique, with anywhere from two to 17,000 near-duplicates of each. Additionally, NMFS received a petition submitted by Kama'āina United to Protect the 'Āina (KUPA)—Friends of Ho'okena Beach Park (Kauhakō Bay), which contained over 285 names and signatures. Comments were submitted by individuals; research, conservation, and education groups; trade and industry associations; tour and retreat operators and participants; and Federal, state, and local government entities. The final swim-with and 50-yard approach prohibition rule, which is publishing concurrent with this proposed rule, includes our responses to these comments.

The swim-with and 50-yard approach prohibition regulation is expected to reduce the frequency of human and Hawaiian spinner dolphin encounters that result in take. However, between the August 24, 2016 proposed rule and finalization of this final swim-with and 50-yard approach prohibition regulation, there has been an increase in commercial swim-with tours putting new pressures and increased take on easily accessible groups of resting Hawaiian spinner dolphins (O'Connor 2009, Impact Assessment 2018). As discussed previously, tourism in Hawaii has continued to increase following significant impacts that began in 2020 resulting from the COVID pandemic; we expect tourism to return to pre-COVID levels. The spinner dolphin essential daytime habitats are targeted for dolphin-directed activities, and dolphins that use these areas are being exposed to high levels of disruption on a year-round, daily basis. Based on extensive review and analysis through internal scoping, external scoping via an ANPR (70 FR 73426, December 12, 2005), public scoping for the spinner dolphin DEIS, public comments on the spinner dolphin proposed rule published on August 24, 2016 (81 FR 57854), and the best available scientific information, we have determined that the existing prohibitions, regulations, and guidelines need to be enhanced to protect Hawaiian spinner dolphins in essential daytime habitats from various forms of take from human activities that cause harassment or disturbance. Although the swim-with and approach regulation will provide protection to Hawaiian spinner dolphins by reducing close encounters between spinner dolphins and humans to some degree, implementing time-area closures will provide effective protection for spinner dolphins at essential daytime habitats while using the smallest size area required to meet the purpose of this action in reducing take of Hawaiian spinner dolphins (Thorne *et al.* 2012, Johnston *et al.* 2013, Heenehan *et al.* 2014, Heenehan *et al.* 2016, Heenehan *et al.* 2017, Tyne *et al.* 2014, Tyne 2015, Tyne *et al.* 2015, Tyne *et al.* 2016, Tyne *et al.* 2017, Tyne *et al.* 2018). We therefore deem it necessary and appropriate to adopt an additional regulation to protect Hawaiian spinner dolphins in essential daytime habitats from human activities that result in take, including harassment or other forms of disturbance, as currently defined by statute and regulation.

Proposed Rulemaking

The mandatory time-area closures described in this proposed rule are designed to protect spinner dolphins from take, including harassment and disturbance, caused by dolphin-directed activities and other human activities that are concentrated in Hawaiian spinner dolphins' essential daytime habitats at five selected sites in the MHI. These proposed mandatory closures prohibit use of waters in effect from 6 a.m. to 3 p.m. daily in areas of Kealakekua Bay, Hōnaunau Bay, Kauhakō Bay (Ho'okena), and Makako Bay on Hawai'i Island, and La Perouse Bay on Maui. NMFS is proposing this regulation pursuant to its rulemaking authority under MMPA sections 112 (a) (16 U.S.C. 1382(a)) and 102 (16 U.S.C. 1372).

Scope and Applicability

Applications to all Hawaiian Spinner Dolphins

The proposed rule's establishment of time-area closures would apply to all Hawaiian spinner dolphins found in the action area (see *Geographic Action Area* section below).

Geographic Action Area

The five time-area closure sites proposed are at the five bays identified

in the 2016 proposed rule (81 FR 57854) and in the DEIS (Figures 4–8). The boundaries for 2 of the proposed sites (Kauhakō Bay and La Perouse Bay) (Figure 6 and Figure 8) have been slightly modified from the boundaries described in the 2016 proposed rule and DEIS to accommodate access by canoe groups, fisherman, and other water users to areas adjacent to the time-area closure areas. The boundary modifications at these two sites result in a slightly reduced size for both areas and do not expand beyond the footprints identified in the DEIS.

The time-area closures' coordinates will be marked using buoys, sight-line markers, and landmarks from shore, and an explanation of the closures' purpose and effective hours will be provided by signs on land. The proposed action areas for the five time-area closures are illustrated in the maps and the boundaries described as follows:

Hawai'i Island—Kealakekua Bay (Figure 4)

The red box between points A, B, C, and D shown in the following map illustrates the closure area for Kealakekua Bay. Approximate segment lengths A–B and C–D are 1,005 m (0.62 mi), and segment lengths A–D and B–C are 220 m (0.14 miles). The total area of closure is 0.09 mi^2. The latitude/longitude coordinates are:

A—19°28′37″ N, 155°55′15″ W
B—19°28′54″ N, 155°55′44″ W
C—19°28′48″ N, 155°55′49″ W
D—19°28′32″ N, 155°55′19″ W

The County of Hawai'i identifies two public access points on Boulder Beach and Nāpō'opo'o Landing at Kealakekua Bay; both points would remain open for access. Additionally, the route used by kayakers to access the Captain Cook Monument at Ka'awaloa from Nāpō'opo'o Pier is located outside of the closure area.

Hawai'i Island—Hōnaunau Bay (Figure 5)

The red lines between points A, B and C in the following map illustrate the closure area for Hōnaunau Bay; the shoreline boundary is at the mean lower low water line between points A and C. The approximate segment length of A–B is 440 m (0.27 mi) and the segment length of B–C is 330 m (0.21 miles). Total area of closure is 0.04 mi^2. The latitude/longitude coordinates are:
A—19°25′27″ N, 155°54′41″ W
B—19°25′22″ N, 155°54′57″ W
C—19°25′31″ N, 155°54′58″ W

The closure site at Hōnaunau would be delineated by means of a single marker buoy at point B to accommodate local native Hawaiians' requests to honor the sacred nature of this cultural site, and would be aligned with site line markers on shore at points A and C. The County of Hawai'i identifies Hōnaunau Bay boat ramp as a public access area for this bay. The boat ramp and the popular access point for swimming and snorkeling known as Two-Step, are located outside of the closure area and would remain open for everyday use.

Hawai'i Island—Kauhakō Bay (Figure 6)

The red box between points A, B, C, and D in the following map illustrate the marine boundaries for the closure area for Kauhakō Bay. The approximate segment length of A–B is 330 m (0.21 mi), and the segment length of B–C is 1,035 m (0.64 miles). The total area of closure is 0.07 mi^2. The latitude/longitude coordinates are:

A—19°22′44″ N, 155°53′49″ W
B—19°22′44″ N, 155°53′57″ W
C—19°22′16″ N, 155°53′49″ W
D—19°22′30″ N, 155°53′46″ W

The County of Hawai'i identifies Ho'okena Beach Park as a public access point for this area, this access point would remain open for everyday use.

Hawai'i Island—Makako Bay (Figure 7)

The red lines between points A, B, C and D in the following map illustrate the closure area for Makako Bay; the shoreline boundary is at the mean lower low water line between points A and D. The approximate segment length of A–B is 315 m (0.20 mi), the segment length of B–C is 758 m (0.47 miles) and the segment length of C–D is 372 m (0.23 mi). Total area of closure is 0.14 mi^2. The latitude/longitude coordinates are:

A—19°44′21″ N, 156°3′16″ W
B—19°44′25″ N, 156°3′26″ W
C—19°44′2″ N, 156°3′36″ W
D—19°43′57″ N, 156°3′23″ W

No public access point from shore is identified by the County of Hawai'i for Makako Bay. The closest access points are identified south at Wawaloli Beach, with another access point identified north at Keāhole Point.

Maui—La Perouse Bay (Figure 8)

The red lines between points A, B, C, and D, in Figure 8 illustrate the closure area for La Perouse Bay; the shoreline boundary is at the mean lower low water line between points A and C, and between B and D. The approximate segment length of A–B is 1,340 m (0.83 mi), and the segment length of C–D is 1,515 m (0.94 mi). Total area of closure is 0.32 mi^2. The latitude/longitude coordinates are:

A—20°35′53″ N, 156°25′12″ W
B—20°35′31″ N, 156°24′50″ W
C—20°35′35″ N, 156°25′26″ W
D—20°35′13″ N, 156°24′54″ W

Maui County identifies a public access point for this area (coordinates: 20°36′10″ N, 156°25′22″ W). The area inshore of the line between A and B, which includes this access point, would remain open for everyday use.

Throughout this rule, all coordinates are referenced to the World Geodetic System of 1984 (WGS84).

These proposed time-area closures are not exclusive to all of the nearshore habitats used as essential daytime habitat for the spinner dolphins or all locations where dolphin-directed human activities that may result in take are known to occur. Similarly, the proposed closure time period between 6 a.m.to 3 p.m. for these areas is not exclusive of the only times that spinner dolphins may be present in closed areas, but this proposed closure time period is chosen in order to encompass the dolphins' historical resting period, when spinner dolphins are most likely to be present. (see Rationale section below).

Applications to Time-Area Closures

This proposed rule would create the time-area closures and promulgate a regulation that prohibits entry and use of surface and subsurface waters within the five delineated areas from 6 a.m. to 3 p.m. Prohibited uses include all forms of access to the closed areas including but not limited to all forms of swimming-with and approaching spinner dolphins; operating a manned or unmanned motorized, non-motorized, self-propelled, human-powered, or submersible vessel; and swimming at the water surface or underwater (*i.e.,* SCUBA or free diving). At all locations, activities occurring in the intertidal zone, such as shore-based fishing and subsistence gathering, would not be affected during any time of day. By prohibiting entry, the proposed mandatory time-area closures would reduce take within these important areas during the closure time-period.

Requirements of the Proposed Rule

Mandatory Time-Area Closures

The rule implements mandatory time-area closures at five essential daytime habitats, four of which are located on Hawai'i Island, and one located on Maui. Entry is prohibited in the closure areas every day between the hours of 6 a.m. and 3 p.m. The time-area closure locations are

(1) Kealakekua Bay
(2) Hōnaunau Bay
(3) Kauhakō Bay

(4) Makako Bay
(5) La Perouse Bay

Exceptions

NMFS is proposing 6 specific exceptions for this proposed regulation:

(1) Vessel operations necessary to avoid an imminent and serious threat to a person or vessel;

(2) Activities authorized through a permit or authorization issued by the National Marine Fisheries Service;

(3) Federal, state, or local government vessels, aircraft, personnel, and assets when necessary in the course of performing official duties;

(4) Vessels participating in organized community-based outrigger canoe races that transit straight through a time-area closure;

(5) Vessels that transit the time-area closure for the sole purpose of ingress and egress to privately owned shoreline residential property located immediately adjacent to the time-area closure; and

(6) Outrigger canoes used for traditional subsistence fishing intended for personal, family, or community consumption or traditional use.

Rationale

Proposed Action—Time-Area Closure Regulations

Hawaiian spinner dolphins resident to the MHI are made up of small, genetically isolated stocks that exhibit a specialized behavioral ecology that makes them easy to access in coastal environments during their daytime resting hours. This leaves these resident stocks vulnerable to human-caused disturbance and its effects, such as habitat abandonment or declines in reproductive success (Norris *et al.* 1994, Andrews *et al.* 2010, Tyne *et al.* 2014). In the MHI, dolphin-directed activities have increased in recent years, and the public's expectation of close interactions has placed increased pressure on resident stocks of Hawaiian spinner dolphins and the habitats that support these stocks, particularly at essential daytime habitats included in the proposed time-area closures (see Background above). Despite outreach, guidelines, and current prohibitions, MHI resident Hawaiian spinner dolphins' natural behaviors are disrupted by human activities (Ostman-Lind *et al.* 2004, Danil *et al.* 2005, Courbis 2004, Courbis and Timmel 2008), and spinner dolphin group behavioral patterns may be changing in essential daytime habitats as a result of these pressures (Norris *et al.* 1994, Forest 2001, Courbis 2004, Courbis and Timmel 2008).

In other locations globally, intense dolphin-directed human activities have resulted in changes to dolphin populations' habitat use and even caused habitat abandonment (Bejder *et al.* 2006a, 2006b; Gannier and Petiau 2006; Nature Conservation Sector 2006; Lusseau and Bejder 2007; Notarbartolo-di-Sciara *et al.* 2009). For example, in Samadai Reef, Egypt, spinner dolphins were reported as distressed from excessive numbers of visitors and people attempting to interact with the dolphins, which eventually abandoned this preferred resting area (Notarbartolo-di-Sciara *et al.* 2009). The spinner dolphins did not return to the site until after management measures were established which included prohibiting human entry into the core resting area, and restricting certain activities in areas surrounding the core resting area to prevent disturbance (Nature Conservation Sector 2006, Notarbartolo-di-Sciara *et al.* 2009).

Studies on Hawai'i Island suggest that dolphins are unlikely to rest outside of resting bays (Tyne *et al.* 2015; Lammers 2004; Norris *et al.* 1994). If dolphins are displaced from their preferred resting habitat due to intense human presence in those bays, there is no guarantee that they will find habitat close to their night time feeding grounds that has fewer human users or less anthropogenic noise, and they may not be able to rest. Chronic disturbance of spinner dolphins at essential daytime habitats could negatively affect the habitat use or health of resident populations. This may be amplified in the MHI's resident stocks, which exhibit high site fidelity and restricted gene flow, because the impacts to multiple individuals' health and fitness are quickly reflected in the overall fitness of these small populations (Bejder 2005).

Area closures have been shown to be an effective management tool for addressing the intensity of wildlife viewing and interaction in other areas globally (Notarbartolo-di-Sciara *et al.* 2009, Nature Conservation Sector 2006). Area closures provide members of the public with precise boundaries so that they may readily tailor their conduct accordingly. Additional management in these essential areas are therefore important to ensure that Hawaiian spinner dolphins are given sufficient space for groups to engage in deep resting behaviors that allow dolphins to recuperate from other energy demanding activities, such as foraging.

In the August 24, 2016 proposed rule initiating a protective regulation for the Hawaiian spinner dolphin, we considered and requested public comment on the use and scope of time-area closures as additional measures to reduce take and increase the protection of spinner dolphins in their daytime resting habitat. We received numerous public comments on the use of time-area closures, and while some comments were opposed to the implementation of time-area closures, the majority of comments were supportive of the time-area closures.

We are concerned that the swim-with and approach regulation alone will not sufficiently protect Hawaiian spinner dolphins in their essential daytime habitats. The swim-with and approach regulation will likely reduce the frequency of human and spinner dolphin encounters; however, we believe that effective protection for essential daytime habitats will be provided by implementing time-area closures in the five areas identified in the this proposed rule, which uses the smallest area compatible with the purpose of this regulation to reduce take of Hawaiian spinner dolphins.

In the August 24, 2016 proposed rule, we stated that we were considering whether additional management measures may be necessary and appropriate to protect Hawaiian spinner dolphins from take, especially in essential daytime habitats that are regularly targeted by humans for dolphin-directed activities, and we included information about the time-area closures for public comment (81 FR 57854). In that same August 24, 2016 proposed rule (81 FR 57854) we stated that we believed a ''careful phased-in approach'' with the swim-with and approach prohibition and time-area closures protective regulations would be warranted, and that by first implementing a swim-with and approach regulation, we expect to reduce the amount of take. However, since the 2016 proposed rule, there has been a rapid and large expansion of commercial swim-with tours putting new pressures and increased take on easily accessible groups of resting Hawaiian spinner dolphins (O'Connor 2009, Impact Assessment 2018). The spinner dolphin essential daytime habitats are targeted for dolphin-directed activities, and dolphins that use these areas are being exposed to high levels of disruption on a year-round, daily basis. Additionally, public comments from this proposed rule questioned whether the swim-with and approach prohibition regulation alone would be sufficient to protect spinner dolphins in their essential daytime resting habitats. These comments and our responses are included in the final swim-with and approach rule. Based on the increased impacts to spinner dolphins, and after considering these additional public comments from the August 24, 2016 proposed rule, as well scientific literature concluding the need for time-area closures to provide

effective protections for Hawaiian spinner dolphins (Heenan *et al.* 2017, Tyne *et al.* 2017, Stack *et al.* 2020), we believe that the swim-with and approach regulation alone provides insufficient protection for Hawaiian spinner dolphins using essential daytime habitats. Accordingly, NMFS has determined that time-area closures are immediately needed to reduce the take occurring in high intensity areas.

The proposed mandatory time-area closures are intended to prevent a range of human activities that occur in close proximity to Hawaiian spinner dolphins (and constitute take) by prohibiting entry into specific areas of daytime essential spinner dolphin habitat. The time-area closures are expected to reduce direct close encounters and disruptions between spinner dolphins and the intensity of activities within essential daytime habitats. NMFS considered the appropriate times for the closures and is proposing a closure time of 6 a.m. to 3 p.m. daily. This time period was chosen in order to encompass the dolphins' historical resting period, allowing the dolphins to enter the bay undisturbed and stay throughout the main portion of their daytime rest period, while also allowing for other human uses to occur (at a distance greater than 50 yards (45.7 m) in accordance with the swim-with and approach regulations before 6 a.m. and after 3 p.m.

Historic spinner dolphin resting times (before human interactions were likely a major factor in the dolphins' resting patterns) were observed to occur between dawn and dusk (Norris and Dohl 1980). Norris *et al.* (1994) noted dolphins entering the bay approximately an hour after sunrise and staying late into the afternoon. Research indicates that Hawaiian spinner dolphin resting behavior still occurs throughout daytime hours (generally 6 a.m. to 6 p.m.) with the highest resting activity occurring between 10 a.m. and 2 p.m. (Tyne *et al.* 2015). The late afternoon hours are considered a time of transition when dolphins rally together to engage in movements as they are waking from rest, prior to moving offshore to their foraging grounds (Norris *et al.* 1994).

Some Hawaiian spinner dolphin groups have been deterred from entering their essential daytime habitat if human presence in the area was too high early in the day (Danil *et al.* 2005). Preventing disturbance in these habitats during early morning hours is intended to reduce disruption and disturbance of spinner dolphin behavior during their arrival to the essential daytime habitat and descent into rest.

To limit some potential impacts to the public from the time-area closure regulations, we propose exceptions that are designed to allow for transit into and out of ports, harbors, and restricted channels; ingress and egress to private residential property adjacent to the restricted areas; public safety measures; avoidance of penalties when the animal has closely approached a boat or person; organized outrigger canoe races and traditional fishing practices in outrigger canoes; and continuation of essential government and permitted activities (see *Exceptions* section above). These exceptions occur infrequently and at such a low intensity that these actions do not individually, or cumulatively, raise the threat to take.

The reduction in disturbance to Hawaiian spinner dolphins, as addressed through each element of the rule as described above, provides a benefit to the dolphins, as well as to members of the public who value the dolphins. Reducing threats to the dolphins also supports the long-term sustainability of the responsible dolphin watching. Therefore, to reduce the threat of take occurring (including harassment and disturbance) in important essential day-time habitats, NMFS is proposing mandatory time area-closures for five selected essential daytime habitats from 6 a.m. to 3 p.m. daily. We are proposing the time-area closure regulations at this time, after further consideration since the August 2016 propose rule, because of the specific added benefits of implementing time-area closures in conjunction with a swim-with and approach regulation, extensive public comments in support of time-area closures, and the best available science supporting time-area closures as a protective measure.

Geographic Scope (Time-Area Closures)

The proposed regulation would establish mandatory time-area closures at five nearshore sites (bays) identified as essential daytime habitat for the Hawaiian spinner dolphin: Kealakekua Bay, Hōnaunau Bay, Kauhakō Bay, and Makako Bay on the Hawai'i Island, and La Perouse Bay on Maui. We selected these five areas for time-area closures using a step-down process. In this approach, we identified important habitats that might benefit from additional protection, and then considered additional factors that may promote or obstruct the effectiveness of the closure (See Appendix A of the DEIS for more detail). The five proposed sites are essential daytime habitats where human activities are largely Hawaiian spinner dolphin-directed and where closures are logistically feasible. Once the sites were selected for time-area closures, we delineated core areas within each of the five sites where spinner dolphins are most often engaged in resting activities. The core areas would be subject to closure, while leaving other areas of the bays open in order to minimize impacts on other human activities (*e.g.,* snorkeling, surfing) (Figures 1–5).

The boundaries of the time-area closures were specifically designed to cover the portion of the bays where the dolphins are known to rest while leaving other portions open to various activities. These closures were carefully designed with community input to ensure access to the bays from, and use of, as much of the shoreline as possible. Two of the proposed closure areas, (Kauhakō Bay and La Perouse Bay) (Figures 3 and 5) have been slightly modified from the boundaries described in the 2016 proposed rule and DEIS to accommodate access by canoe groups, fisherman, and other water users to areas adjacent to the time-area closure areas.

Additional Measures Eliminated From Consideration

NMFS did not propose some of the regulatory options suggested in the DEIS and public comments, including voluntary time-area closures and implementing time-area closures in other essential daytime habitat areas throughout the Hawaiian Islands. NMFS does not anticipate that participation will be high for voluntary time-area closures, because resource users' motivations and beliefs vary widely within the five closure areas, and voluntary compliance measures have had limited success in the past. We expect that compliance with voluntary measures would be generally lower than compliance with mandatory regulations, and within the five bays, resource users are diverse and have varying motivations and beliefs with regard to Hawaiian spinner dolphin conservation. The lack of a common understanding about the value of these conservation measures may make it difficult to achieve voluntary compliance for the closures. Further, inconsistent compliance with voluntary measures could lead to increased tension between resource user groups that have conflicting views about Hawaiian spinner dolphin conservation. Therefore, the intensity of spinner dolphin-directed activities may still remain high in essential daytime habitats with voluntary time-area closures in place, and spinner dolphins may receive no additional benefit. Voluntary time-area closures were,

therefore, eliminated from consideration, and mandatory time-area closures are being proposed. Implementing closures of all identified essential daytime habitats throughout the Hawaiian Islands would create many restrictions on activities that are not dolphin-directed, obstruct some harbors, be costly, and require a larger infrastructure to institute and enforce. For these reasons, the consideration of this option was eliminated from further consideration in the development of this proposed rule.

Public Comments

We request that interested persons submit comments, information, and suggestions concerning this proposed rule during the comment period (see **DATES**). We are soliciting comments or suggestions from the public, other concerned governments and agencies, the scientific community, industry, or any other interested party concerning this proposed rule. You may submit your comments and materials concerning this proposal by any one of several methods (see **ADDRESSES**). Copies of the proposed rule and supporting documentation can be found on the NMFS Pacific Islands Regional website at *http://www.fpir.noaa.gov/.* We will consider all comments pertaining to this proposed rule received during the comment period in preparing the final rule.

References Cited

A complete list of all references cited in this proposed rule can be found on our website at *https://www.fisheries.noaa.gov/action/enhancing-protections-hawaiian-spinner-dolphins,* or at *www.regulations.gov,* and is available upon request from the NMFS office in Honolulu, Hawai'i (see **ADDRESSES**).

Classification

National Environmental Policy Act (NEPA) and Regulatory Impact Review (RIR)

NMFS has prepared an EIS and an RIR pursuant to NEPA (42 U.S.C. 4321 *et seq.*) and Executive Order (E.O.) 12866, to support this proposed rule. The EIS/RIR contains a full analysis of a No Action Alternative and five action alternatives. There are a number of elements that were common to all of the action alternatives analyzed, and a number of exceptions that would apply to these alternatives. The mandatory time-area closures proposed in this rule are included as Alternative 4 in the EIS and along with swim-with and approach constitute Alternative 4 of the EIS. The EIS/RIR and supporting documents are available for review and comment and can be found on the NMFS Pacific Islands Region website at *https://www.fisheries.noaa.gov/action/enhancing-protections-hawaiian-spinner-dolphins.* If NMFS finalizes this rule to implement Alternative 4, a separate ROD will be issued documenting that decision. NMFS will revisit the analysis in the FEIS to determine whether any supplementation or modification might be required.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, whenever an agency publishes a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a Regulatory Flexibility Analysis describing the effects of the rule on small entities, *i.e.,* small businesses, small organizations, and small government jurisdictions.

Pursuant to the RFA, NMFS prepared the following Initial Regulatory Flexibility Analysis (IRFA). A description of the action, why it is being considered, and the legal basis for this action are contained in the preamble to this proposed rule. This proposed rule does not duplicate, overlap, or conflict with other Federal rules. The analysis contains a description of and, where feasible, an estimate of, the number of small entities to which the proposed rule will apply. The Small Business Administration (SBA) establishes criteria for defining a ''small entity'' for purposes of the RFA. This IRFA analyzes the alternatives described in the preamble to the rule and does not address alternatives previously considered and subsequently dismissed in the DEIS. There are no record-keeping or reporting requirements associated with this proposed rule.

Description and Estimate of the Number of Small Entities to Which the Proposed Rule Applies

There are several types of industries directly affected by this proposed rulemaking: Swim-with-wild-dolphins tour operators; dolphin watch tour operators; non-motorized vessel ocean wildlife viewing tour operators; and generalized commercial boat tour operators. This analysis uses size standards prescribed by the SBA. Specifically, for scenic and sightseeing water transportation operators (North American Industry Classification System Code 487210), the SBA size standard for a small business is average annual receipts of $8.0 million or less. Much of the background information for potentially affected entities is based on a 2018 report (2018 report) that summarized information collected in 2017 with regard to participants within these industries that potentially interact with Hawaiian spinner dolphins to varying degrees in the MHI (Impact Assessment 2018). The 2018 report provides information that suggests that most, if not all, businesses operating in the swim-with-wild-dolphins tour and the dolphin watch tour industries operating in 2017 could be considered small entities, and most of the generalized commercial boat tour operators were assumed to be small entities (Impact Assessment 2018).

Swim-with-wild-dolphins tour operators are those that bring clientele into close proximity with spinner dolphins. This includes health and/or spiritual retreat operations as well as dolphin-oriented swim tours. Health and spiritually-linked businesses provide opportunities for persons wishing to interact with spinner dolphins for perceived physical, mental, and/or spiritual well-being enhancement. The number of businesses in this category had increased between 2007 and 2017, especially on the Island of Hawai'i. Spiritually-linked tour operations may charter vessels through other established dolphin-swim companies to transport customers as part of an overall per-person package consisting of lodging, swimming with dolphins, and other activities. According to the 2018 report, an estimated six to eight locally owned spiritual retreat businesses and at least 33 non-local (*i.e.,* mainland United States, Europe, Japan, South Africa, and Australia) spiritual retreat businesses operating on Hawai'i Island reportedly provided direct Hawaiian spinner dolphin interaction in 2017. No numbers were provided for spiritual retreat businesses operating on O'ahu, Maui, and Kaua'i.

Dolphin-oriented swim tours operate by transporting passengers by boat or having them swim from shore to areas in which dolphins are known to be present during daytime hours. Customers may also be provided with facemasks, fins, flotation devices, and snorkels to enhance viewing. The 2018 report suggests that at least 41 swim-with-dolphins tour companies operated on Hawai'i and seven operated on O'ahu. The report also indicated that commercial boat tours on Maui did not appear to advertise underwater encounters with spinner dolphins, nor did those on Kauai, although unplanned

encounters may occur. All are believed to be small entities. Dolphin-watch tour operators involve taking clients out specifically to view wild dolphins. These companies tend to operate smaller boats than the more generalized commercial boat tours described below and are more likely to view dolphins at a closer range. Revenue information for this specific business category is not available. The 2018 report did not provide estimated number of businesses that primarily focused on dolphin viewing, but NMFS had previously estimated the number of dolphin watch tour businesses to be as follows in 2015: Hawai'i (3), Maui (21), O'ahu (3), and Kaua'i (11) (NOAA Fisheries, PIRO).

More generalized commercial boat tours offer a range of ocean activities, which may include sightseeing, snorkeling, diving, viewing various forms of sea life from a vantage point in and/or above the water, or just generally spending time on the ocean. The majority of the general tour boats derive revenue from whale watching and sightseeing operations, while a number of the dive/snorkel vessels offer snorkeling or diving trips. The 2018 report provided economic or operational information from 28 generalized commercial boat tour businesses (Hawai'i Island: 5, O'ahu: 2, Maui: 16, and Kaua'i: 15), although there are likely more businesses that fall in this category. NMFS believes that most, but not all, would be considered small entities.

Non-motorized vessel ocean wildlife viewing tour operators, specifically kayak tour businesses around the MHI, provide a general wildlife viewing experience, with very few, if any, operators advertising direct or intentional interactions with dolphins. The 2018 report indicated that these operations were designed to provide clients with a variety of recreational and sightseeing experiences that typically did not include dolphin interactions. The 2018 report did not provide estimated number of businesses in this category, but NMFS had previously estimated that in 2015, the numbers of companies that either operate kayak tours or rent out kayaks was as follows: Hawai'i (6), Maui (9), O'ahu (6), and Kaua'i (13) (NOAA Fisheries, PIRO). Based on the information from the 2018 report and/or obtained by NMFS for 2015, the estimated numbers of small entities directly affected by the proposed rulemaking, by industry, on the MHI are as follows: At least 60 or 70 swim-with-wild-dolphins tour operators (including health and/or spiritual retreats enabling opportunities to swim with wild dolphins), and at least 38 generalized commercial boat tour operators (one or more of which are likely to be considered large entities).

Because information on these entities was collected in 2017, these numbers might differ currently and in the near term, as these are businesses whose customer base are often comprised of tourists and visitors to the State of Hawaii or interisland travelers. Restrictions resulting from the COVID pandemic have significantly impacted the tourism industry in Hawaii. Following the onset of the COVID pandemic and restrictions that began in March 2020 to slow the spread of COVID–19 in the state, a total of 4,564 visitors arrived in Hawaii in April 2020, representing a 99.5 percent decrease from the previous year in which there were 856,250 visitors in April 2019 (*https://www.hawaiitourism authority.org/media/4635/april-2020-visitor-statistics-press-release-final.pdf*). The number of tourists visiting Hawaii has increased steadily throughout the first half of 2021. In December 2020 visitor arrivals in Hawaii were down 75.2 percent compared to the number of visitors in December 2019; however, June 2021 showed an approximate 16.5 percent decrease compared to June 2019 (*https://www.hawaiitourism authority.org/media/7582/june-2021-visitor-statistics-press-release.pdf*). With the steady increase in arrivals to Hawaii during the first half of 2021, we expect tourism to continue to increase to reach pre-COVID levels.

Economic Impacts to Small Entities Resulting From the Proposed Action (Mandatory Time-Area Closures in Five Selected Essential Daytime Habitats)

This proposed rule would prohibit people from using areas closed in five selected essential daytime resting habitats during specific times. NMFS believes that this restriction is needed within established resting areas because research has indicated that Hawaiian spinner dolphins show high site fidelity, returning from offshore feeding grounds to the same protected bays and shallow, sandy-bottomed habitats to rest. Spinner dolphins appear to select these specific locations because they are located close to the feeding grounds while also offering protection from predators. Yet, the consistency in which spinner dolphins return to these resting sites has also encouraged tour operators to visit these same locations in order to increase the opportunity for clientele to view or otherwise interact with spinner dolphins. Because of constant reliance that spinner dolphins have shown for these locations, NMFS has decided to propose the mandatory time-area closures within these resting areas.

Businesses that rely on providing activities within locations potentially subject to time-area closures, would potentially see a reduction in revenue in the short term and potentially in the long term. The decrease in revenue could come from the reduction in the number of customers, specifically those who seek the experience of viewing spinner dolphins at these locations where dolphins can regularly be seen. The loss in overall revenue to individual businesses and the industry as a whole that rely on providing access to these bays for revenue is uncertain.

For generalized tour boat operators with a clientele base that does not have a specific goal of viewing spinner dolphins, the direct economic impact of the proposed action is likely to be minimal. Individuals or companies that conduct kayak tours or other non-motorized vessel tours in or near time-area closures may see a slight reduction in revenues relative to their dependence on dolphin-directed customers. Additionally, due to the closed areas, these tour companies may choose to offer alternative tour locations that set fewer viewing restrictions.

The time area closures are expected to affect tour operators that typically operate within or nearby areas subject to these restrictions. Dolphin-viewing tour operators using these areas may choose to view dolphins from outside the closures or otherwise experience increased costs to travel to alternative sites not subject to closure to allow more flexibility in viewing the dolphins from the required 50 yard minimum distance. Similarly, generalized commercial boat tour operators may continue to use areas or times outside of the closures for their tours or choose alternative locations that allow greater viewing flexibility. Those individuals or companies that conduct kayak tours or other motorized or non-motorized vessel tours in or near time-area closures may see a slight reduction in revenues if their customer base is comprised of individuals who wish to view dolphins within those areas. For those operators who operate within or nearby the bays subject to time-area closures, the economic impact on generalized commercial tour boat operators is likely to be minimal while non-motorized vessel tour operators may see a slight reduction in revenue, and there should be little to no impact on these operators that primarily operate outside of the time-area closures.

NMFS concludes that there would be disproportionate impacts to the operators with dolphin-directed

activities or other ocean-based recreational entities operating near the time-area closures from implementation of this proposed action relative to all other general wildlife viewing tour operators. As a result, dolphin-watch tour entities may face disproportionate impacts relative to the generalized commercial boat tour companies, which are likely to incur few direct economic impacts from the proposed action. We note that dolphin watch tour entities are all believed to be small entities, and most of the generalized commercial boat tour companies are as well, although a few might be considered large entities with revenues exceeding $8.0 million.

NMFS considered Alternative 1, the No Action Alternative, in addition to Alternative 4, the mandatory time-area closures. Alternative 4 would result in a slightly higher direct economic impact to individual small entities and the dolphin-viewing industry as a whole, relative to the proposed action compared to the No Action Alternative, but Alternative 4 would also offer more protection to spinner dolphins in specific resting habitat. NMFS has determined that the final action meets the goals and objective of reducing human-caused disturbances that Hawaiian spinner dolphins are facing in their natural habitat, and will help protect against declines in the fitness of the population over time.

No additional reporting, record keeping, and other compliance requirements are anticipated for small businesses. NMFS has identified no Federal rules that may duplicate, overlap, or conflict with the action alternatives.

Executive Order 12866, Regulatory Planning and Review

This rule was determined to be not significant for purposes of E.O. 12866.

Paperwork Reduction Act

The purpose of the Paperwork Reduction Act is to minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, and other persons resulting from the collection of information by or for the Federal Government. The proposed regulation includes no new collection of information, so further analysis is not required.

National Historic Preservation Act (NHPA)

The goal of the National Historical Preservation Act (NHPA; 16 U.S.C. 470 *et seq.*) is to have Federal agencies act as responsible stewards of our nation's resources when their actions affect historic properties. Section 106 of the NHPA requires Federal agencies to take into account the effects of undertakings they carry out, assist, fund, or permit on historic properties. Federal agencies meet this requirement by completing the section 106 process set forth in the implementing regulations, ''Protection of Historic Properties,'' 36 CFR part 800. The goal of the section 106 process is to identify and consider historic properties (or sites eligible for listing) that might be affected by an undertaking, and to attempt to resolve any adverse effects through consultation. The process provides for participation by State Historic Preservation Officers, Tribal Historic Preservation Officers, tribal, state and local governments, Indian tribes and Native Hawaiian organizations, applicants for Federal assistance, permits, or licenses, representatives from interested organizations, private citizens, and other members of the public. Federal agencies and consulting parties strive to reach agreement on measures to avoid, minimize, and mitigate adverse effects on historic properties and to find a balance between project goals and preservation objectives.

Under the NHPA, an ''effect'' means an alteration to the characteristics of a historic property qualifying it for inclusion or eligibility for the National Register. In April 2012, NMFS sent a letter to the Hawaii State Historic Preservation Division (SHPD) describing the undertaking and requested assistance in identifying organizations that may have an interest in preserving any historic properties that may occur in the time-area closures. In July and August 2012, NMFS held scoping meetings on Hawaii Island and Maui to determine if historic or cultural properties may be affected by the proposed regulation. In 2013, NMFS conducted interviews with 15 individuals from three lineal descendants from each of the five bays identified for time-area closures to assist in providing additional information about historic properties or practices that may be affected by the proposed action. By letter to the Hawaii State Historic Preservation Division dated June 7, 2021, NMFS has determined that this undertaking constitutes a finding of no historic properties affected (36 CFR 800.4(d)(1)). NMFS has requested review and concurrence with SHPD for our determination for the undertaking to establish time-area closures at essential daytime habitats for Hawaiian spinner dolphins. NMFS invites public comment on this determination.

Coastal Zone Management Act

Section 307(c)(1) of the Federal Coastal Zone Management Act of 1972 requires that all Federal activities that affect any land or water use or natural resource of the coastal zone be consistent with approved state coastal zone management programs to the maximum extent practicable. We have determined that these proposed time-area closures are consistent to the maximum extent practicable with the enforceable policies of the approved Coastal Zone Management Program of Hawai'i. This determination, a copy of this document, and the EIS will be submitted for review by the Hawai'i Coastal Zone Management Program.

Executive Order 13132, Federalism

E.O. 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific consultation directives for situations in which a regulation may preempt state law or impose substantial direct compliance costs on state and local governments (unless required by statute). As described in a May 13, 2020 letter NMFS received from the State of Hawai'i DLNR, the State supports implementing time-area closures in the 5 sites, as described in the FEIS, to increase protection of Hawaiian spinner dolphins from harassment and disturbance pursuant to the MMPA. NMFS has determined that the proposed time-area closures regulation does not have federalism implications.

Information Quality Act (IQA)

Pursuant to Section 515 of Public Law 106–554 (the Information Quality Act), this information product has undergone a pre-dissemination review by NMFS. The signed Pre-dissemination Review and Documentation Form is on file with the NMFS Pacific Islands Regional Office (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 216

Administrative practice and procedure, Marine mammals.

Dated: September 20, 2021.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 216, as amended elsewhere in this issue of the **Federal Register**, effective October 28, 2021, is proposed to be amended as follows:

PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 1. The authority citation for 50 CFR part 216 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

■ 2. Section 216.20 amended by adding paragraphs (f) through (j) to read as follows:

§ 216.20 Special restrictions for Hawaiian spinner dolphins.

* * * * *

(f) *Applicability.* The following special restrictions designed to protect Hawaiian Spinner Dolphins apply:

(1) Hawai'i Island—Kealakekua Bay (Figure 3):

(i) The time-area closure in place between 6 a.m. to 3 p.m. Hawai'i Standard Time (HST) daily for Kealakekua Bay includes all surface and subsurface waters between points A, B, C, and D (Figure 3 to § 216.20). Approximate segment lengths A–B and C–D are 1,005 meters (m) (0.62 miles (mi)), and segment lengths A–D and B–C are 220 m (0.14 mi). The total surface area of closure is 0.09 square miles (mi^2). The latitude/longitude coordinates are:

(A) A—19°28′37″ N, 155°55′15″ W;
(B) B—19°28′54″ N, 155°55′44″ W;
(C) C—19°28′48″ N, 155°55′49″ W;
(D) D—19°28′32″ N, 155°55′19″ W.

(ii) [Reserved]

(2) Hawai'i Island—Hōnaunau Bay (Figure 4):

(i) The time-area closure in place between 6 a.m. to 3 p.m. HST daily for Hōnaunau Bay includes all surface and subsurface waters between points A, B, and C (Figure 4 to § 216.20); the shoreline boundary is at the mean lower low water line between points A and C. The approximate segment length of A–B is 440 m (0.27 mi) and the segment length of B–C is 330 m (0.21 miles). The total surface area of closure is 0.04 mi^2. The latitude/longitude coordinates are:

(A) A—19°25′27″ N, 155°54′41″ W;
(B) B—19°25′22″ N, 155°54′57″ W;
(C) C—19°25′31″ N, 155°54′58″ W.

(ii) {Reserved]

(3) Hawai'i Island—Kauhakō Bay (Figure 5):

(i) The time-area closure in place between 6 a.m. to 3 p.m. HST daily for Kauhakō Bay includes all surface and subsurface waters between points A, B, C, and D (Figure 5 to § 216.20). The approximate segment length of A–B is 290 m (0.18 mi), the approximate segment length of A–D is 540 m (0.34 mi), and the segment length of B–C is 915 m (0.57 miles). The total surface area of closure is 0.06 mi^2. The latitude/longitude coordinates are:

(A) A—19°22′44″ N, 155°53′49″ W;
(B) B—19°22′44″ N, 155°53′57″ W;
(C) C—19°22′16″ N, 155°53′49″ W;
(D) D—19°22′30″ N, 155°53′46″ W.

(4) Hawai'i Island—Makako Bay (Figure 6):

(i) The time-area closure in place between 6 a.m. to 3 p.m. HST daily for Makako Bay includes all surface and subsurface waters between points A, B, C, and D (Figure 6 to § 216.20); the shoreline boundary is at the mean lower low water line between points A and D. The approximate segment length of A–B is 315 m (0.20 mi), the segment length of B–C is 758 m (0.47 miles) and the segment length of C–D is 372 m (0.23 mi). The total surface area of closure is 0.14 mi^2. The latitude/longitude coordinates are:

(A) A—19°44′21″ N, 156°3′16″ W;
(B) B—19°44′25″ N, 156°3′26″ W;
(C) C—19°44′2″ N, 156°3′36″ W;
(D) D—19°43′57″ N, 156°3′23″ W.

(ii) [Reserved]

(5) Maui—La Perouse Bay (Figure 7):

(i) The time-area closure in place between 6 a.m. to 3 p.m. HST daily for La Perouse Bay includes all surface and subsurface waters between points A, B, C, and D (Figure 7 to § 216.20). The approximate segment length of A–B is 1,120 m (0.70 mi), the segment length of C–D is 1,290 m (0.80 mi), the segment length of A–C is 670 m (0.42 mi), and the segment length of B–D is 510 m (0.32 mi). The total surface area of closure is 0.31 mi^2. The latitude/longitude coordinates are:

(A) A—20°35′53″ N, 156°25′12″ W;
(B) B—20°35′31″ N, 156°24′50″ W;
(C) C—20°35′35″ N, 156°25′26″ W;
(D) D—20°35′13″ N, 156°24′54″ W.

(ii) All coordinates referenced to The World Geodetic System of 1984 (WGS 84)).

(g) *Prohibitions.* Unless otherwise excepted in paragraph (c) of this section, it is unlawful for any person or vessel, during the hours from 6 a.m. to 3 p.m. (HST), to enter, cause to enter, solicit to enter, or remain within any of the five time-area closures identified in paragraph (f) of this section. This prohibition includes all means of accessing the closed area during the relevant times, including on or below the surface of the water;

(h) *Exceptions.* The prohibitions of paragraph (b) of this section do not apply to:

(1) Vessel operations necessary to avoid an imminent and serious threat to a person or vessel;

(2) Activities authorized through a permit or authorization issued by the National Marine Fisheries Service;

(3) Federal, State, or local government vessels, aircraft, personnel, and assets when necessary in the course of performing official duties;

(4) Vessels participating in organized community-based outrigger canoe races that transit straight through a time-area closure;

(5) Vessels that transit straight through the time-area closure for the sole purpose of ingress and egress to privately owned shoreline residential property located immediately adjacent to the time-area closure; and

(6) Outrigger canoes used for traditional subsistence fishing intended for personal, family, or community consumption or traditional use;

(i) *Affirmative defense.* In connection with any action alleging a violation of this section, any person claiming the benefit of any exemption, exception, or permit listed in paragraph (c) of this section has the burden of proving that the exemption or exception is applicable, or that the permit was granted and was valid and in force at the time of the alleged violation.

(j) *Maps of areas for Hawaiian spinner dolphin special restrictions.* Figures 3 through 7 to this section are overview maps. Table 2 to paragraph (j) provides the corresponding coordinate data for the time-area closure areas for Hawaiian spinner dolphin special restrictions.

TABLE 2 TO PARAGRAPH (j)—COORDINATES FOR THE FIVE TIME-AREA CLOSURES DESIGNATED IN HAWAI'I AND MAUI

	Latitude	Longitude
Coordinates for the Hawai'i Island—Kealakekua Bay time-area closure (Figure 3 to § 216.20) Hawai'i Island—Kealakekua Bay		
Figure 1 Label:		
A	19°28′37″ N	155°55′15″ W
B	19°28′54″ N	155°55′44″ W
C	19°28′48″ N	155°55′49″ W

TABLE 2 TO PARAGRAPH (j)—COORDINATES FOR THE FIVE TIME-AREA CLOSURES DESIGNATED IN HAWAI'I AND MAUI—Continued

	Latitude	Longitude
D	19°28′32″ N	155°55′19″ W
Coordinates for the Hawai'i Island—Hōnaunau Bay time-area closure (Figure 4 to § 216.20)		
Hawai'i Island—Hōnaunau Bay		
Figure 2 Label:		
A	19°25′27″ N	155°54′41″ W
B	19°25′22″ N	155°54′57″ W
C	19°25′31″ N	155°54′58″ W
Shoreline boundary—Mean low water line between A and C.		
Coordinates for the Hawai'i Island—Kauhakō Bay time-area closure (Figure 5 to § 216.20)		
Hawai'i Island—Kauhakō Bay		
Figure 3 Label:		
A	19°22′44″ N	155°53′49″ W
B	19°22′44″ N	155°53′57″ W
C	19°22′16″ N	155°53′49″ W
D	19°22′30″ N	155°53′46″ W
Shoreline boundary—Mean low water line between C and D.		
Coordinates for the Hawai'i Island—Makako Bay time-area closure (Figure 6 to § 216.20)		
Hawai'i Island—Makako Bay		
Figure 1 Label:		
A	19°44′21″ N	156°3′16″ W
B	19°44′25.18″ N	156°3′26.07″ W
C	19°44′2″ N	156°3′36″ W
D	19°43′57″ N	156°3′23″ W
Shoreline boundary—Mean low water line between A and D.		
Coordinates for the Maui—La Perouse Bay time-area closure (Figure 7 to § 216.20)		
Maui—La Perouse Bay		
Figure 1 Label:		
A	20°35′53″ N	156°25′12″ W
B	20°35′31″ N	156°24′50″ W
C	20°35′35″ N	156°25′26″ W
D	20°35′13″ N	156°24′54″ W

* * * * *

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Figure 3 to § 216.20 -- Hawai'i Island – Kealakekua Bay Proposed Time-area Closure

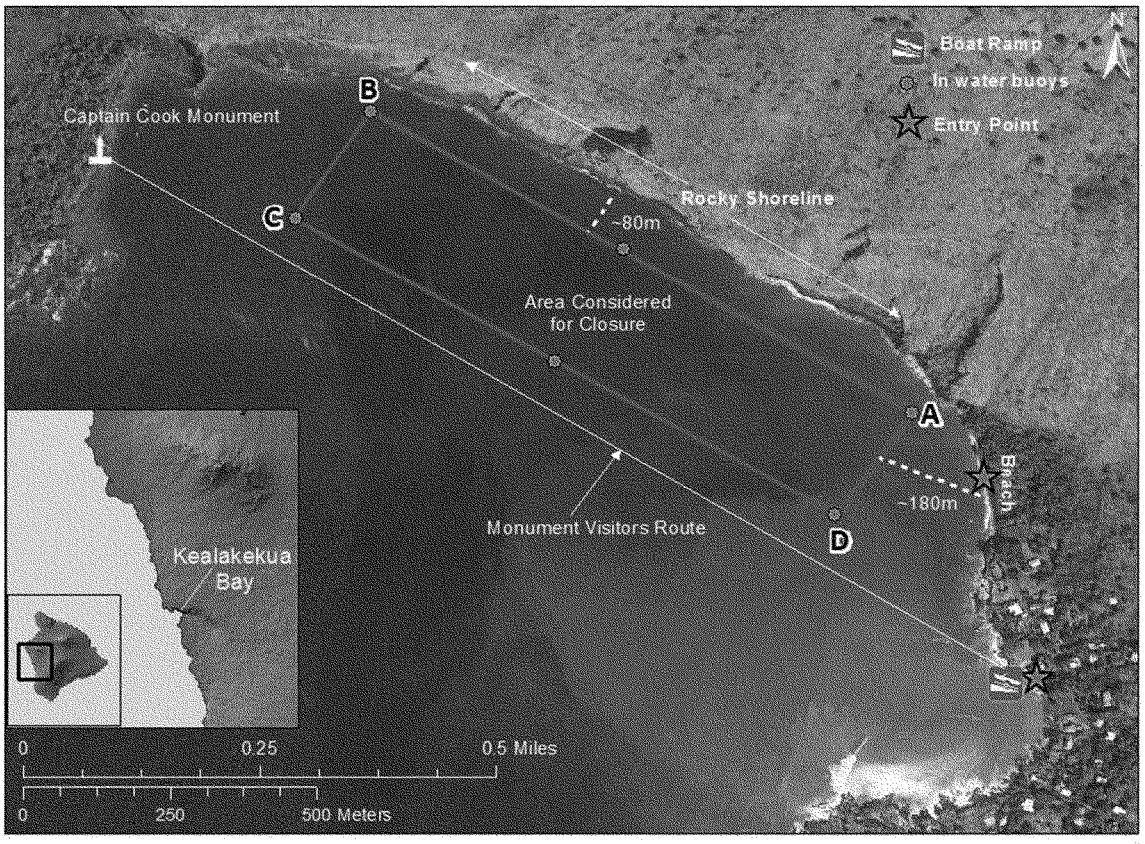


Figure 4 to § 216.20 -- Hawai'i Island – Hōnaunau Bay Proposed Time-area Closure

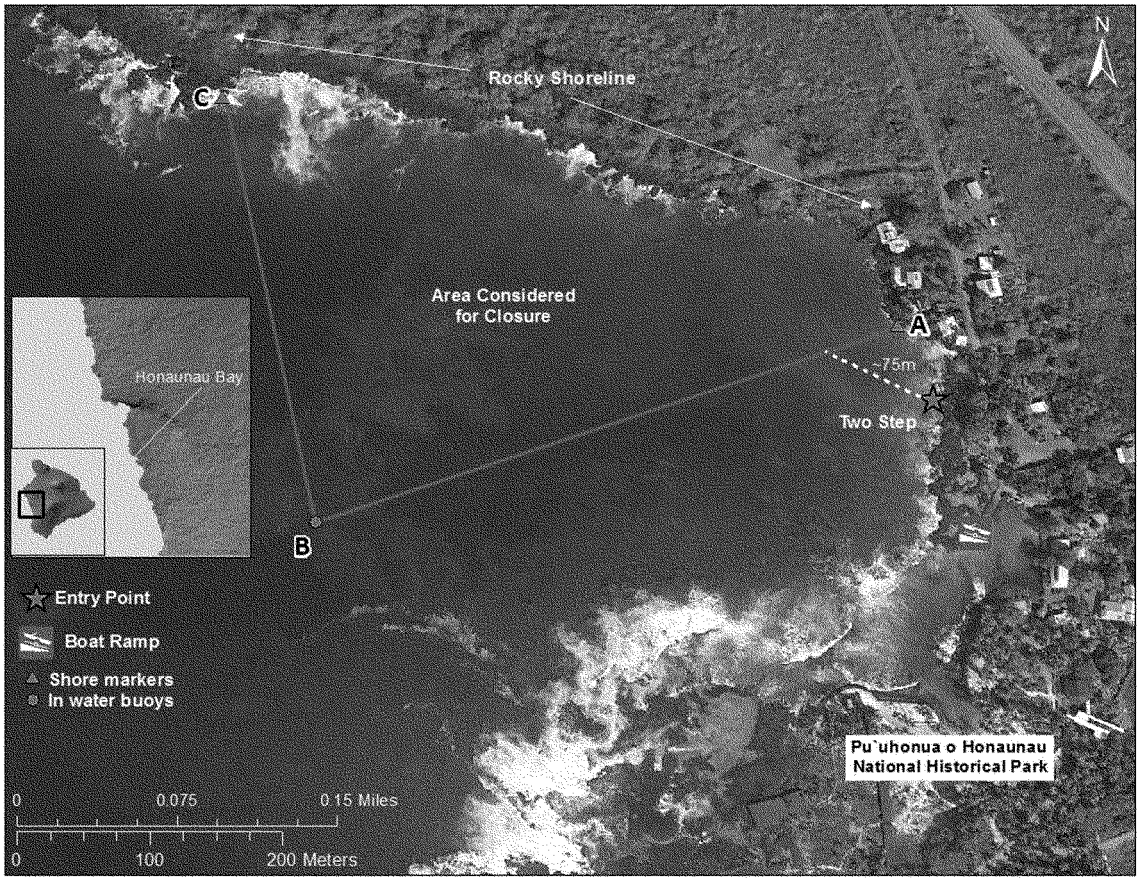


Figure 5 to § 216.20 -- Hawai'i Island – Kauhakō Bay Time-area-Closure

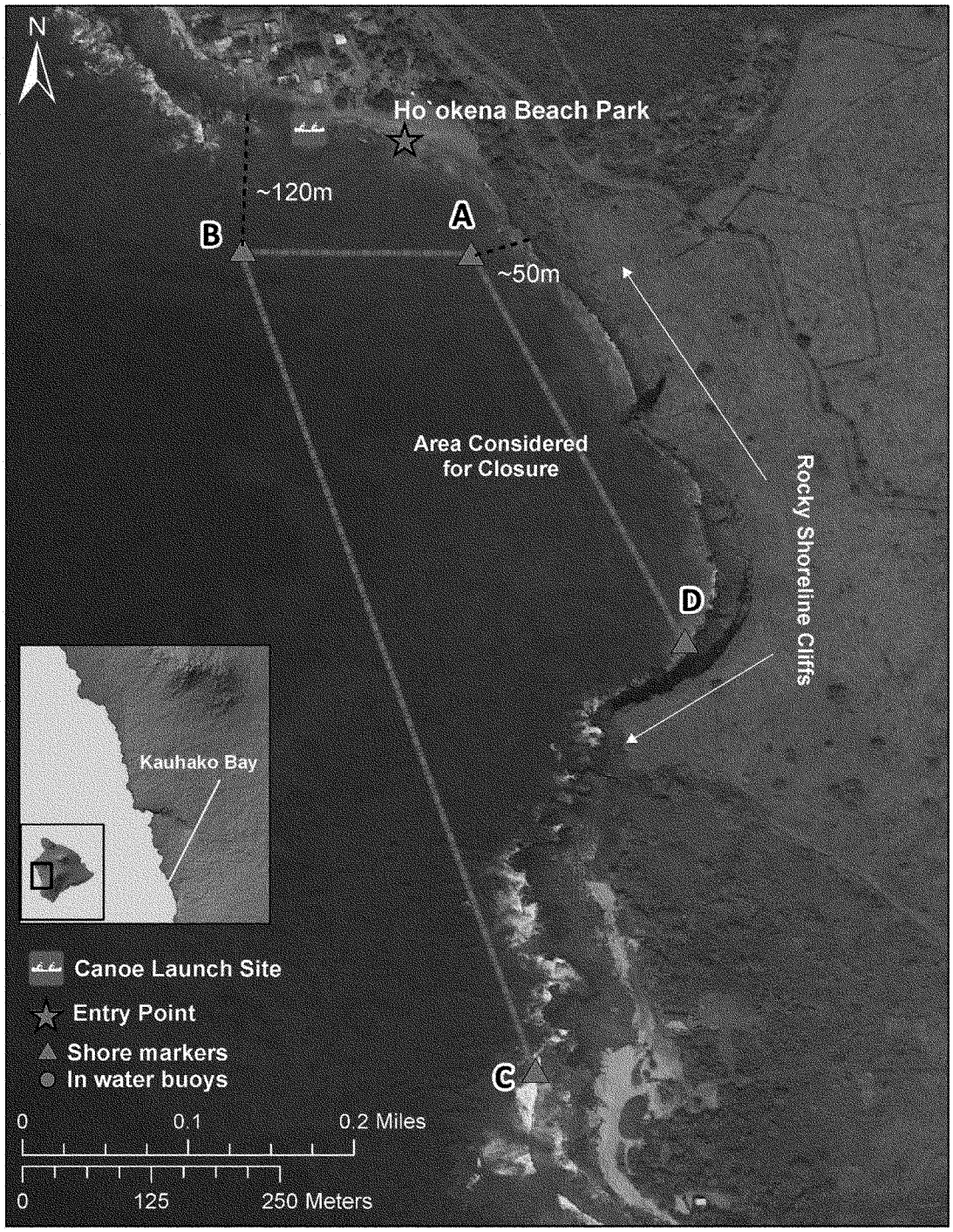


Figure 6 to § 216.20 -- Hawai'i Island – Makako Bay Time-area Closure

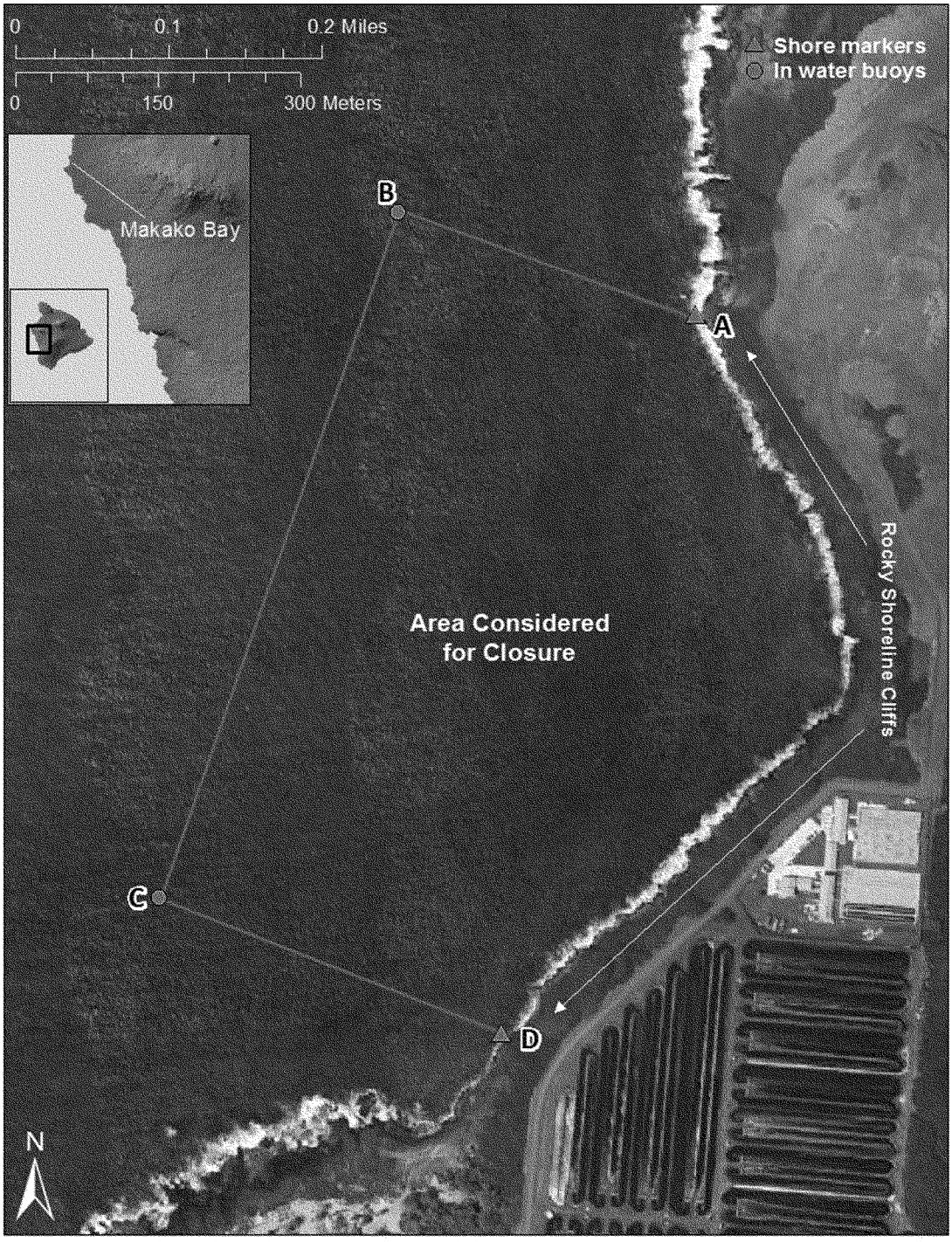
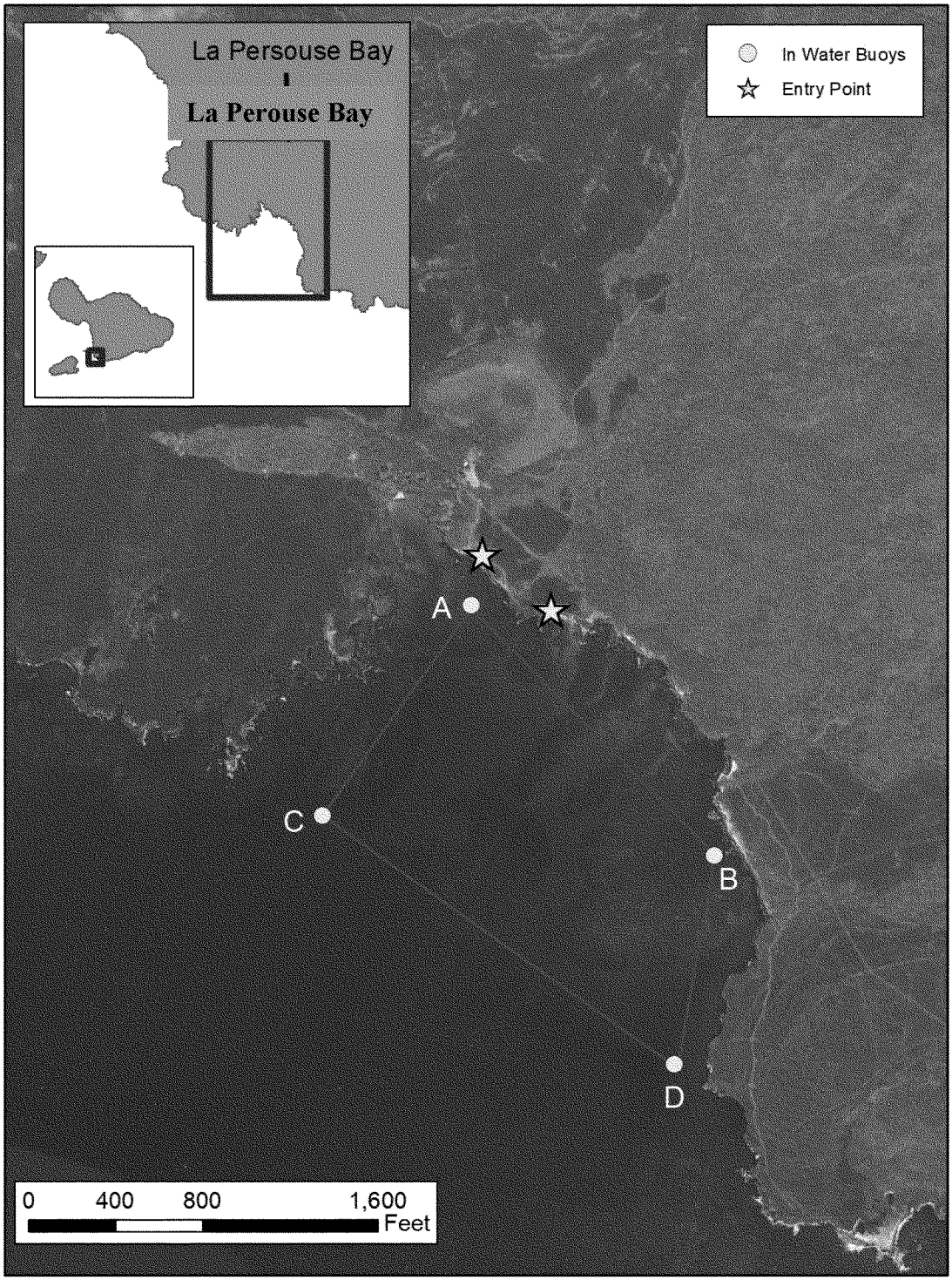


Figure 7 to § 216.20 -- Maui – La Perouse Bay Time-area Closure



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